

WIPO



WIPO/GRTKF/IC/12/4(b)

ORIGINAL: English

DATE: January 31, 2008

E

WORLD INTELLECTUAL PROPERTY ORGANIZATION

GENEVA

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

**Twelfth Session
Geneva, February 25 to 29, 2008**

**THE PROTECTION OF TRADITIONAL CULTURAL
EXPRESSIONS/EXPRESSIONS OF FOLKLORE:**

FACTUAL EXTRACTION

Document prepared by the Secretariat

Background

1. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the Committee) is currently considering the protection of traditional cultural expressions/expressions of folklore (TCEs/EoF) through two related and complementary processes:

(i) consideration of an agreed List of Issues concerning the protection of TCEs/EoF; and

(ii) consideration of a draft set of Revised Objectives and Principles for the Protection of TCEs/EoF.

2. The Committee decided at its Eleventh Session in July 2007 that the WIPO Secretariat should prepare “a factual extraction, with attribution, consolidating the view points and questions of Members and Observers on the List of Issues considered during the Eleventh Session including their comments submitted in writing for the Eleventh Session, subject to review of Member States and observers and without prejudice to any position taken on these issues.” It also decided the revised objectives and principles for TCEs/EoF protection should remain on the table.

3. In line with these decisions, the working documents on protection of TCEs/EoF being prepared for the twelfth session of the Committee comprise:

(i) WIPO/GRTKF/IC/12/4(a): a brief overview of current work on TCEs/EoF;

(ii) WIPO/GRTKF/IC/12/4(b): the present document, the text of the required “factual extraction”;

(iii) WIPO/GRTKF/IC/12/4(c): the text of the draft Objectives and Principles, identical to the text that was circulated at the eighth, ninth, tenth and eleventh sessions, but provided for ease of reference in view of the decision that this document remains on the table.

The draft factual extraction

4. The Annex to the present document (“Factual Extraction”) is the factual extraction referred to in the Eleventh Session’s decision, now provided for consideration and further review, as required, by the Committee at its Twelfth Session. It was made available on the WIPO website at www.wipo.int/tk in draft for review by Member States and observers, which were invited to send their comments to the WIPO Secretariat before January 31, 2008. Comments received on the draft have been incorporated into the Factual Extraction contained in the Annex.

How has this “factual extraction” been prepared?

5. The Committee’s decision at its Eleventh Session required the Secretariat to make “a factual extraction” which “consolidates” the view points and questions of States and observers on the List of Issues relating to TCEs/EoF. The “factual extraction” should be made “with attribution”. The view points and comments to be extracted and consolidated are those appearing in the written comments on the List of Issues provided by States and observers (as documented in WIPO/GRTKF/IC/11/4(a), WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/4(a) Add. 2.) and those made orally at the Committee’s Eleventh Session (as recorded in the session’s draft report, WIPO/GRTKF/IC/11/15 Prov.).

6. The draft “factual extraction” in this present document comprises extractions reproduced directly from the written comments and oral interventions in respect of each of the ten issues in the List of Issues made by States and observers. The extractions appear, therefore, in quotation marks. As the written comments and oral interventions themselves raised a number of more specific questions related to the ten main Issues in the List of Issues, and as several comments and interventions identified the same questions, an attempt has been made to consolidate the comments and interventions around the more specific questions (“sub-issues”) related to each of the ten main Issues. The extractions are, therefore, presented in “clusters”, each cluster relating to a specific sub-issue that several comments and interventions identified. This may mean that parts of a single written comment or intervention have been “extracted” and appear in different clusters. Where text of a comment or intervention has not been included in a particular extraction (in which case that text will appear elsewhere), this is indicated by the use of stop marks (such as “...”). All comments and interventions are included, however, save for comments and interventions of a purely formal and/or procedural nature. In addition, some comments referring to the comments of other delegations and observers may have been omitted where the context would not make it clear which other comment was being referred to. In some cases, an extraction of a comment or intervention appears in more than one place, in cases where the extraction relates to more than one question or sub-issue. The full written comments and the full interventions remain available to be consulted in the documents cited above.

7. Each extraction is attributed, as required, by identifying the name of the State or observer and through the use of footnotes. Footnote references to “WIPO/GRTKF/IC/11/4(a)”, for example, means the extraction is from a written comment appearing in that document, while a reference to “WIPO/GRTKF/IC/11/15 Prov.” means that the extraction is from an oral intervention made at the Committee’s Eleventh Session.

8. In cases where a State or observer made both a written comment and an oral intervention at the Eleventh Session, the Secretariat has generally reproduced both, unless there is a direct repetition, in which case both the written comment and the oral intervention are cited as sources for the extraction.

9. The general comments on substantive issues related to TCES/EoF that States and observers made in their written comments and oral interventions have also been included, and clustered as described above.

10. The Committee is invited to refer to the annexed factual extraction in its consideration of the protection of traditional cultural expressions/expressions of folklore at its twelfth session, and to provide instructions or guidance on the further development, if any, of this material.

[Annex follows]

ANNEX

THE PROTECTION OF TRADITIONAL CULTURAL
EXPRESSIONS/EXPRESSIONS OF FOLKLORE:

FACTUAL EXTRACTION

TABLE OF CONTENTS

GENERAL COMMENTS 6

**ISSUE I: DEFINITION OF TRADITIONAL CULTURAL EXPRESSIONS (TCES)/
EXPRESSIONS OF FOLKLORE (EOF) THAT SHOULD BE PROTECTED..... 19**

A. SHOULD THERE BE A DEFINITION OF TCES/EOF? 20
Clear definition needed..... 20
Clear definition may not be needed 20
On usefulness of the Berne Convention 21

B. WHAT SUBJECT MATTER SHOULD THE CONCEPT TCES/EOF INCLUDE? HOW SHOULD THE
RELATIONSHIP BETWEEN TCES/EOF AND TK BE EXPRESSED? 21
Examples of TCES/EOF 21
Link between TCE/EOF and cultural heritage 26
Relationship between TCES and TK..... 27

C. WHAT QUALITIES/CHARACTERISTICS SHOULD TCES/EOF POSSESS IN ORDER TO BE PROTECTABLE?
..... 31

D. WHAT OTHER RELATED TERMS, CONCEPTS AND ISSUES MAY ALSO REQUIRE CLARIFICATION? 39

E. HOW SHOULD GREATER CLARITY ON THE MEANING AND SCOPE OF TCES/EOF BE ACHIEVED?..... 40

F. WHAT COMMENTS ARE THERE, IF ANY, ON THE DRAFT PROVISION DEALING WITH THIS ISSUE IN
WIPO/GRTKF/IC/12/4(C) OR EARLIER VERSIONS OF THIS DOCUMENT (SUCH AS WIPO/GRTKF/IC/10/4,
WIPO/GRTKF/IC/11/4(C))?..... 43

**ISSUE II. WHO SHOULD BENEFIT FROM ANY SUCH PROTECTION OR WHO WOULD
HOLD THE RIGHTS TO PROTECTABLE TCES/EOF? 49**

A. WHICH PERSONS, COMMUNITIES OR ENTITIES ARE IDENTIFIED AS POTENTIAL (I) BENEFICIARIES OF
PROTECTION AND/OR (II) RIGHTS HOLDERS? WHAT IS THE ROLE, IF ANY, OF THE STATE? COULD
INDIVIDUALS BE RIGHTS HOLDERS IN TCES/EOF? 50
Originators and custodians..... 50
Various possible beneficiaries and owners, including the State and individuals..... 50
Communities only..... 52
Communities as beneficiaries, States as owners..... 54
General comments 54
Individual vs. communal owners..... 56

B. HOW SHOULD BENEFICIARIES AND RIGHTS HOLDERS BE IDENTIFIED? HOW SHOULD THE “LINK”
BETWEEN A TCE AND A BENEFICIARY/RIGHT HOLDER BE CONSTRUED AND DETERMINED? 56
Criteria of origination (“authorship”) and/or continuous use 56
Origination not necessary..... 57
Criterion of link to land/territory, and potential difficulties therewith..... 57
Criterion of descent..... 58
Need for identifying beneficiaries/owners, and how to do so 59

C. IN CASES OF THE SAME OR SIMILAR TCES/EOF FOUND IN MORE THAN ONE COMMUNITY AND/OR
COUNTRY, HOW SHOULD BENEFICIARIES/RIGHTS HOLDERS BE IDENTIFIED? 60

- D. HOW SHOULD GREATER CLARIFICATION ON THE MEANING AND SCOPE OF BENEFICIARIES/RIGHTS HOLDERS BE ACHIEVED? WHAT OTHER RELATED TERMS AND CONCEPTS MAY ALSO REQUIRE CLARIFICATION? 61
- E. WHAT COMMENTS ARE THERE, IF ANY, ON THE DRAFT PROVISION DEALING WITH THIS ISSUE IN WIPO/GRTKF/IC/12/4(C) OR EARLIER VERSIONS OF THIS DOCUMENT (SUCH AS WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(C))?..... 64

ISSUE III: WHAT OBJECTIVE IS SOUGHT TO BE ACHIEVED THROUGH ACCORDING INTELLECTUAL PROPERTY PROTECTION (ECONOMIC RIGHTS, MORAL RIGHTS)? ... 67

