

**OBSERVATIONS RELATIVES A L'AVANT-PROJET DE CONVENTION
SUR LES ACCORDS EXCLUSIFS D'ELECTION DE FOR**

reçues par le Bureau Permanent

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**COMMENTS ON THE PRELIMINARY DRAFT CONVENTION
ON EXCLUSIVE CHOICE OF COURT AGREEMENTS**

received by the Permanent Bureau

*Document préliminaire No 29 de mai 2005
à l'intention de la Vingtième session de juin 2005*

*Preliminary Document No 29 of May 2005
for the attention of the Twentieth Session of June 2005*

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TABLE DES MATIERES / TABLE OF CONTENTS

I^{re} PARTIE / PART I – OBSERVATIONS DES ETATS MEMBRES / COMMENTS RECEIVED FROM MEMBER STATES

Etats-Unis d'Amérique (uniquement en anglais) / United States of America (in English only)	5
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II^{de} PARTIE / PART II – OBSERVATIONS DES OBSERVATEURS / COMMENTS RECEIVED FROM OBSERVERS

Organisation Mondiale de la Propriété Intellectuelle (OMPI) (uniquement en anglais) / World Intellectual Property Organisation (WIPO) / (in English only)	12
International Association of Insurance Supervisors (IAIS) (uniquement en anglais) / (in English only)	30

I^{re} PARTIE – OBSERVATIONS DES ETATS MEMBRES
PART I - COMMENTS FROM MEMBER STATES

**Comments from the United States of America on the
December 2004 Report on the Preliminary Draft Convention
on Exclusive Choice of Court Agreements
(dated 10 June 2005)**

This note offers comments on the 2004 Report on the Preliminary Draft Convention, and takes the opportunity to offer views on what the final Report might look like. We appreciate very much the supreme effort that the *Rapporteurs* have made in preparing the 2004 Report, and look forward to cooperative and productive efforts to prepare the final Report following a successful Diplomatic Conference.

Note on the Final Report

The 2004 Report on the Preliminary Draft played a role in the preparation of a final convention that the final Report of the adopted convention will not play. Although the comments on the 2004 Report set out below are drafted with respect to the addition or deletion of specific language, we recommend strongly that the final Report not start with the draft of the 2004 Report. There are simply too many places where the approach of the 2004 Report is unsuitable for a Final Report. It is important for the final Report to start with a fresh approach.

The goal of any final report on an adopted Convention is to explain the intention of the parties to the negotiation. In our view, the Report should focus on presenting a clear and concise overview of the Convention, and outlining the core concepts and purposes of the Convention. It should be both a tool for the well informed, and an introduction for the uninformed. In general, it should not seek to raise and discuss all possible misinterpretations. If a matter has been specifically discussed in the Diplomatic Conference, and there has been a request for it to be clarified in the Report, then it would be appropriate to go into hypothetical examples. But in general, the *Rapporteurs* should avoid writing a detailed review and analysis of the text. In particular, it is in our view inappropriate for the Report to offer an interpretation of the plain language of the text if that interpretation was not specifically discussed at the Diplomatic Conference. That is for future academic work.

The Report might begin with an overview that highlights that the three basic rules of the Convention are found in Articles 5, 7, and 9. By simply beginning with Article 1, the Report could create the impression that a front-to-back read can help one best understand the Convention. Our experience is that this kind of reading can create problems, as it does for people who come to the Brussels Convention and Regulation for the first time and try to read it in consecutive order. The Report should begin with an introduction to the core rules:

- 1) The chosen court has exclusive jurisdiction and must exercise it (Article 5).
- 2) A court not chosen must (with limited exceptions) defer to the chosen court (Article 7).
- 3) Contracting States will recognize and enforce judgments resulting from choice of court jurisdiction (Article 9).

If it is adopted, the Drafting Committee text of Article 11 may also be viewed as adding a fourth basic rule: Courts in contracting states will not recognize and enforce judgments from non-contracting state courts that are in violation of exclusive choice of court agreements.

Comments on 2004 Report

Introduction

Note: No reason to recite history of the larger project in the final report. The new convention will stand entirely on its own.

Paragraph 4, line 8: "must" vice "can".

Paragraph 7 – this paragraph is unnecessary. Why apply terminology of the previous (failed) project to this one? Becomes very silly to talk about this new convention in terms of the "gray area."

Article 1

Paragraph 10 –Article 1(2) has nothing to do with territorial units, and it is confusing and misleading to lump them in here. This paragraph should end at the end of the second line with "...should apply without restriction in domestic cases." It should not be occasion to foreshadow discussion of federal state/REIO issues. It should not suggest that to apply this one must determine what "state" means. Moreover, this paragraph fails to note that article 1(2) only applies to determine the application of Chapter II (jurisdiction).

Paragraph 14, line 5 – "may also" vice "would".

Paragraph 15. Not so sure that "civil and commercial" is "standard" in OAS and former Soviet Union countries' conventions. Line 2 should say: "...standard in Hague Conventions [footnote to Service and Evidence Conventions]. It is generally interpreted to exclude public..." Footnote might be to the Reports on those conventions or to the Implementation Guides.

Paragraph 15, line 5 and footnote 17 – Disagree with the statement that it is "necessary" to use both terms. Both terms may be helpful to some legal systems, but is confusing to others. Using only "commercial" would be helpful and understandable to some systems but confusing to others. In any case, any term could be used if it was clear that it was an autonomous definition. Thus, the footnote is misleading.

Article 2

Page 2, footnote 22 – Put this in the text of the report.

Paragraph 29, line 1 – Redraft for clarity: "Another example of the exclusion for antitrust/competition matters would be the rule..."

Line 5 – "against public policy" vice "wrong".

Line 6 – "the rule" vice "it".

Paragraph 39, line 5 – add "generally" before "agree".

Line 9 – "precisely" vice "only".

Footnote 42 – add "under its own law and outside the Convention" after "them".

Paragraph 48, lines 2-3 – "where specifically provided" vice "in those areas expressly covered by it (jurisdiction, and recognition and enforcement of foreign judgments)".

Paragraph 53 – Delete as unnecessary.

Paragraph 54 – This paragraph is unclear – does it imply de novo review of the existence of the choice of court agreement? If so, that should be discussed in Article 3 and 9. There is no reason to refer to rules of evidence.

Footnote 58 – this is extremely misleading. Must make clear that the autonomous rule of this convention is to have a different outcome from Ruffer and similar. Goal is the Ivey-type result, not to have the Convention be applied differently in different countries. This is a critical point. Pocar/Nygh report was clear and correct.

