

WIPO



WIPO/GRTKF/IC/9/6
ORIGINAL: English
DATE: January 9, 2006

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WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

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

Ninth Session
Geneva, April 24 to 28, 2006

PRACTICAL MEANS OF GIVING EFFECT TO
THE INTERNATIONAL DIMENSION OF THE COMMITTEE'S WORK

prepared by the Secretariat

I. INTRODUCTION

1. At its thirty-second session, the WIPO General Assembly extended the mandate of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') over the 2006-2007 budgetary biennium "to continue its work on traditional knowledge, traditional cultural expressions/folklore and genetic resources." The Committee's extended mandate emphasizes the international dimension of its work.¹ At its sixth session, the Committee decided to deal with the international dimension integrally with other substantive items on its agenda, notably the items on traditional knowledge (TK), expressions of folklore (EoF) and traditional cultural expressions (TCEs), and genetic resources (GR).
2. Past working documents considered by the Committee provided background on the international dimension² and practical means of giving effect to the international dimension of the committee's work.³ The present document provides a brief overview of this background information, in case the Committee wishes to continue to draw upon it during the current

¹ Document WO/GA/30/8, paragraph 93.

² See in particular WIPO/GRTKF/IC/6/6

³ WIPO/GRTKF/IC/8/6.

phase of its mandate. It is intended only to summarize past technical material put before the Committee, and not to prejudge or promote any decision by the Committee on its work.

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

(i) what should be the *content* of the outcome – the question of substance, or what subject matter, focus and level of detail should the outcome have (including the substantial element of its international dimension);

(ii) what should be the *nature, format or status* of the outcome – the question of what the format or nature of an outcome should have, and what legal or political status and legal, political or ethical implication should the outcome have, including any international legal implications;

(iii) *how* should the Committee work towards the outcome – the question of what procedures or processes, and what forms of consultation, would help lead to understanding on the content and status of any proposed outcome; and what timelines or interim steps should apply.

4. The Committee has considered each of these questions at length in past sessions. It is likely that an outcome from the Committee's work would require coordinated progress on each aspect. No one of these aspects can, perhaps, be considered in isolation, and various positions concerning the work of the have stressed one or more of these aspects. For instance, the Committee decided at its sixth session to develop two sets of draft objectives and principles for the protection of TCEs and TK respectively. However, even as work on the content of these materials progressed, questions and concerns arose about the format and structure of such objectives and principles, their legal implications, and how the international dimension should be dealt with. Debate has continued over the possibility of a legally binding instrument or other forms of outcome, with Committee participants differing on the desirability of a legally binding outcome and on the appropriate time-frame for such work, as well as how the work should be sequenced. There have also been discussions over possible ways of organizing the work of the Committee to promote progress on its work, including through intersessional consultations, and the kind of intersessional commentary process that the Committee instituted between its seventh and eighth sessions. Continuing stress has been laid on the need for inclusive consultations with a wide range of stakeholders, notably the communities which themselves are holders and custodians of TCEs and TK.

II. CONTENT OR SUBSTANCE

5. On the possible content or substance of an outcome, the following factors have been considered at past sessions:

(i) the work of the Committee has concentrated on 'protection' in the sense of protection of TK and TCEs/EoF against misuse and misappropriation, in line with the role of WIPO and other intellectual property treaties in the international legal and policy framework. This also accords with a past outcome of work in this area, the WIPO-UNESCO Model Provisions on Folklore, which focused on protection against illicit exploitation and other prejudicial actions. Existing forms of protection of folklore in international IP standards, such

as the protection of performances of expressions of folklore in the WIPO Performances and Phonograms Treaty (WPPT) take a similar approach. Many Committee participants have stressed that the preservation, promotion and protection of TCEs and TK should be considered in an holistic manner. The intellectual property (IP) aspect of the overall legal framework can be characterized as setting the limitations or constraints on third parties' use of protected materials: or, as it was characterized in document WIPO/GRTKF/IC/4/8, giving the holders of TK or TCEs the right to say 'no', and thus ensuring they have a say in whether – and, if so, how – their TK or TCEs are to be used by third parties.