- A. SHOULD INTELLECTUAL PROPERTY PROTECTION BE ACCORDED TO TCEs/EOf? IS THE CLARIFICATION OF OBJECTIVES FOR ANY SUCH PROTECTION AN IMPORTANT AND VALUABLE STEP? HOW SHOULD OBJECTIVES BE CLARIFIED?..... 68
- B. WHICH SPECIFIC OBJECTIVES WERE IDENTIFIED AS RELEVANT?..... 72
- C. WHAT OTHER RELATED TERMS, CONCEPTS AND ISSUES MAY ALSO REQUIRE CLARIFICATION? 82
- D. WHAT COMMENTS ARE THERE, IF ANY, ON THE DRAFT PROVISION DEALING WITH THIS ISSUE IN WIPO/GRTKF/IC/12/4(C) OR EARLIER VERSIONS OF THIS DOCUMENT (SUCH AS WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(C))?..... 83

ITEM IV: WHAT FORMS OF BEHAVIOR IN RELATION TO THE PROTECTABLE TCEs/EOf SHOULD BE CONSIDERED UNACCEPTABLE/ILLEGAL?..... 85

- A. COMMENTS ON THE PRINCIPLE: ARE ANY FORMS OF BEHAVIOR IN RELATION TO TCEs/EOf ALREADY CONSIDERED UNACCEPTABLE/ILLEGAL? SHOULD ANY ADDITIONAL FORMS OF BEHAVIOR BE CAPABLE OF BEING CONSIDERED UNACCEPTABLE/ILLEGAL? 86
- Forms of TCEs/EOf already protected*..... 86
- Doubts as to need for additional protection/suggestions as to how to explore this Issue further*.... 86
- A human rights-based approach*..... 88
- B. SPECIFIC SUGGESTIONS AND EXAMPLES: WHAT SPECIFIC FORMS OF BEHAVIOR IN RELATION TO TCEs/EOf SHOULD BE CONSIDERED UNACCEPTABLE/ILLEGAL? SHOULD DIFFERENT TYPES/CATEGORIES OF TCEs/EOf RECEIVE DIFFERENT LEVELS OF PROTECTION? SHOULD ANY FORM OR LEVEL OF PROTECTION BE SUBJECT TO ANY PRIOR REGISTRATION OR OTHER FORMALITY? 89
- Acknowledgement of source*..... 89
- Derogatory use*..... 89
- Behavior that “damages” TCEs/EOf* 89
- Absence of prior consent*..... 89
- Various*..... 90
- Comments on prior registration/notification or other formality*..... 96
- TCEs/EOf of cultural and spiritual value*..... 97
- Interaction between international, national and community level regulation* 98
- Specific examples of “misappropriation”* 98
- C. WHICH RELATED TERMS, CONCEPTS AND ISSUES MAY ALSO REQUIRE CLARIFICATION?..... 100
- “Unacceptability”* 100
- “Misappropriation”* 100
- “Public domain”* 101
- “Behaviors”* 102
- “Adaptation” and “benefit”* 102
- “Culturally significant”* 102
- D. WHAT COMMENTS ARE THERE, IF ANY, ON THE DRAFT PROVISION DEALING WITH THIS ISSUE IN WIPO/GRTKF/IC/12/4(C) OR EARLIER VERSIONS OF THIS DOCUMENT (SUCH AS WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(C))?..... 103

ISSUE V: SHOULD THERE BE ANY EXCEPTIONS OR LIMITATIONS TO RIGHTS ATTACHING TO PROTECTABLE TCEs/EOf? 105

- A. COMMENTS ON TIMING OF DISCUSSION OF THIS ISSUE: SHOULD A DISCUSSION ON EXCEPTIONS AND LIMITATIONS TAKE PLACE AT THIS TIME? 106
- B. COMMENTS ON SUBSTANCE: WOULD EXCEPTIONS AND LIMITATIONS TO ANY TCE/EOf PROTECTION THAT MAY BE ESTABLISHED BE NECESSARY? IF SO, WHICH PRINCIPLES SHOULD DETERMINE

WHICH EXCEPTIONS AND LIMITATIONS WOULD BE NECESSARY? WHICH SPECIFIC EXCEPTIONS AND LIMITATIONS WERE SUGGESTED?.....	108
<i>Exceptions and limitations necessary, governing principles and specific suggestions</i>	108
<i>No exceptions and limitations, or exceptions and limitations subject to certain conditions</i>	115
<i>How to determine appropriate exceptions and limitations</i>	115
C. WHICH RELATED TERMS, CONCEPTS AND ISSUES MAY ALSO REQUIRE CLARIFICATION?.....	116
<i>TCEs/EoF</i>	116
<i>“Adaptation” and “derivatives”</i>	116
D. WHAT COMMENTS ARE THERE, IF ANY, ON THE DRAFT PROVISION DEALING WITH THIS ISSUE IN WIPO/GRTKF/IC/12/4(C) OR EARLIER VERSIONS OF THIS DOCUMENT (SUCH AS WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(C))?.....	117
ISSUE VI: FOR HOW LONG SHOULD PROTECTION BE ACCORDED?	120
A. COMMENTS ON THE TIMING OF THE DISCUSSION OF THIS ISSUE: IS IT APPROPRIATE TO CONSIDER THIS ISSUE AT THIS TIME?	121
B. COMMENTS ON POLICY CONSIDERATIONS: WHICH POLICY ISSUES ARE RELEVANT TO CONSIDERATION OF THIS ISSUE?	122
C. SPECIFIC SUGGESTIONS AS TO TERM I: SHOULD THE TERM BE “UNLIMITED” OR LIMITED IN SOME WAY? IF LIMITED, WHICH CRITERIA SHOULD BE USED TO DETERMINE THE TERM? SHOULD THE TERM BE DEPENDENT UPON ANY FORM OF REGISTRATION OR NOTIFICATION AND RENEWAL THEREOF?.....	124
<i>Term of protection should be unlimited</i>	124
<i>Term of protection limited: with reference to copyright and related rights standards</i>	126
<i>Term of protection limited: with reference to the intrinsic nature of TCEs</i>	127
<i>Registration and/or notification requirements</i>	129
<i>Other general comments</i>	130
C. SPECIFIC SUGGESTIONS ON TERM II: SHOULD CERTAIN TCE SUBJECT MATTER BE PROTECTED FOR PARTICULAR PERIODS? SHOULD CERTAIN RIGHTS ATTACHING TO TCEs BE PROTECTED FOR PARTICULAR PERIODS?	131
<i>TCEs of commercial value</i>	131
<i>Derivatives and “extractions”</i>	131
<i>Distinctions between economic and moral rights</i>	131
<i>TCEs/EoF protected by existing copyright and related rights</i>	132
<i>Secret TCEs</i>	132
D. WHAT COMMENTS ARE THERE, IF ANY, ON THE DRAFT PROVISION DEALING WITH THIS ISSUE IN WIPO/GRTKF/IC/12/4(C) OR EARLIER VERSIONS OF THIS DOCUMENT (SUCH AS WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(C))?.....	133
ISSUE VII – TO WHAT EXTENT DO EXISTING IPRS ALREADY AFFORD PROTECTION? WHAT GAPS NEED TO BE FILLED?	135
A. WHAT GENERAL COMMENTS WERE THERE ON THE RELATIONSHIP BETWEEN OBJECTIVES IDENTIFIED FOR THE PROTECTION OF TCEs/EoF (SEE ISSUE III ABOVE) AND EXISTING IP SYSTEMS? ARE IP SYSTEMS DESIGNED FOR AND/OR SUITABLE FOR PROTECTING TCEs/EoF? WERE PARTICULAR PRINCIPLES OR CONCEPTS OF EXISTING IPRS IDENTIFIED AS PROBLEMATIC IN RELATION TO PROTECTING TCEs/EoF? HOW COULD THE COMMITTEE EXPLORE THE RELATIONSHIP BETWEEN EXISTING IPRS AND TCEs/EoF FURTHER?.....	136
<i>General comments</i>	136
<i>References to particular principles and concepts of existing IPRS in relation to TCEs/EoF</i>	142
B. WHAT SPECIFIC EXAMPLES ARE THERE OF TCEs/EoF, OR FORMS THEREOF, RECEIVING PROTECTION, TO SOME DEGREE AT LEAST, FROM EXISTING IPRS AND/OR FROM OTHER LAWS? ARE THERE “GAPS” BETWEEN THE PROTECTION AFFORDED AND THE OBJECTIVES IDENTIFIED FOR THE PROTECTION OF TCEs/EoF, AND, IF SO, WHAT SPECIFIC EXAMPLES WERE PROVIDED? DID ANY OF THE COMMENTS AND INTERVENTIONS REFER TO SPECIFIC CASES, LAWS OR OTHER MEASURES?.....	143
C. IN CASES OF “GAPS”, WHAT SOLUTIONS WERE PROPOSED? WHAT OTHER (NON IP) LAWS AND MEASURES MIGHT BE USEFUL IN PROVIDING COMPREHENSIVE PROTECTION FOR TCEs/EoF?	151
<i>“What gaps need to be filled?”</i>	154

