

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

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**PROTECTING TRADITIONAL KNOWLEDGE: MISAPPROPRIATION, INTELLECTUAL PROPERTY,
AND THE FUTURE OF THE IGC**

I. INTRODUCTION

1. The Eighth Session of the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC) will be held in Geneva on 6-10 June 2005. The Eighth Session will be the last meeting of the IGC under the mandate established by the WIPO General Assembly in 2003, which instructed the IGC, *inter alia*, to “accelerate its work” and “focus on the international dimension of intellectual property, genetic resources, traditional knowledge, and folklore,” excluding “no outcome, including the possible development of an international instrument or instruments in this field.”¹ In particular, the Eighth Session will discuss the revised texts of draft provisions developed to address the international level of the protection of traditional knowledge and traditional cultural expressions/folklore against misappropriation (WIPO/GRTKF/IC/8/5 and WIPO/GRTKF/IC/8/4 respectively). As a result, the Eighth Session will be fundamental to advancing the development concerns at the core of the work of WIPO on these issues: the need to establish international and legally-binding provisions to effectively protect traditional knowledge and traditional cultural expressions/folklore from misappropriation, particularly in the context of intellectual property.

2. The present Background Note aims to support the advancement of these development concerns in the Eighth Session of the IGC in several ways. First, it will provide an analysis of the revised texts of draft provisions, focusing primarily on traditional knowledge.² Second, it will examine the different legal options put forth for advancing the international protection of traditional knowledge and traditional cultural expressions/folklore against misappropriation. Finally, as the Eighth Session will address the possibility of extending the mandate of the IGC and prepare recommendations for the WIPO General Assembly, the Note will present some issues that may be considered in this context.

3. In particular, Section II will analyze the revised draft provisions for the protection of traditional knowledge in Document WIPO/GRTKF/IC/8/5, focusing on their treatment of a primary development concern: the misappropriation of traditional knowledge in the context of the intellectual property system. Section III will then address the different options proposed by Document WIPO/GRTKF/8/6 as far as the next steps towards giving effect to the international protection of traditional knowledge from misappropriation. Lastly, Section IV will present some considerations regarding the extension of the mandate and provide some concluding remarks.

¹ Document WO/GA/30/8, paragraph 93.

² Although the analysis will focus on traditional knowledge, some of the points made may be equally relevant for traditional cultural expressions/folklore.

II. MISAPPROPRIATION, INTELLECTUAL PROPERTY, AND THE REVISED DRAFT PROVISIONS FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE (DOCUMENT WIPO/GRTKF/8/5)

4. Document WIPO/GRTKF/8/5 contains a revision of the draft objectives and principles for the protection of traditional knowledge presented in WIPO/GRTKF/7/5. Document WIPO/GRTKF/IC/7/5 was revised in light of comments presented by Member States and other IGC participants during the Seventh Session of the IGC and the review process established by that Session.³ In this regard, the pro-active participation of various stakeholders and the increased transparency in the consideration of comments and observations has impacted positively in the revised draft provisions in Document WIPO/GRTKF/IC/8/5. The revised provisions maintained the structure presented in WIPO/GRTKF/IC/7/5, with some reformulation of objectives and principles and additional comments on the substantive standards, as well as a clearer emphasis on the possibility of these provisions forming the basis of international standards for the protection of traditional knowledge against misappropriation.

5. Preventing misappropriation thus adequately continues to be the common normative theme of the revised draft provisions for the protection of traditional knowledge. Document WIPO/GRTKF/IC/8/5 establishes that its provisions may in that way complement other international instruments and processes that deal with other aspects of the preservation, safeguarding, and conservation of traditional knowledge.⁴ Preventing misappropriation of traditional knowledge - the defensive aspect of the protection of traditional knowledge – is indeed a pre-condition in developing a more comprehensive and multifaceted legal framework for the protection, preservation, and promotion of traditional knowledge and the adequate role for the IGC, particularly as misappropriation takes place in the context of intellectual property.