(ii) While an IP approach considered in isolation may be considered an inadequate response to the holistic character of TK and TCEs, and the diverse challenges confronting traditional communities, the standards that set limits to use of this material by third parties is clearly one important aspect of the overall response. This aspect may be an appropriate substantive contribution for a WIPO process to add to the broader international policy framework, bearing in mind the stress laid on respect for other international processes and legal instruments, a number of which have dealt with or are dealing with complementary aspects. In the domain of traditional cultural expressions, the UNESCO International Convention on the Safeguarding of the Intangible Cultural Heritage is an example of an existing instrument that especially concerns identifying, documenting, transmitting, revitalizing and promoting cultural heritage in order to ensure its maintenance or viability. In the field of biodiversity-related TK, the Conference of the Parties of the CBD⁴ has requested the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions to consider non-intellectual-property-based *sui generis* forms of protection of traditional knowledge, innovations and practices relevant for the conservation and sustainable use of biodiversity.

(iii) Draft objectives and principles on the protection of TK and TCEs/EoF have been prepared in two successive versions,⁵ based on the work of the Committee since 2001, and these drafts are still under consideration. Some Committee Members specifically opposed the draft substantive principles of the more recent versions as the basis for continuing work and consultation;⁶ and indeed no member indicated that the content of these drafts was satisfactory as it stood, even those supporting the use of these drafts as a basis for future work signaled disagreement with key substantive aspects of the texts. These documents do, in any case, distil some of the key policy choices that must be addressed in developing and applying protection of TK and TCEs (such as definitions, scope of protection, identity of beneficiaries, need for formalities, role of government authorities, etc.); they may also highlight those matters on which States may prefer to exercise diverse policy choices, and thus help clarify the substantive boundary between international and national layers of protection. Accordingly, at least some of the content of these draft materials, suitably modified and developed through the active direction of Committee members, might evolve into the substance of a shared international platform for protection of TK and/or TCEs, and could express common international objectives and principles for protection, in the event that Committee members opted for such a direction.

⁴ See paragraph 6 (b) of decision VII/16 H,

⁵ On TCEs/EoF, see Annex I of WIPO/GRTKF/IC/8/4 (and the previous text in WIPO/GRTKF/IC/7/3); on TK, see Annex I of WIPO/GRTKF/IC/8/5 (and the previous text in WIPO/GRTKF/IC/7/5).

⁶ Part III of the Annexes in question; see the extensive discussion on this material as reported in WIPO/GRTKF/IC/8/15 Prov.

(iv) Many Committee participants have stressed the importance of the international dimension of the protection of TK, TCEs/EoF and genetic resources; it is also expressly highlighted in the Committee's renewed mandate. The international dimension potentially includes the substance of international obligations, the desired interplay between the international dimension and national legal systems, the preferred manner of recognition of foreign right holders, and the appropriate relationship with other international instruments and processes. In other areas of IP and other relevant areas of law and practice, much of the direct effect of international standards is enforced by laws at the national level, so that 'protection' is strictly carried out by national laws and policies, subject to the 'soft law' influence or 'hard law' binding effect of international standards, but operating within the policy space afforded by such standards

(v) Debate has continued on the 'international dimension' of the substance or content of any outcome, and in particular what aspects of protection are best implemented through international measures, and what aspects are best implemented under national laws (guided, bound, or influenced as appropriate by international norms or guidelines). This debate has included consideration of specific matters:

- the options for recognizing the rights of the holders or custodians of TK, TCEs/EoF and GR in foreign jurisdictions ('recognition of foreign right holders'); and
- the linkage between international law, principles and standards, and national laws and measures that protect TK, TCEs/EoF and GR against misappropriation and misuse ('the interaction between international and national dimensions').

These aspects are examined in detail in WIPO/GRTKF/IC/8/6.

III. FORM OR STATUS

6. The Committee agreed at its sixth session to develop draft sets of objectives and principles on protection of TK and TCEs. While work has proceeded on the substance of these provisions, there is as yet no common position on what format or status such outcomes should have, and the Committee has not reached a consensus on the appropriate vehicle for any substantive outcome. Broadly, the approaches canvassed have included the development of an international instrument or instruments (with demands for an instrument that would be binding in international law); or an approach that would first focus on the national dimension of protection, with the possibility of building on this subsequently to create an international instrument. Hence the question of what substantive outcomes should be sought, and the process of development of international norms against misappropriation and misuse, give rise to the need to settle on the appropriate legal or policy vehicle that would give international effect to such provisions: WIPO/GRTKF/IC/6/6 and WIPO/GRTKF/IC/8/6 set out the options for consideration at previous Committee sessions.

7. Document WIPO/GRTKF/IC/6/6, considered at the sixth session, set out the possible approaches concerning the format or status of an outcome as follows:⁷

- a binding international instrument or instruments;
- a non-binding statement or recommendation;

⁷ WIPO/GRTKF/IC/6/6, paragraph 34.

