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

**Sixteenth Session**  
**Geneva, May 3 to 7, 2010**

THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/  
EXPRESSIONS OF FOLKLORE:

REVISED OBJECTIVES AND PRINCIPLES

*Document prepared by the Secretariat*

### INTRODUCTION

1 At its fifteenth session, held from December 7 to 11, 2009, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') decided that the Secretariat should "prepare and distribute, before the end of January 2010, a revised version of working document WIPO/GRTKF/IC/9/4, reflecting the proposed amendments and comments made on and questions posed in relation to this document at this session of the Committee. Amendments, comments and questions of observers should be recorded for consideration by Member States. The Secretariat would invite Committee participants to provide written comments on that revised version before the end of February 2010. The Committee invited the Secretariat then to prepare and distribute a further revised version of the document, reflecting the written comments made, as a working document for the next session of the Committee."<sup>1</sup>

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<sup>1</sup> Draft Report of Fifteenth Session (WIPO/GRTKF/IC/15/7 Prov.)

2 Accordingly, a revised version of working document WIPO/GRTKF/IC/9/4 was prepared and published, as WIPO/GRTKF/IC/16/4 Prov., on January 22, 2010, and Committee participants were invited to provide written comments on that revised version before February 28, 2010.

3 This present working document is the revised version of working document WIPO/GRTKF/IC/16/4 Prov. reflecting the written comments received thereon during this intersessional written commenting process pursuant to the above invitation. Written comments were received from the following Member States: China, Germany, Mexico, Republic of Korea and Switzerland; and from the following accredited observers: Ibero-Latin-American Federation of Performers (FILAIÉ). The written comments, as received, are available online at [http://www.wipo.int/tk/en/consultations/draft\\_provisions/comments-3.html](http://www.wipo.int/tk/en/consultations/draft_provisions/comments-3.html)

#### *Preparation and structure of this document*

4 Document WIPO/GRTKF/IC/9/4 comprised a cover document prepared by the Secretariat, which provided information on the history, structure and content of the document as at the time it was prepared (January 2006), and an Annex, which contained the “substance” of the document, namely the revised draft objectives and principles.

5 The Annex comprised the objectives and principles themselves as well as a “Commentary”. The Commentary consisted of a substantive commentary on each objective and principle and information identifying and discussing comments received on an earlier version of each objective and principle, as contained in document prepared for the seventh session of the Committee (WIPO/GRTKF/IC/7/3). These comments had already been reflected in document WIPO/GRTKF/IC/9/4.<sup>2</sup>

6 In the circumstances and in the interest of keeping the present document as concise and current as possible:

- a) the cover document to WIPO/GRTKF/IC/9/4 has not been carried over to the present revised version. As the cover document notes, however, the draft objectives and principles are based upon extensive fact-finding, discussion, analysis and case-studies and draw directly upon comments and proposals made by Committee participants since they were first published in an earlier form in August 2004. The full history of the draft objectives and principles, and in particular the past comments made on them, is available online.<sup>3</sup> The draft objectives and principles are also complemented by other resources, such as the collations and factual extraction of comments on the agreed List of Issues<sup>4</sup> and the draft Gap Analysis.<sup>5</sup> All this information is available

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<sup>2</sup> The comments noted in the Commentary to WIPO/GRTKF/IC/9/4 were comments that had been made on document WIPO/GRTKF/IC/7/3, an earlier version of WIPO/GRTKF/IC/9/4, during an inter-sessional commentary process established by the Committee at its seventh session in November 2004. The commentary process ran from November 2004 to February 2005, and the comments made during that period were incorporated in a revised version of WIPO/GRTKF/IC/7/3 which was issued as a working document for the eighth session of the Committee in June 2005 (WIPO/GRTKF/IC/8/4). Document WIPO/GRTKF/IC/8/4 was subsequently reissued, without any amendment to the Annex, as document WIPO/GRTKF/IC/9/4. In other words, the comments noted in document WIPO/GRTKF/IC/9/4 have already been taken into account in the preparation of the present document.

<sup>3</sup> [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_9/wipo\\_grtkf\\_ic\\_9\\_4.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_4.pdf)

<sup>4</sup> Working documents WIPO/GRTKF/IC/11/4(a) on the “Collation of Written Comments on the List of Issues” and WIPO/GRTKF/IC/12(b) on the “Factual Extraction”.

<sup>5</sup> Working document WIPO/GRTKF/IC/13/4(b) Rev.

online;<sup>6</sup>

- b) in the Annex, the substantive commentary on each objective and principle has been retained. The information on the comments made on the earlier version of document WIPO/GRTKF/IC/9/4 has not been included and is in effect replaced by comments made and questions posed at the fifteenth session and during the intersessional written commenting process. To avoid confusion between the earlier comments and those made at the fifteenth session and during the intersessional written commenting process, references to earlier comments in footnotes have also been removed. The comments made previously on the “original” document WIPO/GRTKF/IC/9/4 remain available to be consulted online;<sup>7</sup>
- c) in line with the decisions of the Committee taken at its fifteenth session, specific amendments proposed by Member States at this session and during the intersessional written commenting process are reflected in the objectives and principles in the Annex. Proposed insertions and additions are underlined, while words or phrases that a Member State has proposed be deleted are “struck through.” Where more than one proposal has been made, the proposals are separated by two forward slashes (/). The Annex also records other comments made and questions posed at the fifteenth session and during the intersessional written commenting process, as well as drafting suggestions, comments and questions of observers which are recorded for consideration by Member States. The comments and questions are, as far as possible, grouped by issue. Several comments made during the intersessional written commenting process related generally to the entire document; these general comments are reflected at the very end of the document.

*7 The Committee is invited to continue to review and comment on the draft provisions contained in the Annex towards developing a revised and updated version thereof.*

[Annex follows]

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<sup>6</sup> <http://www.wipo.int/tk/en/igc>

<sup>7</sup> [http://www.wipo.int/tk/en/consultations/draft\\_provisions/comments-1.html](http://www.wipo.int/tk/en/consultations/draft_provisions/comments-1.html)

ANNEX

REVISED PROVISIONS  
FOR THE PROTECTION OF  
TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE

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## I. OBJECTIVES

*The protection of traditional cultural expressions, or expressions of folklore,<sup>1</sup> should aim to:*

### *Recognize value*

(i) *recognize that indigenous peoples and communities and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity;*

### *Promote respect*

(ii) *promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore;*

### *Meet the actual needs of communities*

(iii) *be guided by the aspirations and expectations expressed directly by indigenous peoples and communities and by traditional and other cultural communities, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such peoples and communities;*

*Prevent the misappropriation and misuse of traditional cultural expressions/expressions of folklore*

(iv) *provide indigenous peoples and communities and traditional and other cultural communities with the legal and practical means, including effective enforcement measures, to prevent the misappropriation of their cultural expressions and derivatives therefrom, and control ways in which they are used beyond the customary and traditional context and promote the equitable sharing of benefits arising from their use;*

### *Empower communities*

(v) *be achieved in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and communities and traditional and other cultural communities to exercise in an effective manner their rights and authority over their own traditional cultural expressions/expressions of folklore;*

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<sup>1</sup> In these provisions, the terms “traditional cultural expressions” and “expressions of folklore” are used as interchangeable synonyms, and may be referred to simply as “TCEs/EoF”. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.

*Support customary practices and community cooperation*

(vi) *respect the continuing customary use, development, exchange and transmission of traditional cultural expressions/expressions of folklore by, within and between communities;*

*Contribute to safeguarding traditional cultures*

(vii) *contribute to the preservation and safeguarding of the environment in which traditional cultural expressions/expressions of folklore are generated and maintained, for the direct benefit of indigenous peoples and communities and traditional and other cultural communities, and for the benefit of humanity in general;*

*Encourage community innovation and creativity*

(viii) *reward and protect tradition-based creativity and innovation especially by indigenous peoples and communities and traditional and other cultural communities;*

*Promote intellectual and artistic freedom, research and cultural exchange on equitable terms*

(ix) *promote intellectual and artistic freedom, research practices and cultural exchange on terms which are equitable to indigenous peoples and communities and traditional and other cultural communities;*

*Contribute to cultural diversity*

(x) *contribute to the promotion and protection of the diversity of cultural expressions;*

*Promote the community development of indigenous peoples and communities and traditional and other cultural communities; and legitimate trading activities*

(xi) *where so desired by indigenous peoples and communities and traditional and other cultural communities ~~communities~~ and their members, promote the use of traditional cultural expressions/expressions of folklore for ~~community-based~~ the development of indigenous peoples and communities and traditional and other cultural communities, recognizing them as an asset of the communities that identify with them, such as through the development and expansion of marketing opportunities for tradition-based creations and innovations;*

*Preclude unauthorized IP rights*

(xii) *preclude the grant, exercise and enforcement of intellectual property rights acquired by unauthorized parties over traditional cultural expressions/expressions of folklore and derivatives thereof;*

*Enhance certainty, transparency and mutual confidence*

(xiii) *enhance certainty, transparency, mutual respect and understanding in relations between indigenous peoples and communities and traditional and cultural communities, on the one hand, and academic, commercial, governmental, educational and other users of TCEs/EoF, on the other.*

[Commentary on Objectives follows]



COMMENTARY

OBJECTIVES

Background

This section contains suggested policy objectives for the protection of TCEs/EoF, which draw on past submissions and statements to the Committee and relevant legal texts. Such objectives could typically form part of a preamble to a law or other instrument.

As the Committee has noted several times, protection of TCEs/EoF should not be undertaken for its own sake, as an end in itself, but as a tool for achieving the goals and aspirations of relevant peoples and communities and for promoting national, regional and international policy objectives. The way in which a protection system is shaped and defined will depend to a large extent on the objectives it is intended to serve. A key initial step, therefore, of the development of any legal regime or approach for the protection of TCEs/EoF is to determine relevant policy objectives.

*Amendments proposed, comments made and questions posed during the intersessional written commenting process*

The specific drafting amendments reflected in the objectives were proposed by Mexico.

