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

**Ninth Session**  
**Geneva, April 24 to 28, 2006**

NORWAY: MEMORANDUM ON DOCUMENTS WIPO/GRTKF/IC/9/4 AND  
WIPO/GRTKF/IC/9/5

*Document submitted by Norway*

1. By a communication dated April 20, 2006, the Delegation of Norway submitted a document to be circulated as a working document for the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”) at its ninth session.
2. The text of the document as received is published in the Annex to this document.
3. *The Intergovernmental Committee is invited to take note of the contents of the Annex.*

[Annex follows]

## ANNEX

The aim of this document is to contribute to the discussions in the IGC regarding the policy objectives and principles for the protection of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE) with the aim of making progress on these matters within the renewed mandate period of the Committee. The first parts of the document present ideas on how to proceed. We propose to focus on trying to find areas where there is consensus or emerging consensus, instead on focusing on issues where the discussions have been polarised. Following this track we present suggestions on how to sort the objectives and guiding principles in the annexes to document GRTKF/9/4 and GRTKF/9/5 in two categories; objectives with a preambular or contextual character and objectives/principles that may be more suitable for regulation in substantive provisions on the international level. In the last parts of the document we present proposals on the use of article 10bis in the Paris Convention as a model for an instrument for protection of TK .

## I. Introduction

1. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“IGC – GRTKF”) was established by the WIPO General Assembly in October 2000 as an international forum for debate and dialogue concerning the interplay between intellectual property (IP), and traditional knowledge (TK), genetic resources (GR), and traditional cultural expressions (TCE (folklore)).
2. The 2005 WIPO General Assembly decided to renew the IGC mandate for a further two year period. The renewed mandate includes a reference to the possibility of a legal instrument, it asks for a focus on the international dimensions of the IGC’s work and it calls for the IGC to accelerate its work. It also expressly states that work in the IGC shall be without prejudice to the work conducted in other fora on related issues.
3. The main focus of this document is to identify areas where there is potential for agreement on policy objectives and core principles and to present ideas on how to move forward to reach an outcome during the renewed mandate period. Three aspects of the outcome are distinguished;
  - process
  - content, and
  - nature of an outcomewith the suggestion that each of these might need to be considered in parallel, and anyone may not be resolved alone, without considering the other two.
4. During the past eight sessions of the IGC, the Committee has in particular discussed IP issues relating to
  - access to genetic resources and benefit sharing
  - protection of traditional knowledge
  - protection of traditional cultural expressions
5. Both positive and defensive protection systems for TK and TCE have been discussed. The Committee has reached important results on matters relating to defensive protection, e.g. the PCT minimum search requirements, amendments in the patent classification, an agreed international data standard for TK registers and databases (WIPO/GRTKF/IC/4/14) and a

collection of standard contracts in the field of exploitation of genetic resources and TK. Although the participants have differing viewpoints, some common ground has also been identified as regards many of the possible ways of establishing better protection systems for TK and TCE. This is reflected in some of the more recent documents produced for IGC sessions: for example, the policy objectives and core principles outlined in the documents for the 9th session are mainly drawn from interventions and submissions at earlier sessions. It should be noted that there are certain links between *positive* forms of TK/TCE protection and some *defensive* measures that are also being discussed in WIPO and elsewhere. One example relates to the issue of disclosure requirements in patent applications, such requirements will contribute to improving transparency and building trust in the patent system and might have implications for monitoring possible cases of misappropriation of TK/TCEs. The Norwegian delegation will submit a proposal regarding disclosure in patent applications in a separate document.

6. The IGC has an agenda that includes the links between IP and genetic resources, traditional knowledge and TCEs (folklore). In this document we only deal with TK and TCE.

7. While TK and TCEs are related in practice, and raise some similar issues, (such as the nature of collective custodianship), the TK and TCE provisions of WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 have been drafted to take into account the distinction that arise when considering the distinct forms of misappropriation and misuse of TK and of TCEs. International treaties already have measures to protect expressions of folklore, and the draft TCE provisions draw from and build on these. Many national and regional laws already provide distinct forms of protection for TCEs and TK, and the two sets of provisions reflect these distinct experiences and policy choices. The TCE provisions also draw from and build on the model provisions on expressions of folklore for national laws developed some 25 years ago.