Paragraph 59 – why exclude bail bonds?? Never discussed and should not be dismissed here. Footnote 59 cites a case that seems unrelated to bail bonds. All very unclear.

Article 3

Paragraph 63 – Third party issues is complex and will have results based on local law. Why go into this? There is no convention rule.

Paragraph 72, last sentence – this statement, under which one party can convert a non-exclusive choice of court agreement into an exclusive choice of court agreement can't be right. Don't recall ever having agreement on this.

Paragraph 80 – Cannot understand the meaning of the first sentence.

Paragraph 82 - Cannot understand the discussion of consideration or what its place is in the report. Cannot understand the rationale for additional language suggested at the end of the paragraph. There is an issue whether under Article 9 the F2 court can determine that there was no actual agreement on choice of court (no meeting of the minds/consent) and therefore F1 had no jurisdiction. Needs to be resolved and addressed in report.

Article 4

Paragraph 95, line 4 – “the question is left to internal law” vice “the question is more difficult”.

Paragraph 97 – this is misleading. There may be other factors involved in determining what is “appropriate” – this implies that EC court can't refuse to hear a case in favour of *lis pendens* in the court not chosen.

Article 5

Paragraph 105 – add reference to court-made rules (common law countries).

Article 6

Paragraph 114 – this will necessarily be redrafted – intent is to be a savings clause only and apply to all excluded matters under Article 2 in context of being considered as an incidental question.

Article 7

Footnote 122 – there is a recent Australian case like this.

Paragraph 124 – should refer in first sentence to choice of law rules of court as done in paragraph 125.

Paragraph 128 – Should not/not redraft the provision (“manifestly contrary to fundamental principles of public policy” into “manifestly part of its public policy”)? Report needs to resist the inclination to redraft this carefully negotiated provision. Restate the

provision in its own words and note that it is intended to apply not to technical violations of mandatory rules, but to set a very high threshold. If this is not the intent, then we would insist on deleting the choice of law rule in 7(a).

Article 9

Paragraph 141 and footnote 153 – We had understood 9(1)(c)(ii) to be an extraordinary remedy, with an extremely high threshold where service was carried out in such a fashion that it constituted a violation of local sovereignty – e.g., if a foreign judicial officer came illegally to serve. We extremely surprised to read in the report that it could be interpreted to cover routine instances where a civil law country deems foreign service to violate even technical requirements of local law. This is unacceptable to us – we had thought there was broad acceptance of the approach in (c)(i). This provision serves no purpose if it is only an example of the application of a public policy exception. If some were to read it to permit technical violations of the Hague or other conventions and local law to be grounds for declaring local sovereignty to be violated, the convention would be severely undermined. The case cited in footnote 153 – our understanding had been that under Japanese judicial precedent, foreign service by mail would not be a ground in itself not to enforce a judgment. Rather, the court would look to see where the defendant was unfairly prejudiced – for example, by being served in a foreign language.

Footnote 154 – add “in some serious way” after conflicts, and “mandatory” before “substantive law.” This is a critical point – the high threshold for the application of public policy is critical to the effective and uniform application of the Convention. Must make clear that the mere existence of a statute or regulation that might somehow conflict with the judgments is not grounds for a public policy refusal of recognition and enforcement.

Discussion of 9(1)(f) – Do not agree and/or do not understand various parts of the discussion here, including the relationship to Article 11. However, this was clarified by the Drafting Committee, and the final report should carefully track the final provision.

Paragraphs 146-152 - Discussion in final Report must track conclusion of text in Article 11.

Footnote 165 - There was no agreement on this categorical conclusion. It is also inconsistent with the text of paragraph 153.

Paragraph 154 – Drafting is unclear – appears to say that revision au fond is permitted under Chapter III. Perhaps add the word “limited” before “review” in line 2.

Article 11

Discussion of this article is not clear; drafting committee made some progress in narrowing and clarifying the provision. The final report should track closely the text and rationale for any final agreed text.

Article 12 & 13

Paragraph 180 - Report describes a situation that will not be known or understood to common law courts – enforcement but not recognition – where the settlement does not even resolve the dispute between the parties, but is intended to be enforced. It is not easy for a common law court to be expected to understand that the judicial settlement under Article 12 is only a “contractual defence to the claim.” Report leaves out the critical, agreed point, that a person wanting to enforce a transaction *judiciare* in a common law court (where it is unknown) must produce a court order that is enforceable per Article 13(1)(d). This comes in paragraphs 184-185. There must be a specific reference to Article 13(1)(e) and an admonition to civil law parties to get a court statement that the settlement is judicial enforceable in the country of origin. It is very important for the final Report to include such practice-oriented directions.

Article 14

Paragraph 14 – not clear the reason for the discussion of no special procedures. Don't recall consensus or extended discussion of this point in the special commissions, and do not see the basis for the recommended language.

Article 15

This section departs in a major way from the carefully negotiated text of this provision, which has changed very little over several years of negotiations, and was the subject of a careful explanation in the Pocar/Nygh Report. The Report departs in significant ways from the actual text of Article 15 and from the explanation of the Pocar/Nygh Report, adding unhelpful glosses that significantly lower the high threshold of the provision.

Paragraph 190 – intent was for 15(2) to cover only grossly excessive damages, not non-compensatory damages. This is a major departure from the agreed text.

Paragraph 190 & 194 *et seq.* The provision addresses "grossly excessive damages." The report departs from this standard in a number of places, referring only to "excessive" damages – this is a substantial and unjustified departure from the plain language of the text. Moreover, there was no discussion that we recall to the effect that 15(2) should apply to non-compensatory damages. If there was discussion, there was certainly no consensus.

Paragraph 193 – This paragraph is self-contradictory. The first sentence states that in certain circumstances, "the part of the foreign judgment awarding non-compensatory damages will never be recognized or enforced." The final sentence states that: "In all cases, however, it is permitted to recognize and enforce the judgment to the full amount." The first sentence should be deleted.

Paragraph 195, last line – "the award cannot be reduced solely for this reason" vice "the award cannot normally be reduced for this reason" – it can *never* be reduced solely on the basis of the standards in F2 – this was the clear intent of the provision.

Paragraph 196 – There is no requirement for that the F2 court *will* reduce damages. This is a major and unjustified departure from the text. It must read "may".

Paragraph 197 – There is no justification for the Report to depart from the Pocar/Nygh report because there was "strong criticism" by "several delegations." There were also strong statements on the other side. The Report should not be weighing and balancing the strength of the debate. Paragraph 197 should end after the words "...State of origin" in the first sentence. The rest is the reporters' gloss for which there is no consensus. The statement that "if 'standards' are to be applied, they must be those of the requested State" is contrary to the plain language of 15(2) regarding "grossly excessive damages." The test is, and must, be the standards of the judgment state.