II. GENERAL GUIDING PRINCIPLES

- (a) *Principle of responsiveness to aspirations and expectations of relevant communities*
- (b) *Principle of balance*
- (c) *Principle of respect for and consistency with international and regional agreements and instruments*
- (d) *Principle of flexibility and comprehensiveness*
- (e) *Principle of recognition of the specific nature and characteristics of cultural expression*
- (f) *Principle of complementarity with protection of traditional knowledge*
- (g) *Principle of respect for rights of and obligations towards indigenous peoples and communities and traditional and other cultural communities ~~indigenous peoples and other traditional communities~~*
- (h) *Principle of respect for customary use and transmission of TCEs/EoF*
- (i) *Principle of effectiveness and accessibility of measures for protection*

[Commentary on General Guiding Principles follows]

COMMENTARY

GENERAL GUIDING PRINCIPLES

Background

The substantive provisions set out in the next section are guided by and seek to give legal expression to certain general guiding principles which have underpinned much of the discussion within the Committee since its inception and in international debate and consultations before the Committee's establishment.

*(a) Principle of responsiveness to aspirations and expectations of relevant communities*

This principle recognizes that protection for TCEs/EoF should reflect the aspirations and expectations of indigenous peoples and traditional and other cultural communities. This means, in particular, that the protection of TCEs/EoF should recognize and apply indigenous and customary laws and protocols as far as possible, promote complementary use of positive and defensive protection measures, address both cultural and economic aspects of development, prevent insulting, derogatory and offensive acts in particular, promote cooperation among communities and not engender competition or conflicts between them, and enable full and effective participation by these communities in the development and implementation of protection systems. Measures for the legal protection of TCEs/EoF should also be recognized as voluntary from the viewpoint of indigenous peoples and other communities who would always be entitled to rely exclusively or in addition upon their own customary and traditional forms of protection against unwanted access and use of their TCEs/EoF. It means that external legal protection against the illicit acts of third parties should not encroach upon or constrain traditional or customary laws, practices and protocols.

*(b) Principle of balance*

The need for balance has often been emphasized by the diverse stakeholders taking part in discussions concerning the enhanced protection of TCEs/EoF. This principle suggests that protection should reflect the need for an equitable balance between the rights and interests of those that develop, preserve and sustain TCEs/EoF, and of those who use and benefit from them; the need to reconcile diverse policy concerns; and, the need for specific protection measures to be proportionate to the objectives of protection, actual experiences and needs.

*(c) Principle of respect for and consistency with international and regional agreements and instruments*

TCEs/EoF should be protected in a way that is respectful of and consistent with relevant international and regional instruments, and without prejudice to specific rights and obligations already established under binding legal instruments, including human rights instruments. Protection for TCEs/EoF should not be invoked in order to infringe human rights guaranteed by international law or to limit the scope thereof.

*(d) Principle of flexibility and comprehensiveness*

This principle concerns a need to recognize that effective and appropriate protection may be achieved by a wide variety of legal mechanisms, and that too narrow or rigid an approach at the level of principle may constrain effective protection, conflict with existing

laws to protect TCEs/EoF, and pre-empt necessary consultation with stakeholders and holders of TCEs in particular. It concerns the need to draw on a wide range of legal mechanisms to achieve the intended objectives of protection. In particular, experience with TCEs/EoF protection has shown that it is unlikely that any single “one-size-fits-all” or “universal” international template will be found to protect TCEs comprehensively in a manner that suits the national priorities, legal and cultural environment, and needs of traditional communities in all countries. An indigenous organization has put it best: “Any attempt to devise uniform guidelines for the recognition and protection of indigenous peoples’ knowledge runs the risk of collapsing this rich jurisprudential diversity into a single ‘model’ that will not fit the values, conceptions or laws of any indigenous society.”

The draft provisions are therefore broad and inclusive, and intended, while establishing that misappropriation and misuse of TCEs/EoF would be unlawful, to give maximum flexibility to national and regional authorities and communities in relation to which precise legal mechanisms may be used to achieve or implement the provisions at the national or regional levels.

Protection may accordingly draw on a comprehensive range of options, combining proprietary, non-proprietary and non-IP measures, and using existing IP rights, *sui generis* extensions or adaptations of IP rights, and specially-created *sui generis* IP measures and systems, including both defensive and positive measures. Private property rights should complement and be carefully balanced with non-proprietary measures.

This is a relatively common approach in the IP field and previous documents gave examples of IP conventions which establish certain general principles and which give scope for wide variation as to implementation within the laws of the signatories. Even where international obligations create minimum substantive standards for national laws, it is accepted that the choice of legal mechanisms is a matter of national discretion. It is also an approach found in instruments concerning indigenous peoples, such as ILO Convention 169.

*(e) Principle of recognition of the specific nature and characteristics of cultural expression*

Protection should respond to the traditional character of TCEs/EoF, namely their collective, communal and inter-generational character; their relationship to a community’s cultural and social identity and integrity, beliefs, spirituality and values; their often being vehicles for religious and cultural expression; and their constantly evolving character within a community. Special measures for legal protection should also recognize that in practice TCEs/EoF are not always created within firmly bounded identifiable “communities”.

TCEs/EoF are not necessarily always the expression of distinct local identities; nor are they often truly unique, but rather the products of cross-cultural exchange and influence and intra-cultural exchange, within one and the same people whose name or designation may vary on one side or another of a frontier. Culture is carried by and embodied in individuals who move and reside beyond their places of origin while continuing to practice and recreate their community’s traditions and cultural expressions.

*(f) Principle of complementarity with protection of traditional knowledge*

This principle recognizes the often inseparable quality of the content or substance of traditional knowledge (TK) *stricto sensu* and TCEs/EoF for many communities. These draft

provisions concern specific means of legal protection against misuse of this material by third parties beyond the traditional context, and do not seek to impose definitions or categories on the customary laws, protocols and practices of indigenous peoples and traditional and other communities. The Committee's established approach of considering the legal protection of TCEs/EoF and of TK *stricto sensu* in parallel but separately is, as previously discussed, compatible with and respectful of the traditional context in which TCEs/EoF and TK are often perceived as integral parts of an holistic cultural identity.

*(g) Principle of respect for rights of and obligations towards indigenous peoples and communities and traditional and other cultural communities ~~indigenous peoples and other traditional communities~~*

This principle suggests that any protection of TCEs/EoF should respect and take into account certain over-arching rights and obligations, particularly international human rights and systems of indigenous rights, and not prejudice the further elaboration of such rights and obligations.

*(h) Principle of respect for customary use and transmission of TCEs/EoF*

Protection should not hamper the use, development, exchange, transmission and dissemination of TCEs/EoF by the communities concerned in accordance with their customary laws and practices. No contemporary use of a TCE/EoF within the community which has developed and maintained it should be regarded as distorting if the community identifies itself with that use of the expression and any modification entailed by that use. Customary use, practices and norms should guide the legal protection of TCEs/EoF as far as possible.

*(i) Principle of effectiveness and accessibility of measures for protection*

Measures for the acquisition, management and exercise of rights and for the implementation of other forms of protection should be effective, appropriate and accessible, taking account of the cultural, social, political and economic context of indigenous peoples and traditional and other cultural communities.

*Amendments proposed, comments made and questions posed during the intersessional written commenting process*

The specific drafting amendments reflected in the general guiding principles were proposed by Mexico.

### III. SUBSTANTIVE PROVISIONS

#### ARTICLE 1:

##### SUBJECT MATTER OF PROTECTION

~~(a)~~ (A) “Traditional cultural expressions” and/or “expressions of folklore” are any forms, ~~whether tangible or and intangible~~ // are any forms, whether tangible, intangible or a combination thereof // are any forms, tangible and intangible // and any forms, tangible and/or intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and are passed on from generation to generation, including: // such as but not limited to ~~and comprise~~ the following forms of expressions or combinations thereof:

(i) phonetic or verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols, etc.;

(ii) musical or sound expressions, such as songs, rhythms, ~~and~~ instrumental music ~~and popular tales~~;

(iii) expressions by action, such as dances, plays, ceremonies, rituals, sports and traditional games and other performances, theater, including, among others, puppet performance and folk drama.

*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), wooden carvings, sculptures, mouldings, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, food and drink, needlework, textiles, glassware, carpets, costumes, works of mas, toys, gifts and ~~;~~ handicrafts; musical instruments; stonework, metalwork, spinning, and architectural and/or funeral forms;

*which are:*

– ~~(a)~~ the products of creative intellectual activity, including individual and communal creativity;

– ~~(b)~~ characteristic indicative of authenticity/being genuine of ~~a~~ ~~community's~~ the cultural and social identity and cultural heritage of indigenous peoples and communities and traditional and other cultural communities; and

– ~~(c)~~ maintained, used or developed by indigenous peoples and communities ~~such community~~, or by individuals having the right or responsibility to do so in accordance with the customary land tenure system or law // customary ~~law~~ normative systems ~~and~~ or traditional/ancestral practices of those indigenous peoples and communities and traditional and other cultural communities, or has an affiliation with an indigenous/traditional community ~~that community~~.

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

[Commentary on Article 1 follows]

COMMENTARY

ARTICLE 1: SUBJECT MATTER OF PROTECTION

Background

The suggested article describes the subject matter covered by the provisions. Paragraph (a) sets out both a description of the subject matter itself (“traditional cultural expressions” or “expressions of folklore”) as well as the substantive criteria which specify more precisely which of those expressions would be protectable. The Committee’s discussions have clarified the distinction between description of the subject matter in general, and the more precise delimitation of those TCEs/EoF that are eligible for protection under a specific legal measure. As has been pointed out, not every expression of folklore or of traditional cultures and knowledge could conceivably be the subject of protection within an IP framework.

The suggested article draws upon the WIPO-UNESCO Model Provisions for National Laws for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 (the Model Provisions, 1982) and the Pacific Islands Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002 (the Pacific Model, 2002), as well as existing national copyright laws which provide *sui generis* protection for TCEs/EoF.