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

These options are briefly reviewed below. This section is not intended to prejudge or predetermine any choice by the Committee, but to review the material previously presented to the Committee, recognizing that this is a matter entirely for the Committee to determine in line with the requirements of WIPO Member States.

(i) *A binding international instrument*

8. A binding instrument would oblige Contracting Parties to apply the prescribed standards in their national law, as an obligation under international law. Possible vehicles include stand-alone legal instruments, protocols to existing instruments or special agreements under existing agreements. The IGC and the WIPO General Assembly do not have themselves have the capacity to create binding international law. Past WIPO treaties have become binding under international law through the choice of the parties concerned to adhere to the treaties; other states are not bound by the treaty as such (in some cases, they have chosen to apply the standards created by a treaty without formally adhering to it as a matter of law, for instance in the field of industrial property classifications). A distinct treaty-making process would be required (typically, a diplomatic conference) to negotiate such an instrument.

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

(ii) *A non-binding normative international instrument*

10. A non-binding instrument could recommend or encourage States to give effect to certain standards in their national laws and in other administrative and non-legal processes and policies, or could simply provide a framework for coordination among those States which chose to follow the agreed approach. Options could include an authoritative recommendation or a soft-law instrument. Other international organizations have developed such instruments in areas of relevance to the work of the Committee. These include UNESCO declarations on bioethics and cultural diversity (including the recently concluded Universal Declaration on Bioethics and Human Rights); the FAO International Undertaking on Plant Genetic Resources and resolutions on issues such as farmers' rights; and decisions of the Conference of Parties of the CBD. Several of these instruments were subsequently developed into formal legal instruments, through successive negotiation processes. It should be noted that the Universal Declaration of Human Rights was itself drafted as a non-binding instrument.

11. One option, discussed in earlier documents, would be a high-level declaration or joint declaration by relevant WIPO assemblies. The themes of such a declaration might reflect current work on objectives and principles; for instance, it could recognize the value and significance of TK and/or TCEs; stress the need to empower their traditional holders or custodians to defend their interests regarding TK/TCEs and to use them as the basis for

sustainable cultural and economic development; establish core objectives and principles for protection; call on Member States actively to apply these objectives and principles as they work towards enhanced national and international protection; and establish goals for future work including more specific instrument or instruments. Such an approach need not preclude nor retard subsequent development of binding international law, and in some cases such outcomes have been used as the basis for negotiations on binding instruments (one example is the development of the FAO International Treaty from the past non-binding International Undertaking). Past WIPO joint recommendations have been widely applied and followed, for instance in the field of trade marks, and have been recognized and given effect in other legal instruments.

(iii) Strengthened coordination through guidelines or model laws

12. Model laws or guidelines have in the past been used to express a shared international approach, to assist in the coordination of national laws and policy development, without the adoption of a specific international instrument. This can provide the basis for cooperation, convergence and mutual compatibility of national legislative initiatives for the protection of TK and TCEs/EoF, and can also lay the groundwork for more formal international instruments. In practice, it may be difficult to distinguish between model laws or guidelines and the kind of soft-law norms discussed above. Several guidelines, frameworks and model laws already exist in areas of direct relevance to the work of the Committee. On the international level, in the 1980s, UNESCO and WIPO developed Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions (as noted, these are similar in their normative content to the focus on 'misappropriation and misuse' within the IGC⁸). Earlier, the Tunis Model Law on Copyright for Developing Countries of 1976 provided for protection of indefinite duration of national folklore. These models directly influenced the development of many national laws in this area. A proposal to update the WIPO-UNESCO Model Provisions in the light of practical experience was put to the Committee at its third session but was not accepted by all Committee members.⁹ These model provisions were intended to evolve into a draft treaty on protection of folklore, although at the time it was concluded that a treaty would be premature partly in view of the limited national experience with such provisions (considerable experience has since been gained by a number of countries). Nonetheless, they illustrate how model provisions may form the groundwork for the development of international legal instruments.

13. A number of other influential international instruments on the protection of TK and TCEs/EoF have been prepared as non-binding instruments with potential capacity to determine the legal obligations established under national laws (these include the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, established in 2000, and the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture of 2002). These models have in turn contributed to the discussion and review of protection within the Committee and therefore to the development of the draft objectives and principles currently under consideration. In the past, it has been noted that 'while this is very plainly a matter for Committee members to consider and determine, experience in other domains suggests the possibility of a phased approach, in which one mechanism for framing

⁸ As discussed in WIPO/GRTKF/IC/8/6

⁹ WIPO/GRTKF/IC/3/10, paragraph 162

international standards and for promoting the desired approach to protection in national standards leads in turn to further elaborated or revised mechanisms, with increasing expectation of compliance and increasing legal effect.’