8. Below in chapter 2 we present some elements that have emerged from the IGC discussions so far, as well as some ideas on how to proceed in chapter 3. Chapter 4 considers policy objectives and core principles that there seems to be consensus on, and suggests that the objectives and principles can be sorted into two categories; those that may be considered suitable to be transposed to substantive provisions at the international level and those of a more preambular or contextual character. In chapter 5 we elaborate on the use of Article 10bis (unfair competition) of the Paris Convention as a model for the development of a provision for the protection of TK (without regard to the legal status of such a provision). We realize that the kinds of misappropriations and misuses applicable to TK are distinct from those applicable to TCEs. Therefore, while respecting the interconnectedness of TCEs and TK especially from a community perspective, some differences in approach to legal protection against misappropriation can be expected. We therefore hope to return to the question of a possible general norm for TCE protection at a later stage.

9. It is proposed that the proposals on how to make progress and achieving results during the renewed mandate period in this document be considered alongside the other proposals and ideas that have been introduced in the IGC. Those proposals and ideas will undoubtedly have to be further considered during the period of the renewed mandate, one obvious example being the proposal of the African Group outlined in document WIPO/GRTKF/IC/6/12.

## II. Documents WIPO/GRTKF/IC/9/4 AND WIPO/GRTKF/IC/9/5: Emerging Consensus on Policy Objectives and Core Principles for the Protection of TCEs and TK ?

10. The annexes of documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5 contain revised draft provisions, policy objectives and core principles. While the TCE and TK provisions have similar objectives and general principles, and provide for complementary forms of protection, their respective substantive provisions are quite distinct for the reasons mentioned above.

11. During the discussions at the seventh and eighth sessions of the IGC, it was clear that some common ground was emerging as regards the policy objectives and core principles for protection of TCE and TK. On the other hand, the discussions on the draft substantive provisions and the commentary to these provisions were rather polarised. While many delegations were of the opinion that the Committee should start to draft provisions for legally binding instruments based on the draft provisions, others argued that this would be premature, and wished the Committee to discuss the policy objectives and core principles in more detail first.

12. Thus, there seems to be an emerging limited consensus regarding the policy objectives and core principles set out in the Annexes to documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. However, this does not imply that there is any general consensus about the preferred final outcome of the IGC's work or to what extent such policy objectives and core principles have to be elaborated and specified. While general statements have been made about the importance of many of the policy objectives and principles, there has been relatively little substantive or technical discussion of them.

## III. How Can the IGC Fulfil Its Mandate?

13. As the debate on the proposed substantive principles or provisions for protection of TK and TCE and the drafting of a legally binding instrument seems to be rather polarised at this stage, one may question whether there is any real possibility that the Committee will be able to reach consensus on these principles within the renewed mandate period. At the same time, there was 'strong support for the work and process of the Committee' at the eighth session. Many feel that the Committee's extensive technical work over four years should be reflected in concrete outcomes by the end of this biennium.

14. It may therefore be more fruitful to *focus on areas where there is potential for agreement* rather than to continue discussing issues where there are disagreement. One way forward may be to start by focusing on the policy objectives and core principles.<sup>1</sup> If the Committee could reach consensus on the objectives and principles, this in itself would be an important achievement. In the absence of consensus on the need for legally binding instruments to protect TK and TCE, an agreement on at least policy objectives and core principles would send an important signal to governments, civil society, international organisations and other relevant stakeholders. Agreed policy objectives and core principles

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<sup>1</sup> It is possible that broad consensus could also be reached on at least *some* of the substantive principles, but this might be better to consider after policy objectives and core principles have been agreed.

would also provide an important basis for further policy development - whether in the form of legally binding instruments or by other means.

15. International law is often developed by first establishing consensus on fundamental objectives and principles expressed in for example a political declaration or recommendation. At a later stage, this can be developed further, with a legally binding international instrument as the result. One example of this type of procedure is the revision of the Trademark Law Treaty. A Joint Recommendation concerning Trademark Licences was adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of the World Intellectual Property Organization (WIPO) at the Thirty-Fifth Series of Meetings of the Assemblies of the Member States of WIPO in 2000. The substantive parts of this recommendation are included in the texts that were approved by the Diplomatic Conference for the adoption of a revised Trademark Law Treaty that was concluded in Singapore in March this year.