*Description of subject matter*

The words “or combinations thereof” in paragraph (a) are intended to demonstrate that TCEs/EoF can be both tangible and intangible and have both tangible and intangible components (“mixed expressions”), as has been suggested. Paragraph (a) also makes it clear that oral (non-fixed) expressions would also be protectable, responding to the often oral nature of traditional cultural expression. Fixation would therefore not be a requirement for protection. The protection for “architectural forms” could contribute towards the protection of sacred sites (such as sanctuaries, tombs and memorials) to the extent they are the object of misappropriation and misuse as covered by these provisions.

*Criteria for protection*

In terms of the criteria set out in paragraphs (a) (aa) to (cc), the suggested provision is to the effect that protectable TCEs/EoF should:

(i) be intellectual creations and therefore “intellectual property”, including both individual and communal creativity. Differing versions, variations or adaptations of the same expression could qualify as distinct TCEs/EoF if they are sufficiently creative (much like different versions of a work can qualify as copyright works if they are each sufficiently original);

(ii) have some linkage with a community’s cultural and social identity and cultural heritage. This linkage is embodied by the term “characteristic” which is used to denote that the expressions must be generally recognized as representing a communal identity and heritage. The term “characteristic” is intended to convey notions of “authenticity” or that the protected expressions are “genuine”, “pertain to” or an “attribute of” a particular people or community. Both “community consensus” and “authenticity” are implicit in the requirement that the expressions, or elements of them, must be “characteristic”: expressions which

become generally recognized as characteristic are, as a rule, authentic expressions, recognized as such by the tacit consensus of the community concerned;

(iii) still be maintained, developed or used by the community or its individual members.

The notion “heritage” is used to denote materials, intangible or tangible, that have been passed down from generation to generation, capturing the inter-generational quality of TCEs/EoF; an expression must be “characteristic” of such heritage to be protected. It is generally considered by experts that materials which have been maintained and passed between three, or perhaps two, generations form part of “heritage”. Expressions which may characterize more recently established communities or identities would not be covered.

#### *Contemporary creativity/individual creators*

As discussed in previous documents, many expressions of folklore are handed down from generation to generation, orally or by imitation. Over time, individual composers, singers and other creators and performers might call these expressions to mind and re-use, re-arrange and re-contextualize them in a new way. There is, therefore, a dynamic interplay between collective and individual creativity, in which an infinite number of variations of TCEs/EoF may be produced, both communally and individually.

The individual, therefore, plays a central role in the development and re-creation of traditional cultural expression. In recognition of this, the description of the subject matter in Article 1 includes expressions made by individuals. In order to determine what is or what is not a TCE or EoF, it is therefore not directly relevant whether the expression was made collectively or by an individual. Even a contemporary creative expression made by an individual (such as, for example, a film or video or a contemporary interpretation of pre-existing dances and other performances) can be protected as a TCE/EoF, provided it is characteristic of a community’s cultural and social identity and heritage and was made by the individual having the right or responsibility to do so in accordance with the customary law and practices of that community. In so far as the *beneficiaries of protection* are concerned, however, the primary focus of these draft provisions is on communal beneficiaries rather than on individuals. Communities are made up of individuals, and thus communal control and regulation of TCEs/EoF ultimately benefits the individuals who make up the relevant communities (see further Article 2 “Beneficiaries”).

#### *Choice of terms*

Member States and other stakeholders have called for flexibility in regard to terminology, amongst other things. Many international IP standards defer to the national level for determining such matters. Hence, to allow for appropriate national policy and legislative development, consultation and evolution, the suggested paragraph (b) recognizes that detailed decisions on terminology should be left to national and regional implementation.



Amendments proposed, comments made and questions posed at the fifteenth session (December 7 to 11, 2009) and during the intersessional written commenting process

The specific drafting amendments reflected in the draft provision were proposed by Angola, Australia, Bolivia (Plurinational State of), Brazil, Colombia, Egypt, El Salvador, India, Indonesia, Islamic Republic of Iran, Mexico, Nepal, Nigeria, the Philippines, Trinidad and Tobago, and Venezuela (Bolivarian Republic of).

*Comments made and questions posed*

The comments made and questions posed were proposed by Australia, Brazil, Cameroon, China, Colombia, Egypt, France, Germany, Italy, Islamic Republic of Iran, Japan, Republic of Korea, the Philippines, the Russian Federation, Spain, Sudan, Switzerland, United States of America and, as observers, by the Ibero-Latin-American Federation of Performers (FILAIE), Saami Council, Tulalip Tribes, and Tupaj Amaru.

Structure of Article 1

A delegation sought to have clarification from the Secretariat on the structure of Article 1. The delegation asked whether its understanding was correct that all conditions stated in (aa) to (cc) applied to all forms of TCEs described in subparagraphs (i) to (iv). If that understanding was correct, the delegation suggested to structure the text accordingly in order to avoid ambiguities.

Terminology

A delegation suggested that, in sub-paragraph (a)(bb), the word “heritage” in English be replaced by a word closer in meaning to the Spanish “*patrimonio*.” The English version did not reflect the idea, present in the Spanish version, that TCEs had a dynamic and interactive nature.

A delegation suggested that, in paragraph (a), the term “traditional” be clearly defined. It believed that the main objective for protecting TCEs was to provide protection to those TCEs containing sufficient value to be protected that would not fall under the scope of the conventional copyright protection regime. As “cultural expressions” could generally be subject for protection under the existing copyright regime, the core concept applicable to deciding the subject matter of TCE protection should be the term “traditional.” Although subparagraph (iv)(bb) could help in defining this term, using the words “cultural and social identity” and “cultural heritage,” these words too were broad concepts. “Traditional” was, therefore, not clearly defined.

Several delegations suggested adding an article or glossary setting out definitions of key terms. It was believed to be necessary to use unified terminology for the concepts as the establishment of a working definition of TCEs was one of the prerequisites of a substantive discussion. Existing relevant international terminology, including the definition of “intangible cultural heritage” of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, should also be taken into account by the Committee.

A delegation noted that the Committee had not determined whether TCEs or expressions of folklore were in fact one and the same, and that the definitions remained open.

Meaning of “community”

Two delegations posed questions related to the concept of members of a “community” and wished to know what the definition of “traditional community” was.

A delegation suggested that the term “community” should be understood in the same broad and inclusive sense as the term “communities” as described in footnote 23 of the Annex of working document WIPO/GRTKF/IC/9/4. [Note from the Secretariat: this footnote had read: “The broad and inclusive term “indigenous peoples and traditional and other cultural communities”, or simply “communities” in short, is used at this stage in these draft provisions. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.”]

The issue of community in Diaspora was also raised. One delegation stated that TCEs were only alive when carried in people, when expressed through people within a political or geographic region that claimed it, or when owned by people across the world in the Diaspora. It gave the example of a Cambodian dancer located in Seattle, who might be accused of pirating Cambodian TCEs, or, similarly, of an Ethiopian group of musicians in Washington, D.C. The delegation found [in the commentary to this article] that the statement “expressions which may characterize more recently established communities or identities would not be covered” was confusing.

An observer concurred on the issue of communities in Diaspora.

Meaning of “characteristic”

A delegation suggested that instead of using the word “characteristic,” which was deemed too general, some other wording could be used to make it clearer that the TCE should be “authentic and genuine.”

A delegation, in relation to subparagraph (a)(bb), posed the question as to who determined what was “characteristic” and at which stage that would be done.

In relation to subparagraph (a)(bb) and in response to the question posed by one delegation, an observer said that it should be the indigenous people or community themselves who decide on what would be characteristic. For example, he said that the traditional Saami dress would be a TCE under Article 1 as a traditional costume of the Saami people; it could only be the Saami who could really determine whether it was a costume that was signifying the cultural identity or not. It would not be possible for anyone else than the Saami to do so. In most instances and as a general rule, it would have to be up to the community or people from which the TCE originates to determine whether it was culturally significant or not; in relation to subparagraph (a)(cc), it suggested to replace it with: “affiliated with an indigenous people or community due to its cultural significance to that indigenous people or community.”

Definition of TCEs (Scope of Subject Matter): Open-ended / exhaustive nature

Two delegations said that the definition should be left open for further additions. A delegation suggested adding at the end of the preamble paragraph “etc.”, so as to suggest that there were also other forms of TCEs.

A delegation was of the view that the definition was generally acceptable, however, given cultural diversity, the examples in the definition should not be considered exclusive.

A delegation sought greater clarification on what should be the objective and subject matter of the protection of TCEs.

A delegation suggested that the scope of the TCE subject matter for protection be clearly defined as it found that the classification of TCEs was too vague in the present document. More work was needed to break it down in more detail.

A delegation noted that it considered the establishment of a working definition of “TCEs” to be one of the prerequisites of substantial discussion. The definition of “TCEs” as contained in Article 1 constituted a good working definition. The Committee could and should revisit this definition during the course of its negotiations to amend or modify the definition if necessary. The delegation highlighted that the definition of “TCEs” should encompass all TCEs, i.e., TCEs from developing countries and developed countries.

#### Relationship with conventional copyright law

A delegation noted that there was a possible overlap with copyright protection for adaptations and variations of TCEs, and asked how that conflict would be resolved. The delegation pointed to the text which read “differing versions, variations or adaptations of the same expression could qualify as distinct TCE/EoF.” It said that not only original TCEs but also variations and adaptations therefrom would also be protected as TCEs. The delegation said that it was its understanding that such adaptations based on original TCEs could also be protected by the conventional copyright regime. There would thus be two rights on the same subject matter and this would lead to a conflict of rights.

A delegation pointed to a conflict with the Berne Convention (Article 2) as far as the definitions were concerned and the relationship between the Berne Convention and the protection intended in the document. It suggested that this issue be looked into by an expert group.

An observer suggested reviewing the reference to “architectural forms.” The potential concern was that neither in the Berne Convention nor in modern IP law were architectural works protected. However, projects, drawings, models, architectural or engineering designs could be protected. The observer stated that architectural works were permanently located in parks, streets, squares or other public places and could be reproduced, distributed and communicated freely through paintings, drawings, photography and audiovisual processes. This could possibly conflict with the Berne Convention.

