

ANNEX II
DRAFT POLICY OBJECTIVES AND CORE PRINCIPLES:
BACKGROUND INFORMATION AND DISCUSSION

1. This Annex provides background to the suggested draft policy objectives and core principles, and illustrates the origins of these materials within the work of Committee and related discussions. This is intended to illustrate that the draft policy objectives and core principles are well-established both in national laws and in international discussion. They draw on a diverse array of traditional knowledge (TK) systems, and a diverse set of policy and legal approaches to protecting TK that have already been employed in a number of countries.¹ This Annex also seeks to illustrate the relationship between TK protection and the provisions of a number of key treaties.²

2. If the Committee so chooses, these draft materials may be used as a starting point to address the international dimension of rules, disciplines, guidelines or best practices governing the protection of TK. They can form a basis to develop a concrete product for protection of TK, in the form of an international instrument, or instruments, intended to be accepted as binding or influential but non-binding international law. These principles accordingly address only the substance, not the form, of TK protection at the international level. The legal status which that substantive content may take in the future will require subsequent discussion and may be promoted by consensus on substance.

A. OBJECTIVES OF TRADITIONAL KNOWLEDGE PROTECTION

3. Protection of TK should not be undertaken for its own sake, as an end in itself, but as a tool for achieving the goals and aspirations of relevant peoples and communities and for promoting national and international policy objectives. The way in which a protection system is shaped and defined will depend to a large extent on the objectives it is intended to serve. A

¹ The national laws chiefly referred to in this Annex are: *African Union*: African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources of 2000 (hereafter ‘African Model Law’); *Brazil*: Provisional Measure No. 2186-16 of 2001 Regulating Access to the Genetic Heritage, Protection of and Access to Associated Traditional Knowledge (‘Brazilian Measure’); *China*: Patent Law of 2000, and Regulations on the Protection of Varieties of Chinese Traditional Medicine; *Costa Rica*: Law No. 7788 of 1998 on Biodiversity (‘Costa Rican Biodiversity Law’); *India*: Biological Diversity Act of 2002 (‘Indian Biodiversity Act’); *Japan*: ^{Unfair} Competition Prevention Law No. 47 (‘Japanese Unfair Competition Law’); *Peru*: Law No. 27,811 of 2002 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources (‘Peruvian Law’); *Philippines*: Indigenous Peoples Rights Act of 1997 (‘Philippines Act’); *Portugal*: Decree Law No.118 of 2002 Establishing a Legal Regime of Registration, Conservation, Legal Custody and Transfer of Plant Endogenous Material (‘Portuguese Law’); *Republic of Korea*: ^{Unfair} Competition Prevention and Trade Secret Protection Law No. 911 (‘ROK Unfair Competition Law’); *Thailand*: Act on Protection and Promotion of Traditional Thai Medicinal Intelligence, B.E 2542 (‘Thai Act’); *United States of America*: Indian Arts and Crafts Act of 1990 (‘US Arts and Crafts Act’), ^{Uniform Trade Secrets Act of 1979 with 1985 Amendments} (‘US Trade Secrets Act’). Document WIPO/GRTKF/IC/5/INF/2 and INF/4 contain further details of many of these laws.

² The treaties referred to in this document include: the UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1996) (hereinafter ‘the UNCCD’); the International Treaty on Plant Genetic Resources for Food and Agriculture (2001) (‘ITPGR’); the Convention on Biological Diversity (1992) (‘CBD’);

key initial step, therefore, of the development of any legal regime or approach for the protection of TK is to determine relevant policy objectives.

4. The Committee has decided on the formulation of such objectives as a specific output. In the past sessions of the Committee, IP-related objectives have crystallized over two years through questionnaire responses,³ policy statements,⁴ panel presentations,⁵ document submissions,⁶ notified national laws⁷ and documented practical experience. The present section codifies the key objectives of TK protection that emerge from this background material. The policy objectives that emerge from the material are listed below. This provides a distillation of the common policy objectives which guide existing TK protection systems and which have been identified by Committee members in their policy statements and document submissions to previous sessions of the Committee.

The protection of traditional knowledge should aim to:

[Recognize value]

(i) recognize the intrinsic value of traditional knowledge, including its social, spiritual, economic, intellectual, scientific, ecological, technological, commercial and educational value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that benefit all humanity;

[Promote respect]

(ii) promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders who conserve and maintain those systems; and for the contribution which traditional knowledge holders have made to the conservation of the environment, to food security and sustainable agriculture, and to the progress of science and technology;

[Meet the actual needs of holders of traditional knowledge]

(iii) be guided by the aspirations and expectations expressed directly by traditional knowledge holders, and contribute to their welfare and economic, cultural and social benefit and reward the contribution made by them to the progress of science and the useful arts;

[Empower holders of TK]

(iv) be undertaken in a manner inspired by the protection provided for intellectual creations and innovations, that is balanced and equitable and that effectively empowers traditional knowledge holders to exercise due authority over their own knowledge, including appropriate moral and economic rights;

[Support traditional knowledge systems]

(v) respect and facilitate the continuing customary use, development, exchange and transmission of traditional knowledge by and between traditional knowledge holders; and support and augment customary custodianship of knowledge and associated genetic resources, and promote the continued development of traditional knowledge systems;

³ See WIPO/GRTKF/IC/Q.1, WIPO/GRTKF/IC/Q.3, WIPO/GRTKF/IC/Q.4.

⁴ See WIPO/GRTKF/IC/1/13, WIPO/GRTKF/IC/2/16, WIPO/GRTKF/IC/3/17, WIPO/GRTKF/IC/4/15 and WIPO/GRTKF/IC/5/15.

⁵ See WIPO/GRTKF/IC/5/INF/4.

⁶ For example, see WIPO/GRTKF/IC/1/8, WIPO/GRTKF/IC/1/10, WIPO/GRTKF/IC/4/14.

⁷ See <http://www.wipo.int/tk/en/laws/index.html> and the laws listed in footnote 1 above.

[Contribute to safeguarding traditional knowledge]

(vi) contribute to the preservation and safeguarding of traditional cultural expressions and the customary means for their development, preservation and transmission, and promote the conservation, maintenance, application and wider use of traditional knowledge, for the direct benefit of traditional knowledge holders in particular, and for the benefit of humanity in general;

[Repress unfair and inequitable uses]

(vii) repress the misappropriation of traditional knowledge and other unfair commercial activities;

[Concord with relevant international agreements and processes]

(viii) recognize, and operate consistently with, other international and regional instruments and processes, in particular regimes that regulate access to and benefit-sharing from genetic resources which are associated with that traditional knowledge, that recognize farmers' rights, and that mitigate the effects of drought in countries experiencing serious drought or desertification;

[Promote innovation and creativity]

(ix) encourage, reward and protect tradition-based creativity and innovation, particularly when desired by traditional knowledge holders; and promote innovation and the transfer of technology to the mutual advantage of holders and users of traditional knowledge;

[Promote intellectual and technological exchange]

(x) promote access to and the wider application of traditional knowledge on fair and equitable terms, for the general public interest and as a means of sustainable development, in coordination with existing international and national regimes governing access to and use of genetic resources;

[Promote equitable benefit sharing]

(xi) promote the fair and equitable distribution of the monetary and non-monetary benefits arising from use of traditional knowledge, consistent with other applicable international regimes;

[Promote community development and legitimate trading activities]

(xii) promote the use of traditional knowledge for community-based, recognizing traditional knowledge as an asset of its holders; and promote the development of, and the expansion of marketing opportunities for, authentic products of traditional knowledge and associated community industries;

[Preclude the grant of invalid IP rights]

(xiii) curtail the grant or exercise of invalid intellectual property rights over traditional knowledge and associated genetic resources;

[Enhance transparency and mutual confidence]

(xiv) enhance certainty, transparency, mutual respect and understanding in relations between traditional knowledge holders on the one hand, and academic, commercial, educational and other users of traditional knowledge on the other;

[Complement protection of traditional cultural expressions]

(xv) operate consistently with protection of traditional cultural expressions and expressions of folklore, respecting that for many traditional communities their knowledge and cultural expressions form an indivisible part of their holistic identity.

5. These objectives pertain in particular to the international dimension of TK protection, and seek to capture the shared policy perspective which has been progressively articulated in successive Committee sessions. The objectives are also consistent with relevant provisions of existing international IP instruments⁸ and of existing international non-IP instruments pertaining to TK⁹.

6. These policy objectives are drafted as a synthesis of material from a wide range of sources. They draw widely on the needs and expectations expressed by TK holders in WIPO consultations prior to the Committee's formation, and then the legal materials and policy statements put to the Committee. Several of these objectives were essentially expressed in document WIPO/GRTKF/IC/6/4 Rev (*Traditional Knowledge: Policy and Legal Options*). Others were identified as early as the first session by regional groups in their submissions. Still others were extracted from existing *sui generis* legislation for TK protection and supported by Committee participants' statements.

II. CORE PRINCIPLES

A. General Guiding Principles

7. General guiding principles would ensure that the effect of the specific principles for protection are equitable, balanced, effective and consistent, and appropriately promote the policy objectives set out above. This section sets out several general and overarching principles which could provide broad guidance in the TK protection area. They are distinct from the more specific principles which are listed under the headings of 'Substantive principles of TK protection' and 'General elements'. These principles were already identified and supported in previous sessions of the Committee and include principles such as: flexibility to allow for national legislative and policy development; recognition of rights; and full and effective participation of TK holders. Recognizing complementarity between TK and TCEs, some of these principles echo and correspond to the general guiding principles for TCE protection (WIPO/GRTKF/IC/7/3).

A.1 Responsiveness to the needs and expectations of TK holders

8. WIPO's work on the protection of TK was initiated by fact-finding consultations with many representatives of TK holders in many countries, and this perspective is still central to the policy task of identifying a common approach. Discussions within WIPO and elsewhere continue to stress that TK holders should be directly involved in decision-making about the protection, use and commercial exploitation of their TK, using customary decision-making processes, laws and protocols as far as possible.

A.1: Principle of responsiveness to the needs and expectations of TK holders

⁸ See for example the preambles of the UPOV Convention, the PCT, and the TRIPS Agreement.

⁹ See in particular preambular paragraphs pertaining to TK in UNCCD; ITPGR and the CBD.

Protection should reflect the aspirations and expectations of traditional knowledge holders; and in particular should: recognize and apply indigenous and customary practices, protocols and laws as far as possible; address cultural and economic aspects of development; address insulting, derogatory and offensive acts; enable full and effective participation by traditional knowledge holders; and recognize the inseparable quality of traditional knowledge and cultural expressions for many communities.

A.2 *Recognition of rights*

9. At its sixth session, the Committee reviewed a general principle of recognizing rights of TK holders.¹⁰ Such rights might pertain to conventional IP rights arising from elements of TK; they may be *sui generis* exclusive rights that may be available for TK; they may be entitlements as an aggrieved party to seek certain remedies for misappropriation of TK or other unfair acts and commercial behavior; they may constitute an entitlement to grant or withhold prior informed consent concerning access to TK, or an entitlement to equitable compensation and benefit-sharing; or the rights may draw on or give effect to rights of TK holders under customary laws and protocols within their communities. Irrespective of the form and content of these rights, a number of existing TK protection laws expressly recognize rights.¹¹ It is also reflected in existing international legal instruments referring to TK,¹² and was widely proposed by Committee Members as a general principle for TK protection.¹³

A.2: *Principle of recognition of rights*

The rights of traditional knowledge holders to the effective protection of their knowledge against misuse and misappropriation should be recognized.

10. The principle is stated in general terms, with due flexibility for its application in keeping with the principle of flexibility and comprehensiveness. The specific principles below outlines how this entitlement may be structured, and WIPO/GRTKF/IC/7/6 describes how they are given effect in national laws.

A.3 *Effectiveness and accessibility of protection*

11. Any new forms of protection that might be established will have no practical meaning unless they include culturally appropriate, effective and accessible means by which communities can acquire rights and subsequently manage and enforce them. Therefore, there is a need for special measures that will improve the usage and operational effectiveness of TK

¹⁰ See WIPO/GRTKF/IC/6/4, para. 20.

¹¹ See for example African Model Law (Art. 16, Part IV and Objective (a), Part I); Brazilian Measure (Para. 8.1); Peruvian Law (Article 1, 'Recognition of rights'), Philippines Act (s. 2).

¹² See UNCCD Article 17(c).

¹³ See, African Group (WIPO/GRTKF/IC/4/15, para. 95), Asian Group (WIPO/GRTKF/IC/4/14, Annex, page 3, and WIPO/GRTKF/IC/4/15, para. 120), Andean Community (WIPO/GRTKF/IC/3/17, para.240), Brazil (WIPO/GRTKF/IC/2/14, para. 15), China (para. 95, WIPO/GRTKF/IC/5/15), Colombia (WIPO/GRTKF/IC/3/17, para. 222), India (WIPO/GRTKF/IC/4/15, para. 140), New Zealand (WIPO/GRKTF/IC/6/14, para. 87), Panama (WIPO/GRTKF/IC/3/17, para 226), Peru (WIPO/GRKTF/IC/6/14, para. 76), Turkey (para. 109, WIPO/GRTKF/IC/4/15), Venezuela (WIPO/GRTKF/IC/3/17, paragraph 213), Saami Council (WIPO/GRKTF/IC/6/14, para. 98) and COICA (WIPO/GRKTF/IC/6/14, para. 99).

protection, taking into account the diverse legal, conceptual, infrastructural and other operational needs of countries. Certain specific suggestions for improving use of existing rights and for strengthening the effective implementation of specific systems are discussed in WIPO/GRTKF/IC/7/6. This may include tasking a specific national authority or making use of existing mechanisms such as collecting societies or access and benefit-sharing regimes to manage and enforce the rights and interests of TK holders.

A.3: Principle of effectiveness and accessibility of protection

Measures for protecting traditional knowledge should be effective in achieving the objectives of protection, and should be understandable, affordable, accessible and not burdensome for their intended beneficiaries, taking account of the cultural, social and economic context of TK holders. National authorities should make available appropriate enforcement procedures that permit effective action against misappropriation of traditional knowledge and violation of the principle of prior informed consent.

A.4 Flexibility and comprehensiveness

12. This principle concerns the need to respect that effective and appropriate protection may be achieved by a wide variety of legal mechanisms, and that too narrow or rigid an approach at the level of principle may constrain effective protection, conflict with existing laws to protect TK, and pre-empt necessary consultation with TK holders. It also concerns the need to draw on a wide range of legal mechanisms to achieve the intended objectives of protection. In particular, experience has shown that a mix of measures, between proprietary and non-proprietary approaches, and between distinct new measures and adaptations of existing IP rights, is more likely to achieve the objectives of protection. This has been repeatedly endorsed within the Committee as a ‘comprehensive approach’ to TK protection.

13. There is already extensive legislative and jurisprudential experience with TK protection in many countries, showing considerable diversity in existing national and regional approaches. While some 35 countries and certain regional organizations have already enacted, or are in the process of developing, specific TK protection measures, the approaches they follow differ widely. Even among those countries which have followed regional approaches such as the African Model Law or Decision 391 of the Andean Pact, existing national laws differ on a range of legal elements.¹⁴

14. Therefore, as many Committee members have pointed out, any provisions for TK protection adopted at the international level would have to accommodate the diversity of existing national and regional approaches.¹⁵ Furthermore, TK and the customary protocols applicable to it are as diverse as the number of indigenous and local communities in the world. An indigenous organization has put it best: “Any attempt to devise uniform guidelines for the recognition and protection of indigenous peoples’ knowledge runs the risk of

¹⁴ See ‘Review of Existing Intellectual Property Protection of Traditional Knowledge’ (WIPO/GRTKF/IC/ 3/7).