(iv) *Coordination of national legislative developments*

14. Many countries are currently engaged in the development of new laws and policies in the protection of TK and TCEs/folklore. Those doing so have expressed strong interest in learning from other governments and regional bodies concerning their choices, and experiences in implementing such measures. This is to ensure the application of ‘best practice’ but also to promote consistency and comity between national laws, given the need for different national legal systems to interact appropriately. One effect of even draft international materials on may be to encourage and support such coordination of national and regional initiatives, where this is desired by the governments concerned. Informal feedback has suggested that many governments have chosen to move forward as a priority on developing national protection for TK and/or TCEs, but that they are concerned to ensure a consistent approach in which governments can share experiences in a structured way, ensure reasonable consistency, and avoid conflicting approaches. Some form of non-binding instrument may be a means to assist in this process.

IV. PROCEDURE

15. A third aspect of the Committee’s work has concerned the appropriate procedure or methodology to promote progress towards an outcome. Three broad questions have been considered:

(i) How can the Committee itself undertake its work so as to advance towards desired outcomes?

(ii) What forms of consultation are appropriate and necessary within and beyond the Committee?

(iii) How should the work of the Committee take account of and leave appropriate space for other international processes?

(i) *Procedures under the aegis of the Committee*

16. Previous sessions discussed the question of whether the Committee’s work could be supplemented by expert-level consultations, open-ended working groups, intersessional consultations, or other forms of dialogue and consultation apart from the Committee plenary itself. Expert-level or subsidiary consultations could, for example, deal with specific questions or working through the text from a focused expert perspective. At its seventh session, the Committee discussed various possibilities for consultations, and agreed upon an intersessional commentary process to develop further the draft materials contained in documents WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5. In a related area (but separate from the work of the Committee), a commentary and consultative process was established by the WIPO General Assembly to develop an examination of issues regarding the interrelation of access to genetic resources and disclosure requirements in intellectual property rights

applications.¹⁰ Documents WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5 both included a proposal to ‘consider options for further enhancing the role of the Committee, and possible subsidiary bodies, in directly preparing future drafts’ of the provisions annexed to those documents.

17. The Committee has already undertaken a range of other measures to promote consultation; this includes specific panels on the protection of TCEs and TK, and on aspects of TK documentation, and the panels that now commence each IGC session which are chaired by indigenous or local community representatives. The Committee has established a web site for observers’ submissions on matters before the IGC, and has encouraged the formation of the independent indigenous consultative forum that now directly precedes each of its sessions. The Committee has also considered various possibilities for consulting upon and developing further draft materials, and what procedural steps may be desirable. This would be additional to the steps already taken to enhance the participation of indigenous and local communities, through accreditation, procedural changes, and the creation of a voluntary fund.

(ii) Need for consultation

18. The need for consultation has been identified by a number of Committee participants. For example, regarding the international dimension of the Committee’s work, one delegation cautioned that “regional and international protection was ... a complex issue and it was necessary to be very careful. Countries would have to consult with each other before adopting any legal measures in this regard.” Many participants have stressed the need for the Committee’s work to be guided by inclusive consultations with holders of TK and TCEs, and a number of governments have described extensive domestic consultation processes involving indigenous and local communities, some with a specific focus on the draft objectives and principles under consideration by the Committee.

(iii) Interaction with other international legal mechanisms

19. The mandate of the Committee indicates that its work is “without prejudice to work in other fora”. With particular relevance to TK and genetic resources issues, the Committee itself has identified the principle that its work shall “be fully complementary with, and supportive of, the work of the CBD and FAO in particular.” Participants in the Committee have consistently voiced the concern that WIPO’s work in this area should be respectful of developments in other international fora, and should not encroach upon other international processes, nor pre-empt their outcomes. At the same time, many participants have called for international outcomes from the Committee as a high priority, observing that exchanging national experience, explicating the full range of options, and capacity building initiatives are an inadequate response to the demands on and expectations of the Committee. This raises the question of how its work should interact with other international processes and instruments, including dealing with concern that WIPO activities should be compatible with outcomes from other fora that are dealing with related questions such as human rights, the conservation of biodiversity and regulation of access and benefit sharing concerning genetic resources, cultural heritage, and the promotion of cultural diversity.