#### Relationship with the public domain

Two delegations suggested that the impact on the public domain be examined. One delegation asked what criteria were used to distinguish the TCEs that were protected from those that were not. Among TCEs, some were handed down only to certain individuals within a small community, while others were handed down in a broader nation-wide cultural context, maintained and used by a wider range of public or sometimes even used commercially. This issue was important since it would have a direct impact on the boundaries of the public domain. Pending the level of protection to be applied to the subject matter,

broader definition of TCEs could imply limiting the scope of public domain materials which were currently available.

*Drafting suggestions by observers*

An observer, in relation to paragraph (a), suggested to add, after “or are manifested”, the phrase “in original form” in order to have a criterion to identify and reference a particular community. The representative also suggested to delete “and knowledge” to avoid any confusion with TK, which was dealt with separately. In relation to subparagraph (a)(aa), the representative suggested to add, after the semicolon, “which was created by former generations” to focus on the true essence of what was being discussed: cultural heritage and legacy.

An observer, commenting on the sentence “maintained, used or developed by such community or by individuals having the right . . .” stated that the language suggested that the instrument would only apply to TCEs that were still in the custody of indigenous peoples. The language “maintained, used or developed” suggested that the TCE was still to be managed by the community or the indigenous peoples and he believed that it should also apply to artifacts that might have been non-consensually taken out of the community. He proposed the alternative language “has an affiliation with an indigenous people or a community due to its cultural significance to that community.”

An observer proposed the following text for Article 1:

“Article 1

Protected material

- (1) Verbal expressions, such as folk tales and legends, folk poetry, stories, epic poems, riddles, other narrations; words, signs, sacred names and symbols;
- (2) Musical expressions, such as songs and indigenous instrumental music, music on percussion instruments and woodwinds;
- (3) Expressions by action, such as dances, plays, ceremonies, ritual expressions and other folkloric performances;
- (4) Tangible expressions, such as art, drawings, paintings, sculptures, pottery, terracotta, mosaic, woodwork and jewelry; basketwork, needlework, textiles, glasswork, pencils, clothing, handicrafts; and
- (5) Musical instruments and architectural works.

The said TK has universal value from a historical, aesthetic and anthropological standpoint and is passed from generation to generation.”

ARTICLE 2:

BENEFICIARIES

*Measures for the protection of national traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples and communities, individual groups, families, tribes, nations and traditional and other cultural communities or the nation // or the countries, to which a traditional cultural expression/expression of folklore is specific.<sup>2</sup>*

- (i) in whom the custody, care and safeguarding of the TCEs/EoF are ~~entrusted~~ existing in accordance with their customary law ~~and~~ or practices; and*
- (ii) who maintain, control, use or develop the traditional cultural expressions/expressions of folklore as being ~~characteristic~~ authentic and genuine of their cultural and social identity and cultural heritage.*

[Commentary on Article 2 follows]

<sup>2</sup>

Document WIPO/GRTKF/IC/6/12 The broad and inclusive term “indigenous peoples and traditional and other cultural communities”, or simply “communities” in short, is used at this stage in these draft provisions. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.

## COMMENTARY

### ARTICLE 2: BENEFICIARIES

#### Background

Many stakeholders have emphasized that TCEs/EoF are generally regarded as collectively originated and held, so that any rights and interests in this material should vest in communities rather than individuals. Some laws for the protection of TCEs/EoF provide rights directly to concerned peoples and communities. On the other hand, many vest rights in a Governmental authority, often providing that proceeds from the granting of rights to use the TCEs/EoF shall be applied towards national heritage, social welfare and culture related programs. The African Group has stated that principles for the protection of TCEs/EoF should ‘Recognize the role of the State in the preservation and protection of traditional knowledge and expressions of folklore.’<sup>3</sup>

The suggested provision is sufficiently flexible to accommodate both approaches at the national level – while the beneficiaries of protection should directly be the concerned peoples and communities, the rights themselves could be vested either in the peoples or communities, or in an agency or office (see also Article 4 “Management of Rights”).

Article 2, and the provisions as a whole, contemplate that more than one community may qualify for protection of their TCEs/EoF in line with the criteria in Article 1. Existing *sui generis* laws provide for this possibility, such as the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge of Panama, 2000 and the related Executive Decree of 2001 (“the Panama Law”)<sup>4</sup>, and the Peruvian Law of 2002 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources (“the Peru Law, 2002”).<sup>5</sup> This also touches upon the allocation of rights or distribution of benefits among communities which share the same or similar TCEs/EoF in different countries (so-called “regional folklore”). This is dealt with further in Articles 4, “Management of Rights” and 7, “Formalities”.

The term “cultural communities” is intended to be broad enough to include also the nationals of an entire country, a “nation”, in cases where TCEs/EoF are regarded as “national folklore” and belonging to all of the people of a particular country. This complements and accords with the practice in other policy areas.<sup>6</sup> Therefore, a national law could, for example, state that all nationals are the beneficiaries of protection.

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<sup>3</sup> WIPO/GRTKF/IC/6/12.

<sup>4</sup> Article 5, Decree.

<sup>5</sup> Article 10.

<sup>6</sup> See Glossary on Intangible Cultural Heritage, Netherlands National Commission for UNESCO, 2002 (“... a nation can be a cultural community”).

*Communities/individuals*

As discussed in relation to Article 1, these provisions are intended primarily to benefit communities, including in cases where a TCE/EoF is created or developed by an individual member of a community. The essential characteristics of “traditional” creations are that they contain motifs, a style or other items that are characteristic of and identify a tradition and a community that still bears and practices it. Thus, even where an individual has developed a tradition-based creation within his or her customary context, it is regarded from a community perspective as the product of social and communal creative processes. The creation is, therefore, not “owned” by the individual but “controlled” by the community, according to indigenous and customary legal systems and practices.<sup>7</sup> This is what marks such a creation as “traditional”.

For these reasons, the benefits of the protection envisaged in these provisions accrue to communities and not individuals – this is what distinguishes this *sui generis* system from conventional IP law which remains available to the individual should he or she wish to take advantage of it (see Article 10). This approach accords with the view articulated by Committee participants that these provisions should aim to provide forms of protection for expressions of culture and knowledge not currently available under conventional and existing IP law.

However, communities are made up of individuals, and thus communal control and regulation of TCEs/EoF ultimately benefits the individuals who make up the relevant community. Thus, in practice, it is individuals who will benefit, in accordance with customary law and practices.

*Amendments proposed, comments made and questions posed at the fifteenth session (December 7 to 11, 2009) and during the intersessional written commenting process*

The specific drafting amendments reflected in the draft provision were proposed by Australia, Brazil, El Salvador, India, Mexico, Morocco, and Trinidad and Tobago.

*Comments made and questions posed*

The comments made and questions posed were proposed by Australia, Brazil, El Salvador, India, Indonesia, Islamic Republic of Iran, Republic of Korea and Morocco and, as an observer, by the Arts Law Centre of Australia.

Terminology

A delegation reiterated its comments made under Article 1 regarding the English equivalent to the Spanish “*patrimonio*.”

A delegation, concerning paragraph (i), said that the term “entrusted” could have certain legal ramifications in terms of requiring evidence of the custody, care and safeguarding being entrusted to a particular community. It suggested substituting the word “entrusted” with the word “existing.”

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<sup>7</sup> See generally WIPO/GRTKF/IC/6/3.

### Scope of beneficiaries

A delegation suggested that other groups should also be referred to in addition to “indigenous peoples and traditional and other cultural communities.”

A delegation said that, concerning paragraph (i), the term “traditional communities” was much too broad and should be defined in a clearer and more precise way. The delegation said that a nation had its own folklore, “national” folklore; however there was no mention of “national” TCEs. It suggested amending paragraph (i) stating that the “national” folklore of the States also needed to be protected.

A delegation proposed that the definition of beneficiaries also include the following elements: (i) other than traditional/indigenous communities as parties who maintained and developed TCE/EoF, governments also needed to play a role in facilitating TCE/EoF protection in case there were other communities who had potential benefits for the utilization of TCE/EoF; (ii) in cases where the owner of TCE/EoF could not be identified, the beneficiary of TCE/EoF protection should be the government, such as the local government, and the TCE/EoF would be used for the sake of community’s interests; (iii) the owner of TCE/EoF eligible to benefit from the protection should be the TCE/EoF owner who had been identified by the local government; (iv) regarding the individual’s contribution to the development of TCE/EoF, it could be rewarded by the existing IP system; (v) a state could play a certain role in facilitating the protection of the community and it could be extended further as a right holder only if it benefited the communities.

A delegation believed that the right holders should be individual groups, families, local communities, tribes and nations. However, the rights of holders were considered in the framework of the rights of society. In this regard, national legislation was important and could not be ignored. The rights of local communities who were real owners and their consent should particularly be observed.

A delegation stated that the provision did not fully address the issue of legitimate beneficiaries of TCE protection. Different communities could share the same or similar forms of TCEs or their TCEs could have similar features, which could make it difficult for potential users to find the legitimate beneficiaries or rights holders of the TCEs they wished to use. In addition, without a clear scope of beneficiaries, the TCE registration offices, as referred to in Article 7(b)(iv), would be highly burdened when resolving disputes.

### Customary law

A delegation said that there would be difficulties to prove the relevant customary law for indigenous communities, and suggested that “or” should replace “and” in paragraph (i).

An observer suggested that, in relation to paragraph (i), the requirement that communities prove that they had been entrusted with the custody, care and safeguarding of the TCEs/EoF in accordance with their customary law and practices be deleted and that a presumption should apply in favor of the indigenous community claiming to have been entrusted with the custody, care and safeguarding of the TCEs/EoF. She suggested rephrasing the paragraph for it to read: “in whom the custody, care and safeguarding of the TCEs/EoF are entrusted.” She also said that the end of the sentence should be deleted, and that a new clause should be added



at the end of the provision, reading: “The Indigenous peoples and traditional and other cultural communities claiming the benefit of the measures for the protection of TCEs/EoF are presumed to have been entrusted with the custody, care and safeguarding of those TCEs/EoF.” Alternatively, and as a minimum, she suggested that the following change should be made: “in whom the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with their customary law or practices.” She also said that in Australia, indigenous peoples considered it disrespectful to use the term indigenous otherwise than with a capital “I” and that therefore, the word “indigenous” should be with a capital I throughout the text. She said that this spelling was consistent with the one used in the Declaration on the Rights of Indigenous peoples.