ISSUE VIII: WHAT SANCTIONS OR PENALTIES SHOULD APPLY TO BEHAVIOR OR ACTS CONSIDERED TO UNACCEPTABLE/ILLEGAL? 157

- A. GENERAL COMMENTS: IS IT PREMATURE TO BE DISCUSSING THIS ISSUE? HOW IS THE ISSUE INTERPRETED AND HOW COULD IT HAVE BEEN FRAMED? 158
Specific suggestions as to how to advance discussion of this Issue 159
- B. SPECIFIC COMMENTS: HOW SHOULD SANCTIONS AND PENALTIES BE DESIGNED? WHICH SPECIFIC SUGGESTIONS AS TO SANCTIONS AND PENALTIES WERE THERE? WERE ANY NATIONAL EXPERIENCES OR EXAMPLES CITED? 160
On interaction between national and international regulation and nature of possible "instrument" 166
National experiences..... 167
- C. WHAT COMMENTS ARE THERE, IF ANY, ON THE DRAFT PROVISION DEALING WITH THIS ISSUE IN WIPO/GRTKF/IC/12/4(C) OR EARLIER VERSIONS OF THIS DOCUMENT (SUCH AS WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(C))?..... 169

ISSUE IX: WHICH ISSUES SHOULD BE DEALT WITH INTERNATIONALLY AND WHICH NATIONALLY, OR WHAT DIVISION SHOULD BE MADE BETWEEN INTERNATIONAL REGULATION AND NATIONAL REGULATION?..... 171

- A. GENERAL COMMENTS: SHOULD THIS ISSUE BE DISCUSSED AT THIS TIME? WHAT IS THE HISTORICAL BACKGROUND TO THIS ISSUE? WHAT DOES THE ISSUE MEAN AND WHY IS IT IMPORTANT? WHICH NATIONAL EXPERIENCES OR EXAMPLES WERE CITED? 172
National experiences and examples 174
- B. COMMENTS ON THE DISTINCTION BETWEEN INTERNATIONAL AND NATIONAL REGULATION: HOW DO OR SHOULD INTERNATIONAL AND NATIONAL REGULATION INTERACT? DOES INTERNATIONAL REGULATION PRECEDE NATIONAL REGULATION OR *VICE VERSA*? WHICH ISSUES SHOULD BE DEALT WITH INTERNATIONALLY AND/OR NATIONALLY? 179
General comments 179
National regulation precedes international regulation..... 179
Issues that could be dealt with both internationally and nationally 180
Interaction/relationship between international and national regulation/division of labor between international and national regulation..... 180
Reasons give for /need for international instrument..... 184
Regional and bilateral agreements 188
Coordination with other international instruments and forums..... 188
- C. WHICH ISSUES HAVE SPECIFICALLY BEEN IDENTIFIED AS SUITABLE FOR NATIONAL LEVEL REGULATION? WHAT IS THE FUNCTION OF NATIONAL REGULATION? 189
- D. WHICH ISSUES SHOULD BE DEALT WITH AT THE INTERNATIONAL LEVEL? WHAT IS THE FUNCTION OF INTERNATIONAL REGULATION? 190
- E. WHAT COMMENTS ARE THERE, IF ANY, ON THE DRAFT PROVISION DEALING WITH THIS ISSUE IN WIPO/GRTKF/IC/12/4(C) OR EARLIER VERSIONS OF THIS DOCUMENT (SUCH AS WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(C))?..... 192

ISSUE X: HOW SHOULD FOREIGN RIGHTS HOLDERS/BENEFICIARIES BE TREATED . 194

- A. GENERAL COMMENTS: WHAT DOES THIS ISSUE MEAN? WHICH CONSIDERATIONS APPLY WHEN DISCUSSING IT? HOW SHOULD IT BE RESOLVED? 195
- B. SPECIFIC COMMENTS: SHOULD FOREIGNERS AND NATIONALS BE TREATED EQUALLY? IF SO, ACCORDING TO WHICH PRINCIPLE (FOR EXAMPLE, NATIONAL TREATMENT AND/OR RECIPROCITY AND/OR MUTUAL RECOGNITION)? 198
Equal treatment: general comments 198
Reciprocity..... 199
National treatment 199
National treatment and/or reciprocity 201
National treatment and mutual recognition..... 202
Foreigners cannot be owners or beneficiaries of rights 202

C. WHAT COMMENTS ARE THERE, IF ANY, ON THE DRAFT PROVISION DEALING WITH THIS ISSUE IN
WIPO/GRTKF/IC/12/4(C) OR EARLIER VERSIONS OF THIS DOCUMENT (SUCH AS WIPO/GRTKF/IC/10/4,
WIPO/GRTKF/IC/11/4(C))?..... 202

GENERAL COMMENTS

Introductory note by the Secretariat

The general comments provided by States and observers in their written comments and their oral interventions comprised comments on the process being followed by the Committee in its work on IP and TCEs/EoF, on the List of Issues and how it should be interpreted and used, on objectives for the Committee's work on TCEs/EoF and on questions of substance. Certain general comments also provided information on national initiatives and experiences.

Accordingly, the comments and interventions have been extracted and consolidated into the following clusters:

- (A) Comments on process: What comments were there on the work of the Committee on TCEs/EoF as a whole and, in particular, on the List of Issues? How have States and observers approached the List of Issues? What is the relationship between the List of Issues and the draft policy objectives and principles?;
- (B) Objectives: What are the objectives of the Committee's work on TCEs/EoF in general and/or of the discussion of the List of Issues in particular?;
- (C) Comments on the Issues themselves: Are the Issues properly framed? How should the Issues be interpreted? Should certain of the Issues be prioritized? Are there certain related terms that require further discussion?;
- (D) Substantive comments: What general comments were there on the relationship between IP and TCEs/EoF? Which principles should guide the work of the Committee?; and,
- (E) National experiences: What information on national experiences, consultations, laws and policies was provided?

- A. Comments on process: What comments were there on the work of the Committee on TCEs/EoF as a whole and, in particular, on the List of Issues? How have States and observers approached the List of Issues? What is the relationship between the List of Issues and the draft policy objectives and principles?

European Community

“The European Community and its Member States welcome the approach chosen at the last session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to pursue the discussion in the next session on the basis of a questionnaire, as this approach allows for a focus on the substantive issues at stake...”¹

Hungary

“... the European Union's contributions concerning the 2 lists of issues will be Hungary's position as well.”²

International Publishers Association (IPA)

“... welcomes the opportunity to comment on the list of Issues attached to the Initial Draft Report on the 10th meeting of GRTKF/IC, and respectfully submits its responses as attachment to this letter. Our responses do not supersede, but compliment our position with regard to the work of the WIPO/GRTKF/IC as set out in our previous submissions and interventions... To help advance the process of consensus-building, we have chosen to reply to those of the Issues put up for consultation that affect the perspective of the publishing industry, in particular of local writers and publishers and those publishers collaborating closely with indigenous communities... We would be delighted to further explain our position to the WIPO Secretariat or WIPO Delegates at an appropriate time. We wish you all the success with the work of this important committee, and look forward to participating in GRTKF/IC/11.”³

Kyrgyzstan

“Since currently the issues of protection of Traditional Knowledge, Traditional Cultural Expressions (Folklore) are most urgent and discussed in international community, our office also observes the development of Traditional Knowledge and Traditional Cultural Expressions (Folklore) protection in other countries. At present time the Kyrgyz Republic carries out certain works to investigate these fields. However we would like to note that the work carried out by the Intergovernmental Committee on Intellectual

¹ WIPO/GRTKF/IC/11/4(a)

² WIPO/GRTKF/IC/11/4(a)

³ WIPO/GRTKF/IC/11/4(a)

Property, Genetic Resources, Traditional Knowledge and Folklore (ICGR) is also very important in the said fields.”⁴

United States of America

“At the Tenth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), Member States agreed to submit written comments on ten issues (List of Issues) related to the protection of Traditional Knowledge (TK) and Traditional Cultural Expressions/Expressions of Folklore (TCEs/EoF) with a view toward facilitating within the IGC a sustained discussion of the many complex substantive issues before the Committee. The United States welcomes that opportunity, and, toward that end, is pleased to submit these preliminary comments on the selected issues related to the protection, preservation and promotion of TK and TCEs/EoF. The United States also believes that reaching agreement on policy objectives and general principles on TK and TCEs/EoF will advance the work of the Committee. Although many of these issues are not new to the Committee, to date the members of the IGC have not had the opportunity to engage in the kind of focused discussion needed to reach a consensus on these important questions. The United States also understands that these initial Lists of Issues will be further refined and elaborated by the Member States in their comments and during the course of the IGC’s deliberations...”⁵

South Africa

“... reaffirms its stance that the work of the IGC must veer towards an accelerated completion hence it does not view the responses to decisions of the 10th Session of the IGC as mainly exploratory in nature with compilation of information and wide-ranging discussions for future work of the IGC. South Africa finds it appropriate as it would like to think of being in an advantageous position of having a national Indigenous Knowledge Systems (IKS) Policy in place which duly informs our position on the various questions and draft legislation that aligns our intellectual property rights legislation as well as formalized the IKS policy...”⁶

Canada

“Pursuant to Agenda Item 11 it was agreed at the tenth session of the WIPO IGC that Member States and observers would be invited to submit comments on a list of ten issues attached as Annex I of the decision document dated December 8, 2006. Canada extends its thanks to the WIPO Secretariat for the opportunity to comment. We are looking forward to working with other Member States, and governmental and non-governmental organizations and believe the submissions received will guide the future work of the IGC.