6. The revised draft provisions, however, still do not focus on preventing misappropriation in the intellectual property context. Given the numerous cases of illegitimate patents granted in relation to traditional knowledge, ensuring that the intellectual property system does not permit the misappropriation of traditional knowledge is fundamental. The African Group, for instance, welcomed the IGC as a “historic opportunity enabling the imbalance inherent in current intellectual property systems in the international community to be corrected” and, along with numerous other developing countries, continues to underline the need to consider the role of the intellectual property system in the prevention and suppression of misappropriation.⁵ The Philippines, Indonesia, Bolivia, India, Peru, and Brazil also expressed the need to focus on the intellectual property system aspects of misappropriation during discussions on the previous draft

³ During the Seventh Session of the IGC, for instance, developing countries welcomed Document WIPO/GRTKF/7/5 as a foundation for further discussion, particularly in light of the focus on misappropriation. A number of countries, however, recalled that the creation of IGC responded to the shared understanding that the intellectual property system should be supportive of the protection of traditional knowledge. As a result, preventing the misappropriation of traditional knowledge required, rather than a principle ensuring consistency with existing intellectual property rules, the introduction of effective measures to ensure the intellectual property regime did not undermine the protection of traditional knowledge. Moreover, a number of developing countries reaffirmed that only a legally binding international regime would be effective in preventing the global phenomenon of misappropriation of traditional knowledge.

⁴ WIPO/GRTKF/IC/8/5, paragraph 3.

⁵ WIPO/GRTKF/IC/1/13, paragraph 25.

provisions for the protection of traditional knowledge in the Seventh Session of the IGC.⁶ A general approach to misappropriation, therefore, cannot be considered sufficient.

7. Acknowledging the urgency of addressing misappropriation without a clearer focus on intellectual property is also inadequate in light of other ongoing discussions in WIPO and other international intellectual property fora. In the Working Group on the Reform of the Patent Cooperation Treaty (PCT), for example, Switzerland has proposed to amend the PCT regulations to explicitly enable the Parties to require patent applicants to declare the source of genetic resources and/or traditional knowledge, if an invention is directly based on such resource or knowledge.⁷ In the context of developing a WIPO response to the CBD request for work on disclosure requirements in intellectual property applications, the European Union has recognized “there are good reasons for an obligation to disclose that an invention is directly based on traditional knowledge associated with the use of genetic resources” in supporting a legally binding and universal disclosure requirement for inventions directly based on genetic resources.⁸ In the World Trade Organization (WTO), the Council for Trade-related Aspects of Intellectual Property Rights (TRIPS) is currently discussing the need to amend the TRIPS Agreement to prevent the granting of patents for inventions that use genetic material and associated knowledge without requiring compliance with the provisions of the Convention on Biological Diversity (CBD), including through disclosure of source and country of origin of biological resources and traditional knowledge and of evidence of prior informed consent and benefit sharing under relevant national regimes. The proposal for focused discussion was originally put forth by Bolivia, Brazil, Cuba, Ecuador, India, Peru, Thailand, and Venezuela, and has received wide and cross-regional support.⁹

8. Moreover, focusing on the intellectual property aspects of traditional knowledge is the only way to ensure the work of the IGC indeed complements other international instruments and processes that deal more comprehensively with the preservation, safeguarding, and conservation of traditional knowledge. Traditional knowledge, for instance, is addressed in a range of activities of the United Nations Education, Scientific, and Cultural Organization (UNESCO) in the fields of education, science, culture and communication. These activities include the possible creation of an international normative instrument on the protection of folklore and traditional culture.¹⁰ In the context of the CBD, the program of work addressing the commitments embodied in Article 8(j) and other provisions dealing with traditional knowledge includes establishing mechanisms with various objectives, such as ensuring the effective participation of indigenous and local communities in decision-making and policy planning; respecting, preserving and maintaining traditional knowledge relevant to the conservation and sustainable use of biological diversity; and encouraging the equitable sharing of the benefits arising from the utilization of such traditional

⁶ WIPO/GRTKF/IC/7/15 PROV.2.

⁷ PCT/R/WG/4/13.

⁸ European Community and its Member States, “Disclosure of origin or source of genetic resources and associated traditional knowledge in patent applications,” presented to WIPO Process Regarding an Invitation by the Convention on Biological Diversity on Access to Genetic Resources and Disclosure Requirements in Intellectual Property Rights Applications, December 2004.

⁹ IP/C/W/420.