¹⁵ Venezuela (WIPO/GRTKF/IC/6/14, para. 72), African Group (WIPO/GRTKF/IC/6/14, para. 73), Canada (WIPO/GRTKF/IC/6/14, para. 79), Syria (WIPO/GRTKF/IC/6/14, para. 80), New Zealand (WIPO/GRTKF/IC/6/14, para. 88), Kaska Dena Council (WIPO/GRTKF/IC/6/14, para. 59).

collapsing this rich jurisprudential diversity into a single ‘model’ that will not fit the values, conceptions or laws of any indigenous society.”¹⁶

15. In response to these views, this principle underpins the approach followed in this document and in WIPO/GRTKF/IC/7/6, which draw a distinction between possible international principles, on the one hand, and the choice of national legal mechanisms to give effect to those principles, on the other. This can give countries appropriate discretion in how they protect TK, and the legal tools and doctrines that are applied in practice to achieve shared objectives.

16. This is a relatively common approach in the IP field. Existing international *sui generis* instruments for IP protection of specific subject matter, such as layout designs of integrated circuits, establish general principles and give scope for wide variation within the laws of the signatories.¹⁷ 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. This is especially so for those forms of protection which are in a state of evolution and are newly articulated at the international level (see the references to the Washington Convention and the Rome Convention in paragraph 17 of the main body of this document).

17. Thus, the core principles set out in this document are intended to give maximum flexibility to national authorities in relation to terminology, beneficiaries, term of protection, and which areas of law and which particular legal mechanisms are used to give effect to the principles. 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, adapted IP rights, the general law of unfair competition and various general legal mechanisms beyond the scope of IP law proper (such as criminal law, the law of torts, access and benefit-sharing laws, customary laws, law of contract or liability principles). This document sets out the principle in broad terms, and WIPO/GRTKF/IC/7/6 illustrates this necessary flexibility and comprehensiveness in more detail.

18. Throughout the work of the Committee defensive and positive protection have been treated as complementary and indispensable parts of a holistic approach to TK protection. Either form of protection would be incomplete without the presence of the other. Consequently, numerous Committee members have proposed that the complementarity of defensive and positive protection measures should constitute a general principle of TK protection.¹⁸ As the Delegation of Brazil pointed out, “any proposed combined approach to the protection of TK would necessarily have to include the use of defensive protection

¹⁶ Four Directions Council, ‘Forests, Indigenous Peoples and Biodiversity,’ Submission to the Secretariat for the CBD, 1996.

¹⁷ WIPO/GRTKF/IC/6/6, referring for example to the TRIPS Agreement, Article 1.1; Rome Convention, Article 7; the Satellites Convention, Article 2; the Lisbon Convention, Article 8; the Washington Treaty, Article 4; and the Phonograms Convention, Article 3.

¹⁸ See, African Group (WIPO/GRTKF/IC/6/12, Annex, page 1), Asian Group (WIPO/GRTKF/IC/2/10, Annex, page 3, para. 7(b)(ii)), European Community and its Member States (WIPO/GRTKF/IC/3/16), Brazil (WIPO/GRTKF/IC/6/14, para. 90); Canada (WIPO/GRTKF/IC/6/14, para. 78); India (WIPO/GRTKF/IC/6/14, para. 80); Islamic Republic of Iran (WIPO/GRTKF/IC/6/14, para. 85); South Africa (WIPO/GRTKF/IC/6/14, para. 67); Venezuela (WIPO/GRTKF/IC/6/14, para. 93); ARIPO (WIPO/GRTKF/IC/6/14, para. 96)

measures.”¹⁹ Hence the general suppression of misappropriation deals with both defensive and positive protection.

A.4: Principle of Flexibility and Comprehensiveness

1. Protection should respect the diversity of traditional knowledge held by different peoples and communities in different sectors, should acknowledge differences in national circumstances and the legal context and heritage of national jurisdictions, and should allow sufficient flexibility for national authorities to determine the appropriate means of implementing these principles within existing and specific legislative mechanisms, adapting protection as necessary to take account of specific sectoral policy objectives.
2. Protection may combine proprietary and non-proprietary measures, and use existing IP rights (including measures to improve the application and practical accessibility of such rights), *sui generis* extensions or adaptations of IP rights, and specific *sui generis* laws. Protection should include defensive measures to curtail illegitimate acquisition of industrial property rights over traditional knowledge or associated genetic resources, and positive measures establishing legal entitlements for traditional knowledge holders.

19. This principle corresponds with a general norm of flexibility expressed in other international instruments relating to IP, TK or genetic resources, for example the TRIPS Agreement (Article 1) and the Bonn Guidelines (paragraph 7(g)). Two forms of flexibility²⁰ are suggested by existing TK protection and by past statements to the Committee: ‘vertical flexibility’ for national choices within an international framework, and ‘horizontal flexibility’ for specific choices for the protection of TK within different sectors.

20. *Vertical flexibility:* Many countries have established or are developing national *sui generis* measures to protect TK.²¹ International principles for the protection of TK should therefore accommodate this existing diversity of approaches. And the principles would need to operate consistently with a diverse set of broader legal frameworks, such as access and benefit-sharing laws, existing national intellectual property laws, indigenous rights legislation, and constitutional law. This guiding principle affirms this necessary flexibility.

21. *Horizontal flexibility:* Comprehensive TK protection may need to reflect distinct policy objectives in specific sectors, and may need to be integrated with different sectoral regulatory systems at the national level. This adds another dimension of flexibility, allowing for differences in sectors. For instance, distinct measures have been developed at the national level to regulate traditional medicine, traditional agricultural practices, TK associated with genetic resources, and tradition-based industries (such as handicraft production). The Committee has considered the need for flexibility to adapt protection to the distinct policy

¹⁹ Brazil (WIPO/GRTKF/IC/6/14, para. 69)

²⁰ This distinction follows the existing literature on flexibility in application of legal frameworks for IP protection. See, for examples, Xichun, Pan. *Flexibility of the TRIPS Agreement with Regard to Patent Protection*. University of Lund, (2002) at 36-37.

²¹ Besides the *sui generis* measures which were presented to the Committee at its fifth session, additional *sui generis* laws on TK are reportedly being drafted and promulgated in many countries, including, for example, Botswana, Cook Islands, India, Kazakhstan, Pakistan, Sri Lanka and Zimbabwe.

needs of these areas of regulation, as well as the distinct characteristics of TK in these sectors.²² Such sectoral distinctions are apparent in existing *sui generis* laws which focus on a particular sector, such as traditional agriculture or traditional medicine. Several international instruments also address TK in specific sectors, such as the protection of biodiversity-related TK within the context of conservation of biological diversity or the farmers' rights provisions of the ITPGR, thus creating a distinct policy environment for those sectors. Conventional forms of *sui generis* IP protection tend also to take account of particular aspects of the sector they are aimed at (for example, plant variety rights and integrated circuit protection). The principle of horizontal flexibility would recognize that TK protection has to be coordinated and consistent with policy objectives and regulatory mechanisms in related areas, and may therefore differentiate between different sectors.

22. The principle draws on definitions of defensive and positive protection which have been developed by the Committee in the past.²³ The principle does not prescribe any particular means of implementing the complementary forms of protection, respecting the need for due flexibility.

A.5 Principle of equity and benefit-sharing

23. A broad principle of equity is central to general IP law²⁴ and is also implied in most non-IP legal instruments which pertain to TK protection.²⁵ A form of equity or equitable treatment has been propounded by many Committee members²⁶ and was among the principles considered by the Committee at its sixth session.²⁷ Most existing *sui generis* measures cite a form of equity as a guiding principle.²⁸

24. This principle has both a general and a particular application to TK.²⁹ The Committee acknowledged a general concern with equity as being common to issues relating to genetic resources, TK and folklore/TCEs³⁰ when it adopted its initial work program in 2001. This reflects a broad principle of IP law that protection should promote social and economic welfare, and a balance of rights and obligations.³¹

²² See statement of the Asian Group (WIPO/GRTKF/IC/4/14, Annex, page 4 and page 7), the Republic of Korea (para. 93, WIPO/GRTKF/IC/5/15), Nepal for SAARC (WIPO/GRTKF/IC/4/15, para. 14), New Zealand (WIPO/GRTKF/IC/4/15, para. 138), Norway (WIPO/GRTKF/IC/4/15, para. 133), and the International Chamber of Commerce (WIPO/GRTKF/IC/4/15, para. 161).

²³ WIPO/GRTKF/IC/Q.4, WIPO/GRTKF/IC/6/8, WIPO/GRTKF/IC/2/6.

²⁴ Article 7 of the WTO TRIPS Agreement.

²⁵ Article 8(j), CBD; Article 17(c), UNCCD; Section IV. D of the Bonn Guidelines.

²⁶ For example, South Africa (WIPO/GRTKF/IC/5/15, para 115), Egypt (WIPO/GRTKF/IC/5/15, paras 165 and 197), African Group (WIPO/GRTKF/IC/4/15, para 12), Zambia (WIPO/GRTKF/IC/4/15, para 156),

²⁷ See WIPO/GRTKF/IC/6/4.Rev, para. 23, and See WIPO/GRTKF/IC/6/14, para. 217

²⁸ African Model Law (Objective (d), Part I); Brazilian Measure (Article 1.III); Costa Rican Biodiversity Law (Articles 1, 3, 9.4 and 10.4); Peruvian Law (Art. 5(b), 7 and 46); Portuguese Law (Preamble, Para 1); US Arts and Crafts Act (S. 105).

²⁹ See WIPO/GRTKF/IC/6/4.Rev, para. 23

³⁰ See WIPO/GRTKF/IC/1/3, para. 7

³¹ See WIPO/GRTKF/IC/1/3, para. 7, and Article 7 of TRIPS.

25. This principle, most directly applicable to traditional environmental knowledge,³² has a more specific focus on the equitable sharing of benefits arising from the use of TK in the context of environmental objectives, such as conservation and sustainable use of natural resources or combating of desertification.³³ For example, the United Nations Convention to Combat Desertification (UNCCD) requires that owners of traditional and local knowledge, know-how and practices should “directly benefit *on an equitable basis* and on mutually agreed terms from any commercial utilization of it or from any technological development derived from that knowledge.”³⁴ Several other multilateral environmental agreements contain an equity principle in their objectives³⁵ and in some cases foresee that these objectives would be implemented by measures at the national level for fair and equitable sharing of the results of research and development and the benefits arising from the utilization of the relevant resources and knowledge.³⁶

26. The principle is stated here in general terms to guide the elaboration of specific principles of protection below, ensuring commercial use of TK is subject to equitable sharing of benefits, as a particular aspect of the general principle of equity.³⁷ The Committee has already identified the legal tools commonly used to implement this principle, namely compensatory liability and mutually agreed terms, i.e. contractual arrangements, in combination with prior informed consent. Where these tools are applied to TK associated with genetic resources, they should operate consistently with any access and benefit-sharing regime applicable to those genetic resources. This equity principle, and its application through compensatory liability or benefit-sharing regimes, are expressed in some form in most national TK protection measures presented to the Committee,³⁸ in numerous statements of Committee members,³⁹ in various working documents submitted by regional groups to the Committee,⁴⁰ and in a number of questionnaire responses on TK protection provided in response to WIPO/GRTKF/IC/2/5. The application and particular elements of the principle are consistent with soft law instruments such as the Bonn Guidelines.⁴¹

³² See Mugabe et al. *Protecting Traditional Environmental Knowledge*

³³ See for example, Art. 1, CBD and UNCCD.

³⁴ See Art. 17(c), UNCCD

³⁵ For three examples of such agreements, see Art. 1 CBD; and Arts. 16(g) and 17(c) UNCCD ; and Arts. 3.1 and 4.2(a) UNFCCC. See also, *Social Conflict and Environmental Law: Ethics, Economics and Equity*. Eds A. Greenbaum, A. Wellington and E. Baar (1995).

³⁶ See Art. 15.7 CBD.

³⁷ See document submitted by GRULAC (WO/GA/26/9, Annex I, page 3).

³⁸ See the African Model Law and the laws of Brazil, Costa Rica, India, Peru, the Philippines and Portugal referred to in footnote 1 above.

³⁹ African Group (WIPO/GRTKF/IC/4/15, para. 12), the European Community and its Member States (WIPO/GRTKF/IC/3/16, page 5), Andean Community (WIPO/GRTKF/IC/3/17, para.240), Brazil (WIPO/GRTKF/IC/2/14, Annex, para. 15), France (WIPO/GRTKF/IC/5/15, para. 14), Panama (WIPO/GRTKF/IC/3/17, para. 226), Peru (WIPO/GRTKF/IC/4/15, para. 127, and WIPO/GRTKF/IC/3/17, para. 221), the United States of America (WIPO/GRTKF/IC/4/13, para. 9), Venezuela (WIPO/GRTKF/IC/3/17, para. 213), and Zambia (WIPO/GRTKF/IC/4/15, para. 156).

⁴⁰ See the document submissions of the African Group (WIPO/GRTKF/IC/3/15, Annex, page 3, and WIPO/GRTKF/IC/1/10, Annex, Proposals 3.3(c) and 3.4(d)), the European Community and its Member States (WIPO/GRTKF/IC/1/8, Annex III, para. 34), GRULAC (WO/GA/26/9, Annex I, page 2, and Annex II, page 4, and WIPO/GRTKF/IC/1/5, Annex I, page 2).

⁴¹ See Section IV. D of the Bonn Guidelines.

A.5: Principle of equity and benefit-sharing

1. Protection should reflect the need for an equitable balance between the rights and interests of those that develop, preserve and sustain TK, and of those who use and benefit from TK; the need to reconcile diverse policy concerns; and the need for specific protection measures to be proportionate to the objectives of protection and the maintenance of an equitable balance of interests.
2. Holders of traditional knowledge should be entitled to fair and equitable sharing of benefits arising from the use of their traditional knowledge. Where traditional knowledge is associated with genetic resources, the distribution of benefits should be consistent with measures, established in accordance with the Convention on Biological Diversity, providing for sharing of benefits arising from the utilization of the genetic resources.

27. This principle was reviewed by the Committee in WIPO/GRTKF/IC/6/4 (paragraph 23), drawing on various proposals generally concerning equity in the protection of TK in general (the first element), and specifically in the distribution and sharing of benefits from TK (the second element). Possible forms of “equitable sharing of benefits” include the exercise of exclusive rights, compensatory liability rules and the use of access and benefit-sharing frameworks with mutually agreed terms and prior informed consent (included in the substantive principles below). The second element deals specially with TK related to genetic resources, in view of the need for equitable benefit sharing to operate consistently with the legal frameworks for genetic resources and, by extension, potentially to associated TK.

A.6 Consistency with existing legal systems

28. Legal measures to protect TK beyond its original customary or traditional context will need to operate consistently within the broader legal environment, and could be rendered ineffective or burdensome if they operated in conflict with general legal systems. In the case of TK protection, this applies especially to the relationship with regimes governing genetic resources, which are often associated with TK, and to the relationship with existing IP rights. This principle addresses these specific needs.

29. The subject matter of protection is limited to traditional knowledge as such and does not extend to rights in physical material (which are separately governed and defined by existing legal regimes). Since, however, this includes TK that is related to genetic resources, several Committee members have stressed that these Principles should be consistent or coordinated with laws governing access to genetic resources. Several regional groups⁴² have proposed that TK protection should always be coordinated with measures and laws governing those resources⁴³. The CBD (Article 3) affirms national sovereignty over genetic resources.

30. Existing intellectual property systems, adapted and extended where appropriate, have been used extensively to protect traditional knowledge against various forms of misuse or misappropriation, and provide one avenue for at least partially fulfilling the defined objectives of protection.⁴⁴ Equally, appropriate protection of traditional knowledge should not be in

⁴² African Group (WIPO/GRTKF/IC/6/12, Annex, page 1), GRULAC (WIPO/GRTKF/IC/1/5)

⁴³ For example, African Group WIPO/GRTKF/IC/6/12.

⁴⁴ See extensive examples cited in WIPO/GRTKF/IC/5/7, WIPO/GRTKF/IC/5/8 and WIPO/GRTKF/IC/6/4 Rev.

conflict with legitimate intellectual property rights of third parties, but should operate consistently and mutually supportively to achieve robust and effective protection in the interests of TK holders and in the broader public interest.