⁴ WIPO/GRTKF/IC/11/4(a)

⁵ WIPO/GRTKF/IC/11/4(a)

⁶ WIPO/GRTKF/IC/11/4(a)

In response to the above invitation, Canada is making the following submission, without prejudice to comments that may be provided at a later date. Canada's preliminary comments in relation to traditional cultural expressions (TCEs) and the aforementioned ten issues should be read in conjunction with Canada's preliminary comments on traditional knowledge (TK) as TCEs are considered by many to be a subset of TK. The intent is that this submission be shared among Member States, the WIPO Secretariat, and governmental and non-governmental organizations..."⁷

Australia

"Although the agreed issues are by no means new to the IGC's deliberations, reviewing them in the light of the extensive work of the IGC to date may assist in clarifying where more specific work might be beneficial, where objectives need further clarification and where differences in approach lie. It is clear from the views expressed by Members States to date that there is in fact a wide divergence of views on how the issues surrounding the intersection of Traditional Cultural Expression/Expressions of Folklore (TCE/EoF) Issues and Intellectual Property (IP) should be approached..."⁸

New Zealand

"... The key issues that have emerged from the Tenth Session are a positive step in addressing the complex more contentious issues at the interface between IP and TK. We consider this approach to be crucial prior to entering into discussions on potential policy or legal options to address the issues. The policy objectives and principles contained in the papers still require substantial work; that and the work on the sets of key issues should be the IGC's priorities. The exercise of delving deeper into the substance of the key issues associated with the protection of TK and TCEs has been a constructive step on which the Committee should expand. The New Zealand responses [set out in the rest of its submission] build upon our comments made in previous sessions of the IGC and should be read in conjunction with and in addition to those comments. The responses do not constitute New Zealand's final position on these issues. New Zealand would welcome the opportunity to make further comments at future sessions, as we continue to receive views from various domestic stakeholders, and as our national experience develops. A number of indigenous stakeholders in New Zealand have stressed that issues relating to TK and TCEs should be addressed as a whole.⁹ New Zealand deems these concerns to be valid and therefore has taken a more holistic approach by combining our responses to the two sets of key issues..."¹⁰

⁷ WIPO/GRTKF/IC/11/4(a)

⁸ WIPO/GRTKF/IC/11/4(a)

⁹ [Note by Secretariat: original footnote in comment and Appendix I of document WIPO/GRTKF/IC/11/4 (a) Add.] Maui Solomon in his Peer Review Report, which was submitted to the IGC at the Tenth Session and is published in document WIPO/GRTKF/IC/11/4(b), states that one single document on TK and TCEs would be more user-friendly, given the commonality and repetition between the two documents.

¹⁰ WIPO/GRTKF/IC/11/4(a) Add.

B. Objectives: What are the objectives of the Committee's work on TCEs/EoF in general and/or of the discussion of the List of Issues in particular?

European Community

“... The purpose of this submission is to contribute constructively to the dialogue among the WIPO members, taking into account the interests voiced by some WIPO members to protect the spiritual and commercial value attached to traditional cultural expressions and expressions of folklore, highlighting their importance as shared heritage. The European Community and its Member States recognize the general and specific value that indigenous and local communities attach to their Traditional Cultural Expressions (TCEs) and acknowledge that these communities deserve respect...”¹¹

United States of America

“... The Lists of Issues for both TK and TCEs/EoF ... provide a useful point of departure and a helpful framework for facilitating such a sustained discussion... the terms of discussion of the List of Issues, which aims to facilitate consensus among Committee participants...”¹²

International Publishers Association (IPA)

“... Our position is guided by the following primary concerns and goals:

- Support for the work of local and international publishers in preserving and disseminating TCEs/EoF and TK;
- Support for the role of educational publishers in their passing on of TCEs/EoF or TK;
- The importance of freedom of expression and freedom of access to information for the development of cultures;
- The value of a rich public domain for the development of society generally, including creators and publishers in particular;
- The pre-eminent value of copyright and other existing intellectual property rights for the protection of the economic and moral interests of all creators, including indigenous people;
- Respect for the principle of subsidiarity, according to which only those tasks should be performed at international level which cannot be performed effectively at a more immediate or local level;

...
... With our responses we hope that we can ultimately contribute to the development of a framework that incentivises indigenous communities as well as professional publishers

¹¹ WIPO/GRTKF/IC/11/4(a)

¹² WIPO/GRTKF/IC/11/4(a)

to enhance the possibilities for the preservation and dissemination of indigenous content for the benefit of all...”¹³

Japan

“... Therefore, as the first step to deepening our understanding of TCEs/EoF, we welcome fundamental discussions based on the Lists of Issues...”¹⁴

South Africa

“... any further work of WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the “IGC”) will constitute a step towards developing an international binding instrument that aims to protect traditional knowledge, traditional cultural expressions and genetic resources...”¹⁵

“... FUTURE OF THE IGC

In order to illuminate a positive role on the continued working of the IGC South Africa encourages working towards a comprehensive and integral legal international binding convention to promote and protect the rights and dignity of local and indigenous communities.”¹⁶

Arts Law Centre of Australia

“The overarching goal should be to stop the widespread misappropriation of Traditional Cultural Expressions. There is an urgent need to protect cultural heritage which is vulnerable to powerful commercial interests e.g. rock art sites. The Intergovernmental Committee should encourage nations to take action now to put in place positive protections given it is clear that gaps currently exist... It is interesting that Indigenous participants are generally advocating for a binding international instrument contrary to the position of many Government representatives.”¹⁷

¹³ WIPO/GRTKF/IC/11/4(a)

¹⁴ WIPO/GRTKF/IC/11/4(a)

¹⁵ WIPO/GRTKF/IC/11/4(a)

¹⁶ WIPO/GRTKF/IC/11/4(a)

¹⁷ WIPO/GRTKF/IC/11/4(a) Add. 2

C. Comments on the Issues themselves: Are the Issues properly framed? How should the Issues be interpreted? Should certain of the Issues be prioritized? Are there certain related terms that require further discussion?

United States of America

“... notes that a number of the issues in the List of Issues are framed using words such as “protection” and “protected.” Such words sometimes have been used within the IGC to refer to legal measures to address issues and concerns related to TK and TCEs/EoF, including protection under intellectual property laws. However, over the course of its deliberations, Committee participants have not placed limits on the discussion of TK and TCEs/EoF. Instead, the Committee consistently has taken a broad approach to addressing issues and concerns related to TK and TCEs/EoF, including discussion of measures to safeguard, preserve, and promote an environment of respect for TK and TCEs/EoF. Such an approach is consistent with the mandate of the Committee, which leaves no outcome excluded. Similarly, the United States believes that the terms of discussion of the List of Issues, which aims to facilitate consensus among Committee participants, must not prejudge the understanding of any particular issue or prescribe any particular outcome...”¹⁸

Japan

“... the issue of traditional cultural expressions (TCEs)/expressions of folklore (EoF) is important for many member States. However ... the depth of understanding among the member States on this issue is still insufficient for any kind of agreement at the international level to be formed... In discussing the List of Issues, we believe that it is useful to discuss fundamental issues, such as the definition or the content of certain terms. We wish to point out that there are some issues that cannot be resolved because these fundamental issues are still unclear. Even before attempting to finalize the details of the wordings of certain terminology, what is more problematic is the lack of formation of common understandings or common perception as to what such words should mean. Arguing, however, that under these circumstances, it is impossible to agree on the detailed wording of definitions or that the definitions should be left to the national laws of member States is a failure in facing up to the problem squarely. The List of Issues contains words such as “rights” and “protection”, but at this stage, there is no consensus on establishing any new rights or forms of protection. We may use and touch on these words in the course of discussing each individual issue, but such usage is not indicative of Japan’s positions on the formulation of any new “rights” or “protection”. Of course we are aware that there are some pre-existing rights under customary laws and that they should be respected. However, even in such cases, we must point out that rights recognized by customary laws in certain states or regions are

¹⁸ WIPO/GRTKF/IC/11/4(a)

not necessarily recognized in other jurisdictions. Japan submits the following comments on each issue. We will reserve further comments if necessary.”¹⁹

Canada

“... provide[s] some general comments that apply to all the issues. We agree with the view expressed in a number of documents prepared by the WIPO Secretariat that identifying the policy objective to be addressed and the legal rationale for the protection of the TCEs can help to define the appropriate form of protection and how one defines the protectable subject matter. Coming to a consensus as to a common objective is the first step in being able to properly address the other issues identified below.”²⁰

International Publishers Association (IPA)

“... The need for consensus on Policy Objectives and Core Principles prior to discussing the creation of a more detailed framework for the protection of TCEs/EoF or TK at international level.”²¹

Australia

“... the IGC should continue to build a firm foundation of knowledge on which to base its further deliberations. It is important to continue to share national experiences. It is also crucial for the continuing work of the IGC that the policy objectives and general guiding principles for treatment of IP issues intersecting with TCE/EoF be agreed. It is only when there is consensus on those that the full range of options for fulfilling the objectives, in accordance with agreed principles, can be fully explored and progressed.”²²

New Zealand

“... supports the continuation of the IGC’s work in **all** its areas, but retains its position on the need to reach some consensus on policy objectives and guiding principles before determining potential legal mechanisms for the protection of TK or making decisions about the form of any international obligations that may ensue (including the possibility of drafting guidelines, a declaration, protocol, treaty or amendments to existing treaties)...”²³

¹⁹ WIPO/GRTKF/IC/11/4(a)

²⁰ WIPO/GRTKF/IC/11/4(a) Add.