16. A similar approach to the issues included in the existing mandate of the IGC, could lead to the expression of an agreement on policy objectives and core principles in a declaration or recommendation on TK and TCE. This could be adopted by the Assembly of the Paris Union and the Assembly of the Berne Union and the Member States of WIPO at the General Assembly in 2007, following a procedure similar to that described above. Proceeding by means of a recommendation makes it possible to take into account the vast differences between the needs and experiences of Member States and domestic processes that are currently in progress. Moreover, as the example discussed above shows, this approach can also provide a basis for further development of international law.

#### IV. Further Analysis on Objectives and Core Principles in Documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5

17. The IGC is working on mature texts both in the field of protection of TK and TCE and there is a perceived impression of common ground for the need of some kind of protection for the subject matter at hand.

18. In the discussions in the Committee we should focus on the international dimension of our work.

19. A constructive approach to help us progress the work would be to analyse the objectives and principles in the Annexes to documents 9/4 and 9/5 in order to separate the elements that may be suitable for substantive regulation on the international level from those of a contextual nature that any form of protection should take into account or not run counter to. In performing an analysis it is important to keep in mind that the Committee is only dealing with the interplay between TCE/TK and intellectual property rights, and that WIPO's expertise necessarily has limits. Issues concerning the protection and recognition of TCE/TK that have little or no connection to intellectual property rights, while important and part of the more general context for protection, are better left to other organisations with the necessary expertise and mandate to consider further. These issues can also be addressed at the national level.

20. Document WIPO/GRTKF/IC/9/4 regarding TCEs has provided us with the following list of objectives in the annex (p. 3-5): (i) *Recognize value*, (ii) *Promote respect*, (iii) *Meet the actual needs of communities*, (iv) *Prevent the misappropriation of TCEs*, (v) *Empower communities*, (vi) *Support customary practices and community cooperation*, (vii) *Encourage*

*community innovation and creativity, (ix) Promote intellectual and artistic freedom, research and cultural exchange on equitable terms, (x) Contribute to cultural diversity, (xi) Promote community development and legitimate trading activities, (xii) Preclude unauthorized IP rights and (xiii) Enhance certainty, transparency and mutual confidence.* In the Committee's work so far there has been no indication that any members do not support these objectives *per se*. The same could be said about the "general guiding principles" (p. 6-10 in the same document), all these principles seem to have wide support from committee members. In our opinion, most of these objectives and principles are "true objectives" from a legal point of view, i.e. they are not in themselves substantive provisions suitable to protect TCEs at the national or international level. These objectives and guiding principles should therefore be kept in the back of our mind when we proceed in our discussion, and in any national policy development that may be proceeding at this time.

21. However, at least two of the listed objectives (p. 3-5) are in our opinion somewhat different from the others: (iv) Prevent misappropriation and (xii) Preclude unauthorized IP rights. These two are not only objectives, but also have a substantive character that could be transformed into substantive provisions. Prevention of misappropriation and precluding unauthorized IP rights are measures that contribute to the fulfilment of the other objectives, such as recognition of value, promotion of respect, the actual needs of communities etc. These objectives also sit squarely at the interface between TCEs and intellectual property rights, and encompass the key issues that led to the establishment of the IGC. These objectives would be a useful place to focus the IGC's discussions during the period of the extended mandate. This would not exclude more detailed work on other objectives or core principles later on. In this sense the IGC would be taking an incremental approach.

22. National regulation alone is in our opinion not sufficient to prevent misappropriation of TCEs and granting of unauthorized intellectual property rights. These problems often have an international dimension and substantive regulation on the international level is – in our opinion – necessary. There seems to be a lot of common ground within the IGC on the importance of these two objectives as well as the need for some sort of international regulation. It is our hope that we can soon discuss in more detail the content of such rules, and we look forward to exchanging views on this. For example, the terms misappropriation, misuse, unfair use or disrespectful use are often used by the holders of TCEs in defining their concerns with the current system, and can mean many different things to different people. The Committee needs to further develop its thinking in this area.