¹⁰ The work of UNESCO on local and indigenous knowledge is detailed at http://portal.unesco.org/en/ev.php-URL_ID=5065&URL_DO=DO_TOPIC&URL_SECTION=201.html.

knowledge.¹¹ In particular, the mandate of the Working Group on Article 8(j) includes developing guidelines to ensure that indigenous and local communities obtain a fair and equitable share of the benefits arising from the use and application of their traditional knowledge and to ensure that private and public institutions interested in using such knowledge obtain the prior informed approval of indigenous and local communities.¹² It is fundamental that the IGC does not undermine such work and initiatives, but rather focuses on the intellectual property-related issues it was created to address.

9. The revised draft provisions on the protection of traditional knowledge in WIPO, therefore, should develop concrete measures addressing the gaps and shortcomings of the intellectual property system and supporting the implementation of international, regional, and national rules regulating access and benefit sharing. Some potential measures will be suggested in the analysis of selected provisions in Document WIPO/GRTKF/IC/8/5 below. Building a range of intellectual-property related elements into the existing draft, as well as ensuring these elements become legally binding at the international level; will be essential to ensuring the eventual outcome is an effective tool against misappropriation and a step towards the adequate protection and conservation of traditional knowledge. In addition, given the strong position of developing countries on these issues, it will also be an important measure of the consideration of development concerns by WIPO.¹³

II.A Policy Objectives

8. Document WIPO/GRTKF/IC/8/5 establishes a range of important policy objectives for a misappropriation regime, including the goal of curtailing the grant or exercise of improper intellectual property rights over traditional knowledge. Other fundamental objectives included relate to repressing unfair and inequitable uses of traditional knowledge, ensuring prior informed consent, and promoting equitable benefit sharing.¹⁴ Of the sixteen potential policy objectives mentioned in Document WIPO/GRTKF/IC/8/5, however, only precluding the grant of improper intellectual property rights, mentioned above, contains an express reference to intellectual property. Although preambular language is often quite general and imprecise, incorporating a focus on intellectual property in the core of the draft provisions is vital for two primary reasons. First, since the policy objectives provide a common direction to the protection established by the

¹¹ The program of work on traditional knowledge in the CBD is available at <http://www.biodiv.org/convention/articles.asp?lg=0&a=cbd-08>.

¹² Other international instruments and initiatives relevant to traditional knowledge include the International Labour Organization's Convention 169 on Indigenous and Tribal Peoples, the United Nations Draft Declaration on the Rights of the Indigenous Peoples, and programs within the United Nations Development Program (UNDP) and the World Bank launched to promote indigenous peoples' development.

¹³ See report for the 31st Session of WIPO General Assembly, WO/GA/31/15, at paragraph 148.

¹⁴ These objectives can be traced to the comments of Member States and observers to the IGC, in particular the African Group proposal. In addition, some of these objectives also reflect the discussion of the objectives of an international regime on access and benefit sharing in the context of the CBD, which include, for example, the proposal that the regime should aim "to ensure compliance with prior informed consent of countries of origin and of indigenous and local communities, and mutually agreed terms and support the implementation of and compliance with national legislations." The objectives of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) also address similar issues as they focus on the conservation and sustainable use plant genetic resources for food and agriculture and the fair and equitable sharing of benefits thereof, including through the recognition of the contribution of farmers and the protection of traditional knowledge.

principles and substantive provisions, developing effective intellectual-property related elements requires a clear acknowledgement of the purpose of these draft provisions: focusing on the role of the intellectual property system in preventing misappropriation. For example, the goal of an international instrument to prevent misappropriation in the WIPO context is not and cannot be enhancing transparency in regards to traditional knowledge generally – as significant as that may be – but rather concretely in the context of intellectual property claims related to traditional knowledge. As a result, as the IGC revises the list of objectives, it will be important for the broader goals and aims of the document to provide adequate guidance for the more specific substantive provisions.

9. Second, many potential elements in a regime to prevent the misappropriation of traditional knowledge find their justification within the intellectual property system, which is not reflected in the current policy objectives. In addition to increasing the transparency of the intellectual property system, measures to prevent misappropriation also improve the availability of prior art; assist in the determination of patentability of an invention; and facilitate the resolution of cases involving the challenge of patent grants, disputes on inventorship, and infringement. Moreover, intellectual property law requires equitable limitations on the acquisition and enforcement of intellectual property rights. For example, statutory or regulatory requirements prohibit the vesting of intellectual property rights when the applicant has improperly acquired the knowledge on which intellectual property rights would be based, or mandate disclosures of information so as to assure that rights are not improperly acquired.¹⁵