²¹ WIPO/GRTKF/IC/11/4(a)

²² WIPO/GRTKF/IC/11/4(a) Add.

²³ WIPO/GRTKF/IC/11/4(a) Add.

D. Substantive comments: What general comments were there on the relationship between IP and TCEs/EoF? Which principles should guide the work of the Committee?

International Publishers Association (IPA)

“... Publishers come into contact with traditional cultural expressions/expressions of folklore (TCE/EoF) or traditional knowledge (TK) in many different ways:

- Local publishers of children’s books and school textbooks make reference in their works to the cultural context and environment of their readers. The retelling of folk tales or the depiction of the culture forming part of their readers’ daily lives is part of the editorial content.
- Similarly, many writers of fiction are inspired by their local customs, traditions and the social environment in which they were raised. They may refer in their works to some specific experiences important to their local culture.
- Academic publishers publish works of scientists describing ethnological observations; others may publish medical research which is based on discoveries by indigenous peoples. In this area, there is a heightened awareness of the ethical implications of this kind of research and a series of codes of conduct have been established, or are being debated.”²⁴

European Community

“... further discussion in the IGC should be based on the following general principles, as we reiterated in the tenth session of the IGC (November 30 to December 8, 2006).

General Guiding Principles:

- a) Recognizing the importance of the aspirations and expectations of indigenous communities as regards their TCEs, we however believe that enabling these communities to use the current Intellectual Property system, where appropriate, both nationally and internationally, is a practical first step. Unless part of a working legal framework, it is difficult to identify illicit acts.
- b) The very nature of Intellectual Property protection has always been based on a delicate balance of interests between the creators and those wanting to enjoy or use these creations. For uses that are considered offensive other areas of law, such as blasphemy or unfair competition rules, can be of use.
- c) We agree that the current international Intellectual Property system of rights and obligations should not be interfered with and double protection should be avoided.

²⁴ WIPO/GRTKF/IC/11/4(a)

- d) In view of the great variety in indigenous communities and the different attitudes and needs expressed by them during the past years of the Intergovernmental Committee, it appears that it will not be possible to develop a single system as a solution.
- e) The characteristics of TCEs set out in this section mean that protection via copyright is not satisfactory. Indeed, the notions of their evolving character, the difficulty in identifying the creator and time of creation, their lack of uniqueness and the indefinite term of protection being sought are problematic when compared to the strict criteria (regarding the identity of the creator, the originality of the work, the time and length of protection) required to qualify for copyright protection.
- f) We are in favour of continuing to discuss TCEs separately from issues under the heading of Traditional Knowledge.
- g) The work of this committee should not interfere with the internationally recognised agreements on the subject of human rights.
- h) It appears that there is a certain overlap with indications already contained in subparagraph a). In our jurisdictions, TCEs are in the public domain and therefore open for free use by everyone, including, of course, those persons belonging to the original community.
- i) Whatever systems are introduced to administer rights attached to indigenous communities should not prevent those wanting to be inspired by such TCEs to create.”²⁵

Brazil

“The following concerns should guide the discussions on the protection of TCEs/EoFs within the competences of WIPO, most of which, by and large, are touched upon by the draft international instrument under consideration on the Annex to document WIPO/GRTKF/IC/10/4:

- Defensive protection: Measures to curb misappropriation of TCEs/EoFs, in particular to prevent and, when applicable, revert, the granting of IPRs without the authorization of the custodians of TCEs/EoFs, irrespective of whether the TCEs/EoFs have been registered;
- Positive protection: Without prejudice to the decision Members may take to protect TCEs/EoFs via “sui generis” systems, the Committee should consider the adequacy of IP mechanisms to provide for the protection of TCEs/EoFs by examining, for example, (i) the extent to which rules relating to public domain should be adapted to accommodate appropriate protection of TCEs/EoFs; (ii) changes that might be necessary to accord TCEs/EoFs a term of protection commensurate to their duration in time; (iii) possible modifications in rules governing the validity of IPRs with a view to provide for deterrent mechanisms against misappropriation of TCEs/EoFs;
- Prior informed consent: ensure that communities enjoy rights over their TCEs/EoFs by setting out the requirement of prior informed consent as a condition for their use by third parties;
- International dimension: The Committee should address ways and means to facilitate the enforcement of national legislation on the protection of TCEs/EoFs in third countries.”²⁶

²⁵ WIPO/GRTKF/IC/11/4(a)

²⁶ WIPO/GRTKF/IC/11/4(a)

Arts Law Centre of Australia

“... A fundamental principle of the protective framework is that Traditional Cultural Expressions are not used without consent of custodians...”²⁷

E. National experiences: What information on national experiences, consultations, laws and policies was provided?

New Zealand

“... The Ministry of Economic Development of New Zealand, Intellectual Property Policy group, hosted a workshop on the protection of TK and TCEs on Monday 12 March 2007 in order to discuss with Māori and other domestic stakeholders the key issues that emerged from the Tenth Session of the IGC. A report on the workshop was produced in consultation with the participants; it is attached to this document as Appendix I.²⁸ The content of the report, the submissions received to date on the draft policy objectives and guiding principles and the Peer Review by Maui Solomon (submitted to the IGC at the Tenth Session and published in document WIPO/GRTKF/IC/11/4(b)), have informed New Zealand’s response [set out in the rest of the submission]. In order to provide some analysis of the issues, examples of stakeholder views and domestic indigenous customary concepts have been provided where such examples assist in elucidating New Zealand’s position. Reference to such individual stakeholders’ views and concepts in the New Zealand response does not necessarily mean that they are endorsed by the New Zealand Government. They have been incorporated in the document in order to reflect and integrate the distinctive domestic views and indigenous customary concepts that relate to these key issues. We consider this approach to be beneficial, especially given WIPO’s current study on (i) the role of customary laws and protocols of indigenous and local communities in relation to their traditional knowledge (TK), genetic resources and traditional cultural expressions (TCEs)/expressions of folklore, and (ii) the relationship of customary laws and protocols with the intellectual property (IP) system. All domestic indigenous customary terms and concepts are translated in English and are defined for the broader international audience to understand. A glossary of Māori²⁹ terms is also available for reference at the end of the document.³⁰”³¹

²⁷ WIPO/GRTKF/IC/11/4(a) Add. 2

²⁸ [Note from Secretariat: original footnote in comment and Appendix I of document WIPO/GRTKF/IC/11/4 (a) Add.]

²⁹ [Note by Secretariat: original footnote in comment and Appendix I of document WIPO/GRTKF/IC/11/4 (a) Add.] Māori are the Indigenous peoples of New Zealand.

³⁰ [Note from Secretariat: original footnote in comment and Appendix I of document WIPO/GRTKF/IC/11/4 (a) Add.]

³¹ WIPO/GRTKF/IC/11/4(a) Add.

Kyrgyzstan

“... folklore as artistic heritage occupied a special place in non-material and material cultural heritage. Its protection, together with the protection of genetic resources and TK, had been the subject of enormous attention by UNESCO and WIPO for many years. In that regard, the Kyrgyzstan had prepared a draft Law on the Preservation and Legal Protection of the National Folklore of the Republic of Kyrgyzstan, which was in the process of being updated and approved. In the country, the need had arisen to adopt measures to protect folklore. Globalization was leading to the commercialization of folklore subject matter on a worldwide scale, since the forms of use of that part of the cultural heritage had been expanded, and the technological revolution had led to broader possibilities for disseminating the cultural traditions of various peoples. With the aid of modern digital technologies, works of national folklore were subject to commercial use at the global level, without due observance to the cultural and economic interests of the peoples creating them. However, the unlawful use of folklore was only one aspect of the problem relating to folklore protection. The other was related to the expropriation of folklore, its assimilation in order to create another ethnicity, distortions of use, and the absence of information on ownership. In the context of increased attention on the part of the international community to the protection and preservation of folklore, and in addition to the absence of a relevant international instrument designed to regulate the relations in question, a number of countries were rushing, by all accessible means, to fix and disseminate, as their own national folklore, the traditions and customs and cultural heritage of other States. Moreover, as the cultural property of a particular people, folklore was an instrument of its cultural self-expression, general human value and the property of universal culture. Works of national culture constituted spiritual and material values. Heritage in the form of literary, musical and artistic works was the pride of any ethnicity. A striking example of such a work was the Kyrgyz national epic “*Manas*”, a unique model of national creation, handed down from generation to generation, and also the art of national storytellers “*akyns*”, which had been included in a UNESCO list of 28 masterpieces of oral and non-material art. Material works of national creation were widely known and much loved. For centuries, the national masters had honed their knowledge in order to create original objects from different kinds of materials which even today had not lost their value and originality. The Delegation explained that the draft Law contained provisions on the preservation, legal protection and defense of national folklore, which were implemented on the basis of special legislation, similar to IP legislation. Likewise, expressions of national folklore were defined as a non-traditional form of IP. As a manifestation of individual or collective intellectual creation, folklore deserved legal protection no less than works of intellectual creation.

Such folklore protection was essential as a means of allowing this form of the heritage, both inside the country and beyond its borders, to develop, guarantee continuity and be more widely disseminated. The Republic of Kyrgyzstan was striving to adhere to the following policy regarding the legal protection of expressions of folklore: creating a legislative base guaranteeing the preservation of such expressions; creating the conditions for international cooperation with the aim of ensuring legal protection for

expressions of folklore belonging to the Kyrgyz people on the territory of other States; and, popularizing the importance of folklore as an element of cultural originality. In conclusion, the Delegation thanked the Committee for the major work that had been done in this area and also for the opportunity to exchange opinions and discuss subjects of interest to all.”³²

³² WIPO/GRTKF/IC/11/15 Prov.