ARTICLE 3:

ACTS OF MISAPPROPRIATION AND MISUSE (SCOPE OF PROTECTION)

Traditional cultural expressions/expressions of folklore registered or notified 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 indigenous people or community, traditional and other cultural 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 indigenous peoples and communities and traditional and other cultural communities ~~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, done in order to cause harm thereto or to the reputation or image of the community, indigenous peoples and communities or region to which they belong; 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 indigenous peoples and communities and traditional and other cultural communities ~~community~~ concerned, or brings them ~~the community~~ into contempt or disrepute;

(iii) any fixation, representation, publication, communication or use in any form of the traditional cultural expressions/expressions of folklore which make no mention of the community, indigenous peoples or communities or region to which they belong.

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 indigenous peoples and communities and traditional and other cultural communities are ~~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 the indigenous peoples and communities and traditional and other cultural communities ~~a community~~, suggest any endorsement by or linkage with such indigenous peoples and communities and traditional and other cultural communities ~~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 designated national authority ~~Agency~~ referred to in Article 4 in consultation with the relevant indigenous people and communities and traditional and other cultural communities ~~community~~; and*

Secret traditional cultural expressions/expressions of folklore

(c) *There shall be adequate and effective legal and practical measures to ensure that the indigenous peoples and communities and traditional and other cultural communities ~~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.*

[Commentary on Article 3 follows]

COMMENTARY

ARTICLE 3: ACTS OF MISAPPROPRIATION AND MISUSE  
(SCOPE OF PROTECTION)

Background

This draft article addresses a central element of protection, that is, the misappropriations of TCEs/EoF covered by the provisions and the rights and other measures that would apply in each case.

As Committee participants have stressed should be the case, the article aims to provide forms of protection for expressions of culture and knowledge not currently available under conventional and existing IP law. These provisions are without prejudice to protection for TCEs/EoF already available under current IP law. Conventional IP protection remains available. See further commentary to Articles 2 “Beneficiaries” and 10 “Relationship with Intellectual Property and Other Forms of Protection and Preservation”.

The suggested provision seeks to address the kinds of IP-related uses and appropriations of TCEs/EoF which most often cause concern to indigenous and local communities and other custodians and holders of TCEs/EoF, as identified by them in earlier fact-finding and consultations (see paragraph 53 of document WIPO/GRTKF/IC/7/3). It draws from a wide range of approaches and legal mechanisms embodied in various national and regional laws (see paragraphs 54 to 56 of document WIPO/GRTKF/IC/7/3).

*Summary of draft provision*

In brief, the draft provision suggests three “layers” of protection, intended to provide supple protection that is tailored to different forms of cultural expression and the various objectives associated with their protection, reflecting a combination of exclusive and equitable remuneration rights and a mix of legal and practical measures:

(a) for TCEs/EoF of particular cultural or spiritual value to a community, a right of “free, prior and informed consent” (PIC), akin to an exclusive right in IP terms, is suggested, in terms of which the kinds of acts usually covered by IP laws, especially copyright, related rights, trademarks and designs, would be subject to the PIC of the relevant community.

(i) This layer of protection would be subject to prior notification or registration in a public register as provided for under Article 7 (see below). Registration or notification is optional only and for decision by relevant communities. There would be no need to register or notify secret TCEs/EoF because secret TCEs/EoF are separately protected under Article 3 (c). This registration option is applicable only in cases where communities wish to obtain strict, prior informed consent protection for TCEs/EoF which are already known and publicly available.

(ii) The right of PIC would grant a community the right either to prevent or authorize, on agreed terms including on benefit-sharing, the use of the TCEs/EoF. As such, PIC is akin to an exclusive IP right which may be, but need not be, licensed. These rights could be used positively or, which is more likely perhaps, defensively (to prevent any use and exploitation of these TCEs/EoF and acquisition of IP rights over them).

(iii) Specific tailored forms of protection are suggested for words, names, symbols and other designations, drawing on trademark law and special measures already

established in this regard in the Andean Community, New Zealand and the United States of America.

(iv) In respect of performances which qualify as TCEs/EoF (TCEs/EoF which are ‘expressions by action’: see Article 1), these may also be registered or notified and so be protected strongly, as suggested. The moral and economic rights proposed include rights modeled on the kinds of rights already provided to other performers, including by in particular the WIPO Performances and Phonograms Treaty, 1996 (WPPT, 1996). This form of protection is without prejudice to the protection available under the WPPT. If such performances were not so registered or notified, they could be protected under (b) or (c) below, depending on the circumstances and the community’s wishes.

(b) For TCEs/EoF not so registered or notified, their use would not be subject to prior authorization but protection would concern *how* the TCEs/EoF were used. These TCEs/EoF could be used, as a source of creative inspiration for example, without the need for prior consent or authorization, in furtherance of creativity and artistic freedom, a key objective as many have stated. However, how the TCEs/EoF are so used would be regulated, drawing mainly upon moral rights and unfair competition principles, with civil and criminal remedies proposed, as well as the payment of an equitable remuneration or equitable benefit-sharing, to be determined by a competent authority. This authority could be the same Agency as referred to in Article 4 “Management of Rights”. This approach is akin perhaps to a compulsory license or equitable remuneration approach, found in national *sui generis* laws concerning TCEs/EoF<sup>8</sup>, as well as in conventional copyright law concerning musical works already fixed in sound recordings.<sup>9</sup>

(c) Finally, for secret, confidential or undisclosed TCEs/EoF, the suggested provision seeks to clarify that existing protection for confidential or undisclosed information covers TCE-related subject matter, building also upon case-law to this effect.<sup>10</sup> The Mataatua Declaration, 1993 recognizes, amongst other things, that indigenous peoples have the right to “protect and control dissemination” of [their] knowledge.<sup>11</sup>

#### *Flexibility as to legal mechanisms for implementation*

The provisions are broad and inclusive, and intended to give flexibility to national and regional authorities and communities in relation to which precise legal mechanisms may be selected at the national or regional levels to implement them.

To illustrate this point with a practical example – the suggested principle which states that there ought to be protection against false or misleading indications in trade as to the endorsement by or linkage with a community of tradition-based creations (a typical example is a handicraft sold as ‘authentic’ or ‘Indian’ when it is not) could be implemented in practice at the national level through *one or more* of the following: (i) the registration and use of certification trademarks by concerned communities; (ii) civil and/or criminal remedies available under general trade practices and labeling laws; (iii) enactment of legislation specifically to provide this form of protection for TCEs/EoF; (iv) the registration and use of geographical indications; and/or (v) common law remedies for “passing off” and laws for the suppression of unfair competition.

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<sup>8</sup> Such as the Bangui Accord, OAPI, as revised in 1999.

<sup>9</sup> Article 13, Berne Convention, 1971.

<sup>10</sup> Foster v. Mountford (1976) 29 FLR 233.

<sup>11</sup> Article 2.1.

*Derivative works*

Some key policy and legal questions pivot on the adaptation right, the right to make derivative works and on the setting of appropriate exceptions and limitations in this regard.

The suggested provision suggests an adaptation right in respect of TCEs/EoF of particular cultural or spiritual value, subject to prior registration or notification. In respect of other TCEs/EoF, there would be no adaptation right as such, nor prevention of the obtaining of IP rights in the derivative work by its creator. Nor would, in either case, mere “inspiration” be prevented, as is also the case in copyright law, in line with the idea/expression dichotomy.<sup>12</sup> However, it is suggested there be regulation of how derivative works may be exploited, following the general approach of the Pacific Model Law, 2002.

*Amendments proposed, comments made and questions posed during the intersessional written commenting process*

The specific drafting amendments reflected in the draft provision were proposed by Mexico.

*Comments made during the intersessional written commenting process*

The comments made were proposed by China.

*Enforcement of rights*

A delegation suggested that minimum criteria be specified for the enforcement of rights. For example, the following two conditions should be met, as a matter of principle and regardless of the nature of rights, when TCEs were to be used: (i) in regard to moral rights, TCEs should be protected against distortion and mutilation and the source of a TCE should be indicated; and (ii) in regard to property rights, appropriate economic compensations should be ensured.

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<sup>12</sup> Discussed in WIPO/GRTKF/IC/6/3.

ARTICLE 4:

MANAGEMENT OF RIGHTS

(a) *Prior authorizations to use traditional cultural expressions/expressions of folklore, when required in these provisions, should be obtained either directly from the indigenous peoples and communities and each of the groups, families, tribes, nations, traditional and other cultural communities or countries ~~community concerned where the community so wishes~~, or from a designated national authority ~~an agency~~ acting at the request, and on behalf, of the indigenous people and community or the traditional and other cultural communities ~~community~~ (from now on referred to as “the Agency”). Where authorizations are granted by the authority ~~Agency~~:*

(i) *such authorizations should be granted only in appropriate consultation with the relevant indigenous people and community and traditional and other cultural communities, in accordance with their traditional decision-making and governance processes;*

(ii) *any monetary or non-monetary benefits collected by the designated national authority ~~Agency~~ for the use of the traditional cultural expressions/expressions of folklore should be provided directly by it to the indigenous people and community and the traditional and other cultural communities concerned.*

(b) *The designated national authority ~~Agency~~ should generally be tasked with awareness-raising, education, advice and guidance functions. The designated national authority ~~Agency~~ should also:*

(i) *where so requested by an indigenous people and community and traditional and other cultural communities, monitor uses of traditional cultural expressions/expressions of folklore for purposes of ensuring fair and appropriate use as provided for in Article 3 (b); and,*

(ii) *establish the equitable remuneration referred to in Article 3 (b) in consultation with the relevant indigenous peoples and communities and traditional and other cultural communities ~~community~~.*

[Commentary on Article 4 follows]

COMMENTARY

ARTICLE 4: MANAGEMENT OF RIGHTS

Background

This provision deals with how and to whom authorizations to use TCEs/EoF are applied for and related questions. The matters dealt with in this provision should apply regardless of whether communities or State-appointed bodies are the rights holders (see Article 2 “Beneficiaries” above).