A.6: Principle of consistency with existing legal systems

1. The authority to determine access to genetic resources, whether associated with traditional knowledge or not, rests with the national governments and is subject to national legislation. The protection of traditional knowledge associated with genetic resources shall be consistent with the applicable law, if any, governing access to those resources and the sharing of benefits arising from their use. Nothing in these Principles shall be interpreted to limit the sovereign rights of States over their natural resources and the authority of governments to determine access to genetic resources, whether or not those resources are associated with protected traditional knowledge.

2. Traditional knowledge protection should be consistent with, and supportive of, existing IP systems and should enhance the applicability of relevant intellectual property systems to traditional knowledge subject matter in the interests of holders of traditional knowledge and consistently with the broader public interest. Nothing in these Principles shall be interpreted to derogate from existing obligations that national authorities have to each other under the Paris Convention and other international intellectual property agreements.

31. The first paragraph recalls the established principle, based on Articles 3 and 15.1 of the CBD, that the authority to regulate access to genetic resources as such rests with national governments. Hence this paragraph clarifies that the protection of TK related to genetic resources should be consistent with the legislative, administrative and policy measures through which governments exercise their authority to regulate access to genetic resources. The need to clarify that protection of TK should not limit sovereignty over genetic resources was identified by a number of Committee participants.⁴⁵

A.7 Respect for and cooperation with other international and regional instruments and processes

32. Since its first session, the Committee has addressed the field of TK in close co-ordination and co-operation with other intergovernmental processes and fora. This has been reflected in the decisions of the Committee⁴⁶ and in positive responses from other processes and fora.⁴⁷ Hence co-ordination with other processes was considered as a general principle of protection at the Committee's sixth session. In the case of TK, this concerns co-ordination with the work of the CBD, FAO, the International Forum on Forests (IFF), WHO and ILO, UNCCD, UNCTAD, UNEP, the UN Permanent Forum on Indigenous Issues, and the WHO and WTO. The General Assembly of WIPO 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

⁴⁵ See African Group (WIPO/GRTKF/IC/6/12, Annex).

⁴⁶ See Chairman (WIPO/GRKTF/IC/1/13, para. 128 and 129).

⁴⁷ See FAO (WIPO/GRKTF/IC/6/14, para. 133, SCBD (WIPO/GRKTF/IC/6/14, para. 141), UNEP (Joint study on the role of IP in benefit-sharing, jointly presented to the seventh Conference of Parties of the CBD); UNCTAD (WIPO/GRKTF/IC/6/14, para. 96); and FAO (WIPO/GRKTF/IC/6/14, para. 133).

reporting on developments elsewhere, and respect for the distinct mandates and competencies of other fora.

33. This also means that TK protection should be consistent with and supportive of the provision in other international legal instruments pertaining to TK.⁴⁸ For example, Part IV of the ITPGR recognizes farmers' rights as part of a binding international instrument, and Article 9 states that each Contracting Party should "as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including ... protection of traditional knowledge relevant to plant genetic resources for food and agriculture." No detailed provisions for such TK protection are prescribed, and any specific measures taken are subject to national law and fall in the domain of national implementation. Even so, this kind of provision underscores the need for compatibility with and support for the objectives of such other international instruments.

*A.7: Principle of respect for and cooperation with
other international and regional instruments and processes*

1. Traditional knowledge shall be protected in a way that is consistent with the objectives of other relevant international and regional instruments and processes, and without prejudice to specific rights and obligations already established under binding legal instruments.
2. Nothing in these Principles shall be interpreted to affect the interpretation of other instruments or the work of other processes which address the role of traditional knowledge in related policy areas, including the role of traditional knowledge in the conservation of biological diversity, the combating of drought and desertification, or the implementation of farmers' rights as recognized by relevant international instruments and subject to national legislation.

34. This wording draws on the principle of co-ordination with other relevant fora and processes considered by the Committee at its sixth session (WIPO/GRTKF/IC/6/4 Rev., paragraph 28(b)). It is intended to affirm consistency with the relevant provisions of the instruments mentioned above.

A.8 Respect for customary use and transmission of traditional knowledge

35. Respect for customary use, practices and norms has two aspects: ensuring that protection does not override existing customary practices, and using the customary context as a positive guide in the application of protection. Customary use is safeguarded under three international instruments⁴⁹ and many national *sui generis* laws that considered by the Committee (including the laws of African Union, Brazil, Costa Rica, India, Peru, Portugal and Thailand).⁵⁰ It is further reflected in softlaw instruments that apply it to associated genetic resources, such as the Bonn Guidelines.⁵¹ Numerous Committee members thus stated that customary uses of TK and associated genetic resources should be encouraged, and should not

⁴⁸ See, for example, CBD Articles 8(j), 10(c), 17.2 and 18.4; ITPGR, Art. 9; UNCCD, Art 17(c); ILO Convention 169.

⁴⁹ See Article 10(c) CBD; Articles 43(b) and 44(g) Bonn Guidelines; and Article 9, ITPGR.

⁵⁰ See WIPO/GRTKF/IC/5/INF/4, Annex 1

⁵¹ See the Bonn Guidelines, Articles 43(b) and 44(a).

be restrained by the formal legal protection of TK nor by other IP rights.⁵² The principle of safeguarding customary uses was reviewed by the Committee at its sixth session (WIPO/GRTKF/IC/6/4 Rev, para. 27). Some existing *sui generis* laws make reference to or recognize certain elements of customary laws applicable to TK in the local context. Examples of such national or regional legislation include the laws of the African Union, Peru and the Philippines. Customary law has also been used within conventional IP laws to guide the determination of such matters as equitable interests, appropriate remedies and the equitable distribution of damages for infringement; it may also be relevant to dispute settlement procedures and the determination of appropriate exceptions and limitations on exclusive rights.

A.8: Principle of respect for customary use and transmission of traditional knowledge

Customary use, practices and norms shall be respected and given due account in the protection of traditional knowledge, as far as possible and as appropriate and subject to national law and policy. Protection beyond the traditional context should not conflict with customary access to, and use and transmission of, traditional knowledge, and should respect and bolster this customary framework.

36. This wording draws on the national *sui generis* laws mentioned above as well as Article 10(c) of the CBD and Articles 43(b) and 44(g) of the Bonn Guidelines.

A.9 Recognition of the specific characteristics of traditional knowledge

37. Effective and equitable protection of TK should ideally be founded on an understanding of the origins, forms, nature and characteristics of traditional knowledge systems and their customary and cultural context. This helps clarify the precise characteristics of TK that should be protected in the external environment, the nature of the protection, the identities of the beneficiaries of protection, and the objectives of protection. The levels and forms of protection should respect the nature of traditional knowledge systems, including their inherent diversity and the holistic conception of TK in its original context.

A.9: Principle of recognition of the specific characteristics of traditional knowledge

Protection of traditional knowledge should respond to the traditional context, the collective or communal context and inter-generational character of its development, preservation and transmission, its relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values, and constantly evolving character within the community.

⁵² Brazil (WIPO/GRTKF/IC/2/14, Annex, para. 15), New Zealand (WIPO/GRKTF/IC/6/14, para. 87); Peru (WIPO/GRKTF/IC/6/14, para. 76); Switzerland (WIPO/GRTKF/IC/1/9, Annex, pages 4), Thailand (WIPO/GRTKF/IC/3/17, para.216), the Assembly of First Nations, the Inuit Circumpolar Conference and the Métis National Council (WIPO/GRTKF/IC/4/15, para. 117), Assembly of First Nations (WIPO/GRKTF/IC/6/14, para. 100); Saami Council (WIPO/GRKTF/IC/6/14, para. 98); and COICA (WIPO/GRKTF/IC/6/14, para. 99).

B. Substantive Principles

Background

38. This section sets out suggested principles that could give more specific guidance on protection of TK. These principles would seek to achieve the policy objectives (Part A above) within the framework set by the general guiding principles (Part B). These principles draw extensively upon existing IP and non-IP principles, doctrines and legal mechanisms, as well as national and regional experiences, both practical and legislative, from a wide cross-section of countries and regions. They recognize and take into account that current IP laws already some TK, while meeting the request of many Member States, communities and others to address in particular subject matter that is not currently protected under current international standards (although it is variously protected in some existing laws). The suggested principles, while recognizing an extended scope of protected subject matter, are firmly rooted in IP law, policy and practice and seek to strike the required balances in a manner that is complementary to and supportive of existing IP approaches.

39. The main organizing principle is the suppression of misappropriation. The very diversity of TK and of the needs and expectations of TK holders has naturally inspired diverse approaches to shaping its protection. This diversity is apparent in the different concerns raised about misuse of TK, in the legal measures already implemented in national and regional legal systems, and in the proposals for further protection of TK. Respecting this necessary diversity, while building a common policy platform and setting shared future directions is a fundamental task. One strongly consistent theme, however, within and beyond the Committee, expressed with apparent consensus, is the importance of preventing misappropriation of TK. TK holders inside⁵³ and beyond the Committee⁵⁴ have used the term ‘misappropriation’ to describe the acts of third parties which raise the need for legal protection. Committee members have variously affirmed this basic premise,⁵⁵ for instance that they are “committed to preventing the misappropriation of TK”⁵⁶ and that the

⁵³ See Aboriginal and Torres Strait Islander Commission, Aboriginal and Torres Strait Islander Commission (ATSIC), Foundation for Aboriginal and Islander Research Action (FAIRA), Assembly of First Nations (AFN), Call of the Earth (COE), Canadian Indigenous Biodiversity Network (CIBN), Coordinating Body of Indigenous Organizations of the Amazon Basin (COICA), Indigenous Peoples Caucus of the Creators Rights Alliance, Hoketehi Moriori Trust, Rekohu, Aotearoa (New Zealand), International Indian Treaty Council (IITC), the Kaska Dena Council (KDC) and the Saami Council (WIPO/GRTKF/IC/6/14, para. 228);

⁵⁴ See, for example, *Intellectual Property Rights for Indigenous Peoples: A Sourcebook* (Tom Greaves ed., 1994). See also, Howes, D. “Combating Cultural Appropriation in the American Southwest: Lessons from the Hopi Experience Concerning the Uses of Law.” 10 *Can. J. L. & Soc’y*, 129 (1995).

⁵⁵ African Group (WIPO/GRTKF/IC/6/12, Annex, “Objectives”; WIPO/GRTKF/IC/6/14, para. 73, 188, 222), GRULAC (WIPO/GRTKF/IC/6/14, para. 189), Botswana (WIPO/GRTKF/IC/6/14, para. 215), Brazil (WIPO/GRTKF/IC/6/14, para. 69, 91); European Community and its Member States (WIPO/GRTKF/IC/3/16, Annex, p.4); India (WIPO/GRTKF/IC/6/14, para. 81, 197), Indonesia (WIPO/GRTKF/IC/6/14, para. 50), Kenya (WIPO/GRTKF/IC/6/14, para. 199), New Zealand (WIPO/GRTKF/IC/6/14, para. 41), United States of America (WIPO/GRTKF/IC/6/14, para. 157), Consumer Project on Technology (WIPO/GRTKF/IC/6/14, para. 102),

⁵⁶ United States of America (WIPO/GRTKF/IC/6/14, para. 157)

“fundamental objective of any initiative to protect TK” must be the prevention of misappropriation.⁵⁷ Studies prepared outside the Committee,⁵⁸ for example by the South Centre, have proposed “the development of a misappropriation regime for TK.”⁵⁹ In addition, other relevant intergovernmental fora, such as UNCTAD and the CBD, have also concluded that a ‘misappropriation regime’ would be an appropriate way to address international TK protection.

40. The widespread desire to prevent misappropriation provides a foundational principle to clarify and structure the shared elements of the distinct concerns about misuse and misappropriation of TK that have been highlighted in Committee discussion. In particular, three broad aspects of misappropriation have been expressed in the Committee: third parties acquiring illegitimate IP rights over TK; acquisition of TK without prior informed consent, where such consent is required; and commercial free-riding, or the inequitable use of TK for commercial gain without benefit-sharing.

41. Guided by Committee members,⁶⁰ the required “focus on the prevention of misappropriation”⁶¹ is implemented through the agreed “combined approach.” This applies a set of adapted legal tools to address the three key aspects of misappropriation identified in the Committee. The principles for protection therefore shape the use of a combination of well-established legal tools. These tools, already reviewed in detail by the Committee, include the principle of prior informed consent, compensatory liability rules, exclusive rights, suppression of unfair competition and dishonest commercial practices. Customary practices, uses and laws, and the understandings of TK holders provide due guidance and context to the application of these formal legal mechanisms. The substantive principles therefore frame a form of protection that provides: defensive protection; appropriate application of prior informed consent; equitable benefit-sharing for industrial and commercial uses of TK undertaken with gainful intent; and a sensitivity towards customary laws and understandings of TK holders.

⁵⁷ Brazil (WIPO/GRTKF/IC/6/14, para. 69, 91).

⁵⁸ See Correa, C. “Protecting Traditional Knowledge: Lessons From National Experiences.” Discussion Paper. *UNCTAD/Commonwealth Secretariat Workshop on Elements of National Sui Generis Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework* (February 4 – 6, 2004): page 28-31 and 40 (hereinafter “*UNCTAD/Commonwealth Workshop on Sui Generis Systems for TK and Options for an International Framework*”). See especially the chapters entitled ‘Preventing misappropriation’ and ‘Conclusions’. See also the main working paper of the same UNCTAD Workshop, entitled ‘Preserving, Protecting and Promoting Traditional Knowledge: National Actions and International Dimensions’ (page 7).

⁵⁹ See, Correa, C. “Update on international developments relating to the Intellectual Property protection of traditional knowledge including traditional medicine,” *South Centre Working Paper No. 18* (March 2004): p 11, 14 (‘Recommendations and Conclusions’); Lettington, R. and Nnadozie, K. *A Review of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore at WIPO*. South Centre Occasional Paper No. 12 (2003), para. 65, 66 and 67; Chapter IV.(g) (‘Misappropriation regime’) in Correa, C. *Protection and promotion of traditional medicine* Geneva: South Centre (2002): pages 102-106.

⁶⁰ See, African Group (WIPO/GRKTF/IC/1/10, Annex, page 6, para.3.3 (d) and 3.4), GRULAC (WIPO/GRKTF/IC/1/5, Annex I, page 2, and Annex II, page 4), Brazil (WIPO/GRKTF/IC/6/14, para. 68); Japan (WIPO/GRKTF/IC/6/14, para. 69); New Zealand (WIPO/GRKTF/IC/6/14, para. 87); Norway (WIPO/GRKTF/IC/6/14, para. 70); Peru (WIPO/GRKTF/IC/6/14, para. 76); USA (WIPO/GRKTF/IC/6/14, para. 75).

⁶¹ New Zealand (WIPO/GRTKF/IC/6/14, para. 41)

42. These substantive principles would give effect to the objectives of protection, in line with the general guiding principles. They could help to define a shared international understanding of protection characterized as follows:

- protection is balanced and proportionate, given the broader public interests and the specific interests of TK holder communities, recognizing fair use or fair dealing and the public domain, while seeking to repress truly inequitable conduct;
- misappropriation of TK is repressed as an act of unfair competition;
- benefits arising from commercial or industrial uses of TK are shared equitably;
- the principle of prior informed consent is applied to TK subject matter in harmony with existing national and international law;
- national authorities retain full flexibility to give effect to the principles compatible with their own legal systems, national policies and stakeholder needs;
- TK holders retain full involvement and control in TK protection procedures;
- legitimate IP rights are not prejudiced;
- all existing TK laws described to the Committee are consistent with the shared international perspective;
- defensive and positive protection of TK are integrated and complementary;
- national authorities may choose to recognize or grant distinct, *sui generis* private property rights for TK, for either individual or communal owners, according to their own legal systems and national policies and stakeholder needs.