II.B Substantive Provisions

10. The substantive principles and rules of Document WIPO/GRTKF/IC/8/5, as the provisions realizing the purpose and objectives of a legal instrument, should incorporate different rights, obligations, and implementation mechanisms in relation to the intellectual property system. While the current substantive provisions, for example, require traditional knowledge to be protected against misappropriation and establish that the principle of prior informed consent should govern any access of traditional knowledge from its traditional holders, a number of specific measures related to intellectual property being debated or proposed in various international fora are not identified or fully addressed. Consequently, much more attention and detail is necessary on the key issue the document should be focusing on: what should be the measures taken within the intellectual property system to ensure traditional knowledge is not misappropriated and prior informed consent and fair and equitable benefit sharing are realized?

11. Article 1, for example, addresses the crucial aspect of misappropriation in the intellectual property context, but does not incorporate or suggest measures – in that same context – that would address the problem. Article 1 expands on a general principle against the misappropriation through a list of specific acts that must, at a minimum, be considered acts of misappropriation. These acts include “acquiring, claiming or asserting intellectual property rights over traditional

¹⁵ See CIEL comments presented to WIPO Process Regarding an Invitation by the Convention on Biological Diversity on Access to Genetic Resources and Disclosure Requirements in Intellectual Property Rights Applications, March 2005, available at www.ciel.org/Publications/CDB_Request_WIPO_Dec04.pdf.

knowledge-related subject matter when those intellectual property rights are not validly held in the light of that traditional knowledge and any conditions relating to its access.” The provision, however, only calls for “some form” of legal protection against such misappropriation, including outside the realm of intellectual property law. The need for flexibility in the protection of traditional knowledge, which is provided as an explanation of the approach, is valid, particularly in regards to positive protection. Since Document WIPO/GRTKF/8/5 focuses on the defensive aspects of the protection of traditional knowledge, however, the main concern should not be maintaining flexibility but rather ensuring that gaps and shortcomings in the intellectual property system that currently allow misappropriation are addressed.¹⁶ There are important measures within intellectual property systems that can and should be taken to prevent the invalid grant of patents and other intellectual property rights, as will be analyzed below. In order to truly advance the purpose and objectives of the instrument, the substantive provisions of Document WIPO/GRTKF/IC/8/5 should fully identify and address these measures.

Article 2 – Legal Form of Protection

12. In determining the legal form of the protection of traditional knowledge against misappropriation, though, the revised draft provisions do not focus on the international intellectual property system and rather highlight the need for a diversity of measures to protect, preserve, and promote traditional knowledge. In the context of work on the interrelation between intellectual property and traditional knowledge, however, achieving legal protection against misappropriation must necessarily be focused on the intellectual property system, including on measures taken to preclude the grant of improper intellectual property rights and to ensure the intellectual property system supports the principles of prior informed consent and promoting equitable benefit sharing, as well as other important policy objectives. In this regard, a number of potential intellectual property-related measures have been identified in the IGC and other WIPO bodies, as well as in other international fora, including:

- *Protecting and promoting the use of the range of flexibilities in international intellectual property rules.* For instance, the option to establish certain exclusions to patentability under Article 27 of the TRIPS Agreement. Excluding plants from patentability would contribute to impeding the misappropriation of the traditional knowledge of farmers and ensuring their rights are adequately safeguarded. In addition, the possibility of excluding from patentability certain inventions when it is necessary to protect public order and morality could be interpreted to include inventions related to traditional knowledge where, for example, the commercial exploitation of such an invention is contrary to the values or belief system of indigenous and other local communities or would not equitably share the benefits with them.¹⁷

¹⁶ While defensive and positive protection of traditional knowledge are seen as complementary, the confusion created by the unclear incorporation of positive protection in a document focusing on misappropriation is of concern. Article 2, for instance, seems to concentrate on positive protection, foreseeing that exclusive property rights may be made available for the individual and collective holders of traditional knowledge, including through existing or adapted intellectual property rights systems.

¹⁷ Kim Connolly-Stone. “The Interface with Existing Intellectual Property Systems: Limits and Opportunities for Existing Intellectual Property Rights”, (presented at the International Expert Workshop on Access to Genetic Resources and Benefit Sharing, Cuernavaca, Mexico, October 2004.) Intellectual property provisions in bilateral trade agreements, however, currently threaten to erode the flexibilities recognized by the TRIPS Agreement, for instance requiring the ratification of the UPOV Convention (1991) and efforts to grant patents on plants.