Paragraph 198 – Delete this paragraph. We do not agree that the term "standard" suggests rules, but do not understand what it means to say the "test is not one of rules but of judgment." In other parts of the convention (*e.g.*, Article 7), delegations seem to abjure giving discretionary powers to courts.

Paragraph 199 – Reference in first sentence to "excessive" should be "grossly excessive." Last sentence should be deleted. While it may be fair to compare the threshold of a public policy exception (at least in common law courts) to the threshold here, it is not correct to declare that the "essential question" becomes whether there is a public policy violation here. That is a reporters' gloss for which there is no consensus.

Paragraph 207 - adding a "genuine attempt" standard here is interesting, but it is not easier to apply and has no basis in the text. Third sentence should be revised to begin: "If a statute or contract provides an estimate for a fair level of compensation in advance..." Could add a sentence making clear that this is done to reduce to burden, time, and cost of proving exact amount of damages, and give some examples. In the last sentence, it should be revised to begin: "If, on the other hand, the provision provides for a sum for purposes of punishment rather than compensation, the damages would be non-compensatory." Could add a real example.

Article 23

Paragraph 226 - last line refers to Article 11 - this is unclear since effect of Article 11 was unclear.

Various drafting solutions in the report, and much of the specific commentary on this article have been overtaken by the drafting committee work and will have to be completely rewritten.

Paragraph 241 - As I understand it, UK could not/not apply Article 22 since it has not opted out of EU competence over these matters.

Article 26

Paragraph 246 - References to Articles 1, 18, and 19 may make sense for the EU, but not for any and all REIOs. An REIO might not have wide enough competence to encompass all these articles.

II^{de} PARTIE – OBSERVATIONS DES OBSERVATEURS
PART II – COMMENTS FROM OBSERVERS

**Comments from the World Intellectual Property Organization (WIPO)
on the December 2004 Report on the Preliminary Draft Convention
on Exclusive Choice of Court Agreements**

8/06 2005 11:48 FAX +4122 338 91 50

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**WORLD INTELLECTUAL PROPERTY
ORGANIZATION**

世界知识产权组织

**ORGANIZACIÓN MUNDIAL
DE LA PROPIEDAD INTELECTUAL**



**ORGANISATION MONDIALE
DE LA PROPRIÉTÉ INTELLECTUELLE**

المنظمة العالمية للملكية الفكرية

**ВСЕМИРНАЯ ОРГАНИЗАЦИЯ
ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ**

June 3, 2005

Dear Secretary General,

The World Intellectual Property Organization (WIPO) welcomes the opportunity to participate in the work of the Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of the Hague Conference on Private International Law, concerning the preparation of a Convention on Exclusive Choice of Court Agreements.

I am pleased to send herewith the comments by WIPO relating to the articles of the draft Convention as per Working Document No 110 Rev of May 2004, as well as Preliminary Document No. 28 of April 28, 2005, that have direct reference to disputes involving intellectual property matters.

We hope that these comments prove helpful in the deliberations of the Diplomatic Conference, to be held on June 14-30, 2005.

Sincerely yours,

Rita Hayes
Deputy Director General

Mr. Van Loon
Secretary General
Hague Conference on Private
International Law (HCCH)
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**COMMENTS BY THE SECRETARIAT OF THE WORLD INTELLECTUAL
PROPERTY ORGANIZATION (WIPO) ON THE DRAFT HAGUE CONVENTION
ON EXCLUSIVE CHOICE OF COURT AGREEMENTS**

1. The comments set out below address the intellectual property issues raised in the draft Convention on Exclusive Choice of Court Agreements, produced by the Drafting Committee of the Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of the Hague Conference on Private International Law. The comments are based on the alternative proposals set out in Working Document No. 110 Rev.¹ and Preliminary Document No. 28², as well as the corresponding draft report³.

2. WIPO, while maintaining its efforts towards normative development of intellectual property law, is dedicated to assist the IP community in realizing its IP assets, and in optimizing its ability to exploit, manage and enforce its rights with confidence, security, and at reasonable cost. The wide use of forum selection clauses in practice extends to intellectual property contracts, and a secure and predictable international framework to be applied to this expression of party agreement would be of great value for an effective adjudication of cross-territory disputes involving intellectual property. In that sense, while fully acknowledging, as set out below, that the very nature of intellectual property law may require certain special considerations in the Convention, WIPO supports efforts in the negotiation process to include, in the scope of the Convention, intellectual property transactions to a large extent, also taking into account that, in practice, disputes frequently involve both intellectual property matters and other related areas of law.

3. The comments will be limited to those articles having direct reference to disputes involving intellectual property rights, all of which remained in brackets in both alternative proposals, as follows:

- A. Exclusions from the scope, Art. 2 (2) k) WD 110 / Art. 2 (2) k),
Art. 2 (2) k bis) PD 28
 - I. The distinction between different kinds of proceedings
 - (i) The (partial) exclusion of infringement proceedings
 - (ii) The inclusion of contract proceedings - contracts covered
 - II. The distinction between copyright and related rights, and other intellectual property rights
 - (i) The distinction
 - (ii) Reference to international instruments
 - III. Special consideration for "traditional knowledge and folklore"?
- B. The treatment of incidental questions (scope, jurisdiction, enforcement),
Art. 2 (3), Art. 6, Art. 10 (2), (3) WD 110 / PD 28

¹ Henceforth referred to as WD 110.

² Henceforth referred to as PD 28.

³ Preliminary document No 26 of December 26, 2004, henceforth referred to as "draft report".

A. EXCLUSIONS FROM THE SCOPE

4. In both current proposals, two main aspects can be distinguished: an exclusion of certain kinds of proceedings related to intellectual property matters, and an exclusion of certain intellectual property rights in proceedings thus identified. The comments below follow that distinction.

5. As a general remark, in our view, the eventual scope of the exclusion should adequately reflect two key considerations, namely, first, the general respect of party autonomy which governs the entire Convention, and which requires limiting exclusions to cases where, indeed, public or third parties' interests are at stake, and, second, considerations concerning the envisaged uniform interpretation of the Convention in the future.

