

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

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LEGAL PRINCIPLES RELATED TO AN INTERNATIONAL INSTRUMENT

Prepared by the Secretariat

1. At its Forty-Fifth Session, which addressed traditional knowledge (TK) and traditional cultural expressions (TCEs), the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) “requested the Secretariat to update and streamline by IGC 46 some documents from the early years of the IGC on topics such as rights and measures-based approaches, the interplay between national and international instruments, the differences between minimum and maximum standards, and options for the legal nature of international instruments.” This document has been prepared in relation to an international instrument(s) on TK and TCEs for this session pursuant to this decision. The document is an initial draft and may be developed further for future sessions of the Committee.

OPTIONS FOR THE LEGAL NATURE OF INTERNATIONAL INSTRUMENTS

2. The choice of the legal nature of an international instrument is a political question for WIPO’s Member States to consider and determine. The IGC’s mandate requested the IGC to “continue to expedite its work, with the objective of finalizing an agreement on an international legal instrument(s), without prejudging the nature of the outcome(s).” Accordingly, the present document does not seek to promote any particular outcome, but simply aims to catalogue and factually describe some of the main available options. The range of options described below is descriptive and non-exhaustive:

- a binding international instrument;
- a non-binding international instrument (soft law);
- model laws or guidelines.

A binding international instrument

3. A binding international instrument refers to a treaty or convention that creates legally binding obligations for its signatory states. It would oblige contracting parties to apply the prescribed standards in their national law, as an obligation under international law. This type of instrument can be used to establish a common set of rules and standards for the protection and enforcement of intellectual property (IP) globally.

4. A distinct treaty-making process would be required (typically, a diplomatic conference) to negotiate and adopt such an instrument. The instrument would become binding only on those countries which decide to adhere to it through a distinct act of ratification or accession. While other states would not be bound by the treaty as such, they may choose to apply the standards created by the instrument without formally adhering to it.

5. Binding instruments may have the character of framework or policymaking conventions, providing a basis or policy platform for further normative development and for greater convergence and transparency of national policy initiatives. Specific international legal mechanisms with more precise obligations may then be negotiated as protocols under the original framework agreement.

6. Examples of binding international instruments in intellectual property include, amongst others, the Patent Law Treaty (2010), the WIPO Copyright Treaty (1996), the WIPO Performances and Phonograms Treaty (1996) and the Madrid Agreement Concerning the International Registration of Marks (1979).

A non-binding international instrument

7. A non-binding international instrument can take the form of a recommendation, resolution, declaration, decision or any other form of instrument that does not create legally binding obligations for its signatory states (“soft law”).

8. Such an instrument can reflect the political will of member states, including agreement on core issues or principles in a given area, or provide guidance on policy issues or best practices and standards. It 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 choose to follow the agreed approach.

9. Examples include the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007) or the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks adopted in 1999 by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly.

10. A non-binding international instrument can have a consensus-building effect and provide the basis for future negotiations of binding international law.

11. In some instances, declarations and other forms of soft law can eventually become legally binding customary international law over time. Customary international law derives from a general practice accepted as law. For example, some consider aspects of the Universal Declaration of Human Rights (1948), such as the right not to be subject to torture and the right

against arbitrary imprisonment, to be customary international law. Similarly, several key provisions of UNDRIP are considered by some as part of the quickly evolving area of customary international law.

Model laws or guidelines

12. Model laws or guidelines are a standardized set of legal provisions that can serve as a reference for national legislation. They are meant to provide guidance for states in developing their own laws or regulations. They can help ensure a consistent level of protection across countries and promote harmonization of IP laws at the international level. They are not legally binding and each country remains free to adopt or adjust provisions in a manner that suits them.

13. Such tools have in the past been used to express a shared international approach and 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, and can also lay the groundwork for more formal international instruments.

14. In practice, it may be difficult to distinguish between model laws or guidelines and the kind of soft law norms discussed above.

15. Examples include the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions (1982) and the 2002 Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture.

AN OVERVIEW OF RELEVANT APPROACHES IN DRAFTING AN INTERNATIONAL LEGAL INSTRUMENT(S) ON TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS

Positive and defensive protection approaches

16. The IP system can be approached from two different angles to ensure protection of TK and TCEs. These two approaches, generally referred to as “positive” and “defensive” protection, can be undertaken together in a complementary way.

17. Under the positive protection approach, the IP system is designed to enable holders, if they so wish, to acquire and assert IP rights in their TK/TCEs. This can allow them to prevent unwanted, unauthorized or inappropriate uses by third parties (including culturally offensive or demeaning use) and/or to exploit TK/TCEs commercially, for example through the granting of licenses, as a contribution to their economic development. In brief, positive protection is the granting of rights that empower communities to promote their TK/TCEs, control their uses by third parties and benefit from their commercial exploitation. Numerous national and regional laws provide *sui generis* IP rights in TK and TCEs – these are examples of a “positive” approach.