- *Applying patentability criteria more strictly.* For instance, prohibiting patents on elements as found or with minimum modification and avoiding the granting of overly broad patents is particularly important in avoiding the misappropriation of genetic resources and could also be relevant for protecting the associated traditional knowledge. Also valuable would be introducing a universal novelty requirement, which would avoid the grant of exclusive rights over traditional knowledge that has been known and used in developing countries for generations.¹⁸
- *Introducing disclosure requirements.* The disclosure of the source and country of origin of the traditional knowledge related to the claim in intellectual property applications would serve to improve the transparency of the intellectual property system, as well as serve as an important tool for tracking the use of traditional knowledge. The disclosure of evidence of compliance with national prior informed consent and benefit-sharing provisions would also enhance the legitimacy of the intellectual property system by impeding its use for illegal or illegitimate purposes and promoting its coherence with the broader legal and public policy framework.

Articles 6 and 7 – Prior Informed Consent and Fair and Equitable Benefit Sharing

11. Articles 6 and 7 address important principles for the effective protection of traditional knowledge from misappropriation, but do not establish the measures that need to be taken in the intellectual property context to effectuate these principles. Article 7 recognizes the principle of prior informed consent, stating it “should govern any access of traditional knowledge from its traditional holders,” subject to these provisions as well as relevant national laws. Similarly, Article 6 recognizes the need for the “fair and equitable sharing of benefits arising out of the commercial or industrial use of that traditional knowledge.” These provisions are significant insofar as they extend to all traditional knowledge the principles recognized for traditional knowledge related to genetic resources by the Convention on Biological Diversity (CBD) and the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (Bonn Guidelines). The Bonn Guidelines, for instance, establish that countries with users of genetic resources under their jurisdiction should take appropriate measures to support compliance with prior informed consent and the mutually agreed terms on which access was granted, including measures to encourage the disclosure of the origin of traditional knowledge in applications for intellectual property rights.¹⁹

12. Though the broader recognition and application of these principles is important, the primary aim of the draft provisions should be advancing their effective implementation by ensuring the intellectual property system is adequately supportive. For example, Article 6 does establish that “those using traditional knowledge beyond its traditional context should mention its source, acknowledge its holders, and use it in a manner that respects the cultural values of its holders,” but there is no specific reference to disclosure requirements in intellectual property applications, including those demanding evidence of prior informed consent and fair and equitable benefit before an intellectual property right is granted or enforced. Similarly, Article 6 states that “legal

¹⁸ Carlos Correa, “Establishing a Disclosure of Origin Obligation,” Quaker United Nations Office Occasional Paper 12 (2003).

¹⁹ The Bonn Guidelines can be found in Decision VI/24 of the Conference of the Parties to the CBD, available at <http://www.biodiv.org/decisions/default.aspx?m=cop-06&d=24>.

means should be available to provide remedies for traditional knowledge holders in cases where the fair and equitable sharing of benefits ... has not occurred, or where knowledge holders were not recognized as provided for.” There is no reference to where and how these measures should be implemented, however: Would measures providing for damages be sufficient in cases of lack of recognition of holders of traditional knowledge in an intellectual property application? Would measures facilitating access to justice in user countries be necessary? Would a monitoring body be created to ease the application of such remedies?

Article 13 – Administration and Enforcement of Protection

13. In this regard, Document WIPO/GRTKF/IC/8/5 should also include provisions to ensure that its intellectual property-related measures are adequately implemented and enforced. Article 13, while foreseeing a national authority to determine whether an act constitutes misappropriation and to assist holders of traditional knowledge to use, exercise and enforce their rights, does not address the role of intellectual property offices or the measures necessary to ensure compliance with intellectual property-related provisions. Moreover, it does not consider that the nature of the misappropriation of traditional knowledge poses particular problems and opportunities for enforcement, including the inequality of the stakeholders in terms of bargaining power and the possibility of utilizing mechanisms of other international regimes, such as the certificates of legal provenance being developed in the CBD context.