43. The principles seek to articulate a *sui generis* conception of misappropriation that includes all these features, yet is compatible with the foundational principles and doctrines of IP and related areas of law. This is made possible by the insight, discussed in the Committee and in many other studies, that the central notion of misappropriation has deep roots in the law of unfair competition, and related concepts of unjust enrichment, free-riding, slavish imitation, and ‘reaping where another has sown;’ misappropriation generally deals with the unauthorized use of an intangible asset. Associated conceptions concern the repression of acts that seek to profit from misleading or deceptive behavior or acts of competition contrary to honest practices. These general doctrines have evolved and have been interpreted variously, giving rise to a doctrinal basis for several different areas of IP law (as is recognized in a number of existing IP treaties).

44. The use of existing doctrines of unfair competition law to protect some TK subject matter from misappropriation is not new and has been proven successful in several jurisdictions. Studies have shown that “courts in nearly all countries periodically draw upon the misappropriation rationale ... to curb methods of imitation that appear egregiously unethical or market-distorting.”⁶² The Committee’s work has shown widespread use of general law and doctrine of unfair competition to protect TK, such as Hungary, Peru, Portugal and the Republic of Korea.⁶³ Specific proposals that a misappropriation doctrine, unfair competition law and the law of torts (including unjust enrichment) could be applied to protect TK have been suggested by Committee members, such as China, Japan and the United States

⁶² See Reichman, J. Legal Hybrids Between the Patent and Copyright Paradigms. 94 *Columbia Law Review*. 1994; at 2432.

⁶³ Peru (WIPO/GRTKF/IC/6/14, para. 76); responses to questionnaire WIPO/GRTKF/IC/2/5 by Hungary (page 68), Republic of Korea (page 72), Portugal (page 106).

of America;⁶⁴ by regional groups, such as GRULAC, the EC, SAARC and SADC;⁶⁵ by other intergovernmental organizations, such as UNCTAD and the Commonwealth Secretariat;⁶⁶ by policy analysts outside the Committee, such as ICTSD and the South Centre;⁶⁷ and by a growing number of academics who are seeking a theoretical basis for TK protection.⁶⁸

45. This trend towards a misappropriation regime building on existing unfair competition law was crystallized in a specific Norwegian proposal to develop ‘a general international norm that obliged the States to offer protection against unfair exploitation of TK.’ This would protect TK as such without any requirements of prior examination or registration, in a way that was ‘simple and flexible.’⁶⁹ Norway noted the measures against unfair competition in Article 10*bis* of the Paris Convention, and suggested that this could be used ‘as a model when considering the framework of a *sui generis* system for TK.’ This general norm could be supplemented by ‘internationally agreed guidelines’ on its application. The Chair proposed, and the Committee agreed,⁷⁰ that further development of the elements of *sui generis* protection of TK (WIPO/GRTKF/IC/3/8) should consider the possibility of ‘protection for TK along similar lines as in Article 10*bis* of the Paris Convention concerning unfair competition.’

46. The evolution of a new “general international norm” in some way drawing on or applying the model of Article 10*bis* has several well-established precedents in international IP law,⁷¹ notably the protection of undisclosed information and test data (“[i]n the course of ensuring effective protection against unfair competition as provided in Article 10*bis* of the Paris Convention (1967), Members shall protect undisclosed information ... and data submitted to governments or governmental agencies”⁷²), and the scope of protection for geographical indications. Secret TK may of course be directly protected as undisclosed information, and this is accordingly one of the tools that may be applied within this

⁶⁴ China (WIPO/GRTKF/IC/1/13, para. 31); Japan (WIPO/GRTKF/IC/6/14, para. 70); Peru (WIPO/GRTKF/IC/6/14, para. 76); United States of America (WIPO/GRTKF/IC/3/17, para. 223 and WIPO/GRTKF/IC/5/INF/6).

⁶⁵ See SAARC Expert Workshop Recommendations and SADC Expert Workshop Conclusions.

⁶⁶ See Report of the *UNCTAD/Commonwealth Secretariat Workshop on Elements of National Sui Generis Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework* (February 4 – 6, 2004): page 13 (“Tort of Misappropriation”). See also page 25, proposing an international protocol to prevent misappropriation.

⁶⁷ For example, the suggestion that a misappropriation regime should incorporate the law of unfair competition is suggested by Duffield, G. “Protecting Traditional Knowledge and Folklore: A review of progress in diplomacy and policy formulation. » *UNCTAD/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development* (2002) : see chapter on ‘Misappropriation regime’ (page 30).

⁶⁸ For example see ‘Appropriation and the Tort of Misappropriation’ (Section 5(c)) in Karjala, D. and R. Paterson, ‘Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples,’ *11 Cardozo J. Int'l & Comp. L.* at 657. The authors state that, if the tort’s current focus on economic rights could be expanded to include a sensitivity to TK subject matter, “the spirit of the misappropriation doctrine in the INS case seems consistent with indigenous misappropriation claims.”

⁶⁹ Norway (WIPO/GRTKF/IC/3/17, para. 227)

⁷⁰ Decision paragraph (WIPO/GRTKF/IC/3/17, para. 249)

⁷¹ The AIPPI has resolved that “the modern concept of protection against unfair competition aims at protecting not only competitors but also consumers and the public in general’ and that ‘any act contrary to honest (fair) business practices should be regarded as an act of unfair competition.’

⁷² Article 39.1 TRIPS. Emphasis added.

framework. International standards for *sui generis* integrated circuit protection and for the protection of phonograms also explicitly identify unfair competition law as one means of protection; in various forms, unfair competition law has also been used to protect other material such as unregistered trade marks and certain designs, and to defend against slavish imitation.

47. Historical experience has shown the utility of using unfair competition principles to develop *sui generis* protection for new subject matter. Committee members have also identified several additional factors suggesting that a broad doctrine of misappropriation would be useful basis for TK protection:

- misappropriation integrates defensive and positive protection;
- there are no burdensome requirements for TK holders to establish rights, and there is no obligation to register TK in databases nor to disclose it;
- the burden on national authorities and social costs of establishing a protection system are minimized;
- a general principle of misappropriation provides a framework for granting TK holders access to equitable benefits, either within a compensatory liability regime or through procedures governing access and benefit-sharing procedures;
- depending on national legal systems, separate statutory legislation need not be enacted in some jurisdictions;⁷³
- the doctrine is consistent with the general evolution of IP principles, affirming their application to a new priority area, but consistent with their natural development;
- a norm of respect for TK and effective legal protection against misappropriation is established;
- it applies also to TK in the public domain and does not require removing it from there in order to give protection to TK holders;
- the cause of action can be the unfairness of *acquisition and use* of the knowledge;
- it prevents unfair uses without requiring a regime of private property rights which some stakeholders have found to be inappropriate to TK;
- it requires no fixation, registration or compilation of TK in databases, which also some have found inappropriate to TK.

B.1: Protection against Misappropriation

48. Several existing *sui generis* laws protect TK against misappropriation through elements of unfair competition law. The Portuguese Decree Law No.118, which establishes Europe's first *sui generis* law for TK protection, creates the link between *sui generis* frameworks for TK on the one hand and the concept of misappropriation in unfair competition law on the other, including the registration of geographical indications and appellations of origin.⁷⁴ Peru's *sui generis* law "has taken elements of existing protection ... in the area of repression of unfair competition" and applied them to TK.⁷⁵ In fact, the drafters of this law reported to

⁷³ Similar in this respect to the application of Article 10*bis* of the Paris Convention.

⁷⁴ The sixth preambular paragraph of the Portuguese Law states that "The description of this material [i.e., genetic resources and associated TK], the identity of which shall be defined in *sui generis* terms ..., further reinforces the grounds for formulating processes with which to protect appellations of origin and geographical indications and affords some kind of protection against any misappropriation of the material."

⁷⁵ Peru (WIPO/GRTKF/IC/5/INF/6, Annex V, para. 5).

the Committee that “the so-called general clause used in the repression of unfair competition inspired the scope of protection granted by this Law.”⁷⁶

49. The misappropriation principle, as expressed in this section, first sets out a basic norm to repress acts of misappropriation;⁷⁷ it then provides a general and non-exclusive description of misappropriation; and finally sets out specific acts of misappropriation which should be prohibited. This structure mirrors the structure of Article 10*bis* of the Paris Convention on the repression of unfair competition.⁷⁸

B.1: Protection against misappropriation

1. Traditional knowledge shall be protected against misappropriation.

50. This principle seeks to articulate a generally-expressed view that TK should not be misappropriated, and that some form of protection is required to achieve this. The wide array of approaches to legal protection considered by the Committee already share the general effect of constraining misappropriation of TK in several specific ways. A norm against misappropriation of intangible assets (including goodwill, reputation, know-how and trade secrets) is well-established in the general legal system, and is often viewed as part of the law of unfair competition within the broad domain of IP and related law. This suggests that a general principle against the misappropriation of TK would provide a common fulcrum of protection, drawing together existing approaches to protection and building on existing legal framework.

51. The nature of “misappropriation” is further developed through a general definition and specific examples of acts of misappropriation respectively. This applies the Committee’s direction to draw on Article 10*bis* of the Paris Convention as a model. This general statement expresses a broad principle analogous to the first paragraph of Article 10*bis*, which has been shown to be capable of flexible application and development. This may provide for legal protection, without requiring specific legislation in some legal systems. By analogy, Article 10*bis* Paris was concluded with the understanding⁷⁹ that “member States are not obliged to introduce *special* legislation to this effect if their existing general legislation – for example, provisions of civil law directed against torts, or principles of common law – suffices to assure effective protection.”⁸⁰ A similar approach could minimize the transaction costs of establishing an effective misappropriation regime for TK, and maximize the coherence with existing IP principles. Using the structure of Article 10*bis* as a model provides for a norm against misappropriation, while respecting the guiding principle of flexibility and

⁷⁶ Peru (WIPO/GRTKF/IC/5/INF/6, Annex V, para. 49).

⁷⁷ Bodenhausen, G. *Guide to the Paris Convention for the Protection of Industrial Property*. WIPO publication no. 116(E), (hereinafter “Guide to the Paris Convention”), at 142 to 146.

⁷⁸ Article 10*bis* of the Paris Convention reads as follows: “*Unfair Competition*: (a) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition. (b) Any act of unfair competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition. (c) The following in particular shall be prohibited : all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities of a competitor ; [...]”

⁷⁹ See 1911 Revision Conference of the Paris Convention *Actes des Washington*, pp. 305 and 255; 1925 Revision Conference *Actes de La Haye*, pp. 472 and 578

⁸⁰ Guide to the Paris Convention, at 143.

comprehensiveness, and allowing for necessary evolution and development of specific legal measures to repress misappropriation in consultation with TK holders. WIPO/GRTKF/IC/7/6 illustrates the options available within national systems to give effect to this norm.

General nature of misappropriation

2. Any acquisition or appropriation of traditional knowledge by unfair or illicit means constitutes an act of misappropriation. Misappropriation may also include deriving commercial benefit from the acquisition or appropriation of traditional knowledge when the person using that knowledge knows, or is grossly negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge.

52. The nature of misappropriation is described in a general and non-exhaustive manner. A link with unfair competition law is suggested by the focus on acquisition *by unfair means*. Akin to Article 10bis of Paris, the term “unfair means” may be defined with due regard to specific legal settings in national law, in common with other areas of IP law. Existing national jurisprudence would clarify and strengthen the effect of this principle, in contrast to seeking to create a new body of law *ab initio*. For example, national laws may clarify that “unfair means” could include theft, bribery, coercion, misrepresentation, breach or inducement of a breach of a duty contract, confidence, or a similar improper act.⁸¹ Rather than constricting the scope of protection, drawing on the existing framework may strengthen the practical effectiveness and accessibility of protection. Document WIPO/GRTKF/IC/7/6 illustrates how this approach would operate consistently with a range of national laws.⁸² Guided by the elaboration of unfair competition principles in other instruments,⁸³ this principle also includes acts that benefit unfairly from acquisition or appropriation of TK, so that the scope of protection may appropriately extend beyond an initial act of misappropriation, akin to the existing protection of undisclosed information through unfair competition law.

Acts of misappropriation

3. In particular, legal means should be available to suppress:

(i) acquisition of traditional knowledge by theft, bribery, coercion, fraud, trespass, breach or inducement of breach of contract, breach or inducement of breach of confidence or confidentiality, breach of fiduciary obligations or other relations of trust, deception, misrepresentation, the provision of misleading information when obtaining prior informed consent for access to traditional knowledge, or other unfair or dishonest means;

⁸¹ See, for example, the definition of “improper means” US Trade Secrets Act, the definition of the term “act of improper acquisition” in Article 2.3(1) ROK Unfair Competition Law, and the similar definition in Article 2(1)(iv) of the Japanese Unfair Competition Law. See also the term “acquisition by unfair means” in Sections 31 and 41 of the Trademarks Law of the Peoples Republic of China (2001), and the Danish Marketing Practices Act of 1994, Section 2.

⁸² See, for example, Section 1(2), US Trade Secrets Act.

⁸³ See, for example, footnote 10 to Article 39.2 of TRIPS, defining ‘a manner contrary to honest commercial practices’ to mean ‘at least practices such as breach of contract, breach of confidence and inducement to breach’ and including ‘the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.’

- (ii) acquisition of traditional knowledge or exercising control over it in violation of legal measures that require prior informed consent as a condition of access to the knowledge, and use of traditional knowledge that violates terms that were mutually agreed as a condition of prior informed consent concerning access to that knowledge;
- (iii) false claims or assertions of ownership or control over traditional knowledge, including acquiring, claiming or asserting intellectual property rights over traditional knowledge-related subject matter by a person who knew that the intellectual property rights were not validly held in the light of that traditional knowledge and any conditions relating to its access; and
- (iv) commercial or industrial use of traditional knowledge without just and appropriate compensation to the recognized holders of the knowledge, when such use has gainful intent and confers a technological or commercial advantage on its user, and when compensation would be consistent with fairness and equity in relation to the holders of the knowledge in view of the circumstances in which the user acquired the knowledge.

53. This list follows the model of the third paragraph of Article 10*bis* of Paris in providing an inclusive list of those specific acts which would, at a minimum, be considered acts of misappropriation. This list respects the guiding principle of flexibility and comprehensiveness in allowing that a wide range of legal means could be employed within national law. The words “in particular” leave the choice open to consider additional acts as forms of misappropriation of TK; this could include unfair commercial gain from TK-based products.⁸⁴ This list is also open to further elaboration, similarly to the evolution and further application of Article 10*bis* itself.⁸⁵ For example, the list of acts of unfair competition contained in the third paragraph of Article 10*bis* was expanded at the 1958 Revision Conference in Lisbon by adding the third example of acts of unfair competition, which are today included in the Paris Convention (paragraph 10*bis*(3)3).

54. The list distills specific acts of misappropriation which have been identified in the Committee’s work. It includes illicit acquisition (including by theft, deception or breach of contract). They also entail the application of the principle of prior informed consent to TK; this principle has been widely emphasized in the Committee and was supported in the context of WIPO/GRTKF/IC/6/4 at the sixth session⁸⁶ The application of the principle covers both the acquisition of knowledge in violation of national prior informed consent mechanisms, and the violation of terms of access agreed as a condition of access. This should be consistent with the encouragement or specific obligations created under the European Directive 98/44⁸⁷ and the United States’ National Parks System,⁸⁸ as well as under access and benefit-sharing laws of more than 34 countries. The need for defensive protection is recognized in the third

⁸⁴ For example, the conceptions of ‘unfair’ in the US Arts and Crafts Act and Peruvian Law.

⁸⁵ The list of particular acts of unfair competition (Article 10*bis*, para. 3) was progressively augmented by creating confusion; the acts of false allegations and discrediting of a competitor; and misleading the public. The list was expanded at the 1958 Revision Conference in Lisbon by adding the third example of acts of unfair competition, which are today included in the Paris Convention (paragraph 10*bis*(3)3). See *Actes de Lisbonne*, pp. 725, 784, 106, 118.

⁸⁶ See, WIPO/GRTKF/IC/6/4, para. 22.

⁸⁷ See, EC Directive 98/44 on the Legal Protection of Biotechnological Inventions (1998); and Communication from the European Commission on Implementation of the Bonn Guidelines.