18. The defensive protection approach, on the other hand, is designed to prevent the illegitimate acquisition or maintaining of IP rights by third parties. Stated otherwise, defensive protection aims to stop people outside the community from acquiring IP rights over TK and TCEs. Measures that place TK in the public domain aimed at preventing third parties from acquiring patents in inventions closely based on the TK is a good example of a “defensive” approach.

Rights-based and measures-based approaches

19. The rights-based approach places emphasis on the recognition and protection of IP rights as legal entitlements. The objective of this approach is to create a legal framework that safeguards the rights of creators and owners of IP. In a rights-based approach, the beneficiaries are granted rights, which they can manage and enforce. Third parties have a corresponding obligation to respect those rights. For example, the Berne Convention for the Protection of Literary and Artistic Works (1971) (the Berne Convention) grants authors a range of exclusive economic and moral rights.

20. In a measures-based approach, emphasis is placed on the measures taken to protect IP, rather than the rights themselves. Contracting states are enjoined only to provide “measures” to, for example, ensure the protection of TK/TCEs, or prevent the occurrence of certain acts. Such measures can be legal, administrative or practical in nature.

21. For example, the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974) requires contracting states to take adequate measures to prevent the unauthorized distribution on or from its territory of any programme-carrying signal transmitted by satellite.

22. Rights-based and measures-based approaches are not mutually exclusive and there are examples of international instruments containing both approaches. For example, the WIPO Copyright Treaty (1996) establishes the right of reproduction, distribution, and communication to the public as exclusive rights of the copyright holder (rights-based), but it also prohibits the circumvention of technological protection measures and the distribution of tools to circumvent them (measures-based).

Minimum and maximum standards of protection

23. Minimum standards of protection refer to the basic level of protection that must be adhered to by all signatories to an international legal instrument in their national law. While ensuring a common basic level of protection, this approach also allows for some degree of variation in the levels and specifics of protection between countries, as countries may enact higher standards in their national laws.

24. For example, under the Berne Convention certain minimum standards of protection have been prescribed relating to the duration of protection. According to Article 7, the minimum term of protection is the life of the author plus 50 years after his or her death. However, a number of countries have chosen to go beyond this minimum term of protection.

25. On the other hand, maximum standards of protection refer to the highest level of protection that can be granted under national law.

26. For example, in the context of the Trademark Law Treaty (1994), Article 5 of the Treaty provides for the maximum information that an Office may require for the grant of a filing date; Article 12 contains the maximum requirements that an Office may request for the correction of mistakes made by an applicant or holder in any communication to the Office, and Article 13 enumerates the maximum requirements that an Office may impose with respect to renewal.

THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW

27. The evolution and development of international IP law has built on a number of core elements. These included the recognition of national treatment, the overall independence of

rights granted under different national laws, the national discretion to implement international standards through a variety of legal doctrines and mechanisms, a focus on addressing practical hurdles faced by right holders when their rights were obtained through formal procedures, and a need for administrative coordination. The following paragraphs focus on the principle of national discretion in applying international standards.

National discretion in applying international standards

28. International IP law makes a distinction between the articulation of international standards and principles, and the choice of national legal mechanism to give effect to what has been agreed. This often gives contracting states wide areas of discretion in how and by what legal tools and doctrines they give effect to international standards.

29. In some instances, international instruments explicitly set out the range of legal mechanisms under national law to give effect to general protection standards articulated at the international level. Protection requirements may also simply be articulated in terms of those entitled to initiate legal action or to seek remedies in line with the general standards set out in the international instrument.

30. While national discretion is an important aspect of the international IP system, it must be exercised in a manner that is consistent with international obligations and does not undermine the general standards set by the international instrument. The goal of national discretion is to ensure that each country can tailor its IP laws to its own needs, while also contributing to the overall stability and predictability of the international system.

31. For example, under the WTO Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994), members are free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice, and may implement more extensive protection than what is required, provided that such additional protection does not contravene other provisions of the Agreement (Article 1). Under the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (1971), the means of implementation of the Convention is a matter of domestic law. Contracting parties can choose one or more methods of implementation, which include protection by means of the grant of a copyright or other specific right, protection by means of the law relating to unfair competition, or protection by means of penal sanctions (Article 3).

32. The IGC is invited to take note of this document, and provide comments, as it may wish, towards the Secretariat developing a revised version thereof.

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