14. Specific issues that Document WIPO/GRTKF/IC/8/5 should consider, for instance, include mechanisms to facilitate the access to administrative and judicial procedures relating to intellectual property to indigenous and other local communities, as well as to national authorities in their representation. Another example would be some form of monitoring mechanism, as is currently being proposed by some experts in the context of the ITPGRFA. This mechanism might be charged with tracking intellectual property claims relating to traditional knowledge and informing the relevant national authorities, as is suggested in Article 13, paragraph 2. Moreover, if the tracking mechanism were to identify widespread patterns of abuse, a misappropriation regime should incorporate the possibility of sanctions.²⁰

II.C General Guiding Principles

15. Although the analysis in this Background Note has focused on the policy objectives and substantive provisions of Document WIPO/GRTKF/IC/8/5, the general guiding principles are another essential element of the draft provisions and should, as a result, also focus on addressing the intellectual property dimension of misappropriation. General guiding principles serve as tools to interpret the substantive provisions and thus provide checks and balances to ensure harmony in the implementation of multiple policy objectives and with broader national goals. In this regard, the principles of effectiveness and accessibility of protection, equity and benefit-sharing, and consistency with existing legal systems governing access to associated genetic resources are

²⁰ Manuel Ruiz. “Access Laws: Challenges in Implementation, Monitoring and Enforcement”, (presented at the International Expert Workshop on Access to Genetic Resources and Benefit Sharing, Cuernavaca, Mexico, October 2004.)

important steps towards achieving an adequate protection of traditional knowledge against misappropriation. Other principles, however, should refer more directly to the intellectual property system. For example, the principle of flexibility and comprehensiveness contains language regarding the need for protection to include defensive measures to curtail illegitimate acquisition of industrial property rights over traditional knowledge or associated genetic resources, which should be clarified and highlighted. The principle of respect for and cooperation with other international and regional instruments and processes needs to be equally balanced and complemented with the principle that intellectual property should be supportive and not run counter the principles and substantive provisions of the instrument, as is also stated in the CBD. Finally, additional principles relating to intellectual property should also be incorporated, for instance referring to the need to protect and promote the public domain while respecting the rights of indigenous and other local communities, and to ensure the levels of intellectual property protection are adequate to advance public policy objectives.

II. PRIORITIZING THE INTERNATIONAL DIMENSION: OPTIONS FOR ENSURING INTERNATIONAL PROVISIONS FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE ARE EFFECTUATED IN NATIONAL LAWS (DOCUMENT WIPO/GRTKF/IC/8/6)

16. Document WIPO/GRTKF/IC/8/6 – “Practical Means of Giving Effect to the International Dimension of the Committee’s Work” – acknowledges that the international dimension is “a matter of the greatest priority” for many IGC participants and part of the current mandate of the IGC.²¹ Given the decision of the IGC to deal with the international dimension within the discussion of substantive issues on the agenda, Document WIPO/GRTKF/IC/8/6 focuses not on substance but on the manner in which the substance discussed in other IGC documents would, in practice, be given effect at the international level. In particular, Document WIPO/GRTKF/IC/8/6 addresses three issues the International Bureau considers must be resolved in developing “an appropriate legal or policy vehicle for giving international effect” to substantive provisions for the protection of traditional knowledge and folklore.²² First, Document WIPO/GRTKF/IC/8/6 raises the need to develop an adequate interaction with other international legal mechanisms and processes, recognizing that focusing on misappropriation distinguishes “an appropriate role for the Committee’s norm-building activities vis-à-vis other international processes.”²³ As mentioned below, focusing on misappropriation – and particularly in the context of intellectual property – is indeed an adequate approach in light of the discussions in the IGC and other international fora. However, Document WIPO/GRTKF/IC/8/6 goes on to state that such an approach would focus the draft provisions on “the most appropriate and relevant aspect of the broader field of intellectual property law, namely characterizing those acts of third parties... which are to be considered illegitimate, unauthorized or otherwise inappropriate forms of use of traditional knowledge.”²⁴ This language seems to actually exclude the aspects of intellectual property, such as patent law, that most need to be addressed to prevent the misappropriation of traditional knowledge. Some clarification in this regard would be essential if this document were to be revised.

²¹ WIPO/GRTKF/IC/8/6, paragraph 6.

²² *Id.*

²³ WIPO/GRTKF/IC/8/6, paragraph 17.

²⁴ WIPO/GRTKF/IC/8/6, paragraph 18(i).