⁸⁸ WIPO/GRTKF/IC/4/13

item, drawing on previous Committee work.⁸⁹ The final item concerns commercial or industrial uses which misappropriate the value of TK where it is reasonable to expect the holders of TK to share the benefits from this use. The circumstances in which the knowledge is acquired may create a reasonable expectation of compensation or benefit-sharing, and a sense that this is consistent with fairness and equity. The exact manner in which this could be recognized in national law may vary considerably in practice: a general analogy can be drawn with the law of so-called ‘idea submissions,’ which typically can be considered under the headings of misappropriation or conversion, breach of a confidential or fiduciary relationship, breach of an express contract or an implied-in-fact contract, or unjust enrichment based on a quasi-contract or implied-in-law contract that arises from the circumstances of the acquisition of the idea. Along similar lines, this suggested principle and the related principle B.6 below both refer to the circumstances of acquisition of TK and the possibility of obligations arising as a reasonable expectation, based on broader principles of equity and fairness.

General protection against unfair competition

4. Traditional knowledge holders shall also be effectively protected against other acts of unfair competition, including acts specified in Article 10*bis* of the Paris Convention. This includes false or misleading representations that a product or service is produced or provided with the involvement or endorsement of traditional knowledge holders, or that the commercial exploitation of products or services benefit holders of traditional knowledge.

55. Supplementing the broader principles of misappropriation, this principle clarifies that the specific acts of unfair competition already listed Article 10*bis* do have direct application to TK subject matter. For example, it could protect against:

(a) falsely suggesting a relationship with the establishment, goods, or commercial activities of a TK holder community: for example, it would be an act of unfair competition to offer a product for sale with the false description that it was produced by or with the endorsement of a traditional community.⁹⁰ It would also deal with the situation in which medical and other commercial services are offered with a spurious, misleading or deceptive indication that they are authentically indigenous or traditional.⁹¹

(b) false allegations that discredit the establishment, the goods, or the commercial activities of TK holders in the course of trade. For example, false allegations that certain traditional medicinal products are unsafe or ineffective may be considered acts of unfair competition;⁹²

(c) misleading the public about the use of TK in development or manufacture of products or services. This may include the sale of medicinal products as purportedly

⁸⁹ Documents WIPO/GRTKF/IC/2/6, WIPO/GRTKF/IC/3/5, WIPO/GRTKF/IC/3/6, WIPO/GRTKF/IC/5/8 and WIPO/GRTKF/IC/6/8

⁹⁰ In the United States of America a limited or focussed form of such protection is already provided by a *sui generis* mechanism, namely the Indian Arts and Crafts Act. See WIPO/GRTKF/IC/5/INF/6, Annex IX, p. 6.

⁹¹ This need for additional protection was articulated by TK holders in Minnesota during the WIPO Fact-finding Missions on IP and TK. See *WIPO Fact-finding Mission Report*, at 116, 130 and footnote 1 (FFM to North America).

⁹² The need for additional protection against such acts was identified by the WIPO Fact-finding Mission on IP and TK to China and Peru. See ‘Needs and Expectations of TK Holders,’ WIPO, 2000, at 173, and ‘Report on WIPO Fact-finding Mission to China’ forthcoming.

aboriginal products when they draw on similar sources, but are not truly products of indigenous medicine;⁹³

(d) falsely suggesting that TK holders were involved in or endorsed certain commercial products, or that they benefit from the commercial exploitation of TK-based products. This may include representations that cosmetic products are being marketed with benefit-sharing arrangements between the marketing party and the TK holders, when such arrangements have not in fact been established.⁹⁴

Recognition of the customary context

56. The notion of misappropriation of TK is defined in general terms, to be more closely interpreted under national law. Yet the guiding principles suggest that concepts such as “unfair means,” “equitable benefits” and “misappropriation” should in particular cases be guided by the traditional context and the customary understanding of TK holders themselves. The traditional context and customary understandings may be apparent in a community’s traditional protocols or practices, or may be codified in customary legal systems.⁹⁵ It was recently observed in the Committee that “customary laws within local communities may play an important role in regulating access to TK and in sharing any benefits that may arise.”⁹⁶

Recognition of the customary context

5. The application, interpretation and enforcement of protection against misappropriation of traditional knowledge, including determination of equitable sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the customary practices, norms, laws and understandings of the holder of the knowledge, including the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge.

57. This approach is consistent with the reference to, and respect for, customary laws, practices and understandings which was considered at the sixth session of the Committee (paragraph 45, WIPO/GRTKF/IC/6/4.Rev). Several existing *sui generis* laws for TK protection already apply such a guiding principle, such as the African Model Law as well as the laws of Peru and the Philippines. The means by which such aspects of implementing TK protection could be given effect in national legal systems are further elaborated in document WIPO/GRTKF/IC/7/6. For example, customary law has already been used in existing IP systems as a guide to the legal standing of communities, and the nature and distribution of compensation as a remedy to IP infringement. Use of traditional knowledge in breach of ceremonial or sacred duty has also been held to be in breach of fiduciary duties in the context of the law of confidentiality.

⁹³ This was a need articulated by TK holders during the WIPO fact-finding missions. See statement by TK holders in Minnesota, in ‘Needs and Expectations of TK Holders’ at 116, 130 and footnote 1 (FFM to North America).

⁹⁴ This was an example identified by the *WIPO/UNEP Study on the Role of Intellectual Property Rights in the Sharing of Benefits Arising from the Use of Biological Resources and Associated Traditional Knowledge*. WIPO publication no. 769(E).

⁹⁵ See ‘Customary Laws and Protocols’ in *WIPO Fact-finding Report on IP Needs of TK Holders* at 57.

⁹⁶ United States of America, WIPO/GRTKF/IC/6/14, para. 76.

B.2: Legal Form of Protection

58. Existing measures for TK protection, whether *sui generis* or adapted general laws, manifest a wide range of legal forms and doctrines, subject matter coverage, and procedures. For instance, the laws and measures for TK protection considered by a panel of national experts at the Committee's fifth session variously included:

- industrial property laws: patent law (China), trademark law (United States of America), and unfair competition law (Peru);
- the law of torts (United States of America);
- access and benefit-sharing laws (Brazil, Costa Rica, Portugal);
- legislation for indigenous peoples rights (the Philippines); and
- specific exclusive rights in TK as such.

59. The legal forms of protection range from exclusive property rights for all “community innovations, practices, knowledge and technologies,”⁹⁷ over availability of property rights only for TK in specific sectors such as traditional agriculture⁹⁸, traditional medicine,⁹⁹ or Indian crafts,¹⁰⁰ to *sui generis* protection without any exclusive property rights at all.¹⁰¹ Some are subject to registration in databases,¹⁰² others are available without registration,¹⁰³ while still others provide optional rather than mandatory registration.¹⁰⁴ Given this diversity in the existing legal forms of TK protection, it is not surprising that there has been no consensus on creating a limited consensus on the application of private property to TK protection in the past sessions of the Committee. In any event, exclusive property rights are not an isolated policy choice in IP law: “‘intellectual property’ shades off into surrounding forms of civil liability.”¹⁰⁵

60. The reference in the Committee to a “combined approach” to TK protection and the principle of “flexibility and comprehensiveness” in the present document, this diversity of forms of legal protection for TK at the national level is no obstacle to the development of international principles for such protection. In fact, existing international *sui generis* instruments for IP protection leave broad freedom to national authorities to implement substantive principles: the Washington Treaty, cited above, refers to the law on copyright, patents, utility models, industrial designs, unfair competition “or any other law or a combination of any of those laws.”¹⁰⁶ The following suggested principle is therefore in keeping with this approach and the general principle of flexibility and comprehensiveness.

61. Besides the diversity of exclusive rights in existing *sui generis* measures, which is a necessary constraint on any attempt at international harmonization of standards for such private property rights, concerns were expressed by TK holders and Committee members that private property rights might not be appropriate for the protection of TK, given its specific

⁹⁷ African Model Law.

⁹⁸ Portuguese Law.

⁹⁹ Thai Act.

¹⁰⁰ US Arts and Crafts Act.

¹⁰¹ Peruvian Law.

¹⁰² Portuguese Law.

¹⁰³ Brazilian Measure

¹⁰⁴ African Model Law.

¹⁰⁵ W.R. Cornish, *Intellectual Property*, (1999), p. 761.

¹⁰⁶ Highlighted as a model for TK protection by the Delegation of Syria (WIPO/GRTKF/IC/6/14, para 80); see Article 4, Treaty on Intellectual Property in Respect of Integrated Circuits (1989).

characteristics this subject matter.¹⁰⁷ Concerns were expressed in particular that the legal protection of TK through exclusive property rights might:

- fragment TK systems or impair their holistic character;
- create conflict between communities or TK holders who may hold similar or identical TK;
- restrict the customary transmission of TK within the original community;
- diminish the ethos of sharing and collective custodianship of TK;
- disrespect the customary, ceremonial, sacred or religious values of TK;
- lead to perverse incentives for TK holders (e.g., to pass off new products as tradition-based, to distort traditions for commercial advantages, etc);
- create incentives for unsustainable use of genetic resources related to TK;
- lead to disintegration of customary institutions and social structures based on or built around the TK;
- unduly restrict access to and utilization of TK or associated biological resources, so that their conservation is endangered;
- raise transaction costs for transmission and preservation of TK;
- allow free-riding appropriation of TK-based innovations by parties other than grassroots innovators;
- replace communal custodianship with individual ownership of TK;
- allow others than the true customary holders of TK to acquire ownership rights over the knowledge.

62. In fact, a study conducted by the South Centre found that “principles that are central to a [traditional] community’s existence and self-identification,” as reflected in customary legal systems, are, with surprising commonality across communities and regions, “often based on temporary rights of use rather than on exclusive property.”¹⁰⁸ Consequently, TK holders and other non-governmental Committee members have pointed out that private property rights are “unfit to protect TK [and] would most certainly accelerate the commodification, disintegration and destruction of TK.”¹⁰⁹

63. Given the concerns expressed by a wide range of Committee participants, the Principles do not impose private property rights on TK. As stated by the Delegation of Brazil, private property rights were “systems from which, and not by which, TK should be protected.”¹¹⁰ Therefore, the Principles contained in this document do not apply any private property systems to TK and instead use “alternative legal doctrines in formulating policy on these issues.”¹¹¹

64. However, numerous Committee members have already made available exclusive rights for certain TK subject matter,¹¹² and many TK holders have freely elected to make use of

¹⁰⁷ See Genetic Resource Action International (GRAIN), “The great protection racket: Imposing IPRs on traditional knowledge,” *Seedling* (April 2004).

¹⁰⁸ See Lettington, R. and Nnadozie, K. *A Review of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore at WIPO*. South Centre Occasional Paper No. 12 (2003) at paragraph 24, bullet 5.

¹⁰⁹ GRAIN, footnote 107, section: ‘Acknowledge the irrelevance of IPRs’

¹¹⁰ Brazil (WIPO/GRTKF/IC/6/14, para. 69).

¹¹¹ Brazil (WIPO/GRTKF/IC/6/14, para. 69).

¹¹² For example, those countries which are implementing the African Model Law (e.g., Nigeria, Zambia), China, Costa Rica, Philippines, Portugal, Thailand and the United States of America.

these rights. The TK protection systems which are already operating in these countries grant, subject to certain conditions, exclusive rights, and therefore the principles in Text Box ___ merely recognizes that such rights may be granted, depending on national legislation and policy. The principle therefore leaves the option and full flexibility to national authorities to decide upon the grant of exclusive rights, as appropriate to the national legal system, stakeholder needs, the TK base, market structures, and the broader policy objectives at the national level. Since the grant of exclusive rights includes both conventional IP rights and *sui generis* titles, the principle refers generically to those exclusive rights which are already established at international level through the Paris Convention and TRIPS Agreement. However, it does not require countries to make available exclusive rights or establish any private property systems for TK.

B.2: Legal form of protection

1. Protection may be implemented through a special law on traditional knowledge; the laws on intellectual property, including unfair competition law and the law of unjust enrichment; the law of torts, liability or civil obligations; criminal law; laws concerning the interests of indigenous peoples; regimes governing access and benefit-sharing; or any other law or a combination of any of those laws.
2. The form of protection need not be through exclusive property rights, although such rights may be made available, as appropriate, for the holders of traditional knowledge, including through existing or adapted intellectual property rights systems, in accordance with the needs and the choices of the holders of the knowledge, national laws and policies, and international obligations.

65. This suggested principle gives effect to the guiding principle of flexibility and comprehensiveness, and reflects the actual practice reported by those countries that have already implemented *sui generis* forms of TK protection. Its structure is modelled on Article 4 of the Washington Treaty. It leaves national authorities to choose how to achieve the objectives of TK protection most effectively, given the specific legal context in which protection will operate. The principle also clarifies that mechanisms should give effect to the general requirement to suppress misappropriation, and while also specifically providing for the principle of prior informed consent and equitable benefit-sharing as further elaborated in these principles.

B.3: General scope of subject matter

66. International IP standards typically defer to the national level for determining the precise scope of protected subject matter. This practice is both in conformity with due flexibility, and an international recognition of the diverse forms of TK system in many countries. At the national level, different laws protect different types of subject matter. These principles cannot express a preference for any of these individual laws, but rather clarify the scope of TK in a descriptive way. This description draws on a suggested definition that has been developed and refined by within the Committee over past sessions.¹¹³ In essence, if intangible subject matter is to constitute 'TK', it should be 'traditional,' in the sense of being

See, additionally, the responses to the questionnaire contained in document WIPO/GRTKF/IC/2/5.

¹¹³ See for example documents WIPO/GRTKF/IC/3/9, WIPO/GRTKF/IC/4/8, WIPO/GRTKF/IC/5/8, WIPO/GRTKF/IC/5/12, and WIPO/GRTKF/IC/6/4 Rev.

related to traditions passed on from generation to generation, as well as being ‘knowledge’ or a product of intellectual activity.

67. This allows appropriate national policy and legislative development and consultation, so that detailed decisions on protected subject matter should be left to national and regional implementation. Existing laws already show diversity in the terms used to refer to this subject matter, and so an inclusive international approach should accommodate this practice. Considerable concern has been expressed that TK protection would impose artificial legal forms and constructions on diverse and subtle traditional knowledge systems and distort or weaken the customary context. It is therefore crucial to point out that the form of protection considered is not intended to replace or supplant the

B.3: General scope of subject matter

1. These principles concern protection of traditional knowledge against misappropriation and misuse beyond its traditional context, and should not be interpreted as limiting or seeking to define the diverse and holistic conceptions of knowledge within the traditional context.

2. For the purpose of these principles only, the term “traditional knowledge” refers to the content or substance of knowledge that is the result of intellectual activity and insight in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge that is embodied in the traditional lifestyle of a community or people, or is contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.

68. The paragraph clarifies that the scope of this regime would cover traditional knowledge as such, and would therefore not apply to TCEs/folklore. The principle also recognizes that *in toto* these Principles illustrate a shared international perspective which describes a *sui generis* regime for the protection of TK, i.e., a regime specifically customized to the characteristics of TK subject matter. The second sentence of the principle is modeled on Article 2(1) of the Bern Convention which delineates the scope of subject matter covered by that Convention by first providing a general, non exclusive definition of the subject matter and then an illustrative list of elements that would fall under the scope.¹¹⁴

B.4: Eligibility for protection

69. Existing *sui generis* measures for protection of TK establish diverse criteria for eligibility, but they share certain common elements. Several *sui generis* laws do not explicitly specify conditions of protection, such as the African Model Legislation and the laws of Costa Rica, Thailand and the Philippines. In other cases, such as the African Model Law and the Costa Rican law, the requirements of protection are determined by a consultative process led by a competent national authorities. Requirements in existing laws for the recognition of *sui generis* rights in TK include: its collective nature, a relation to biological diversity, creation and development by indigenous peoples, residency of the creator of the TK in the

¹¹⁴ The approach was proposed in successive documents WIPO/GRTKF/IC/3/9, WIPO/GRTKF/IC/4/8, WIPO/GRTKF/IC/5/12, WIPO/GRTKF/IC/6/4 Rev, and received general support by Committee members (see variously WIPO/GRTKF/IC/3/15, WIPO/GRTKF/IC/4/15, WIPO/GRTKF/IC/6/14).

concerned jurisdiction, creation of the TK element after a certain date, registration of the TK, and description so that it can be utilized by third parties. The law of Portugal grants additional protection for undisclosed TK and TK which has commercial novelty. In some cases, a substantive examination process is foreseen.