ISSUE I: DEFINITION OF TRADITIONAL CULTURAL EXPRESSIONS (TCES)/
EXPRESSIONS OF FOLKLORE (EOF) THAT SHOULD BE PROTECTED

Introductory note by the Secretariat

The written comments and interventions at the 11th session of the Committee on this Issue addressed two related questions, namely (i) what are TCES/EoF? and, (ii) which criteria should be applied to determining which TCES/EoF (once the meaning of this concept is clear) should be protected? The discussion on the first question (What are TCES/EoF?) addressed, first, the nature and key characteristics of TCES/EoF and, second, whether a precise definition of TCES/EoF was needed, and, if so, whether or not the draft definition in WIPO/GRTKF/IC/11/4(c) was an appropriate starting point for such a definition. The discussion showed that several key policy questions are implicated by a discussion of the subject matter of protection.

The written comments and interventions have thus been organized into the following clusters:

- (A) Should there be a definition of TCES/EoF?
- (B) What subject matter should the concept TCES/EoF include? How should the relationship between TCES/EoF and TK be expressed?
- (C) What qualities/characteristics should TCES/EoF possess in order to be protectable?
- (D) What other related terms, concepts and issues may also require clarification?
- (E) How should greater clarity on the meaning and scope of TCES/EoF be achieved?, and,
- (F) What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?

A. Should there be a definition of TCEs/EoF?

Clear definition needed

European Community

“Further to the above general principles, the European Community and its Member States would also like to support the endeavour of the IGC to further clarify the intended object of protection. A clear definition of the object of protection is a prerequisite to engaging further in discussions in this area.”³³

International Publishers Association (IPA)

“For publishers to be able to publish works related to TCEs/EoF with economic and legal certainty, a clear and concise definition of the protected subject-matter is required, leaving no room for ambiguity...”³⁴

Clear definition may not be needed

New Zealand

“... the first question was whether a formal or rigid definition was needed ... By attempting to define TK and TCEs, there was a risk of freezing or restricting the rights at the time that they were defined, hence not fully taking into account their evolutionary nature. Rather one should explore models of protection which did not require the elaboration of a formal definition of TK and TCEs or that fully recognized the changing nature of TK and TCEs. The Delegation agreed with Ethiopia that any definition should be a self-definition from TCE holders and should be informed by customary laws relating to the TCEs. The Maori Advisory Committee, created under the New Zealand Trade Marks Act 2002, was an example of possible policy mechanisms and measures which did not require a formal definition of TCEs...”³⁵

Islamic Republic of Iran

“... However, it [the definition] should not be considered to be an exclusive one. Second, due to the diversity of cultures, the definition might get different variations and nuances...”³⁶

³³ WIPO/GRTKF/IC/11/4(a)

³⁴ WIPO/GRTKF/IC/11/4(a)

³⁵ WIPO/GRTKF/IC/11/15 Prov.

³⁶ WIPO/GRTKF/IC/11/15 Prov.

On usefulness of the Berne Convention

Italy

“... the definition of TCEs should be covered by article 2 of the Berne Convention. However, not everything that came from local communities should necessarily be protected as folklore. For that which did not fall under article 2 of the Berne Convention, such as handicrafts and designs, these could be protected as marks or designs. In conclusion, a new definition was not necessary and it was sufficient to reuse the definition that was already in the Berne Convention.”³⁷

Burkina Faso

“... and that there was no reason to be unduly worried about the absence of a precise definition of the concept TCEs. Firstly, in the copyright field, for example, the concept of author had never been defined by international instruments, but the absence of such definition had never prevented those instruments from working. Secondly, it was a mistake, as implied by certain delegations, to refer to the Berne Convention to find a definition of TCEs. However, it was necessary to look from the angle of artistic and literary creation for the material to protect as TCE...”³⁸

B. What subject matter should the concept TCEs/EoF include? How should the relationship between TCEs/EoF and TK be expressed?

Examples of TCEs/EoF

Ghana

“... Examples of such works are folk tales, folk songs, instrumental music or dances and the different rites of people. In the broad sense, folklore comprises all literary and artistic works mostly created by authors of unknown identity but presumed to be nationals of a given country, evolving from characteristic forms traditional with ethnic groups of the country ... Folklore encompasses all aspects of cultural heritage, including art works, songs, dances, stores, customs, traditional medical knowledge, etc.”³⁹

Qatar

“... Its forms among other:

- TKs and practices concerning nature and universe
- TKs concern traditional arts and crafts

³⁷ WIPO/GRTKF/IC/11/15 Prov.

³⁸ WIPO/GRTKF/IC/11/15 Prov.

³⁹ WIPO/GRTKF/IC/11/4(a)

- TKs concern agriculture, traditional medicine, culinary cosmetics and dressings etc...
- TKs concern decorations and symbols
- TKs concern constructing and architecture
- Traditional Law”⁴⁰

Russian Association of Indigenous Peoples of the North (RAIPON)

“... Works of popular creation may include:

- works of oral popular creation, such as popular tales, epics, legends, fairy tales, popular poetry, proverbs and riddles;
- musical works such as popular songs and instrumental music;
- choreographic works such as popular dances;
- dramatic works such as games, performances and rituals;
- works of painting, sculpture, graphic art and other works of fine art;
- works of decorative applied art;
- works of architecture etc.”⁴¹

Tunisia

“... In Tunisia, the fields of application of such traditional knowledge are as follows:

- crafts,
- culinary aspects,
- the art of living,
- the art of building,
- agriculture and nature,
- medicinal knowledge.”⁴²

Guatemala

“Convention on the Protection and Promotion of the Diversity of Cultural Expressions, ratified by the Government of Guatemala, on August 21, 2006, published in the Journal of Central America on March 23, 2007.

Cultural expressions: these are expressions resulting from the creativity of persons, groups and societies, which possess cultural content.

Protection means the adoption of measures aimed at preserving, safeguarding and enriching the diversity of cultural expressions.

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (WIPO/GRTKF/IC/2).

⁴⁰ WIPO/GRTKF/IC/11/4(a)

⁴¹ WIPO/GRTKF/IC/11/4(a)

⁴² WIPO/GRTKF/IC/11/4(a)

Expressions of folklore: products incorporating elements characteristic of the traditional artistic heritage developed and perpetuated by a community or by individuals, which reflect the traditional artistic expectations of that community.

Protects:

Verbal expressions: popular tales, popular poetry and riddles.

Musical expressions: songs and popular instrumental music.

Physical expressions: popular stage dances and performances, and artistic forms of rituals.

Tangible expressions: other forms of popular and traditional art, drawings, paintings, sculptures, pottery, terracotta, mosaics, carpentry, foundry goods, jewelry, basket making, textile work, tapestries, dresses, musical instruments and architectural works.

Decree No. 26-97, revised by Decree No. 81-98 of the Congress of the Republic of Guatemala. Law for the Protection of the National Cultural Heritage.

Cultural heritage: the national cultural heritage consists of the property and institutions which, in accordance with the law or by declaration of authority, are included therein and constitute movable or immovable property, both public and private, relating to palaeontology, archaeology, history, anthropology, art, science and technology, and culture in general, including the intangible heritage, which together help to strengthen the national identity.

Tangible cultural heritage: immovable cultural property: architecture and its elements, including applied decoration, groups of architectural elements and units and of vernacular architecture, historical centers and units, including areas serving as the natural environment and landscape, the urban layout of cities and villages, palaeontological and archaeological sites, historical sites, particular areas or units, man-made works or combinations thereof with the natural landscape, recognized or identified by their character or landscape of exceptional value, prehistoric and prehispanic inscriptions and representations.

Movable cultural property: property which for religious or secular reasons is of genuine importance for the country and is related to the palaeontology, archaeology, anthropology, history, literature, art, science or technology of Guatemala, which comes from the sources listed below. The collections and objects or copies which, owing to their interest and scientific importance for the country, are of value for zoology, botany, mineralogy or archaeology, planned by chance. The elements resulting from the dismantling of artistic and historical monuments and archaeological sites. Artistic and cultural property related to the country's history, special events, and illustrious personalities from social, political and intellectual life, which are of value for the Guatemalan cultural heritage.

Protects:

- (a) Original paintings, drawings and sculptures.
- (b) Photographs, engravings, silk screen paintings and lithographs.
- (c) The sacred art of unique and significant character, made of noble and permanent materials and whose creation is relevant from a historical and artistic standpoint.
- (d) Incunable manuscripts and old books, maps, documents and publications.
- (e) Archives, including photographic, cinematographic and electronic archives of any type.
- (f) Musical instruments.
- (g) Antique furniture.

Decree No. 25-2006 of the National Congress, Convention for the Safeguarding of the Intangible Cultural Heritage, states:

Intangible cultural heritage: these are the uses, representations, expressions, knowledge and technologies together with the instruments, objects, artifacts and cultural areas inherent in communities, groups and, in some cases, individuals, so that they may be recognized as an integral part of their cultural heritage.