23. Applying the same approach to TK, leads us up to the conclusion that the objectives listed in Annex to document WIPO/GRTKF/IC/9/5 page 3-5 except objective viii and xiv seem to concern the objectives of a system of protection of TK, and not the substantive elements of such a protection system. In our opinion the same goes for all the general guiding principles in Annex to document GRTKF/IC/9/5 on page 8. Also on this point it seems to be a general consensus that any system of protection should seek to fulfil the targets and take into account the aims listed in these objective principles: *Recognize value(i), Promote respect (ii), Meet the actual needs of holders of traditional knowledge(iii), Promote conservation and preservation of traditional knowledge (iv), Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems (v), Support traditional knowledge systems (vi), Contribute to safeguarding traditional knowledge (vii), Respect for and cooperation with relevant international agreements and processes (ix), Promote innovation and creativity (x), Ensure prior informed consent and exchanges based on mutually agreed terms (xi), Promote equitable benefit-sharing (xii), Promote community*

*development and legitimate trading activities (xiii), Enhance transparency and mutual confidence (xv) and Complement protection of traditional cultural expressions (xvi).*

24. It could be argued that also objective xi (Ensure prior informed consent and exchanges based on mutually agreed terms) and xii (Promote equitable benefit-sharing) are substantive elements. Therefore, the substantive elements regarding PIC and benefit-sharing are spelled out as specific acts of misappropriation in the TK area, which should be prevented under the heading of ‘misappropriation’ or ‘unfair use’. But these objectives are formulated as aims and targets that a protection system should fulfil. The measures to reach also these two targets in an intellectual property rights connection can therefore be addressed and subsumed under objective viii and xiv. The approach that has been taken by the Committee in document 9/5 is that in the field of TK non-compliance with these principles of prior informed consent and benefit-sharing would itself be defined as an act of misappropriation or unfair use.

25. The IGC could also seek to rationalise some of the overlapping policy objectives and core principles contained in the draft documents, including identification of shared objectives and principles for TK and TCEs. This would make material contained in the documents much easier to deal with for the various IGC stakeholders, and may help to focus the discussion.

#### V. Article 10bis of the Paris Convention – A Basis for a Common Understanding of One Approach to TK Protection

26. In this chapter we discuss how protection of TK could be provided using the Article 10bis of the Paris Convention as a model. We think a similar approach also could be fruitful when it comes to the protection of TCE, but we have not evaluated this sufficiently yet. We hope to return to the question of a possible general norm for TCE protection at a later stage.

27. If the Committee could agree on the objectives and general guiding principles and the need for some international guidance on this point it could consider using a model which the Committee has already supported in its conclusions at its third session. The Committee then suggested that, in preparing an amended and updated version of a document entitled “Elements of a sui generis system for the protection of TK”, it should be “tak[en into] account... whether it would be possible to provide protection along similar line as in Article 10bis of the Paris Convention concerning unfair competition”.<sup>2</sup> This approach could help to at least solve some of the problems relating to TK. This would not be a question of protection of TK under the existing Article 10bis, but rather to use this article as a model for the development of a new instrument dealing only with the protection of TK. A protection system based on Article 10bis as a model would in our opinion be suitable for those issues concerning TK that have an intellectual property dimension or interface.

28. Article 10bis of the Paris Convention<sup>3</sup> deals with unfair competition. This article determines that the countries of the Paris Union are bound to give the nationals of these

<sup>2</sup> WIPO/GRTKF/IC/3/17, paragraph 249(ii).

<sup>3</sup> “Article 10<sup>bis</sup> [*Unfair Competition*]

(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:

[Footnote continued on next page]

countries effective protection against unfair competition. It defines an act of unfair competition as any act of competition contrary to honest practices in industrial or commercial matters, and lists some examples of prohibited actions.

29. It might be useful to discuss protection of TK along similar lines, using Article 10*bis* as a model. This idea was first mentioned by Norway at the third session of the IGC.

Furthermore, the idea of *creating a legal standard modelled on the basis of Article 10bis*, giving the holders protection from misappropriation and unfair use of traditional knowledge, was further elaborated at a side-event to the IGC's eight session organised by the United Nation's University Institute of Advanced Studies. This idea was then applied in document 9/5, in which a norm against misappropriation of TK is modelled, in structure and wording, on Article 10*bis*.

30. The idea would be to establish a general international norm stating that States should offer protection against misappropriation and unfair use of TK. The inclusion of misappropriation would therefore provide greater protection than the conventional unfair competition standard. As noted previously, consideration of what constitutes misappropriation would be crucial, and the further work on the misappropriation objective could pave the way for the development of such a model. This could be supplemented with more detailed guidelines.