I. The distinction between different kinds of proceedings

(i) *The partial exclusion of infringement claims*

6. The concept to exclude, from the scope of the Convention, proceedings having as their object the *validity* of (certain) intellectual property rights, was the key policy consideration in that context, based, as it appears, on a uniform understanding of the Commission. While this rationale is intended to be expressed in both alternative proposals, the proposed language in Art. 2 (2) k) PD 28 which expressly refers to validity determinations, in our view, seems favorable. WD 110 does not display any such reference, which, understandably, raised doubts whether this key rationale would be adequately reflected.

7. Similar consensus seems to govern the debate as to the inclusion of *contractual* claims relating to intellectual property, such as concerning the scope of a license, or the payment of royalties: these are intended to be fully covered by the scope of application of the Convention.

8. In that sense, the previous draft text⁴ proposed to exclude from the scope of the Convention proceedings having as their object the validity of certain intellectual property rights⁵, while allowing all other disputes related to intellectual property rights, including in contractual matters, to be brought under the Convention.

9. Both alternatives in WD 110 and PD 28 go beyond that understanding by excluding certain infringements proceedings from the scope of application, in addition to said validity proceedings. In our view, the policy rationale and the practical relevance of this additional exclusion seems questionable, and it is suggested to fully examine whether there is a need to introduce it.

10. In principle, two categories of infringement claims can be distinguished: The first category relates to "classic" tort cases in which no relevant contractual relation between the parties exists. As the draft report rightly states⁶, for such non-contractual claims normally no

⁴ Working Document No. 49 Revised (in the following referred to as WD 49).

⁵ Art. 1 (3) k) and l) of WD 49 read "the validity of patents, trademarks, protected industrial designs, and layout-designs of integrated circuits", as well as "the validity of other intellectual property rights the validity of which depends on, or arises from, their registration, except copyright".

⁶ Paragraph 39.

forum selection clause would exist⁷, respective proceedings would hence not be addressed by the Convention in any case.

11. The second category, referred to in the second set of brackets of Art. 2 (2) k) WD 110 as “proceedings for infringement of the right to which the contract relates”, as well as in Art. 2 (2) k bis) PD 28 as “infringement proceedings (that) are or could have been brought pursuant to a contract for the transfer or use of such rights”, intends to address claims which concern the use of an intellectual property right under a contract but which may, depending on the national law, nevertheless be sued in tort. Such a situation could, for instance, occur if a licensor alleges that the licensee exceeds his contractual powers and thereby violates not only his contractual obligations but also infringes the underlying IP right. In such a scenario, depending on the actual wording of the choice of court clause as well as on the national law, the plaintiff may have the procedural option to submit breach of contract causes of action as well as infringement causes of action before the chosen forum.

12. The understanding of both current alternative proposals is to exclude the first category, sheer non-contractual infringement proceedings, but to re-introduce the second one under the scope of application in order to allow consolidation of related claims. In other words, the exclusion of infringement proceedings, under both alternatives, would be restrained to entirely non contract-related infringements which, as set out above, would be relevant in terms of forum selection clauses to a very limited extent only. Whether there is, for this restricted potential scope of application of the proposed provision, namely in a non-contractual scenario in which parties agree on a forum after the dispute arose, a policy concern that would require overruling such an agreement aimed at the settlement of the conflict, remains to be identified.

13. These considerations are reinforced with a view to the language which was found to be necessary to accommodate the different aspects. The language of both proposals seems, for an instrument which deals with business-to-business transactions in general, complex. In addition, we have concerns that the wording may give, as the draft report indicates⁸, a wrong impression as to the—limited—extent of proceedings that would be excluded in the area of intellectual property related disputes.

(ii) *The inclusion of contractual claims—contracts covered*

14. If the current concept is maintained, namely to identify the kind of infringement proceedings that would, as exception from the general exclusion, fall under the scope of application of the Convention, it may be useful to further define the current language. The wording proposed in WD 110, namely “proceedings pursuant to a contract which licenses or assigns such intellectual property right” may, in our view, be too restrictive to fully reflect current contract practices associated with intellectual property assets, for instance in the area of the use of intellectual property as collateral (security agreements).

15. The draft report attempts to provide some clarification in that direction, indicating an understanding that the Convention would cover a wide range of contracts, and referring to distribution agreements, joint venture agreements and agency agreements⁹. In that sense, it is suggested that a broader language be used to cover such different contractual scenarios. The

⁷ An exception may occur where parties that are not bound by a contract would agree to enter into forum selection agreements *after* the dispute arose.

⁸ Paragraph 39 draft report.

⁹ Paragraph 41 draft report.

wording proposed in Art. 2 (2) k bis) of PD 28 “proceedings pursuing to a contract for the transfer or use of such intellectual property rights” seems to be a good starting point.

II. The exclusion of certain intellectual property rights

(i) *The distinction between copyright and related rights, and other intellectual property rights*

16. Both current alternative proposals maintain a fundamental distinction between copyright and related rights, on the one hand, and other intellectual property rights, on the other. While disputes relating to the first group of rights would fully fall under the scope of application of the Convention, for other intellectual property rights the exceptions referred to under I, above, will apply. This distinction was the preliminary result of a lengthy debate during which a number of options were discussed as to the kind of intellectual property rights that should be excluded¹⁰.

17. Reference is made to the basic underlying policy rationale of the distinction between copyright and related rights on the one hand, and other intellectual property rights on the other: it was felt that, while other intellectual property rights may or may not depend on compliance with formalities, protection under copyright and related rights comes into existence irrespective of compliance with formalities.

18. In that context, questions were raised as to the respective international legal standards. It is confirmed that the above understanding corresponds to international copyright law, and, to a large extent, is also reflected in the international instruments dealing with the protection of related rights. While, for a number of intellectual property rights, the question whether formalities have to be complied with may, according to international standards, be determined by national legislation, copyright and related rights are subject to specific regulation in international instruments in that respect.

19. The Berne Convention for the Protection of Literary and Artistic Works (1971 Paris Act) establishes copyright as a property rights that automatically flows from the act of creation and, therefore, does not depend on compliance with formalities¹¹.

20. In the field of related rights, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961) remains neutral as to a possibility that may exist under domestic law, to require compliance with formalities as a condition of protecting the rights of producers of phonograms, or of performers, or both, in

¹⁰ WD 49 distinguished, in its Art. 1 (3) k) and Art. 1 (3) l), between patents, trademarks, protected industrial designs, layout-designs of integrated circuits, as well as other intellectual property rights the validity of which depends on, or arises from, their registration, on the one hand, and copyright, on the other. Other proposals were to exclude validity determinations for all intellectual property rights; for all intellectual property rights that depend on, or arise from, registration; or for a “closed list” of certain intellectual property rights.