Protects:

Show arts, social uses, rituals and festive acts, knowledge and uses relating to nature and the universe, traditional craft techniques.”⁴³

Russian Federation

“There is no definition of “traditional cultural expression/expression of folklore” in Russian legislation, the most commonly used notion is the “work of folk arts” used as a synonym. However, “work of folk arts” this notion is not defined in Russian legislation either.

Works of folk arts may include:

- works of oral folk arts, such as sagas, legends, fairy tales, folk poetry, proverbs, riddles;
- musical works, such as folk songs and instrumental music;
- choreographic works, such as folk dances;
- dramatic works, such as games, performances, ceremonies;
- works of art, sculptures, graphics and others;
- works decorative and applied arts,
- architectural works, etc.

Providing the exhaustive list of objects that should be considered works of folk arts is impossible...”⁴⁴

⁴³ WIPO/GRTKF/IC/11/4(a)

⁴⁴ WIPO/GRTKF/IC/11/4(a)

Ethiopia

“... Ethiopian cultural policy included the following under the rubric of culture: languages, heritage history, handicraft, fine arts, oral literature, traditional lore, beliefs, archeological findings (as expressions of the past), Ethiopia’s alphabets, and other cultural features ... and included different kinds of performances and shows, folklore, religious beliefs, wedding and mourning ceremonies, music, drama, literature and similar cultural values, traditions and customs of nations, nationalities and peoples.”⁴⁵

Morocco

“... The definition might include traditional music, dancing, poetry, painting, woodcraft, textiles, needlework and so on because those elements should be contained within any definition that was eventually settled upon.”⁴⁶

Kyrgyzstan

“Traditional cultural expressions (folklore) to be protected – working and ritual traditional expressions (related to verbal folk arts and used in verbal form) of folklore, myths, legends, tales, heritage (sanjyra), epics, folk dramas, proverbs, by-words, riddles, expressions of folk poetry, folk and funeral songs (koshok), dance melodies, folk and professional music, folk dances, games, events, celebrations and other expressions of movement, musical expressions of national folklore and verbal expressions as well as expressions of national symbolism, ornament, pattern, contained in items reflecting the idea of semantic purpose. Protection also cover identified as folk artistic crafts created in the material form and through the folk arts and crafts containing varieties of artistic crafts, including graphic professional pictures, paintings, subject images, shadow pictures, coinage, wooden implements, national clothes, interior decorations, habitations, horses, sculptures, ceramics, earthenware and pottery, bone, stone items, cast items made of steel and bronze, metal works (metallic processing), carved woods, mosaics, embroideries, ornamental paintings, sericulture, patterned hand weaving, felt products, laces, gobelins, pile and pileless carpet weaving representation of ornaments, patterns, jewelry, leather works, basketry, ornamental matting (chiy), clothes as expression of folk arts, musical instruments, timbering, architecture, smaller architectural form etc.”⁴⁷

United States of America

“... In this attempt, the subject matter of TCEs/EoF was said to consist of four broad categories of expressive materials, illustrated by more than 40 examples, which exhibited four characteristics. Into these four broad categories, materials as diverse

⁴⁵ WIPO/GRTKF/IC/11/15 Prov.

⁴⁶ WIPO/GRTKF/IC/11/15 Prov.

⁴⁷ WIPO/GRTKF/IC/11/4(a)

as stories, songs, dances, vernacular architecture, and baskets – whether tangible or intangible – might fit...”⁴⁸

Brazil

“... When it came to the definition of folklore, it was the opinion of Brazil that that definition, or the subject matter of protection, should cover all the elements belonging to the traditional cultural heritage of a community or a people...”⁴⁹

“The subject matter should be all that consists in the elements belonging to the traditional cultural heritage, developed and maintained by a community or a people within a country or by individuals, and that reflect the traditional cultural expressions of said community or people...”⁵⁰

Link between TCE/EoF and cultural heritage

Thailand

“... In addition, perhaps the concept of tangible and intangible cultural heritage should be linked or associated with the definition of TCEs.”⁵¹

Mexico

“... In this regard, consideration should be given to the definition of “intangible cultural heritage”, contained in Article 2 of the International Convention for the Safeguarding of the Intangible Cultural Heritage. In the light of the above and in accordance with the Federal Copyright Law of Mexico and the Regulations made under it, the TCEs that should be protected were: (i) verbal expressions such as stories, popular tales, legends, traditions, popular poetry and other similar expressions; (ii) musical expressions such as popular songs, rhythms and instrumental music; (iii) corporal expressions such as dances and rituals; (iv) tangible expressions such as works of popular art or traditional craft, and, in particular, pictorial works or drawings, wooden carvings, sculptures, pottery, terracotta, mosaics, cabinetmaking, ironware, jewelry, basket making, needlework, textiles, glassware or crystal, stonework, metalwork, leather goods, typical costumes, spinning, tapestries and the like, popular or traditional musical instruments, architecture specific to an ethnic group or community and any native expression that constituted a literary or artistic work or popular art or crafts, which could be attributed to a community or ethnic group.”⁵²

⁴⁸ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

⁴⁹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

⁵⁰ WIPO/GRTKF/IC/11/4(a)

⁵¹ WIPO/GRTKF/IC/11/15 Prov.

⁵² WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

Relationship between TCEs and TK

Burkina Faso

“... That was what permitted a distinction to be made between TCEs and TK, which belonged to the other branch of intellectual creation, namely creations of a technical nature...”⁵³

Cameroon

“... That was the first element, needed to distinguish TCEs from TK, which was the knowledge itself...”⁵⁴

Hokotehi Moriori Trust

“... the distinction drawn between TCEs and TK was one created in these fora to “accommodate” TK within IP systems. It was not a distinction recognized by Moriori and most other indigenous peoples. TK and TCEs were inextricably linked...”⁵⁵

International Indian Treaty Council (IITC)

“... The definition of the Council’s TK should not be limited but should include cultural landscapes and places of major significance for indigenous peoples, knowledge of contemporary use, prior use and potential use of plants and species of animals, minerals, and soil. For example, in the Kuna culture, traditional medicine was produced using plants, minerals, animals, food products, small roots, non-edible fruits, and it was also practiced through therapeutic songs and orations ... TK was a concept that encompassed tangible and intangible creations, cultural manifestations, technologies, sciences, agricultural knowledge, designs, literatures, and visual and performance arts derived from oral and written traditions. TK was also connected to indigenous traditional territories, lands, natural and genetic resources, and was transmitted from generation to generation.”⁵⁶

China

“... Committee [should] make a clear distinction between TCE and TK in order to facilitate the discussion of the two issues, which it had noted was also a point of concern for many Member States.”⁵⁷

⁵³ WIPO/GRTKF/IC/11/15 Prov.

⁵⁴ WIPO/GRTKF/IC/11/15 Prov.

⁵⁵ WIPO/GRTKF/IC/11/15 Prov.

⁵⁶ WIPO/GRTKF/IC/11/15 Prov.

⁵⁷ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

“... was concerned that by discussing TCEs, TK and GRs as a joint package, any discrepancy in one area would be prejudicial to the others ... The representative considered that TCEs was a good name, above all since certain delegations were reluctant to accept the expression “folklore” because they considered it to be pejorative. Thus, a distinction should be made between TCEs and TK. The expressions referred to the whole variety of artistic forms with which a person or group of persons performed literary or artistic works, or expressions of folklore, a term which had been used to define performers in the 1996 WIPO Performances and Phonograms Treaty (WPPT), while the term TK referred to production technologies or behavior as a response to the social reality and the environment in which indigenous communities lived ... Finally, performers were the main active agents that were familiar with cultural expressions, and they loved, defended, developed and conserved those expressions, and therefore played a vitally important role.”⁵⁸

“... The second issue refers to expressions of folklore that should be protected: in our opinion these must be all the original creations of the community in question and which must have as its sphere of application the whole series of creations reflected to a greater or lesser extent in the intellectual property laws in force in very different countries. We believe, however, that musical compositions, with or without words, dramatic and dramatico-musical works, including choreographs, pantomimes, and in general any artistic performance similar thereto, including theatrical works, as well as sculptures, works of painting, drawing, engraving, lithographs and graphic arts on any carrier, as well as applied or non-applied three-dimensional works, should be protected as subject matter for consideration. Indigenous craft designs and preparation of original items, including logotypes, denominations, and specific linguistic expressions used to denominate a region or people should also be included.”⁵⁹

New Zealand

“... Many indigenous peoples defined their TK and TCEs much more broadly to include other tangible and intangible expressions and practices such as: learning systems and practices, traditional practices for environmental management; common-property management practices; traditional decision-making processes; local classification and quantification structures; practices relating to health; animal breeding practices; water and soil conservation; agriculture; building materials; and, energy conservation practices, amongst other things ... Any definition of TK and TCEs that should be the subject of protection should also take account of the commonly understood facts that: Indigenous knowledge was a subset of TK; TCEs were the manifestation of TK; TK and TCEs were embedded in cultural systems of intergenerational transmission and preservation, which each community had developed and maintained in its local cultural and physical environment; ... Lastly, the Delegation stated that TCEs could not be dissociated from the TK itself or from the cultural and physical environment from which

⁵⁸ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

⁵⁹ WIPO/GRTKF/IC/11/4(a)

they emerged. However, TCEs, being specific cultural manifestations or practices of TK, were possibly easier to protect than TK.”⁶⁰

“... The following indigenous customary terms and concepts are important to the domestic analysis of the issues relating to TK and TCEs:

Mātauranga Māori means the Māori knowledge of kaitiaki together with the systems for the organisation, transmission, dissemination, and protection of such knowledge and further includes te reo Māori (Māori language and dialects), tikanga Māori (see definition below) and taonga works (see definition below).⁶¹

Taonga works or Māori TCEs include artistic and literary works such as carving, weaving, waiata (songs), pātere (rhythmical chants), oriori (lullabies), haka (dramatic/poetic expression of cultural issues), mōteatea (overall generic term for traditional Māori songs), painting, crafts, written works, graphic works, dramatic works, musical works, oral traditions, performing arts, symbols, images and designs, artefacts and the mauri (life force) of those taonga works, where the work reflects in some way the culture and/or identity of the kaitiaki (customary guardians or custodians) of the work and includes the knowledge, skill, cultural or spiritual values upon which the work is based.