31. This would enable TK to be protected as such without any requirements of prior examination or registration. Judicial decisions based on possible national transposition on whether TK has been unfairly exploited or misappropriated in individual cases could be taken on the basis of a flexible norm referring to fairness and equity. The guidelines would assist national judges and other national enforcement authorities.

32. The legal standard in article 10*bis* is what an honest person would consider an act of unfair competition within a commercial or industrial context. Transposed to our committee's work the idea of behaviour contrary to honest practices or amounting to inequitable conduct could be developed to guide understanding of what constitutes an act of misappropriation or unfair use of TK. Acts that could clearly qualify as "unfair use" - would *inter alia* be exploitation of TK obtained by theft, bribery, coercion, fraud etc. while also other relevant acts would, depending on the circumstances in each case be covered.

33. It could be argued that it would be difficult for a local community to obtain a court decision in a foreign country. However, it can be argued that the mere possibility would serve as an incentive for users to obtain prior consent from TK -holders and to participate in benefit-sharing arrangements.

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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; false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

An analysis of the Article is given in a WIPO publication "Protection against unfair competition" from 1994. WIPO publication No. 725(E), WIPO 1994.



34. Further, legal certainty would be a challenge. However, to a certain extent uncertainty is inherent in intellectual property law – and as case law and business practices evolve, the possibilities for determining the exact scope of protection would improve.

35. The strength of such a system would be its simplicity and flexibility. It would also allow for a dynamic approach, thereby accommodating the possible need for sector-specific approaches. Such an instrument would further contribute to the recognition of the value of TK on the international level.

36. Another challenge would be how to provide adequate and effective means to the holders of TK for the enforcement of rights. In this regard inspiration might be found in the field of copyright law, where collecting societies play a major role.

37. It has been stated many times from various representatives of indigenous peoples that protection of TK is not something that should be “granted” – the ownership of the TK is inherent in the culture – and the model would answer to this while providing the possibility for different national solutions and ways of implementation.

38. In our opinion an international norm with the following content could be a good starting point for further discussions:

“Recommendation regarding protection against misappropriation and unfair use of Traditional Knowledge

1. The members of the Paris Union for the Protection of Industrial Property and the World Intellectual Property Organization should assure nationals of member countries adequate and effective protection against misappropriation and unfair use of Traditional Knowledge (TK)

2. Any use of TK against honest practices in cultural, industrial or commercial matters should be considered as actions in breach of paragraph one.

3. TK holders should in particular be provided with effective means to ensure that:

- (i) the principle of prior informed consent applies to access to TK,
- (ii) benefits arising from certain uses of TK are fair and equitable shared,
- (iii) all acts of such a nature as to create confusion by any means whatever with the origin of the TK are repressed, and
- (iv) all acts of such a nature that would be offensive for the holder of the TK are repressed.”

39. The provision is based on recognition of rights in traditional knowledge. It is modelled on a similar principle as Article 10*bis* of the Paris Convention. This provision has been the model for various new instruments of law such as the protection of geographical indications, integrated circuits and the protection of undisclosed data.

40. In our opinion paragraphs 1 and 2 of the proposed norm give a simple and flexible general rule that leaves a sufficient margin of discretion for the states in how to implement. Paragraph 3 provides examples of acts that should be prevented by legal means. The member states should have flexibility to choose the legal measures to implement the rules, provided that the measures in all cases provide effective protection.

41. The objectives categorized as “true objectives”, cfr. chapter 4, could be reflected in a preamble to a norm as presented in paragraph 38, while the norm above would be the remedy to fulfil them within an IPR framework.

42. This model can be used regardless of whether the instrument has the form of a recommendation, declaration or a binding instrument. In our opinion the best way to proceed is to discuss and agree on content and then discuss form. It would be an important and huge step forward if the Committee within this mandate period could reach an agreement on a recommendation based on this model. At a later stage such an instrument could be transformed into a legally binding instrument if a recommendation shows to be insufficient, cfr. chapter 3 and the development of the revised Trademark Law Treaty. The Norwegian delegation will at this stage not exclude any final outcome.

[End of Annex and of document]