The provisions as a whole envisage the exercise of rights by the relevant communities themselves. However, in cases where the relevant communities are not able or do not wish to exercise the rights directly, this draft article suggests a role for an “Agency”, acting at all times at the request of and on behalf of relevant communities. A role for such an “Agency” is entirely optional, and only necessary and appropriate if the relevant communities so wish.

An agency fulfilling these kinds of roles is provided for in the Model Provisions, 1982, the Indigenous Peoples Rights Act of 1997 of the Philippines (the Philippines Law, 1997), the Pacific Model Law, 2002 and in many national laws providing *sui generis* protection for TCEs/EoF. Several Member States have expressed support for an ‘authority’ in such cases.

An agency such as that suggested could be an existing office, authority or society, and also a regional organization or office. The African Regional Intellectual Property Organization (ARIPO) and *l’Organisation africaine de la propriété intellectuelle (OAPI)* have, for example, noted the possible role of regional organizations in relation to the protection of TCEs/EoF and TK. Copyright collecting societies could also play a role.

This provision seeks to identify only certain core principles that could apply. Clearly the elaboration of such measures will depend greatly on national and community factors: options for more detailed provisions could be further developed at the national and community levels. Existing laws and models have detailed provisions that could be drawn from.

*Amendments proposed, comments made and questions posed during the intersessional written commenting process*

The specific drafting amendments reflected in the draft provision were proposed by Mexico.

*Comments made during the intersessional written commenting process*

The comments made were proposed, as observer, by the Ibero-Latin-American Federation of Performers (FILAIE).

*Drafting suggestions by observers*

An observer suggested that, in relation to paragraph 4(b), communities living in border regions should select their “Agency”, in the country where they would spend most days per year.



ARTICLE 5:

EXCEPTIONS AND LIMITATIONS

(a) Measures for the protection of TCEs/EoF should:

(i) not restrict or hinder the normal use, transmission, exchange and development of TCEs/EoF within the traditional and customary context by members of the indigenous peoples and communities and traditional and other cultural communities ~~relevant community~~ as determined by customary laws and practices;

(ii) extend only to utilizations of TCEs/EoF taking place outside the traditional or customary context, whether or not for commercial gain; and,

(iii) not apply to utilizations of TCEs/EoF in the following cases:

- by way of illustration for teaching and learning;
- non-commercial research or private study;
- criticism or review;
- reporting news or current events;
- use in the course of legal proceedings;
- the making of recordings and other reproductions of TCEs/EoF for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes; and
- incidental uses,

*provided in each case that such uses are compatible with fair practice, the relevant indigenous peoples and communities and traditional and other cultural communities ~~are community~~ is acknowledged as the source of the TCEs/EoF where practicable and possible, and such uses would not be offensive to such indigenous peoples and communities and traditional and other cultural communities, as long as the traditional cultural expressions/expressions of folklore are not distorted, mutilated or modified so as to cause harm thereto or to the reputation of the community, indigenous peoples and communities or region to which they belong ~~the relevant community~~.*

(b) Measures for the protection of TCEs/EoF could allow, in accordance with custom and traditional practice, unrestricted use of the TCEs/EoF, or certain of them so specified, by all members of a community, including all nationals of a country.

[Commentary on Article 5 follows]

COMMENTARY

ARTICLE 5: EXCEPTIONS AND LIMITATIONS

Background

Many stakeholders have stressed that any IP-type protection of TCEs should be subject to certain limitations so as not to protect them too rigidly. It has been suggested that overly strict protection may stifle creativity, artistic freedom and cultural exchanges, as well as be impracticable in its implementation, monitoring and enforcement.

In addition, the protection of TCEs/EoF should not prevent communities themselves from using, exchanging and transmitting amongst themselves expressions of their cultural heritage in traditional and customary ways and in developing them by continuous recreation and imitation, as has been emphasized.

This suggested provision puts forward certain exceptions and limitations for consideration:

(a) paragraph (a)(i) implements objectives and general guiding principles associated with non-interference in and support for the continued use and development of TCEs/EoF by communities, while (a)(ii) affirms that these provisions would apply only to ‘*ex situ*’ uses of TCEs/EoF, namely uses outside the customary or traditional context, whether for commercial purposes or not;

(b) paragraph (a)(iii) sets out exceptions drawn from the Model Provisions, 1982, the Pacific Islands Model Law, 2002 and copyright laws in general. Certain more specific comments include:

(i) Limitations and exceptions for teaching purposes are common in copyright laws. While these are sometimes limited to “face-to-face” teaching (as also in the Pacific Model, 2002), special limitations and exceptions to copyright and related rights for distance learning have also been raised for discussion.<sup>13</sup> The term “teaching and learning” is used for present purposes.

(ii) National copyright laws in some cases allow public archives, libraries and the like to make, for non-commercial safeguarding purposes only, reproductions of works and expressions of folklore and keep them available for the public<sup>14</sup>, and this is envisaged. In this respect, appropriate contracts, IP check-lists and other guidelines and codes of conduct for museums, archives and inventories of cultural heritage are under development by WIPO. Specific limitations for libraries and archives in copyright law in general have also been raised for discussion.<sup>15</sup>

(iii) Not all typical copyright exceptions may be appropriate, however, as they might undermine community interests and customary rights – for example, incidental use

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<sup>13</sup> See Proposal by Chile (SCCR/12/3) on the Subject “Exceptions and limitations to copyright and related rights”, discussed at the 12<sup>th</sup> session of the WIPO Standing Committee on Copyright and Related Rights (SCCR), November 2004.

<sup>14</sup> An example is the United Kingdom’s Copyright, Designs and Patents Act, 1988, Schedule 2, par. 14.1.

<sup>15</sup> See Proposal by Chile, above.

exceptions which allow a sculpture or work of artistic craftsmanship permanently displayed in a public place to be reproduced in photographs, drawings and in other ways without permission. Thus, exceptions which would be offensive are excluded.

*Amendments proposed, comments made and questions posed during the intersessional written commenting process*

The specific drafting amendments reflected in the draft provision were proposed by Mexico.

*Comments made during the intersessional written commenting process*

The comments made were proposed, as observer, by the Ibero-Latin-American Federation of Performers (FILAIE).

*Drafting suggestions by observers*

An observer suggested that, in subparagraph (a)(iii), the word “incidental” be deleted, or, should the word be retained, that the three-step test be applied to such uses.

ARTICLE 6:

TERM OF PROTECTION

*Protection of traditional cultural expressions/expressions of folklore should endure for as long as the traditional cultural expressions/expressions of folklore continue to meet the criteria for protection under Article 1 of these provisions, and,*

*(i) in so far as TCEs/EoF referred to in Article 3(a) are concerned, their protection under that sub-article shall endure for so long as they remain registered or notified as referred to in Article 7; ~~and~~*

*(ii) in so far as secret TCEs/EoF are concerned, their protection as such shall endure for so long as they remain secret; and*

*(iii) the protection granted to TCEs/EoF against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the community, indigenous peoples and communities or region to which they belong, shall last indefinitely.*

[Commentary on Article 6 follows]

COMMENTARY

ARTICLE 6: TERM OF PROTECTION

Background

Many indigenous peoples and traditional communities desire indefinite protection for at least some aspects of expressions of their traditional cultures. Calls for indefinite protection are closely linked to calls for retroactive protection (see Article 9 “Transitional Measures” below). On the other hand, it is generally seen as integral to the balance within the IP system that the term of protection not be indefinite, so that works ultimately enter the ‘public domain’.

The suggested provision embodies a trademark-like emphasis on current use, so that once the community that the TCE is characteristic of no longer uses the TCE or no longer exists as a distinct entity (analogous to abandonment of a trademark, or a trademark becoming generic), protection for the TCE would lapse. Such an approach draws upon the very essence of the subject matter of protection, it being recalled that at the heart of TCEs/EoF is that they are characteristic of and identify a community (see above). When a TCE ceases to do so, it ceases by definition to be a TCE and it follows that protection should lapse.

In addition to this general principle, specific provision is made for the term of protection of two categories, namely those TCEs/EoF which are registered or notified and those that are secret, undisclosed or confidential.

*Amendments proposed, comments made and questions posed during the intersessional written commenting process*

The specific drafting amendments reflected in the draft provision were proposed by Mexico.

*Comments made during the intersessional written commenting process*

The comments made were proposed, as observer, by the Ibero-Latin-American Federation of Performers (FILAIE).

*Drafting suggestions by observers*

An observer stated that the phrasing of subparagraph (ii) could give rise to ambiguity. For this reason, it would be appropriate to add that legal rules applicable to all other forms of TCEs/EoF be also applied to secret TCEs/EoF, when they ceased to be secret.

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 designated national authority competent office or organization by the relevant indigenous people and community and traditional and other cultural communities, community ~~or~~ by the designated national authority or by a third party 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 indigenous peoples and communities or traditional and other cultural communities 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 designated national authority office or organization receiving such registrations or notifications shall should resolve any uncertainties ~~or disputes~~ and help to resolve disputes arising as to which indigenous peoples and communities and traditional and other cultural communities 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, normative systems and processes, alternative dispute resolution (ADR) and existing cultural resources, such as cultural heritage inventories, as far as possible.*

[Commentary on Article 7 follows]

## COMMENTARY

### ARTICLE 7: FORMALITIES

#### Background

It has been suggested that the acquisition and maintenance of protection should be practically feasible, especially from the point of view of traditional communities, and not create excessive administrative burdens for right holders or administrators alike. Equally important, is the need, expressed by several stakeholders such as external researchers and other users of TCEs/EoF, for certainty and transparency in their relations with communities.

A key choice is whether or not to provide for automatic protection or for some kind of registration:

(a) a first option is to require some form of registration, possibly subject to formal or substantive examination. A registration system may merely have declaratory effect, in which case proof of registration would be used to substantiate a claim of ownership, or it may constitute rights. Some form of registration may provide useful precision, transparency and certainty on which TCEs are protected and for whose benefit;

(b) a second option would be to require automatic protection without formalities, so that protection would be available as of the moment a TCE is created, similar to copyright.