¹¹ Art. 5 (2) reads: “The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded of the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.” The text of the Convention as well as of all other WIPO-administered treaties referred to below, is available online at <http://www.wipo.int/treaties/en/>.

relation to phonograms¹². The more recent Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement, 1994)¹³, as well as the WIPO Performances and Phonograms Treaty (WPPT, 1996)¹⁴, on the other hand, apply the principle of formality-free protection to the related rights governed by these treaties, respectively.

21. For the sake of clarity, it is worth noting that the independence from protection formalities does not prohibit voluntary copyright recordation systems which, in fact, have been incorporated by a number of countries into their national legislation. Such systems enable national and/or foreign rights holders to register their works, and to avail themselves, depending on the national law, of certain advantages, such as legal presumption of ownership, possibility of obtaining statutory damages, and legal costs in case of infringements of rights.

22. In general, while the current proposals no longer refer to the involvement of intellectual property registration mechanisms to define the scope of the exclusion, the underlying policy rationale to distinguish between copyright and related rights, on the one hand, and other intellectual property rights on the other, is still based on this consideration. In that sense, it may be worth, in our view, examining fully whether there are sufficient grounds to overrule party agreement in cases where other intellectual property rights that, according to national law, do not depend on registration, are the subject of a contract.

23. In that context, the policy considerations that have been voiced to justify an overruling of party agreement in the field of rights depending on registration are recalled: first, it was raised that such intellectual property rights directly implicate decisions of the administrative organs of a state which countries may be reluctant to pass on to courts abroad. In addition, reference is made to the close link between the grant of the right and complex procedural and administrative examination issues which are governed by national law. Obviously, these considerations, reflected in a number of national and regional systems which establish (exclusive) jurisdiction at the place where the registration has taken place, or was deemed to have taken place¹⁵, may be of value only when, in a particular case, a registration mechanism is involved.

24. For non-registered rights, reference was made to a potentially arbitrary fragmentation that would be introduced by the Convention for disputes that concern related portions of

¹² Art. 11 Rome Convention. The provision sets forth that, if available, these formalities "shall be considered as fulfilled if all the copies in commerce of the published phonogram or their containers bear a notice consisting of the symbol (P), accompanied by the year date of the first publication, placed in such a manner as to give reasonable notice of claim of protection; and if the copies or their containers do not identify the producer or the licensee of the producer (by carrying his name, trade mark or other appropriate designation), the notice shall also include the name of the owner of the rights of the producer; and, furthermore, if the copies or their containers do not identify the principal performers, the notice shall also include the name of the person who, in the country in which the fixation was effected, owns the rights of such performers."

¹³ Art. 62 (1) TRIPS Agreement reads: "Members may require, as a condition of the acquisition of maintenance of the intellectual property rights provided for under Sections 2 through 6 of Part II, compliance with reasonable procedures and formalities. Such procedures and formalities shall be consistent with the provisions of this Agreement." The protection of both copyright and related rights is addressed in Section 1 of Part II TRIPS.

¹⁴ Art. 20 WPPT: "The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality."

¹⁵ Reference is also made to the ongoing American Law Institute (ALI) project on "Intellectual Property : Principles governing jurisdiction, choice of law, and judgments in transnational disputes". The latest draft proposes establishing jurisdiction "in a proceeding which has as its sole object the obtaining of a declaration of the invalidity of nullity of registered rights" at the courts of the State where deposit or registration has been applied for or taken place (§ 212 (2) a)).

intellectual property rights, for instance between registered and non-registered trademarks¹⁶. To examine this concern, it may be worth analyzing more closely the level of fragmentation of jurisdiction for validity determinations of registered intellectual property rights, on the one hand, and non-registered rights on the other, under the existing legal framework: unlike for intellectual property rights depending on registration where, as set out above, there is a certain acceptance to establish jurisdiction in the country of registration, the legal understanding for non-registered rights seems much less evident¹⁷.

25. If, in line with the current proposals, a public act of grant is not made the dividing line for the scope of the exclusion, reference to certain intellectual property rights is necessary to accommodate, for all disputes, the inclusion of copyright and related rights under the scope of the Convention. This is done, in the current alternative proposals, by excluding all intellectual property rights with the exception of the latter ones; the previous draft as well as the "closed list" proposal enumerated a precise list of rights to be excluded.

26. In that context, it is recalled that, given the considerable diversity among national laws as to rights that may or may not be associated with certain categories of intellectual property, and the many overlaps between the different fields of intellectual property rights, any reference to specific intellectual property rights in the text may result in some legal uncertainty as to the precise scope of application. In that sense, the current proposals may seem practical in that they limit the distinction to be made to copyright and related rights, on the one hand, and other intellectual property rights, on the other.

27. Nevertheless, it may be worth noting that for a number of intellectual property assets, the legal form of protection is not predetermined by international law. Consequently, certain intellectual property rights may, depending on the national law involved, be understood as falling conceptually under copyright or related rights, or other categories of intellectual property rights, or as enjoying stand-alone *sui generis* protection. Such a situation may arise, for instance, in the field of design rights, rights in layout-designs (topographies)¹⁸, (non-original¹⁹) databases, or protection mechanisms in the field of traditional cultural expressions (see also below under III.). In such a scenario, in order to determine in a particular case whether a forum selection clause would fall under the scope of application of the Convention, it would have to be determined, according to the national law, whether the respective protection regime would fall under the category of copyright or related rights, or, in the case of a *sui generis* system, be systematically "close" to these rights.

28. In any case, to facilitate the understanding of the provision, it may be useful to introduce, in the draft report, a short explanation as to the background of this distinction between copyright and related rights, on the one hand, and other intellectual property rights on the other. While even the draft report no longer refers to the initial policy considerations

¹⁶ See, for instance, reference in Preliminary Document No. 22 of June 2003, page 13.

¹⁷ As an example, reference is made to the discussion with respect to the application of the exclusive jurisdiction rule in Art. 16 (4) Lugano Convention (which, within the scope of its application, overrules forum selection clauses, Art. 17 (3)) to *non-registered* trademarks and designs. A part of the legal opinion votes for a non-application of the rule in those cases; the question has not yet been decided by a court.

¹⁸ Art. 4 of the Washington Treaty on Intellectual Property in Respect of Integrated Circuits states: "Each Contracting Party shall be free to implement its obligations under this Treaty through a special law on layout-designs (topographies) or its law on copyright, patents, utility models, industrial designs, unfair competition or any other law or a combination of any of those laws".

¹⁹ Original databases are protected as literary works under the TRIPS Agreement, Art. 10 (2).

related to compliance with formalities, questions have been voiced, understandably, as to the rationale for the different treatment of these categories of intellectual property rights.