70. The present principles aim in general at the repression of misappropriation rather than the creation of property rights over TK. To maintain flexibility, the approach taken is to identify the elements which are present in existing systems, which are consistent with a broad intellectual property approach, which establish a substantive traditional linkage, and which establish a relationship between knowledge and its holders which is sufficient basis for a claim of misappropriation if that relationship is not respected.

B.4: Eligibility for protection

Protection should be extended at least to that traditional knowledge which is:

- (i) generated, preserved and transmitted in a traditional and intergenerational context;
- (ii) distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and
- (iii) integral to the cultural identity of an indigenous or traditional community or people which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility, such as a sense of obligation to preserve, use and transmit the knowledge appropriately, or a sense that to permit misappropriation or demeaning usage would be harmful or offensive; this relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.

71. This principle does not aim to recite all the diverse and detailed characteristics of TK that Considering the criteria which are set out in the numerous existing TK *sui generis* laws as conditions of protection. TK according to these criteria would be contained within the definitions of protected subject matter in existing *sui generis* laws. Yet the reference to ‘at least’ clarifies that policymakers can choose a broader definition to meet with national needs and circumstances. The Principles would thus be consistent with existing *sui generis* systems that already exist among Committee members and have been described to the Committee.

B.5: Beneficiaries of protection

72. Given that TK may be held by multiple communities or individuals at the same time, identifying appropriate right holders has generally been considered a difficult element of effective IP protection for TK. A comparative approach shows that while countries have taken diverse approaches to this aspect, there are certain common denominators. All the laws create a link between entitlement to benefit from protection and some form of recognized holding or custodianship of the TK. In most cases, the holders of TK and those entitled to benefit will be communities, while in some cases they may also be other legal or natural persons. This approach has been underscored by many Committee participants¹¹⁵ and conforms with the principles of responsiveness to the aspirations of relevant communities and of recognition of the specific characteristics and forms of TK. This approach is also

¹¹⁵ For examples, see Fiji (WIPO/GRKTF/IC/6/14, para. 81); Saami Council (WIPO/GRKTF/IC/6/14, para. 98); Health and Environment Program (WIPO/GRKTF/IC/6/14, para. 105).

consistent with the established practice of WIPO since the Fact-finding consultations with TK holders in 1998 and 1999.

TK shared by several communities

73. In some cases, two or more communities in one country may hold potentially overlapping rights in the same or very similar TK. In several laws, such as those of the African Union, Peru, Portugal and the United States of America, the practical solution is established through the creation of a separate body, such as a Board or a Fund, which can acquire and exercise rights on behalf of, and distribute benefits to, all concerned TK holders in the country or region.¹¹⁶ Specific options for addressing the legal issue of beneficiaries in such cases include co-ownership of rights, and allowing communities separately to hold rights in the same or similar TK; and obliging communities who provide PIC or hold rights to certain TK to inform other communities which hold similar TK. A further possible solution to this issue would be to vest the rights in the State or a statutory body in trust for the TK holding communities.

'Regional TK'

74. Communities in different countries and even regions may lay claim to the same or similar TK ('regional TK'). States have suggested *inter alia* the use in such cases of national and/or international systems of registration and notification, alternative dispute resolution (ADR), collective management and the establishment of dispute-resolution organizations, or maybe combinations of these.¹¹⁷ Commentators have suggested that collecting societies be established to deal with these questions.¹¹⁸ Existing regional organizations and mechanisms, such as ARIPO, ASEAN, the Andean Community, the EPO, the GCC, SAARC, SADC and OAPI, all of which have taken an active interest in TK protection issues,¹¹⁹ may be important actors in resolving the 'regional TK' question. The discussion in WIPO/GRTKF/IC/5/8 (para. 131) draws an analogy with the determination of 'practical conditions' and the need for 'equitable treatment' in the case of homonymous geographical indications.¹²⁰ Ultimately, then, the solution may be found in practical resolution, rather than complex rules. On this point, the role of customary law, both in determining forms of custodianship and ownership, and in guiding dispute settlement procedures, may be crucial.

Entitlement of community members

75. As recent IP cases relating to TK and TCEs/folklore have shown, entitlement to benefits arising from the use of TK may rest in particular with specific members of a community, such as individual traditional healers, individual farmers, the owners of 'trap lines', or societies of healers within the community.¹²¹ This issue has been addressed in recent case law by referring to customary laws, protocols and understandings in allowing the communities to

¹¹⁶ For example, US Arts and Crafts Act, Section 2(g) and Peruvian Law Article 37.

¹¹⁷ See for example the responses to the WIPO Questionnaire of 2001 of Canada, Colombia, Egypt, Gambia, Indonesia, Jamaica, Kyrgyzstan, Malaysia, Mexico, Romania and the Russian Federation. See WIPO/GRTKF/IC/3/10.

¹¹⁸ Drahos, P. 'Indigenous Knowledge, Intellectual Property and Biopiracy: Is a Global Bio-Collecting Society the Answer?' *European Intellectual Property Review* (2000) at 245.

¹¹⁹ WIPO/GRTKF/IC/5/15, paras. 48, 50 and 51.

¹²⁰ See TRIPS Agreement, Article 23.3

¹²¹ For example, the *plathi* society of traditional healers within the Kani tribes, as documented in *Study on the Role of Intellectual Property Rights in the Sharing of Benefits Arising from the Use of Biological Resources and Associated Traditional Knowledge*. WIPO/UNEP (2004).

identify internal beneficiaries of protection according to their own laws, protocols and understandings in this regard.

B.5: Beneficiaries of protection

Protection of traditional knowledge should be for the principal benefit of the holders of knowledge in accordance with the relationship described under ‘eligibility for protection.’ Protection should in particular benefit the indigenous and traditional communities and peoples that develop, maintain and identify culturally with traditional knowledge and seek to pass it on between generations, as well as recognized individuals within these communities and peoples. Entitlement to the benefits of protection should, as far as possible and appropriate, take account of the customary protocols, understandings, laws and practices of these communities and peoples. Benefits from protection should be appropriate to the cultural and social context, and the needs and aspirations, of the beneficiaries of protection.

76. This follows the practice established since the very beginning of WIPO’s work program on TK protection of designating TK holders as the beneficiaries of TK protection. This practice dates back to the *WIPO Fact-finding Missions on the IP Needs and Expectations of TK Holders*, and has since proven to be a widely validated approach.¹²² The principle recognizes customary protocols, laws and understandings of the communities as important guidance in identifying specific beneficiaries of TK protection within the communities, in line with existing caselaw in conventional areas of IP law. Document WIPO/GRTKF/IC/7/6 further describes the options and mechanisms that could be used to give effect to this principle in national legal systems.

B.6: Equitable compensation and recognition of knowledge holders

77. Misappropriation of TK may be considered to include use without equitably compensating the holders of the knowledge and failure to acknowledge the TK holders as the source of TK, even in the absence of exclusive property rights. Such equitable treatment and acknowledgement may recognize the value of the TK to the community, the need to respect the intellectual contribution inherent in the potential value of TK for industrial and commercial use, and the broad sense that uncompensated and unacknowledged use of another’s intellectual contribution and knowhow is inherently unfair.

78. One crucial concern is for any compensation and acknowledgement to be appropriate to the cultural context, needs and aspirations of traditional communities. Benefits may not be construed in financial terms, and indeed this may be seen as unacceptable farming out of TK as a commodity, in tension with community values.

79. A general principle of equity and benefit-sharing was considered in detail by the Committee, with many favorable references, at its sixth session (WIPO/GRTKF/IC/6/4 Rev.). Equity is an established principle of IP law and it has been achieved in the field of TK through a range of means and policy tools. One option is for compensatory liability rules that grant a ‘right to compensation’ for commercial follow-on uses, but not a right to block such

¹²² See for example successive reports of the Committee and the CBD Working Group on Article 8(j).

follow-on uses¹²³ and do not remove knowledge from the public domain” this arrangement could be loosely compared to a ‘paying public domain.’ Compensatory liability concepts for TK had been suggested by the Congressional Research Service in the United States of America in 1993,¹²⁴ were proposed to the Committee by the GRULAC countries at its first session,¹²⁵ have most recently been suggested by the *UNDP Human Development Report* (2004),¹²⁶ and have been applied to TK protection in several existing *sui generis* laws which are already in force,¹²⁷ and have been elaborated in recent literature on TK protection.¹²⁸ They also form part of the *sui generis* measures being considered by two regional organizations, namely the South Asian Association for Regional Cooperation (SAARC), and the Southern African Development Community(SADC). At Committee’s sixth session, it was observed that “the use of compensatory liability regimes could be further discussed”¹²⁹ and

¹²³ See, Reichman, J. *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*. Vanderbilt Law Review Vol. 53, no. 6 (2000) at 1743.

¹²⁴ “A central authority could be created to collect royalties from the profits ... derived from traditional knowledge and to disburse them equitably among all indigenous peoples. [...] With regard to scientific folklore, perhaps the concept of *domaine public payant* and the goal of directly compensating the source-group can be combined. Where more than one group has contributed knowledge to the screening and investigation of a plant, a central authority could collect and disseminate any royalties equitably,” proposal made by the former Director of the American Folklife Center in 1992 and subsequent conclusions of the Congressional Research Service of the United States of America in 1993: American Law Division (Ackerman et al.), *Biotechnology, Indigenous Peoples and Intellectual Property Rights*, Congressional Research Service. United States of America, (April 16, 1993) at 65 and footnote 280 (‘scientific folklore’ was used synonymously with the Committee’s use of the term ‘TK *stricto sensu*’) [Emphasis added and text and footnote combined].

¹²⁵ GRULAC proposed a ‘right to compensation’, rather than an exclusive property right, for TK in the public domain: “[In the case of] knowledge and practices associated with plants and animals, natural medicines and medical treatments, nutritional and cosmetic knowledge, knowledge of perfumery, etc., that embody intellectual added value and are in the public domain ... what should be investigated is the introduction of ownership rights that are either collective or individual, *based on a right to compensation for their use*. It does not seem right to look for any right of exclusion as in the case of intellectual property, as the subject matter of protection is in the public domain. *It would be better to concentrate on the system whereby fair compensation or equitable distribution of profits from third-party use or marketing may be secured and channeled towards the legitimate originators of the knowledge.*” WIPO/GRKTF/IC/1/5, Annex I, page 2, and Annex II, page 4 [footnotes excluded].

¹²⁶ *Human Development Report*. UNDP (2004) at 93: “the compensatory liability approach envisages rights for both the patent owner and the owner of traditional knowledge. While the patent owner would have to seek a compulsory licence to use the traditional knowledge resource, the owner would also have the right to commercialize the patented invention after paying royalties to the patent owner. This mechanism avoids restricting scientific progress and makes benefit sharing economically significant.”

¹²⁷ For instance, the African Model Law and the Peruvian Law; see also references to compensated use of TK in the Costa Rican Biodiversity Law (Art. 10.6)..

¹²⁸ See for example ICTSD/UNCTAD. *Protecting Traditional Knowledge and Folklore: A review of progress in diplomacy and policy formulation*. UNCTAD/ICTSD Capacity Building Project on Intellectual Property Rights and Sustainable Development. For earlier proposals, see Reichman, J. *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*. Vanderbilt Law Review Vol. 53, no. 6 (2000) at 1743; and Lewis and Reichman, *Using Liability Rules to Promote and Protect Innovation in Developing Countries: A Law and Economics Primer*, 2004.

¹²⁹ Brazil (WIPO/GRTKF/IC/6/14, para. 69).

there was general interest in using this mechanism within a combined approach to TK protection.¹³⁰

80. Such proposals entail an entitlement to compensation, but no right to block TK from further use. This is precisely provided by a compensatory liability rule. Such a rule is a “use now pay later” system according to which the use of TK is allowed without the authorization of the right holders, but an ex-post compensation is required for industrial and commercial uses for a certain period of time if the TK provides a technology-based advantage to the user.

B.6: Equitable compensation and recognition of knowledge holders

1. Commercial or industrial use of traditional knowledge should be subject to just and appropriate compensation for the benefit of the traditional holder of the knowledge, when such use has gainful intent and confers a technological or commercial advantage, and when compensation would be consistent with fairness and equity in relation to holders of the knowledge in view of the circumstances in which the user acquired the knowledge. Liability for compensation should, in particular, arise where the knowledge was accessed or acquired in a manner that creates a reasonable expectation that benefits from such use should be shared equitably, and where the user is aware of the distinctive association of the knowledge with a certain community or people. Compensation should be in a form that responds to the express needs of the TK holders and is culturally appropriate.
2. Use of traditional knowledge for non-commercial purposes need not incur an obligation for compensation, but suitable benefit-sharing from such uses should be encouraged, including access to research outcomes and involvement of the source community in research and educational activities.
3. Those using traditional knowledge beyond its traditional context should make every reasonable endeavor to identify the source and origin of the knowledge, to acknowledge its holders as the source of the traditional knowledge, and to use and refer to the knowledge in a manner that respects and acknowledges the cultural values of its holders.

81. This principle supplements the general reference to equitable benefit sharing in the general description of misappropriation (principle B.1 above), and develops the concept of recognition and respect for the TK holders in the use of their TK. In this case liability for compensation would apply only to commercial or industrial uses of TK, since it is primarily in these uses that monetary benefits arise, which can form the basis of compensation. The principle applies only in cases where the TK was used with gainful intent and confers a technology-based advantage in commerce or industry to the user. The payment of compensation is structured in such a way that it would be provided directly to the TK holder if the TK holder can be identified. If the TK holder cannot be identified the compensation would be paid to the relevant national authorities which would use it for promotion of all TK holders in the concerned country. Further background on compensatory liability as well as examples of provisions that illustrate how liability principles have been given effect in national legal systems is contained in document WIPO/GRTKF/IC/7/6.

¹³⁰ New Zealand (WIPO/GRKTF/IC/6/14, para. 87); Norway (WIPO/GRKTF/IC/6/14, para. 70); Consumer Project on Technology (WIPO/GRKTF/IC/6/14, para. 102); Health and Environment Program ((WIPO/GRKTF/IC/6/14, para. 105)

B.7: Principle of Prior Informed Consent

82. The application of prior informed consent principles to TK has been central to policy debate on TK protection since the inception of the Committee, and was the most widely supported approach to TK protection at the sixth session.¹³¹ It has been proposed by a wide range of documents submitted by Committee members or regional Groups,¹³² and was present in seven *sui generis* TK measures described by Committee members at the fifth session.¹³³ It has been implemented through permits, contract systems or specific statutes.¹³⁴ Expressed as a principle, it means that TK holders (or some authorized agent) should be both informed about the potential use of TK and should consent to the proposed use, as a condition of fresh access to their TK. Its implementation would mean some form of legal mechanism that establishes how prior informed consent is required in practice: options include permit systems, contractual negotiations, exclusive rights and the use of confidentiality or trade secret protection.¹³⁵

83. Applying the principle of prior informed consent in practice therefore provides a mechanism for negotiation of ‘mutually agreed terms’ at the point of access to TK. These terms can be expressed in the form of permits or contractual arrangements. Applying the prior informed consent principle does not remove TK from the public domain, but clarifies that when specified acts of access to TK occur, there is a requirement both to inform the TK holder of the proposed use of the TK and the consequences of the use, and to agree on mutually agreed terms for benefit-sharing. Given the general support for using prior informed consent, it was favorably discussed as part of the combined approach to TK protection at the Committee’s sixth session.¹³⁶ Even where it has been suggested that it is not a ‘natural right,’ it has been acknowledged that the practical implementation of this principle could be “a valuable practice”¹³⁷ and “a worthy goal”¹³⁸ in association with access and benefit-sharing for TK. This principle is expressed in terms that are consistent with the Bonn Guidelines, which provide guidance for the establishment of related systems for genetic resources. Flexibility remains to apply the principle in accordance with national priorities, needs and domestic laws and policies, given that this principle has already been applied in diverse ways.