20. As document WIPO/GRTKF/IC/8/6 discussed in more detail, clarifying the appropriate focus of the content of the Committee’s work, such as a focus on determining what is meant

¹⁰ WO/GA/32/8

by misappropriation and misuse of TK and TCEs, helps distinguish an appropriate role for the Committee's norm-building activities vis-à-vis other international processes. This focus is akin to the earlier development of 'protection ... against illicit exploitation and other prejudicial actions' that was the objective of earlier norm-setting activities conducted by WIPO and UNESCO regarding folklore.¹¹ In line with past practice, this may leave appropriate space for other international processes and instruments dealing with related questions, such as cultural diversity, intangible cultural heritage, biological diversity, plant genetic resources for food and agriculture, and the rights of indigenous peoples, among other issues which may interact with, but should not be predetermined by, work on protection of TK and TCEs.

21. As described in document WIPO/GRTKF/IC/8/6, "this broad approach, guided by the Committee's own deliberations,¹² could lead to draft provisions on protection of TK and TCEs/EoF which:

(a) focus on the most appropriate and relevant aspect of the broader field of intellectual property law, namely characterizing those acts of third parties, beyond the traditional communities, which are to be considered illegitimate, unauthorized or otherwise inappropriate forms of use of TK or TCEs/EoF, without prejudicing or pre-empting the communities' own laws;

(b) appropriately complement work under way in other contexts, such as on indigenous rights, conservation and benefit sharing associated with biodiversity, and intangible cultural heritage and cultural diversity, without pre-empting outcomes in those fora on the crucial issues they are addressing;

(c) operate consistently with those national *sui generis* systems that elect to create specific intangible rights in TK or TCEs/EoF, without requiring this approach when it is contrary to the wishes of holders of TK and TCEs/EoF, and against the policy of appropriate national authorities;

(d) do not presume that TK or TCEs/EoF will be turned into commodities or be alienated from their communities, but would rather give the holders of TK and TCEs/EoF the entitlement to say 'no' to any use of their TK or TCEs/EoF that is contrary to their wishes; this would include the right to prevent any illegitimate use by third parties, to determine and to delimit how appropriate commercial use could occur through the grant of consent to partners beyond the community, and to sustain a suitable space for community-based initiatives that would make use of TK or TCEs/EoF as the basis of community-led development and cultural exchange;

(e) allow sufficient space for continuing consultation, evolution, cross-fertilization and applying the lessons of practical experience, as continuing community, national, regional

¹¹ WIPO-UNESCO Model Provisions for National Laws for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 (the Model Provisions, 1982).

¹² See in particular the summary of views put to the Committee in Annex 2 of documents WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/5, views which shaped the current provisions, and the more detailed background in documents WIPO/GRTKF/IC/7/4 and WIPO/GRTKF/IC/7/6.

and international initiatives are taken to address various aspects of protection, safeguarding and preservation of TK and TCEs/EoF; and

(f) allow scope and opportunity for continuing capacity building and cooperation based at promoting broader goals of preservation, promotion and safeguarding of TK/TCEs/EoF, and its use in grass roots development in ways chosen by the; this would continue to emphasize those forms of capacity building and the practical tools requested by the communities themselves.¹³

22. Such considerations could help ensure that the work of the Committee meets the expectations outlined above, firstly by appropriately complementing other international laws and processes, without pre-empting or conflicting with them; and secondly by supporting and respecting communities' own traditional and customary norms and practices without encroaching upon or circumscribing them.

V. CONCLUSIONS

23. This document has attempted to summarize a complex set of issues currently before the Committee, as it takes up its renewed mandate. While the Committee's mandate is open-ended, many participants have called for some form of concrete outcome from the current phase of the Committee's work. This document has highlighted some existing resources that the Committee may wish to draw on in determining its future directions. In particular, it has sought to identify the range of options and considerations that may apply under three general aspects: the content or substance of the Committee's work; the appropriate nature, format or status of any outcome; and the kind of procedural questions that may be considered, including the Committee's own work methods, the need for ongoing consultations with stakeholders, and establishing an appropriate role within the international policy and legal framework.

24. The Committee is invited: (i) to review and draw on the above material as needed or appropriate during its ninth session when considering its work on traditional knowledge, traditional cultural expressions/folklore and genetic resources; and (ii) in particular to consider the substance, legal status or format, and procedural steps, required for possible outcomes from its work on these subjects.

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¹³ For example, those materials under development in response to requests made by holders of TK and TCEs/EoF in the consultations held by WIPO in 1998-99 (see 'Needs and Expectations of Traditional Knowledge Holders,' WIPO, 2001.)