(ii) *Reference to international instruments*

29. The draft report briefly outlines the understanding of the Special Commission as to the terms “copyright” and “related rights”²⁰. In order to contribute to a coherent application of the Convention, and to adequately reflect internationally agreed standards, it may be interesting to insert in the draft report a reference to the relevant international instruments, namely those referred to above under (i) (the Berne Convention, the TRIPS Agreement, the Rome Convention, and the WPPT); as well as the WIPO Copyright Treaty (WCT, 1996); and the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (1971).

III. Special Consideration for “Folklore and Traditional Knowledge”?

30. The draft report raises the question whether, in the context of the exclusion of certain proceedings relating to intellectual property, special consideration should be given to “folklore and traditional knowledge as intellectual property rights”²¹. This issue was raised various times during the 2004 session of the Special Commission, without being discussed in detail. In that context, questions were raised as to the current status of the work of WIPO in this field. The following summarizes some aspects of this process that may be of interest for the debate, namely with a view to the latest discussion concerning terminology, the scope of protection, the nature of legal protection, and compliance with formalities.

31. As a starting point, it may be worth noting that existing national and regional systems, with a view to the complexity of the legal and policy issues involved, display a high diversity in their legal approaches. Where traditional knowledge or expressions of folklore, or creations and innovations derived from them, are expressly protected, the scope and nature of protection is defined by a wide range of national legal mechanisms, ranging from *sui generis* systems of protection²², to diverse forms of intellectual property rights²³, unfair competition law and the law of unjust enrichment, as well as various other legal mechanisms such as at the law of torts, liability or civil obligations, criminal law, access and benefit-sharing laws, trade practices laws, cultural heritage laws, customary laws, contract law, environmental law and indigenous rights law.

32. At the international level, there is a dynamic process, both at WIPO and in other international fora. The WIPO General Assembly established, in 2000, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) as an international forum for debate and dialogue concerning the interplay

²⁰ Paragraph 38 draft report.

²¹ Footnote 38 draft report.

²² For an overview of the existing national *sui generis* legislation for the protection of TK and TCEs see WIPO documents WIPO/GRTKF/IC/5/INF/3 ; WIPO/GRTKF/IC/5/INF/4. The documents, as well as all other documents referred to in the following are available online at WIPO's website at <http://www.wipo.int/tk/en/>.

²³ For instance, existing intellectual property laws can protect contemporary derivations from traditional materials (for example, copyright protects recent adaptations and interpretations of expressions of folklore/traditional cultural expressions). The copyright laws of certain countries provide copyright-like yet *sui generis* forms of protection for expressions of folklore/traditional cultural expressions (e.g., Indonesia, Nigeria and Tunisia). Reference also is made to the WPPT which, at the international level, applies protection in the area of related rights to performances of expressions of folklore.

between intellectual property, and traditional knowledge, genetic resources and traditional cultural expressions (folklore).

33. The latest progress made in the IGC can be drawn from the "Revised Objectives and Principles", both in the field of Traditional Cultural Expressions/Expressions of Folklore (TCEs/EoF)²⁴, and Traditional Knowledge (TK)²⁵, produced by the WIPO Secretariat. These draft provisions, which are to be seen in the broader context of the work of the Committee, concern the protection of the assets concerned in a legal sense, while taking into account their particular nature and characteristics.

34. The scope of the protected subject matter of TCEs/EoF and folklore, respectively, is defined in Art.1 of document WIPO/GRTKF/IC/8/4 Annex, and Art. 3 (2) of document WIPO/GRTKF/IC/8/5 Annex, respectively.

35. In the contractual environment to be governed by the Convention, it may be worth noting that, in the field of TK, the principles do not require the creation of exclusive property titles on TK. Only such exclusive rights, however, could be the subject of a licensing transaction. This policy corresponds to concerns voiced by many TK holders that consider private rights on their TK as inappropriate. In that sense, Art. 2 (2) of document WIPO/GRTKF/IC/8/5 Annex, while giving scope for exclusive rights by national law, also allows alternative legal doctrines against misappropriation by third parties.

36. In the area of TCEs/EoF, the draft provisions suggest a combination of exclusive rights and equitable remuneration rights: TCEs/EoF of "particular value or significance" may, under certain circumstances, enjoy the right of "free, prior and informed consent"²⁶, a right akin to an exclusive right in intellectual property terms, which, consequently, could be licensed. Reference is made, though, to the commentary to Art. 3 which indicates that in current practice, the defensive use of this right, namely to prevent any use and exploitation of protected assets, and the acquisition of IP rights over them, is perhaps more likely than positive use through licensing transactions²⁷. The use of other TCEs/EoF would not be subject to prior consent or authorization. For these assets, the principles govern modalities on how they may be used, including by drawing upon moral rights and the payment of an equitable remuneration.

37. As to the legal form of protection, both texts remain "neutral" in the sense that they do not limit implementation of the protection to any specific form or kind of law, and neither requires nor precludes protection to be associated with existing intellectual property laws²⁸. Both draft provisions propose, as a starting point for discussion, a national treatment approach to deal with the international dimension of the protection, indicating, however, that, in respect of TCEs/EoF and TK, this may not be the optimal or only solution²⁹.

²⁴ Document WIPO/GRTKF/IC/8/4 Annex; the quoted substantive provisions are reproduced in Annex I.

²⁵ Document WIPO/GRTKF/IC/8/5 Annex; the quoted substantive provisions are reproduced in Annex II.

²⁶ Art. 3 (a) of document WIPO/GRTKF/IC/8/4 Annex.

²⁷ Commentary to Art. 3, document WIPO/GRTKF/IC/8/4 Annex, page 20.

²⁸ Commentary to II. (d) of the "General guiding principles", document WIPO/GRTKF/IC/8/4 Annex; Art. 2 document WIPO/GRTKF/IC/8/5 Annex.

²⁹ Art. 11 WIPO/GRTKF/IC/8/4 Annex; Art. 14 WIPO/GRTKF/IC/8/5 Annex.

38. Further, with a view to registration mechanisms, the protection of TCEs/EoF, according to the draft provision, should not be made subject to formalities, protection exists from the moment of the creation (Art.7 (a) document WIPO/GRTKF/IC/8/4 Annex). However, in order to be able to enjoy the right of "free, prior and informed consent" registration will be required (Art.7 (b), Art.3 (a) of document WIPO/GRTKF/IC/8/4 Annex).