84. In view of the guiding principle of respect for and cooperation with other international processes, work done on prior informed consent mechanisms in other fora should also be considered. This is especially so when TK is associated with genetic resources. For example, the Bonn Guidelines (Section IV.C) set out guidance on PIC systems and specify certain key features for the application of the principle. While the Bonn Guidelines principally concern access to genetic resources, they also deal with associated TK (paragraph 9). The articulation

¹³¹ See for example Brazil (WIPO/GRKTF/IC/6/14, para. 68); Canada (WIPO/GRKTF/IC/6/14, para.78); Islamic Republic of Iran (WIPO/GRKTF/IC/6/14, para. 85); Mexico (WIPO/GRKTF/IC/6/14, para. 73); New Zealand (WIPO/GRKTF/IC/6/14, para. 87); Norway (WIPO/GRKTF/IC/6/14, para. 70); Peru (WIPO/GRKTF/IC/6/14, para. 76); United States of America (WIPO/GRKTF/IC/6/14, para. 75); Saami Council (WIPO/GRKTF/IC/6/14, para. 98); COICA (WIPO/GRKTF/IC/6/14, para. 99); ICC (WIPO/GRKTF/IC/6/14, para. 103); Kaska Dena Council (WIPO/GRKTF/IC/6/14, para. 103); ATSIC (WIPO/GRKTF/IC/6/14, para. 104).

¹³² E.g. GRULAC (WIPO/GRKTF/IC/1/5, Annex II); African Group (WIPO/GRTKF/IC/6/12).

¹³³ See WIPO/GRTKF/IC/5/INF/4, Annex 1

¹³⁴ See United States of America (WIPO/GRKTF/IC/6/14, para. 76);

¹³⁵ See United States of America (WIPO/GRTKF/IC/4/14, Annex, para. 8)

¹³⁶ See WIPO/GRTKF/IC/6/14, *passim*.

¹³⁷ See, United States of America (WIPO/GRTKF/IC/6/14, para. 76)

¹³⁸ See, United States of America (WIPO/GRTKF/IC/5/15, para. 118)

of prior informed consent for TK should therefore take account of the Bonn Guidelines, as well as existing TK laws and statements to the Committee.

85. For consent to be ‘informed,’ it is important for TK holders to be involved in the decision making process for access to their knowledge. Existing *sui generis* laws achieve this in several ways:

- direct grant of prior informed consent by holders of the relevant knowledge;¹³⁹
- consultations or hearings of the TK holders by a national authority which itself formally grants prior informed consent;¹⁴⁰ and
- combinations of the above approaches.¹⁴¹

86. Access conditions differ, depending on the purpose of utilization for which access is requested (commercial or research, for instance).¹⁴² Customary uses of TK may be expressly exempted from access regulations.¹⁴³ Specific conditions of access to TK may apply to specified national institutions.¹⁴⁴ Even if access is ultimately granted by the State, in some laws the indigenous/local community or the TK owner may refuse access to the TK.¹⁴⁵ This principle expresses the roles and responsibilities concerning prior informed consent principle, but leaves full flexibility to adapt the application of the principle to national legal systems, stakeholder needs and custodianship structures.

B.7: Principle of Prior Informed Consent

1. The principle of prior informed consent should govern any direct access or acquisition of traditional knowledge from its traditional holders, subject to these principles and relevant national laws.
2. Legal systems or mechanisms for obtaining prior informed consent should ensure legal certainty and clarity; should not create burdens for traditional holders and legitimate users of traditional knowledge; should ensure that restrictions on access to traditional knowledge are transparent and based on legal grounds; and should provide for mutually agreed terms for the equitable sharing of benefits arising from the use of that knowledge.
3. The holder of traditional knowledge shall be entitled to grant prior informed consent for access to traditional knowledge, or to approve the grant of such consent by an appropriate national authority, as provided by applicable national legislation.

87. This suggested principle is drafted to allow wide flexibility to accommodate diverse legal systems and national policy priorities. It could be implemented by access legislation for genetic resources and TK (as is the case with more than 30 such laws), through existing national parks systems, through executive or administrative orders (as is the case in the Philippines) or through stand-alone legislation. The principle merely requires that at the point of access, a contract or permit, containing mutually agreed terms, is agreed between TK users

¹³⁹ E.g. Peruvian Law and Philippines Law

¹⁴⁰ E.g. Indian Biodiversity Act and Portuguese Law

¹⁴¹ E.g. African Model Law and the Costa Rican Biodiversity Law

¹⁴² E.g. Peruvian Law and Portuguese Law.

¹⁴³ E.g. African Model Law (Art.2 (2)(ii)) and Indian Biodiversity Act (Art.7).

¹⁴⁴ E.g. Brazilian Measure and Indian Biodiversity Act.

¹⁴⁵ E.g. African Model Law, Brazilian Measure; Costa Rican Biodiversity Law; Peruvian Law; and Portuguese Decree Law.

and providers, based on which consent is granted for access to the TK. It clarifies that the principle is subject to applicable national laws which may already be in place (for example, those governing access to genetic resources). This means that they could be implemented through stand-alone national statutory legislation, as part of existing statutory frameworks or through access agreements governed by contract law. The features of legal systems or mechanisms to implement prior informed consent are drawn from the Bonn Guidelines, which establish a measure of international agreement among relevant stakeholders. The principle also clarifies that the consent mechanism may be direct, or through an intermediary authority, in line with the options outlined above.

B.8: Exceptions and limitations

88. Like other fields of IP protection, rights in TK may be limited or qualified so as to avoid unreasonable prejudice to the interests of society as a whole, and other legitimate interests. Exceptions are also needed to ensure that *sui generis* protection does not interfere with the customary availability of TK to the TK holders themselves by interfering with their customary practices of using, exchanging, transmitting and practicing their knowledge. Appropriate exceptions thus provide a safeguard that TK protection should not impact negatively on TK systems themselves and their ongoing evolution.¹⁴⁶ This is a limitation which is enshrined in seven out of ten *sui generis* laws that were described to the Committee at its fifth session. It might be said that this limitation to the scope of coverage has been generally accepted when it was incorporated into the Bonn Guidelines, following the spirit of Article 10(c) CBD. Other exceptions in existing *sui generis* laws include exceptions for household uses of traditional medicine, use of traditional medicine in government hospitals, use of TK for purely private and non-profit research purposes by third parties, or compulsory licenses on grounds of public interest. In general, potential exceptions and limitations to the granted rights include:

- the exemption of traditional exchange systems of TK among communities;
- production of traditional medicines for household use or use in public health facilities;
- personal, research and other non-commercial use;
- measures necessary for the preservation and development of TK, and the promotion of traditional innovation;
- continuing prior use in good faith by third parties;
- no limitations or prejudice to other IP rights; and
- an exemption of customary use from the scope of rights granted.¹⁴⁷

89. Besides the exclusions which apply to misappropriation in general, existing laws foresee specific exclusions for the requirement for prior informed consent. For example, Peru has described how, in its *sui generis* law, “a different status is given to knowledge that is in the public domain.” For that was already disclosed to the public outside the traditional community,¹⁴⁸ “prior informed consent is not required, but some degree of benefit sharing is

¹⁴⁶ See, GRAIN. *The Great Protection Racket*, footnote 107 above, and Lettington, R. *Customary Laws and Practices in Kenya*

¹⁴⁷ WIPO/GRTKF/IC/6/4.Rev, para. 82

¹⁴⁸ Art. 13 provides that TK is in the public domain “when it has been made accessible to persons other than the indigenous peoples by mass communication media such as publication or, when the properties, uses or characteristics of a biological resource are concerned, where it has become extensively known outside the confines of the indigenous peoples and communities.”

required.”¹⁴⁹ This exception for already disclosed TK concurs with the proposal by GRULAC at the Committee’s first session, concerning prior informed consent for knowledge not in the public domain.¹⁵⁰ An equitable balance would in any event suggest that prior consent cannot be retrospectively required, while a broader equitable balance may yet be achieved through equitable benefit-sharing and due recognition and acknowledgement.

B.8: Exceptions and Limitations

1. The application and implementation of protection of traditional knowledge should not adversely affect:

- (i) the continued availability of traditional knowledge for the customary practice, exchange, use and transmission of traditional knowledge by traditional knowledge holders;
- (ii) the use of traditional medicine for household purposes, use in government hospitals, or for other public health purposes; and
- (iii) other fair use or fair dealing with traditional knowledge, including use of traditional knowledge in good faith that commenced prior to the introduction of protection.

2. In particular national authorities may exclude from the principle of prior informed consent the fair use of traditional knowledge which is already readily available to the general public, provided that users of that traditional knowledge provide equitable compensation for industrial and commercial uses of that traditional knowledge.

90. This principle would clarify that protection of TK should not interfere with the customary patterns of use and sharing of TK, in line with existing laws and the discussion of this principle at the sixth session.¹⁵¹ The acts of TK holders which shall not be affected by the coverage of the regime include those acts which are required for the continued evolution of the TK system as a framework of ongoing innovation: practice, exchange, use and transmission of the knowledge by and among TK holders. The second exception draws on specific provisions in the Thai Law, reflecting public interest in use of traditional medicine. A general fair use or fair dealing exception is suggested, which would include good faith use of traditional knowledge prior to the introduction of specific legal protection, and could apply to such acts as the use of farm-saved seed/propagating material which may be associated with the protected TK. This provision is subject to national law and ensures consistency with Article 9.3 of the ITPGR on farmers’ rights. The second element deals with the specific issue, discussed above, of prior informed consent in relation to TK that has already been disclosed to the public.

B.9: Duration of protection

91. The duration of the right is normally a key issue in establishing the appropriate policy balance in IP protection.¹⁵² The discussion concerning TK stresses the need for a longer,

¹⁴⁹ Peru (WIPO/GRTKF/IC/5/INF/4, Annex V, para. 24).

¹⁵⁰ GRULAC (WIPO/GRTKF/IC/1/5, Annex I, page 6, para. V.2).

¹⁵¹ Also in the spirit of Article 10(c), CBD.

¹⁵² For technical comments on expiration and loss of rights see Andean Community (WIPO/GRTKF/IC/3/17, para.240), Brazil (WIPO/GRTKF/IC/2/14, Annex, para. 15), Fiji

inter-generational time-frame to be taken into account – and this is one of the arguments put forward for its protection through *sui generis* means, rather than conventional IP laws. Therefore, some *sui generis* laws do not contain express provisions on the expiration and loss of rights. For example, the African Model Law states that community intellectual rights “shall at all times remain inalienable” (Art.23(1)). Other *sui generis* laws set specific terms for protection, varying between terms of 7 to 30 years; 50 years from the time of application for the right; and 50 years after the death of the right holder, with possible arrangements for renewal: such specific terms may in some cases be renewed or extended.

92. TK holders have often called for a term of protection that is not subject to a specific term.¹⁵³ General protection of TK against misappropriation (as distinct from the specific choice to create distinct property rights) may be considered alongside those forms of protection that do not necessarily create exclusive rights, but rather deal with a distinctive association between the beneficiary of protection and the protected subject matter, and that lapse when that association ceases: for instance, protection of goodwill, reputation, right of personality, confidentiality, and unfair competition in general. The suggested principle concerning eligibility for protection (B.4 above) proposes such a distinctive association between the knowledge and its holders. This suggests that the rationale for protection would end when this distinctive relationship ceases, creating a possible link between duration of protection and continuing conformity with eligibility for protection.

B.9: Duration of protection

Protection of traditional knowledge against misappropriation should last as long as the traditional knowledge fulfills eligibility for protection, in particular as long as it is maintained by traditional knowledge holders, remains distinctively associated with them and remains integral to their collective identity. Possible additional protection against other acts and more specific forms of protection, which may be made available by relevant national or regional laws or measures, shall specify the duration of protection under those laws or measures.

93. This principle would apply the approach discussed above. It clarifies, however, that more specific forms of protection (such as those conferring an exclusive right) may be time-bound, as is the current practice for several national systems. The second sentence accordingly clarifies that specific terms of protection may be provided for in the event that additional or specific protection is provided, as in the cases cited above.

B.10 Application in time

94. Protection that has retrospective effect can create difficulties because third parties may have already used the protected material in good faith, believing it to be in the public domain; the rights and interests of such third parties may need to be respected. On the other hand, the

(WIPO/GRTKF/IC/3/17, para.236), Thailand (WIPO/GRTKF/IC/3/17, para.216), Zambia (WIPO/GRTKF/IC/3/17, para.232).

¹⁵³ Aboriginal and Torres Strait Islander Commission, Aboriginal and Torres Strait Islander Commission (ATSIC), Foundation for Aboriginal and Islander Research Action (FAIRA), Assembly of First Nations (AFN), Call of the Earth (COE), Canadian Indigenous Biodiversity Network (CIBN), Coordinating Body of Indigenous Organizations of the Amazon Basin (COICA), Indigenous Peoples Caucus of the Creators Rights Alliance, Hoketehi Moriori Trust, Rekohu, Aotearoa (New Zealand), International Indian Treaty Council (IITC), the Kaska Dena Council (KDC) and the Saami Council (WIPO/GRTKF/IC/6/14, para. 228);

traditional context of TK means that proponents of protection seek some degree of retrospectivity. In the field of TK, limiting protection to TK that has commercial novelty has been identified in previous sessions as one way of addressing this dilemma.¹⁵⁴ Several options are apparent in existing laws:

- (i) retroactivity of the law, which means that such utilizations of TK would also become subject to authorization under the new law or regulation;
- (ii) non-retroactivity, which means that only those utilizations would come under the law or regulation that had not been commenced before their entry into force; and,
- (iii) an intermediate solution, in terms of which recent utilizations which become subject to authorization under the law or regulation but were commenced without authorization before the entry into force, should be regularized as far as possible within a certain period, subject to equitable treatment of rights acquired by third parties in good faith.

B.10: Application in time

Protection of traditional knowledge newly introduced in accordance with these principles should be applied to new acts of acquisition, appropriation and use of traditional knowledge. Recent acquisition or uses of traditional knowledge should be regularized as far as possible within a certain period of that protection coming into force, subject to equitable treatment of rights acquired by third parties in good faith. Long-standing prior use in good faith may be permitted to continue, but the user should be encouraged to acknowledge the source of the traditional knowledge concerned and to share benefits with the original holders of the knowledge.

95. This principle seeks to articulate an equitable and practical balance, based on the third, intermediate option outlined above. It conforms broadly with the approach taken in some IP systems, although another widely used option is to provide for no retroactivity of protection over subject matter that is considered already in the public domain. Yet, as participants in the Committee have highlighted, TK holders question the validity of the claim that certain elements of their TK should legitimately be viewed as having fallen into the public domain in the sense of being freely available for any use. The suggested principle is therefore one way of addressing a policy dilemma in a practical manner. This is consistent with the exceptions and limitations suggested under principle B.8.

B.11: Formalities

96. Existing *sui generis* laws take diverse approaches to formal requirements of protection. Some expressly state that the acquisition of *sui generis* rights is without formalities (e.g. African Model Law, and the laws of Costa Rica and Peru); some establish registries of TK but do not expressly link them to the acquisition of rights (the African Model Law, and the laws of Brazil, Costa Rica and India); others expressly require registration as a condition for the operation of a *sui generis* measure (China, Portugal, Thailand and the United States of America). Other laws do not specify the procedural basis for the acquisition of rights.¹⁵⁵

¹⁵⁴ WIPO/GRTKF/IC/6/4.Rev, para. 74. See the ‘commercial novelty’ criteria established by the UPOV Convention and the Washington Treaty, in particular.