17. Second, Document WIPO/GRTKF/IC/8/6 mentions the issue of how rights and interests of foreign holders of traditional knowledge are to be recognized in national laws. For example, it describes the principles of national treatment and most-favoured-nation and how they might apply in the traditional knowledge context. However, given that the draft provisions focus on misappropriation rather than property rights, the usefulness of these principles may be limited in the current discussions. Nevertheless, some of the issues raised in the discussion of this item, such as facilitating access to the domestic legal system for foreign nationals, may merit more consideration in light of the above-mentioned need to introduce adequate implementation and enforcement measures.

18. The third issue raised in Document WIPO/GRTKF/IC/8/6 is perhaps the most relevant in considering the next steps in advancing the international dimension of the work of the IGC: the different legal approaches to providing an international layer of protection for traditional knowledge. Indeed, the consideration of an “appropriate vehicle or procedural steps to give effect to any substantive outcome substantive form of such an instrument” is a central theme of document WIPO/GRTKF/IC/8/6.²⁵ Though the document states there is no consensus on which would be the adequate approach, it does acknowledge that a “significant number of WIPO Member States have stated in the Committee and in other fora that the conclusion of a binding international instrument or instruments in this area is an important or fundamental priority.”²⁶ Indeed, given that gaps in international intellectual property currently allow for traditional knowledge to be misappropriated across borders, only a legally binding international approach will effectively address the problem of misappropriation.

19. A legally binding international approach, however, does not require international law with directly binding effect on countries. As Document WIPO/GRTKF/IC/8/6 rightly notes, “what is often termed international protection of intellectual property is – on the whole- ultimately provided through rights and interests recognized and exercised under national laws.”²⁷ In order to be effective, nevertheless, an instrument against the misappropriation of intellectual property, as international intellectual property instruments, does have to contain legally binding norms – expressed and applied at the international level and implemented and operationalised in a compulsory manner through national laws. Other approaches, from non-binding statements to guidelines and model provisions, would only serve to enhance the national protection in a limited number of countries – most likely the countries where the holders of traditional knowledge are located – and not adequately address the international dimension of the problem of misappropriation.

20. Nevertheless, as Document WIPO/GRTKF/IC/8/6 comments, legally binding and non-legally binding approaches are not necessarily mutually exclusive. In this regard, Document WIPO/GRTKF/IC/8/6 highlights the possibility of a “phased approach,” in which international standards are elaborated or revised with time, with increasing legal effect.²⁸ The phased approach is suggested as a compromise of the differing views of IGC participants as to the next steps in the international protection of traditional knowledge against misappropriation, as well as

²⁵ WIPO/GRTKF/IC/8/6, paragraph 6.

²⁶ *Id.*

²⁷ WIPO/GRTKF/IC/8/6, paragraph 23.

²⁸ WIPO/GRTKF/IC/8/6, paragraph 30.

a recognition that, in a system in which Member States have the choice to adhere to each international instrument, even once legally-binding instruments are negotiated, their effectiveness is not assured.²⁹ In addition, the “soft law” approach to international norm creation is advocated as a means to avoid the belaboured process of treaty making at WIPO. Developing an international instrument entails the establishment of a specific committee, whose deliberation period is followed by the establishment of a preparatory committee for a diplomatic conference, and then ultimately by a diplomatic conference to adopt the proposed instrument.³⁰ It has been noted that this process, if run smoothly, is likely to take a minimum of five years.³¹ Document WIPO/GRTKF/IC/8/6 suggests the non-binding approaches would be easier to develop, with the possibility of evolving into an instrument with binding effects, and suggests alternatives such as a non-binding statement or recommendation; guidelines or model provisions; authoritative or persuasive interpretations of existing legal instruments; or a political declaration supporting core principles and outlining the needs and expectations of TK holders.³² However, none of these options ensure an easier or prompt consensus. Moreover, even if agreeing on such non-binding instruments, the problem of addressing illegitimate intellectual property rights granted in “user countries” would not have been effectively addressed.