39. In the field of TK, the draft provision sets forth that eligibility for protection against acts of misappropriation and other acts of unfair competition should not require any formalities (Art. 11 WIPO/GRTKF/IC/8/5 Annex). Registers or other records may be maintained by the relevant authorities, for instance, in the interest of transparency, however, compliance with formalities is not foreseen as a precondition for protection.

40. It is recalled that these draft provisions are under active consideration of the IGC. In that sense, an endeavor to expressly address rights that may fall under these terms in the draft Convention seems, in our view, premature. In order to be in a position, along the lines of the discussion of the Special Commission related to intellectual property rights, to adequately determine in an instrument on choice of court clauses whether or not to exclude from the scope of application certain determinations involving these, or some of these rights, it would be necessary to dispose of a minimum level of internationally accepted standards.

41. However, as set out above, unlike for other rights in the intellectual property context where there is a certain degree of harmonization at the international level, in the area of traditional knowledge and folklore, such widely accepted standards are not at hand. There are, as yet, also no extensive licensing practices in that field that would allow to draw adequate conclusions. In such a situation it would, in our view, be hardly feasible to precisely define which rights conceivably associated with traditional knowledge and/or folklore should be excluded from the Convention, and for which reasons. In addition, such an attempt would run the risk of conflicting with likely future developments at the international level.

B. THE TREATMENT OF INCIDENTAL QUESTIONS

42. The debate in the Special Commission about the treatment of incidental questions in the Convention is, rightly in our view, based on the strong de-facto interrelation between contractual proceedings, and invalidity claims raised as defense. We support the broad approach in the Special Commission that, in the contractual scenario governed by the Convention, the importance of validity determinations related to intellectual property in practice is related to such a defense, whereas isolated attacks may be of less significance. The starting point in Art. 2 (3) to exclude incidental rulings from the scope of the exclusion rules under Art. 2 (2), therefore, is of paramount importance to ensure a broad application, and hence the value, of the Convention in the field of intellectual property related disputes.

43. Along the same lines, it seems important to clearly draft the scope and rationale of the proposed provision dealing with stay or suspension of proceedings in Art. 6. In principle, this provision is intended to make clear that questions related to stay or suspension of proceedings that may be set forth by national law are not restricted by the Convention. While we have no concern with this rationale, the language proposed in WD 110 seems questionable. This provision could be read to imply a significant grey area, determined by national law, in which proceedings could be suspended or, even, dismissed, and hence considerably undermining, if not entirely questioning, the jurisdiction rule of Art. 5 (2) in this field. In that sense, the

redrafted proposal in PD 28 provides more clarification as to the limited scope of the provision, and its distinct focus, namely on suspension as opposed to declining jurisdiction.

44. With regard to Art. 10 (1), we have no concern with the underlying rationale, however, the need for introducing this provision seems, in our view, questionable as long as the obligations under the Convention concerning recognition and enforcement of judgments do not generally apply to incidental rulings as such. Since the Convention does not set forth a respective obligation, we have sympathy with this interpretation, suggested by the draft report³⁰, which leaves it to the law of the Contracting States to recognize and enforce such rulings on incidental questions under an estoppel doctrine. It may be helpful to introduce some clarification in that respect, either in the draft report or in connection with the definition of the term "judgments" in Art. 4 (1).

45. Based on a respective proposal, both Art. 10 (2) and Art. 10 (3) were introduced to the draft in the 2004 session of the Special Commission without detailed discussion. It may be useful, in our view, to analyze more closely both the potential impact of these provisions, in particular with a view to Art. 10 (3), and the coherence of these provisions with other grounds for refusal of recognition and enforcement of judgments established by the Convention.

46. In that sense, we share the concerns referred to in the draft report as to the unclear interrelation between Art. 10 (2) and Art. 9 (1) f). It is suggested to first clarify the understanding of the Commission as to the scope of the latter provision, namely whether it is intended to apply also to conflicts between the reasoning of judgments, including determinations on incidental issues, expressly left open in the draft report³¹, in order to be in a position to adequately deal with the suggested Art. 10 (2).

47. Further, the policy consideration enshrined in Art. 10 (2) aims at avoiding inconsistency of enforcement proceedings with validity determinations rendered in the country where the right arose. While this approach seems, by extending grounds for refusal to cases of inconsistency between a judgment and an incidental ruling, to build upon the policy considerations drawn upon in Art. 9 (1) f), it may, as indicated in the draft report³², be useful to examine more closely whether a similar concern may be relevant, beyond the intellectual property context, in disputes involving incidental determinations on other matters excluded under Art. 2 (2) and, if so, attempt to find a more general language.

48. The implications of the suggested Art. 10 (3), in our view, deserve a more detailed discussion, in particular with a view to the concerns raised in the draft report concerning potential undue delay of the enforcement of judgements which may be facilitated by this provision. In the discussion, it may be worth considering that, by allowing grounds for suspension of the recognition and enforcement of judgments in cases where validity proceedings are pending in the State under the law of which the intellectual property right arose, the provision goes beyond the standards which are established for inconsistency between final judgments: Art. 9 (1) f) applies only if the inconsistent judgment has already been rendered, whereas grounds for suspension are not foreseen in cases where such potentially conflicting judgment may be pending.

[Annex I follows]

³⁰ Paragraph 165 draft report.

³¹ Paragraph 146 draft report.

³² Footnote 182 draft report.

THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/
EXPRESSIONS OF FOLKLORE:
REVISED OBJECTIVES AND PRINCIPLES

ARTICLE 1:

SUBJECT MATTER OF PROTECTION

(a) "Traditional cultural expressions" or "expressions of folklore" are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

- (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
- (ii) musical expressions, such as songs and instrumental music;
- (iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances,

whether or not reduced to a material form; and,

- (iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;

which are:

- (aa) the products of creative intellectual activity, including individual and communal creativity;
- (bb) characteristic of a community's cultural and social identity and cultural heritage; and
- (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

(b) The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.