¹⁵⁵ For a technical proposal on formal requirements for acquisition of rights see African Group (WIPO/GRTKF/IC/1/10, Annex, page 6, Proposal 3.3(a)). Other technical comments on formal requirements of acquisition were made by Bolivia (WIPO/GRTKF/IC/4/15, para. 151), Brazil

97. Strong concerns have been raised about any obligation to register or record TK as a precondition for its protection: this is in part because recordal of TK may facilitate its further dissemination and potentially accelerate its misappropriation, because it may undercut or supplant customary modes of transmission (including oral traditions), and because this may be seen as a burdensome requirement for traditional communities. By analogy with unfair competition law, protection can be achieved without requirements of documentation or registration of the protected subject matter. As the Delegation of Norway pointed out, “[o]ne aspect of such an angle to the problem would be that TK would be protected as such without any requirements of prior examination or registration.”¹⁵⁶ This does mean in practice that the necessary linkage between the user, the TK holder, and the TK itself would be established on specific cases. For this reason, optional means of recordal or registration may be contemplated to promote predictability and clarity, where this is consistent with the TK holders’ interests and the general public interest.

B.11: Formalities

1. Eligibility for protection of traditional knowledge against acts of misappropriation and other acts of unfair competition should not require any formalities.
2. In the interests of transparency, certainty and the conservation of traditional knowledge, relevant national authorities may maintain registers or other records of traditional knowledge, where appropriate and subject to relevant policies, laws and procedures, and the needs and aspirations of traditional knowledge holders. Such registers may be associated with specific forms of protection, and should not compromise the status of hitherto undisclosed traditional knowledge or the interests of traditional knowledge holders in relation to undisclosed elements of their knowledge.

98. This principle clarifies that the general safeguard against misappropriation would not be conditional on registration of TK in databases, registries or any other formalities. However, the creation of distinct protection mechanisms, more in the nature of exclusive rights, may call for registration or recordal, and in fact a number of countries have established such systems. This principle accordingly clarifies that such additional protection, established subject to national law and policies, may require such formalities. In addition, it clarifies that appropriate registration or recordal may assist in creating a climate of transparency and certainty, and promote the preservation of TK, and thus may serve the interests of TK holders in some circumstances.

B.12: Consistency with the general legal framework

99. TK protection would inevitably intersect with and overlap legal systems in other areas, notably conventional IP protection and related areas of law such as the regulation of genetic resources. It is therefore desirable to clarify the relationship with the general legal framework within which TK protection must operate. For example, a number of existing laws providing TK protection are closely related to regimes governing components of biological diversity. These are coordinated and integrated in different ways:

(WIPO/GRTKF/IC/3/17, para. 220), Dominican Republic (WIPO/GRTKF/IC/3/17, para.215), Panama (WIPO/GRTKF/IC/4/15, para. 157), Venezuela (WIPO/GRTKF/IC/3/17, para. 213).
¹⁵⁶ Norway (WIPO/GRTKF/IC/3/17, para. 227)

- a prior informed consent system may be principally established to regulate access to tangible components of biodiversity, but also includes associated TK under its scope (e.g. laws of Costa Rica and India);
- parallel systems of prior informed consent for TK and associated biological resources may be integrated under one law (e.g. African Model Law and Brazilian measure);
- a prior informed consent system for TK may operate independently of access regulation for genetic resources (e.g. the Peruvian law).

100. The suggested principle aims at mutual consistency of prior informed consent systems for TK and for associated tangible components of biodiversity, without determining or prejudging what their relationship and degree of integration should be, in accordance also with the guiding principle of flexibility and comprehensiveness.

101. Similarly, TK protection can be achieved, at least to a partial extent, through direct, adapted or extended forms of intellectual property protection, and this has been extensively documented.¹⁵⁷ While these principles do not spell out in detail the various forms of IP-related protection that have been successfully applied to TK subject matter, it may be valuable to underscore that the general IP system and the specific measures to prevent misappropriation of TK are not at odds with one another, and indeed that misappropriation is incompatible with the essential principles of the IP system.

B.12: Consistency with the general legal framework

1. In case of traditional knowledge which relates to components of biological diversity, access to, and use of, that traditional knowledge shall be consistent with national laws regulating access to those components of biological diversity. Permission to access traditional knowledge does not imply permission to use associated genetic resources and *vice versa*.
2. Traditional knowledge protection should be consistent with existing intellectual property systems and supportive of the applicability of relevant international intellectual property standards to the benefit of holders of traditional knowledge.
3. Nothing in these Principles shall be interpreted to derogate from existing obligations that national authorities have to each under the Paris Convention and other international intellectual property agreements.

102. This paragraph provides for consistency with the regulation of access to genetic resources associated with TK, while allowing for appropriate independence between specific forms of access as required. This sentence is a direct counterpart to paragraph 37 of the Bonn Guidelines and mirrors the identical independence of PIC for TK and for biodiversity components which is established by the Guidelines from the direction of PIC for access to genetic resources. Similarly, the principle seeks to clarify that TK protection does not prejudice existing IP-related obligations.

B.13: Administration and enforcement of protection

¹⁵⁷ For example, see documents WIPO/GRTKF/IC/4/7, WIPO/GRTKF/IC/4/8 and WIPO/GRTKF/IC/5/INF/4.

103. TK protection is managed and administered in diverse ways in existing measures. Typically, however, they identify certain procedures and national authorities which can ensure effectiveness and clarity in the protection of TK. This principle identifies some of the key tasks that recur in existing TK protection systems, without seeking to specify any form of institutional structure.

104. A specific role may be envisaged for national authorities in enforcing protection of TK. In general, the effectiveness and equity of any protection measures are likely to depend to some extent on the approach to enforcement. An effective approach to TK protection may need to be founded on a clear sense of what enforcement should entail. This is the logic of the concept of an ‘enforcement pyramid’ for TK, discussed in recent literature and elsewhere.¹⁵⁸ The African Model Law includes enforcement of rights as one of its objectives and sets out detailed provisions on enforcement. The Indian Arts and Crafts Act of the United States of America contains extensive enforcement provisions, constituting some of the strongest enforcement provisions of all *sui generis* TK laws described to the Committee: a person who sells a product falsely suggesting it is Indian produced can be subject to very heavy fines and imprisonment, with penalties escalating for repeat infringement. The Indian Arts and Crafts Board has a specific role in monitoring violations of this law.¹⁵⁹ The desirability of alternative dispute resolution (ADR) has also been underlined.¹⁶⁰ The rationale for this approach has been set out in some detail in document WIPO/GRTKF/IC/6/6.

B.13: Administration and enforcement of protection

1. An appropriate national or regional authority, or authorities, should be competent for:
 - (i) distributing information about traditional knowledge protection and conducting public awareness and advertising campaigns to inform traditional knowledge holders and other stakeholders about the availability, scope, use and enforcement of traditional knowledge protection;
 - (ii) determining whether an act pertaining to traditional knowledge constitutes an act of misappropriation of, or an other act of unfair competition in relation to, that knowledge;
 - (iii) determining whether prior informed consent for access to and use of traditional knowledge has been granted;
 - (iv) determining equitable compensation; determining whether a user of traditional knowledge is liable to pay equitable compensation; and, if the user is liable, as appropriate, facilitate and administer the payment and use of equitable compensation;
 - (v) determining whether a right in traditional knowledge has been acquired, maintained, or infringed, and for determining remedies;
 - (vi) assisting, where possible and appropriate, holders of traditional knowledge to acquire, use, exercise and enforce their rights over their traditional knowledge.

¹⁵⁸ See Drahos, P. “Towards an International Framework for the Protection of Traditional Group Knowledge and Practice,” *UNCTAD-Commonwealth Secretariat Workshop on Elements of National Sui Generis Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework* (February 2004). See the chapter entitled «An International Enforcement Pyramid on TGKP» at 39.

¹⁵⁹ See WIPO/GRTKF/IC/5/INF/6, Annex __.

¹⁶⁰ GRULAC (WIPO/GRTKF/IC/1/5, Annex I, p.9), Asian Group (WIPO/GRTKF/IC/2/10), African Group (WIPO/GRTKF/IC/3/15).

2. Measures and procedures developed by national and regional authorities to give effect to protection in accordance with these Principles should be fair and equitable, should be accessible, appropriate and not burdensome for holders of traditional knowledge, and should provide safeguards for legitimate third party interests and the interests of the general public.

B.14: International and regional protection

105. The international dimension of IP in general, and of the Committee's work in relation to TK, refers mainly to the recognition of foreign right holders as having access to national systems of protection on a par with domestic nationals; the creation of practical mechanisms to facilitate the obtaining and administration of IP rights in foreign jurisdictions; and, the 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).

106. Beyond these main aspects, the international dimension potentially covers a range of policy, legal, technical and practical elements, which may interact in various ways with national and regional laws and institutions. Document WIPO/GRTKF/IC/6/6 identified these elements as:

- (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.

107. WIPO/GRTKF/IC/6/6 discussed each of these in detail. Without repeating all the information contained in that document, the following paragraphs identify information of particular relevance to TK in respect of certain of these issues.

- (a) Considering the full international law context

108. The international dimension of the Committee's mandate includes consideration of existing international law in other areas of law. With respect to TK, these areas would include sustainable development; agriculture and food security; biological diversity, forests and the environment; traditional medicine and public health; human rights; labor standards; indigenous peoples' issues; trade and industry; and so on. 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. As discussed above (the guiding principle of concord with other international and regional instruments and processes), international legal instruments and ongoing policy processes of particular relevance to TK would include those administered or under development by the CBD, FAO, ILO, IFF, UNCCD, UNCTAD, UNEP, the UN Permanent Forum on Indigenous Issues, and the WTO.. The General Assembly of WIPO 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.

(b) Existing international IP standards

109. Existing IP treaties contain many provisions that correspond to reported practical experience in the protection of TK as IP (see core principle above 'Combining use of existing IP, extended and adapted IP and specially created *sui generis* IP measures and systems'). A brief selection would include:

- The Paris Convention – the suppression of unfair competition (Article 10*bis* which forms the basis for the development of the Principles contained in this document); the protection of patents; the protection of industrial designs; protection of collective and certification marks, protection of armorial bearings, flags, other State emblems, official signs and hallmarks;
- The Strasbourg Agreement Concerning the International Patent Classification (1979);
- The Lisbon Agreement – the protection of appellations of origin related to products that embody traditional knowledge;
- 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 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 several categories of protection that have been used for the protection of subject matter associated with TK - undisclosed information (confidential information or trade secrets) and geographical indications (a category broader in scope than appellations of origin), linking both forms of protection to the suppression of unfair competition under the Paris Convention.

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

110. Proposals have been put forward for the development of new international norms and standards in the context of the Committee,¹⁶¹ the WIPO General Assembly¹⁶² and in various other fora.¹⁶³ 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 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.

111. These options are discussed further in WIPO/GRTKF/IC/6/6. Concerning TK in particular, the African proposal would foresee the adoption of a stand-alone agreement for TK and TCEs (i.e. not a special agreement within the scope of a broader convention or union), which is nonetheless part of a wider international legal matrix. By contrast, a TK instrument could also take the form of a Special Agreement under Article 19 of the Paris Convention, which would locate it not as a “third pillar”, but as a part of existing industrial property protection (along with copyright and related rights, one of the two existing pillars of intellectual property). Article 19 of the Paris Convention is entitled ‘Special Agreements’ and provides that “the countries of the Union reserve the right to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention.”¹⁶⁴

112. A number of provisions of the Paris Convention may lend themselves to further development in relation to some aspects of protection of TK. As stated above, Article 10*bis* forms a model for the international protection of TK against misappropriation, as proposed by the Delegation of Norway and carried forward by the Committee. 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 TK is protected through industrial property rights, the Paris Convention provides for national treatment.

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

113. 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 IP systems for foreign nationals (provided that they are nationals of a country with relevant treaty

¹⁶¹ See for example various proposals made in the Committee's Fifth Session (document WIPO/GRTKF/IC/5/15, under ‘general statements’ and ‘future work.’

¹⁶² See document WO/GA/30/8, ‘Report of the WIPO General Assembly, paragraph 65 to 92, *passim*.

¹⁶³ 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.”

¹⁶⁴ Article 19, Paris Convention (1979).

commitments), a rule that dates back to the first international conventions in the 1800s. By virtue of the obligations under Paris, Berne, TRIPS and other IP treaties, the principle of national treatment applies to most categories of IP protection (subject to certain exceptions). In addition, WTO Members are required (also subject to certain exceptions) to apply the most-favored nation (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.

114. 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 held by foreign nationals. Some systems of registration and recognition of *sui generis* rights in TK appear to be focused on right holders who are nationals of the country of protection, or who are communities recognized in that country.¹⁶⁵ One model that has been applied has been for reciprocal protection to apply. For example, the Thai Law provides protection for traditional medicinal knowledge of foreign origin according to the principle of reciprocity.¹⁶⁶

115. In principle, access by foreign TK holders 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, including entitlement for TK or related subject matter to be entered on a register, where applicable;
- participation in any official mechanisms for the collective administration of rights;
- participation in benefit-sharing arrangements or other funds concerning the exploitation of TK; and
- entitlements concerning enforcement of rights, including *ex officio* enforcement action taken by national authorities or public prosecutors.

116. Under some national laws, rights in TK may be specifically reserved for certain classes of individuals or communities, identified and recognized under domestic law – for example, ‘Indians’ in the Indian Arts and Crafts Act, 1990, or 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 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

117. 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

¹⁶⁵ See for example the annexes to document WIPO/GRTKF/IC/5/INF/6, and the tables in document WIPO/GRTKF/IC/5/INF/4.

¹⁶⁶ Section 43 of the Act provides that “Persons with the nationality of other nations who agree to permit persons with Thai nationality to have the protection of intellectual property rights on traditional Thai medicine may seek registration of intellectual property rights protection on the local traditional medicine in their country under this Act.”

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) on domestic consultative and policy development practices, reflecting the particular concerns of traditional, local and indigenous communities;
- support for networks of TK holders in different countries;
- the development of information and capacity-building materials for the use of TK holders; and
- pooling of experience in supporting the use of TK as the basis for community development, community-based enterprises and appropriate commercial partnerships.

(f) International notification or registration

118. 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. It was suggested earlier in this document that, in the interests of transparency and certainty, some form of notification or registration should remain an optional mechanism for national authorities, particularly perhaps in respect of TK for which stronger forms of protection may be appropriate.

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

- international registration of appellations of origin for products embodying traditional knowledge under the Lisbon system.
- 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 original designs developed within traditional knowledge 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.

(g) Collective administration and management of IP rights

120. Systems of collective administration and management of IP rights are well developed for copyright and certain related rights. The availability of such collective mechanisms for the management and enforcement of rights in TK, and their international dimension of the

cooperation between such agencies, have been suggested in various intergovernmental processes and the general literature on TK.¹⁶⁷

121. Whatever legal means are decided upon, at the national, regional or international level, for TK protection, 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 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 possible extension or adaptation of such mechanisms for the benefit of TK holders.¹⁶⁸

C14: International and Regional Protection

Legal and administrative mechanisms should be established to provide effective protection in national systems for the traditional knowledge of foreign rightsholders. Measures should be established to facilitate as far as possible the acquisition, management and enforcement of such protection for the benefit of traditional knowledge holders in foreign countries.

122. This principle establishes a general standard of effectiveness for foreign holders of TK, while not specifying what specific legal mechanism that should apply (for example, reciprocal protection, protection to minimum standards, or national treatment). This is because of the limited debate so far on the options, and the lack of general guidance on this issue, both in policy statements and in the diversity of approaches already adopted in national systems for protection of TK. To the extent that conventional IP rights are applied to protect TK in the interests of TK holders, existing international obligations (for example under the Paris and Berne Conventions, and the WTO TRIPS Agreement) would apply.

[End of Annex II and of document]

¹⁶⁷ See, UNCTAD/Commonwealth Secretariat Workshop Report and Drahos, P. (2000), 'Indigenous Knowledge, Intellectual Property and Biopiracy: Is a global bio-collecting society the answer?' *European Intellectual Property Review*, 22:245-250.

¹⁶⁸ Drahos, P. (2000), 'Indigenous Knowledge, Intellectual Property and Biopiracy: Is a global bio-collecting society the answer?' *European Intellectual Property Review*, 22:245-250.