The suggested provision combines these two approaches.

First, paragraph (a) suggests as a general principle that TCEs/EoF should be protected without formality, following copyright principles and in an endeavor to make protection as easily available as possible.

Second, some form of registration or notification is, however, proposed for those TCEs/EoF for which, under Article 3 (a), would receive the strongest protection:

(i) registration or notification is optional only and a matter for decision by relevant communities. Registration or notification is not an obligation; protection remains available under Article 3 (b) for unregistered TCEs/EoF. There would be no need to register or notify secret TCEs/EoF because secret TCEs/EoF are separately protected under Article 3 (c). This registration option is applicable only in cases where communities wish to obtain strict, prior informed consent protection for TCEs/EoF which are already known and publicly available;

(ii) the provision draws broadly from existing copyright registration systems, the Database of Native American Insignia in the United States of America, the Panama Law, 2000, the Andean Decision 351, and the Peru Law, 2002 (see generally WIPO/GRTKF/IC/7/3 and earlier documents for information on these laws);

(iii) a regional organization could conceivably administer such a registration or notification system. ARIPO and OAPI have, for example, noted the role of regional organizations in this area. While these provisions may have initial application at the national level, thus implying national registers or other notification systems, eventually some form of regional and international register could form part of possible eventual regional and

international systems of protection. Such an international system of notification/registration could perhaps draw from existing systems such as Article 6<sup>ter</sup> of the Paris Convention or the registration system provided for in Article 5 of the Lisbon Agreement for the International Registration of Appellations of Origin, 1958;

(iv) it is suggested that the office or organization at which such registrations or notifications may be made, and which would seek to resolve disputes, should not be the same as the Agency referred to in Article 4;

(v) it is made clear that it is only a community which claims protection of a particular TCE/EoF that can register or notify the TCE/EoF, or, in cases where the community is not able to do so, the Agency referred to in Article 4, acting at the request and in the interests of the community;

(vi) in resolving disputes between communities, including communities from more than one country, the draft article suggests that the registration office or organization use customary laws and processes and alternative dispute resolution (ADR) as far as possible. These are suggested in order to achieve as far as possible objectives and principles relating to customary law and non-conflict between communities. In so far as taking existing cultural resources into account, the office or organization could refer also to cultural heritage inventories, lists and collections such as those established under the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003. There may, more broadly, be some opportunities for developing synergies between inventories established or being established for cultural heritage preservation purposes (such as States Parties are obliged to do under the UNESCO Convention referred to) and the kind of registers or notification systems suggested here. Indeed, measures could be developed to ensure that cultural heritage inventories, lists and collections could reinforce, support and facilitate the implementation of *sui generis* provisions for the protection of TCEs/EoF (and TK).<sup>16</sup> WIPO is working with relevant stakeholders in examining these questions further;

(vii) in order for the provision not to be too prescriptive however, further questions of implementation could be left to national and regional laws. Enabling legislation, regulations or administrative measures could provide guidance on issues such as: (a) the manner in which applications for notification or registration should be made; (b) to what extent and for what purposes applications are examined by the registration office; (c) measures to ensure that the registration or notification of TCEs/EoF is accessible and affordable; (d) public access to information concerning which TCEs/EoF have been registered or notified; (e) appeals against the registration or notification of TCEs/EoF; (f) the resolution by the registration office of disputes relating to which community or communities should be entitled to benefit from the protection of a TCE/EoF, including competing claims from communities from more than one country; and (g) the legal effect of notification or registration.

#### *Recording, fixation and documentation of TCEs/EoF*

The role of documentation, recording and fixation of TCEs/EoF and its relationship with IP protection has been discussed at length in previous documents and publications.<sup>17</sup> In brief, previous discussions have identified certain IP-related concerns with documentation

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<sup>16</sup> See UNESCO Expert Meeting on Inventorying Intangible Cultural Heritage, March 17 and 18, 2005.

<sup>17</sup> See WIPO/GRTKF/IC/5/3, WIPO/GRTKF/IC/6/3 and WIPO/GRTKF/IC/7/3, for example.



initiatives. For example, copyright and related rights in the documentation, recordings and fixations would almost always vest not in the communities themselves but in those who undertake the documentation, recording or fixation. Second, documentation and recordal of TCEs/EoF, particularly if made available in digitized form, make the TCEs/EoF more accessible and available and may undermine the efforts of communities to protect them. For these reasons, the proposed article provides that any IP rights in recordings made specifically for registration purposes should vest in the relevant communities. Indeed, fixing in material form TCEs/EoF which would not otherwise be protectable, establishes new IP rights in the fixation and these IP rights could be used indirectly to protect the TCEs/EoF themselves (this strategy has been used for example to protect ancient rock art).<sup>18</sup> It is furthermore clear that the recording and documentation of TCEs/EoF is a valuable if not essential component of cultural heritage safeguarding programs. WIPO is undertaking further work on the IP aspects and implications of recording and documentation of TCEs/EoF in cooperation with other stakeholders. The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, 1993 urges indigenous peoples *inter alia* to “develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge”.<sup>19</sup>

*Amendments proposed, comments made and questions posed during the intersessional written commenting process*

The specific drafting amendments reflected in the draft provision were proposed by Mexico.

*Comments made during the intersessional written commenting process*

The comments made were proposed by the Republic of Korea and Mexico.

Relationship with “characteristics” of TCEs

A delegation believed that formalities should be put in place, particularly, when considering the characteristics of TCEs. For instance, difficulties could arise when determining the time of original creation of a TCE and when specifying the time in which the TCE was recognized or authorized as a TCE. A gap could exist between these two time points, leading to the issue of retroactive protection of TCEs. For that reason, protecting a TCE from the time of its original creation without any formalities could cause confusion to both rights holders and users of TCEs.

“Normative systems”

A delegation explained that “normative systems” comprised knowledge developed and preserved within specific groups of indigenous peoples and communities, and passed on from generation to generation, in oral form. Indigenous normative systems were therefore part of the same cultural matrix as traditional medicine, art and handicrafts, myths of creation, and relationship of exchange, which existed between the communities and with nature. To that extent, internal normative systems constituted TK of indigenous peoples and indigenous

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<sup>18</sup> See, for example, Janke, ‘Unauthorized Reproduction of Rock Art’ in *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, WIPO, 2003.

<sup>19</sup> Article 1.3.

peoples should have the right to use their normative systems to resolve any internal disputes that would arise.

ARTICLE 8:

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

*(a) Accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies, including criminal and civil remedies, shall ~~should~~ be available in cases of breach of the protection for traditional cultural expressions/expressions of folklore.*

*(b) The designated national authority ~~Agency~~ referred to in Article 4 should be tasked with, among other things, advising and assisting indigenous peoples and communities and traditional and other cultural communities ~~communities~~ with regard to the enforcement of rights and with instituting civil, criminal and administrative proceedings on their behalf when appropriate and requested by them.*

[Commentary on Article 8 follows]

COMMENTARY

ARTICLE 8: SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

Background

This provision concerns which civil and criminal sanctions and remedies may be made available for breaches of the rights provided.

Communities and others have pointed out that the remedies available under current law may not be appropriate to deter infringing use of the works of an indigenous copyright holder, or may not provide for damages equivalent to the degree of cultural and non-economic damage caused by the infringing use. References have also been made to the desirability of alternative dispute resolution (ADR) in this area.

Member States have pointed out the necessity of appropriate guidance and practical experiences with sanctions, remedies and enforcement.

*Amendments proposed, comments made and questions posed during the intersessional written commenting process*

The specific drafting amendments reflected in the draft provision were proposed by Mexico.

ARTICLE 9:

TRANSITIONAL MEASURES

*(a) These provisions apply to all traditional cultural expressions/expressions of folklore which, at the moment of the provisions coming into force, fulfill the criteria set out in Article 1.*

*(b) Continuing acts in respect of traditional cultural expressions/expressions of folklore that had commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, should be brought into conformity with the provisions within a reasonable period of time after they enter into force, subject to respect for rights previously acquired by third parties.*

[Commentary on Article 9 follows]

## COMMENTARY

### ARTICLE 9: TRANSITIONAL MEASURES

#### Background

This provision concerns whether protection should operate retroactively or prospectively, and in particular how to deal with utilizations of TCEs/EoF that are continuing when the provisions enter into force and which had lawfully commenced before then.

As many Committee participants have pointed out, this question touches directly upon the notion of the “public domain”. Previous documents have pointed out that a “clearer understanding of the role, contours and boundaries of the public domain is vital in the development of an appropriate policy framework for the IP protection of TCEs.”<sup>20</sup> Committee participants have stated that the public domain was not a concept recognized by indigenous peoples and/or that as expressions of folklore *stricto sensu* had never been protected under IP they could not be said to have entered a “public domain.” In the words of the Tulalip Tribes: “It is for this reason that indigenous peoples have generally called for the protection of knowledge that the Western system has considered to be in the ‘public domain,’ as it is their position that this knowledge has been, is, and will be regulated by customary law. Its existence in the ‘public domain’ has not been caused by their failing to take the steps necessary to protect the knowledge in the Western IP system, but from a failure from governments and citizens to recognize and respect the customary law regulating its use.”<sup>21</sup>

Several options are apparent in existing laws:

- (i) retroactivity of the law, which means that all previous, ongoing and new utilizations of TCEs would become subject to authorization under the new law or regulation;
- (ii) non-retroactivity, which means that only those new utilizations would come under the law or regulation that had not been commenced before their entry into force; and
- (iii) an intermediate solution, in terms of which utilizations which become subject to authorization under the law or regulation but were commenced without authorization before the entry into force, should be brought to an end before the expiry of a certain period (if no relevant authorization is obtained by the user in the meantime, as required).

Existing *sui generis* systems and models either do not deal with the question, or provide only for prospective operation. However, the Pacific Regional Model, 2002 follows in general the intermediate solution described above.