IV. CONCLUSION: CONSIDERING THE RENEWAL OF THE IGC MANDATE

21. As developing countries made clear in discussions towards the 2003 renewal of the IGC mandate, continuing work in the IGC is not a goal in and of itself. Indeed, the original objective of the IGC was to clarify issues relating to genetic resources, traditional knowledge, and folklore sufficiently to include and address them in intellectual property discussions in other WIPO bodies. Instead, the work of the IGC has often been used by developed countries to detract from important initiatives taken in other intellectual property fora to protect traditional knowledge from misappropriation – even when the current mandate of the IGC makes clear that discussions are without prejudice to other international processes. In this regard, the affirmation in the “Statement Adopted at the end of Informal Consultations in Casablanca on February 16, 2005” that the issue of the sufficiency of disclosure and genetic resources, raised in the SCP context, should be looked at in the IGC, is completely unacceptable.³³ In particular, the statement clearly goes beyond the mandate granted to the Director General by the General Assembly in 2004, and undermines the WIPO Development Agenda adopted by the same meeting of the General

²⁹ The Secretariat notes that the number of countries currently adhering to WIPO treaties ranges from 169 (Paris Convention) to 19 (Patent Law Treaty), and that several other treaties have not entered into effect due to lack of ratifications. See WIPO/GRTKF/IC/8/6, paragraph 28.

³⁰ Edward Kwakwa, (2002), “Some Comments On Rulemaking At The World Intellectual Property Organization”, *Duke Journal of Comparative & International Law*, 12 Duke J. Comp. & Int'l L. 179.

³¹ *Id.*

³² WIPO/GRTKF/IC/8/6, paragraph 29.

³³ The Casablanca Statement (WIPO document SCP/11/3) is a document presented by the WIPO Director General to the Standing Committee on the Law of Patents. The SCP is invited to consider and adopt the recommendations, the objectives and the work program for the SCP as contained in the statement for transmission to the WIPO General Assembly in September/October 2005. It is worth noting that the representative of Brazil who was at the Casablanca meeting dissociated himself from the statement. Subsequently, the delegation of India has also clarified that Dr. Mashelkar, who chaired the meeting, attended the meeting in his personal capacity and did not represent the government of India. Moreover, the legitimacy of the Casablanca statement was questioned by a statement of the group of Friends of Development.

Assembly, which emphasizes a more inclusive, transparent and open-ended *modus operandi*. In considering an additional renewal of the mandate, therefore, it must be emphasized that continued work in the IGC will only be justified if there is clear agreement that the issues related to the relationship between intellectual property and genetic resources, traditional knowledge, and folklore should advance in parallel in different relevant fora, including the Council for TRIPS and the SCP.

22. Moreover, despite the current mandate for the IGC to focus on concrete outcomes at the international level, including an international instrument or instruments, work has not sufficiently concentrated towards effective intellectual property-related measures to protect traditional knowledge and traditional cultural expressions/folklore. In this regard, work in the IGC should only continue on the basis of agreement on the need for concrete and tangible intellectual property-related measures that would enable developing countries to effectively protect their traditional knowledge and traditional cultural expressions/folklore from misappropriation. Documents WIPO/GRTKF/IC/4 and WIPO/GRTKF/IC/5, which contain revised draft provisions for the protection of traditional knowledge and traditional cultural expressions/folklore with an increased focus on misappropriation, may provide, in this regard, a solid basis for further work. Nevertheless, significant emphasis must still be placed on the intellectual property aspects of the draft provisions. For example, specific measures must be introduced to overcome the gaps in the existing international intellectual property rules that allow and promote the misappropriation of traditional knowledge. In particular, the importance of disclosure requirements in intellectual property applications as a pre-condition to any effective protection of traditional knowledge must be emphasized. Disclosure requirements should thus be included in the provisions as a procedural element of the misappropriation regime.

23. A sound foundation for future work should also be established in regards to the form of effectuating substantive provisions at the international level. As analyzed above, a legally binding instrument constitutes the sole alternative for an effective and comprehensive solution to the misappropriation of traditional knowledge in the intellectual property context. Any other approach would not adequately address the global aspects of the problem and the key role of “user countries.” Nevertheless, the role of the “soft law” approaches as complementary to a legally binding instrument must be analyzed. For instance, a political statement committing to prevent misappropriation of traditional knowledge in the context of intellectual property could be an outcome of the Ninth Session of the IGC, as work towards a legally binding instrument continues. Such a political statement might also be accompanied by guidelines outlining minimum standards of protection of traditional knowledge against misappropriation in the intellectual property system – again as work towards an international legally binding instrument that fully addressed the problem continues as the highest priority.