ARTICLE 3:

ACTS OF MISAPPROPRIATION (SCOPE OF PROTECTION)

Traditional cultural expressions/expressions of folklore of particular value or significance

(a) In respect of traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance to a community, and which have been registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical

measures to ensure that the relevant community can prevent the following acts taking place without its free, prior and informed consent:

(i) in respect of such traditional cultural expressions/expressions of folklore other than words, signs, names and symbols:

- the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography) of the traditional cultural expressions/expressions of folklore or derivatives thereof;
- any use of the traditional cultural expressions/expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the community as the source of the traditional cultural expressions/expressions of folklore;
- any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore; and
- the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof;

(ii) in respect of words, signs, names and symbols which are such traditional cultural expressions/expressions of folklore, any use of the traditional cultural expressions/expressions of folklore or derivatives thereof, or the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or derivatives thereof, which disparages, offends or falsely suggests a connection with the community concerned, or brings the community into contempt or disrepute;

Other traditional cultural expressions/expressions of folklore

(b) In respect of the use and exploitation of other traditional cultural expressions/expressions of folklore not registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that:

(i) the relevant community is identified as the source of any work or other production adapted from the traditional cultural expression/expression of folklore;

(ii) any distortion, mutilation or other modification of, or other derogatory action in relation to, a traditional cultural expression/expression of folklore can be prevented and/or is subject to civil or criminal sanctions;

(iii) any false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the traditional cultural expression/expression of folklore of a community, suggest any endorsement by or linkage with that community, can be prevented and/or is subject to civil or criminal sanctions; and

(iv) where the use or exploitation is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by the Agency referred to in Article 4 in consultation with the relevant community; and

Secret traditional cultural expressions/expressions of folklore

There shall be adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret traditional cultural expressions/expressions of folklore.

ARTICLE 7:

FORMALITIES

(a) As a general principle, the protection of traditional cultural expressions/expressions of folklore should not be subject to any formality. Traditional cultural expressions/expressions of folklore as referred to in Article 1 are protected from the moment of their creation.

(b) Measures for the protection of specific traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance and for which a level of protection is sought as provided for in Article 3(a) should require that such traditional cultural expressions/expressions of folklore be notified to or registered with a competent office or organization by the relevant community or by the Agency referred to in Article 4 acting at the request of and on behalf of the community.

(i) To the extent that such registration or notification may involve the recording or other fixation of the traditional cultural expressions/expressions of folklore concerned, any intellectual property rights in such recording or fixation should vest in or be assigned to the relevant community.

(ii) Information on and representations of the traditional cultural expressions/expressions of folklore which have been so registered or notified should be made publicly accessible at least to the extent necessary to provide transparency and certainty to third parties as to which traditional cultural expressions/expressions of folklore are so protected and for whose benefit.

(iii) Such registration or notification is declaratory and does not constitute rights. Without prejudice thereto, entry in the register presumes that the facts recorded therein are true, unless proven otherwise. Any entry as such does not affect the rights of third parties.

(iv) The office or organization receiving such registrations or notifications should resolve any uncertainties or disputes as to which communities, including those in more than one country, should be entitled to registration or notification or should be the beneficiaries of protection as referred to in Article 2, using customary laws and processes, alternative dispute resolution (ADR) and existing cultural resources, such as cultural heritage inventories, as far as possible.

ARTICLE 10:

RELATIONSHIP WITH INTELLECTUAL PROPERTY PROTECTION AND OTHER FORMS OF PROTECTION, PRESERVATION AND PROMOTION

Protection for traditional cultural expressions/expressions of folklore in accordance with these provisions does not replace and is complementary to protection applicable to traditional cultural expressions/expressions of folklore and derivatives thereof under other intellectual property laws, laws and programs for the safeguarding, preservation and promotion of cultural heritage, and other legal and non-legal measures available for the protection and preservation of traditional cultural expressions/expressions of folklore.

[Annex II follows]

THE PROTECTION OF TRADITIONAL KNOWLEDGE
REVISED OBJECTIVES AND PRINCIPLES

ARTICLE 2

LEGAL FORM OF PROTECTION

1. The protection of traditional knowledge against misappropriation may be implemented through a range of legal measures, including: a special law on traditional knowledge; laws on intellectual property, including laws governing unfair competition and unjust enrichment; the law of contracts; the law of civil liability, including torts and liability for compensation; criminal law; laws concerning the interests of indigenous peoples; fisheries laws and environmental laws; regimes governing access and benefit-sharing; or any other law or any combination of those laws. This paragraph is subject to Article 11(1).
2. The form of protection need not be through exclusive property rights, although such rights may be made available, as appropriate, for the individual and collective holders of traditional knowledge, including through existing or adapted intellectual property rights systems, in accordance with the needs and the choices of the holders of the knowledge, national laws and policies, and international obligations.

ARTICLE 3

GENERAL SCOPE OF SUBJECT MATTER

1. These principles concern protection of traditional knowledge against misappropriation and misuse beyond its traditional context, and should not be interpreted as limiting or seeking externally to define the diverse and holistic conceptions of knowledge within the traditional context. These principles should be interpreted and applied in the light of the dynamic and evolving nature of traditional knowledge and the nature of traditional knowledge systems as frameworks of ongoing innovation.
2. For the purpose of these principles only, the term "traditional knowledge" refers to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.

ARTICLE 11

FORMALITIES

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

[End of Annex II and of document]

**Comments from the International Association of Insurance Supervisors
(IAIS) on the December 2004 Report on the
Preliminary Draft Convention on Exclusive Choice of Court Agreements**



7 June 2005

Ref: 8/0074

Mr Hans van Loon
Secretary General
The Hague Conference on Private International Law
Scheveningseweg 6
2517 KT The Hague
Netherlands

Dear Mr van Loon

Established in 1994, the International Association of Insurance Supervisors ("IAIS") represents insurance supervisory authorities of some 180 jurisdictions. The IAIS wishes to make the following positive observations.

IAIS is aware that the Hague Conference on Private International Law (the "Conference") has convened a Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the "Special Commission"), and that a Drafting Committee of the Special Commission has prepared a Preliminary Draft Convention On Exclusive Choice Of Court Agreements (the "Convention").

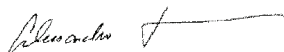
A significant volume of insurance and reinsurance business is conducted in international markets and typically is effected through contracts containing exclusive choice of court agreements. The international recognition and enforcement of judgments entered in respect of such contracts is desirable.

Ensuring that the scope of the proposed Convention addresses the enforceability of exclusive choice of court agreements regarding the implementation of insurance and reinsurance contracts covering the paying of damages resulting from civil liability would be useful in promoting and regulating international trade in the insurance and reinsurance markets. A lesser scope could have consequences for the free flow of international insurance and reinsurance transactions and the protection of insurance policyholders, insurance and reinsurance companies and the public.

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The IAIS encourages adoption of a version of the Convention that expressly ensures that, when contracts of insurance or reinsurance cover damages for liability to be paid to the policyholder or the ceding company, judgments in respect of the contractual obligations by the insurer or the reinsurer towards the policyholder or the ceding company are not excluded from the scope of the Convention.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Alessandro Iuppa', followed by a long horizontal flourish.

Alessandro Iuppa
Chair, IAIS Executive Committee