This intermediate solution is the approach of the draft provision. It draws particularly from the Pacific Regional Model, 2002 as well as wording found in article 18 of the Berne Convention for the Protection of Literary and Artistic Works, 1971.

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<sup>20</sup> See for example WIPO/GRTKF/IC/5/3 and subsequent documents.

<sup>21</sup> Statement at fifth session of the Committee, also available at <http://www.wipo.int/tk/en/igc/ngo/ngopapers.html>

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.*

[Commentary on Article 10 follows]

COMMENTARY

ARTICLE 10: RELATIONSHIP WITH INTELLECTUAL PROPERTY PROTECTION  
AND OTHER FORMS OF PROTECTION, PRESERVATION AND PROMOTION

Background

*Relationship with IP laws*

These provisions are intended to provide forms of protection for TCEs/EoF not currently available under conventional and existing IP laws.

It has been previously discussed that any special protection for TCEs/EoF should be concurrent with the acquisition of IP protection that might also be available under IP laws. Earlier discussions had recalled that some, if not many, of the needs and concerns of indigenous peoples and traditional and other cultural communities and their members may be met by solutions existing already within current IP systems, including through appropriate extensions or adaptations of those systems. For example:

- (a) copyright and industrial designs laws can protect contemporary adaptations and interpretations of pre-existing materials, even if made within a traditional context;
- (b) copyright law may protect unpublished works of which the author is unknown;
- (c) the *droit de suite* (the resale right) in copyright allows authors of works of art to benefit economically from successive sales of their works;
- (d) performances of “expressions of folklore” may be protected under the WIPO Performances and Phonograms Treaty (WPPT), 1996;
- (e) traditional signs, symbols and other marks can be registered as trademarks;
- (f) traditional geographical names and appellations of origin can be registered as geographical indications; and
- (g) the distinctiveness and reputation associated with traditional goods and services can be protected against “passing off” under unfair competition laws and/or the use of certification and collective trade marks.

*Relationship with non-IP measures*

It has also been discussed widely that comprehensive protection may require a range of proprietary and non-proprietary, including non-IP, tools. Non-IP approaches that may be relevant and useful include trade practices and marketing laws; laws of privacy and rights of publicity; law of defamation; contracts and licenses; cultural heritage registers, inventories and databases; customary and indigenous laws and protocols; cultural heritage preservation and promotion laws and programs; and handicrafts promotion and development programs. In particular, as some Committee participants have suggested, opportunities for synergies between the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003 and these provisions could be further explored.

The suggested provisions are not intended to replace the need for such non-IP measures and programs. IP and non-IP approaches and measures are not mutually-exclusive options, and each may, working together, have a role to play in a comprehensive approach to protection.



The provisions are intended to complement and work together with laws and measures for the preservation and safeguarding of intangible cultural heritage. In some cases, existing cultural heritage measures, institutions and programs could be made use of in support of these principles, thus avoiding a duplication of effort and resources. Which modalities and approaches are adopted will also depend upon the nature of the TCEs to be protected, and the policy objectives that protection aims to advance.

ARTICLE 11:

INTERNATIONAL AND REGIONAL PROTECTION

*The rights and benefits arising from the protection of traditional cultural expressions/expressions of folklore under national measures or laws that give effect to these international provisions should be available to all eligible beneficiaries who are nationals or ~~habitual~~ residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country of protection, as well as the rights and benefits specifically granted by these international provisions.*

[Commentary on Article 11 follows]

COMMENTARY

ARTICLE 11: INTERNATIONAL AND REGIONAL PROTECTION

Background

This provision deals with the technical question of how rights and interests of foreign holders of rights in TCEs/EoF would be recognized in national laws. In other words, on what conditions and in what circumstances foreign rights holders would have access to national protection systems, and what level of protection would be available to the benefit of foreign right holders. This question is more widely discussed in companion document WIPO/GRTKF/IC/8/6. For present purposes, and *simply as a starting point for discussion*, a provision based generally upon national treatment as is found in Article 5 of the Berne Convention is included as a basis for further consideration and analysis.

Broadly, but by no means exclusively, the question of how rights and interests of foreign holders of rights in TCEs/EoF would be recognized in national laws has been resolved in IP by reference to the principle of “national treatment”, although this principle can be subject to some important exceptions and limitations. National treatment can be defined in terms of granting the same protection to foreign rightsholders as are granted to domestic nationals, or *at least* the same form of protection. For example:

(a) The Berne Convention (Article 5) provides that “(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention,” and that “protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors”;

(b) The Rome Convention, 1961, in so far as performers are concerned, provides as follows: “For the purposes of this Convention, national treatment shall mean the treatment accorded by the domestic law of the Contracting State in which protection is claimed: (a) to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory; . . . National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention” (Article 2); and,

(c) The WPPT, 1996 states as follows: “Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.”

Instead of national treatment, or supplementing it, other international legal mechanisms have been used to recognize the IP rights of foreign nationals. Under “reciprocity” (or reciprocal recognition), whether a country grants protection to nationals of a foreign country depends on whether that country in turn extends protection to nationals of the first country; the duration or nature of protection may also be determined by the same principle. Under a “mutual recognition” approach, a right recognized in one country would be recognized in a foreign country by virtue of an agreement between the two countries. Another related mechanism for affording access to a national system is “assimilation” to an eligible nationality by virtue of residence. For example, the Berne Convention (Article 3(2)) provides

that authors who are not nationals of one of the countries of the [Berne] Union but who have their habitual residence in one of them shall, for the purposes of the Convention, be assimilated to nationals of that country.

Also of potential application to the recognition of rights of foreign rights holders, is the “most-favoured-nation” principle. The TRIPS Agreement provides (subject to exceptions) that: “[w]ith regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a [WTO] Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.”

While a national treatment approach would, in the light of precedent and past experience in the IP field, appear to be an appropriate starting point, the very nature of TCEs/EoF and the *sui generis* forms of protection being called for by many Committee participants, suggests that national treatment be supplemented by certain exceptions and limitations or other principles such as mutual recognition, reciprocity and assimilation, especially when this concerns the legal status and customary laws of beneficiaries of protection. For example, Article 2 of the suggested provisions above state that the beneficiaries of protection would be the communities in whom “the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with the customary laws and practices of the communities.” Under one strict conception of national treatment, a foreign court in the country of protection would have recourse to its own laws, including its own customary laws, to determine whether a foreign community qualifies as a beneficiary. This may not satisfactorily address the situation from the community’s viewpoint which would, reasonably, wish for its own customary laws to be referred to. Under mutual recognition and assimilation principles, a foreign court in the country of protection could accept that a community from the country of origin of the TCE/EoF has legal standing to take action in country A as the beneficiary of protection because it has such legal standing in the country of origin. Thus, while national treatment might be appropriate as a general rule, it may be that mutual recognition, for example, would be the appropriate principle to address certain issues such as legal standing.

The protection of foreign holders of rights in TCEs/EoF is, however, a complex question as Committee participants have pointed out. The Delegation of Egypt, for example, stated at the seventh session: “. . . TCEs/EoF were often part of the shared cultural heritage of countries. Their regional and international protection was therefore a complex issue and it was necessary to be very careful. Countries would have to consult with each other before adopting any legal measures in this regard.”<sup>22</sup> Morocco noted the need for “wider consultation involving all interested parties before the establishment of legal protection mechanisms.”<sup>23</sup> In view of this complexity, Committee discussions have thus far provided little specific guidance on this technical question and existing TCE *sui generis* national laws either do not protect foreign rightsholders at all or show a mix of approaches.

For present purposes, therefore, a provision based generally upon national treatment as is found in Article 5 of the Berne Convention, is proposed for further consideration and analysis.

Further drafts of these provisions could, depending on the Committee’s wishes, explore more deeply the kinds of technical provisions found in international instruments, such as

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<sup>22</sup> WIPO/GRTKF/IC/7/15 Prov. Par. 69.

<sup>23</sup> WIPO/GRTKF/IC/7/15 Prov. Par. 85.

provisions dealing with points of attachment, assimilation, protection in the country of origin and independent protection. They could also address further the question of “regional folklore” and the practical relationship between the international dimension and the suggested registration/notification of TCEs/EoF (see Articles 3(a) and 7 above). As stated in the commentary to those articles, they currently refer to national registers, but there could eventually be envisaged some form of regional and/or international registers, drawing from, for example, Article 6*ter* of the Paris Convention or the registration system provided for in Article 5 of the Lisbon Agreement for the International Registration of Appellations of Origin, 1958.

*Amendments proposed, comments made and questions posed during the intersessional written commenting process*

The specific drafting amendment reflected in the draft provision was proposed by Mexico.

## GENERAL COMMENTS

*General comments made on working document WIPO/GRTKF/IC/16/4 Prov. during the intersessional written commenting process*

The comments made were proposed by Germany and Switzerland.

A delegation was of the view that the future work of the Committee should not solely be based on working document WIPO/GRTKF/IC/9/4 (further revised as WIPO/GRTKF/IC/16/4). Rather, the discussions should be based on all work carried out by the Committee, without excluding any particular document or documents. Reference should also be made to, for instance, the draft gap analysis document WIPO/GRTKF/IC/13/4(b) Rev. as it contained valuable information on the general characteristics of TCEs. Any discussion on secondary priority issues should be based on a resilient common understanding in the Committee of the objective for TCE protection. The delegation therefore sought clarification on the objective and subject matter for protection in Article 1 and reserved the right to make additional comments on the other substantive provisions once this issue was sufficiently clarified. This would however not imply that the delegation accepted the substantive provisions contained in the Annex of the present document as the only basis for future discussion.

A delegation was of the view that the three substantive issues should be treated on an equal footing. Accordingly all three issues should be dealt with at each session of the Committee and be allotted comparable attention and time. The renewed mandate referred to working document WIPO/GRTKF/IC/9/4 in its entirety, therefore, the Committee should not only discuss part 3, but also parts 1 and 2 of the Annex to that document, in the further course of its negotiations. The delegation wished to clarify that the absence of square brackets in the revised document WIPO/GRTKF/IC/16/4 Prov. would not indicate that there was consensus in the Committee on any parts of the text in the document.

[End of Annex and of document]