Kaitiaki in respect of taonga works, biological and genetic resources in indigenous and/or taonga species, the environment, te reo Māori, tikanga Māori and mātauranga Māori, means the individual(s), whānau (family (-ies)), hapū (sub-tribe (-s)) or iwi (tribe (-s)) (as the case may be) whose customary relationship with those taonga gives rise to an obligation and a corresponding right to: protect, preserve, control, regulate, use, develop and/or transmit those taonga and the relationship with them.

Tikanga Māori means the customs, laws, practices, traditions and values of kaitiaki (customary guardians or custodians) that comprise, underpin and inform Māori culture and its many distinctive tribal cultures.

⁶⁰ WIPO/GRTKF/IC/11/15 Prov.

⁶¹ [Note by Secretariat: original footnote in comment] In the Treaty of Waitangi claim WAI 262, Ngāti Koata claimants (Māori tribal entity from the South Island of New Zealand) discussed their interpretation of ‘Mātauranga’: “Mātauranga is what provides Ngāti Koata with their understanding of their intricate relationships with and connections to the universe, the environment and each other. ...there is no single word or description which defines the meaning of mātauranga. The term “traditional knowledge” gained currency during the hearings as an English language equivalent for mātauranga. Mātauranga is much more than “knowledge”, traditional or otherwise (e.g. acquired). Knowledge can be defined as an acquaintance with facts, truths, or principles, derived from study or investigation. What differentiates mātauranga from knowledge is that knowledge is gained through study or investigation whereas mātauranga is both learned and inherent in the people that hold it. Knowledge may be studied from a book, whereas mātauranga is passed on from generation to generation. Mātauranga can best be described as “understanding” for when one loses their mātauranga they lose their understanding as opposed to losing their knowledge. This understanding which mātauranga embodies is the basis upon which we exist in the universe and how we interact with it.”

Examples of traditional knowledge and traditional cultural expressions in New Zealand might include knowledge systems and practices in relation to weaving, performing arts, medicines, traditional house building, games, songs, tribal stories, fishing, hunting and agricultural knowledge and practices, food gathering practices, biological and environmental knowledge, classification and quantification structures such as the Māori calendar, among other things ... However, a distinction can be drawn between:

- the ‘traditional knowledge base’ (which includes cultural traditions and heritage, language, sacred sites, human remains, natural resources, and the knowledge associated with them); and
- ‘traditional knowledge based innovations and creations’ (which build upon or are inspired by the ‘traditional knowledge base’).

The ‘traditional knowledge base’ is subject to customary laws and protocols. It is often collectively ‘owned’ or guarded, and may be sacred/secret or in the public domain. Traditional knowledge based innovations may be individual creations, to which communal responsibilities may attach, and which may be subject to both formal and customary laws.

Conventional IPRs only protect innovations and creations based on TK, not the underlying TK itself. The problem arises because traditional knowledge based innovations and creations cannot be separated from the TK itself.”⁶²

Arts Law Centre of Australia

“... It is important to acknowledge the fundamental and inseparable connection between Traditional Cultural Expressions and Traditional Knowledge.”⁶³

⁶² WIPO/GRTKF/IC/11/4(a) Add.

⁶³ WIPO/GRTKF/IC/11/4(a) Add. 2

C. What qualities/characteristics should TCEs/EoF possess in order to be protectable?

International Publishers Association (IPA)

“... In particular, any framework for the protection of TCEs should not afford protection simply to a mere idea or concept, but should be tied to a particular manifestation or expression. Otherwise, the right to freedom of expression could be infringed (see e.g. Article 19, Universal Declaration of Human Rights).”⁶⁴

Ghana

“1.1 The WIPO Glossary defines folklore as works belonging to the cultural heritage of a nation created, preserved and developed in indigenous communities by unidentified persons from generation to generation...”

1.2 The Copyright act 2005 (Act 690) defines folklore as the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana designs, where the author of the designs are not known and any work designated under the Act as works of folklore.

1.3 Definition 3: The UNESCO Bulletin Volume 32 NO. 4 defines folklore as follows:-
Folklore is a mode by which culture is expressed...”⁶⁵

Norway

“Traditional cultural expressions and expressions of folklore may include any artistic or traditional expressions, tangible or intangible, that are the results of individual or communal creativity, and that are characteristics of a community’s cultural and social identity and cultural heritage, and that is maintained, used or developed by such a community. There should be considerable room for further specifics to be determined at the national level...”⁶⁶

Qatar

“Traditional Knowledge (TK) is the totality of tradition – based creations of a community, expressed by a group of individuals and recognized as reflecting the Knowledge of a community in so far as they reflect its social experience. Its life practices, standard and values are transmitted orally, by imitation or other means...”⁶⁷

⁶⁴ WIPO/GRTKF/IC/11/4(a)

⁶⁵ WIPO/GRTKF/IC/11/4(a)

⁶⁶ WIPO/GRTKF/IC/11/4(a)

⁶⁷ WIPO/GRTKF/IC/11/4(a)

Russian Association of Indigenous Peoples of the North (RAIPON)

“All works whose source is traditional culture, performed by folklore groups or authors from a number of indigenous peoples...”⁶⁸

Tunisia

“Terminology:

Traditional knowledge includes the processes acquired by peoples through the know-how, skills and creativity which they inherit. It is the handing-down of culture, from one generation to another.

Traditional knowledge should be preserved because it contains indicators of the identity and specific nature of a nation...”⁶⁹

Russian Federation

“... As we can see from the above works of folk arts may and may not be expressed in a material form.

In general, taking into consideration the studies of the ethnographers expressions of folklore (works of folk arts) are characterized by the following features:

- impossibility to define the author with a sufficient level of certainty;
- regional peculiarities caused by habitation of certain people on certain territories;
- impossibility to define with a sufficient level of certainty the moment of creation of works of folk arts.

Works of folk arts can be considered as an object comprising typical elements of traditional artistic heritage created and preserved by a nationality of its individuals, which embodies traditional artistic aspiration of that nationality.”⁷⁰

Nicaragua

“Knowledge acquired in the course of time in a particular region with characteristics of a specific community which passes said knowledge on from generation to generation as part of its customs and culture.”⁷¹

⁶⁸ WIPO/GRTKF/IC/11/4(a)

⁶⁹ WIPO/GRTKF/IC/11/4(a)

⁷⁰ WIPO/GRTKF/IC/11/4(a)

⁷¹ WIPO/GRTKF/IC/11/4(a) Add.

Ethiopia

“... TCEs should to some extent be self-definitional, allowing the understanding of traditional or local communities of what constituted cultural expressions. This required the recognition of customary laws. The search for an acceptable definition should be informed by traditional and customary legal practices ... Domestic legislation defined intangible cultural heritage, in Proclamation 209 in 2000, as any cultural heritage that could not be felt by hands but could be seen or heard...”⁷²

Islamic Republic of Iran

“... Third, with respect to the tangible and intangible nature of TCEs, it was necessary to pay attention to mixed expressions which combined both tangible and intangible elements.”⁷³

Morocco

“... the definition needed for TCEs should be general and it should contain all of the elements reflecting the traditional artistic expressions and the work of local communities and indigenous peoples ... The definition should take into account any forms, whether tangible or intangible, expressed and manifested by the individual communities who were representatives of those expressions...”⁷⁴

Cameroon

“... in respect of the definition of TCEs there were at least two elements. First, there was the word “expression”, which referred to the form or the representation of something ... Then there were also the elements “traditional” and “cultural”, which were also important because they were specific characteristics of TCEs...”⁷⁵

Amauta Yuyay

“... a TCE constituted knowledge, an “ancestral” practice inherent in indigenous peoples, be it manifested in the form of music, dance, the clothes used for different festivities, crafts, visions, gastronomy, ceremonies and so on. Research into such ancestral knowledge by academics, companies or artists, be they white or racially mixed in the multicultural society of Ecuador, and who commercialized such knowledge and used it in different artistic or similar scenarios, was known as folklore. H₂O was the physical and chemical formula which was taught in schools but *yacu*, the quechua word for water, was their source of life and was the elder sister of Mother Earth. In that

⁷² WIPO/GRTKF/IC/11/15 Prov.

⁷³ WIPO/GRTKF/IC/11/15 Prov.

⁷⁴ WIPO/GRTKF/IC/11/15 Prov.

⁷⁵ WIPO/GRTKF/IC/11/15 Prov.

regard, the representative proposed that the term “ancestral” be taken into consideration.”⁷⁶

Tupac Amaru

“... TCEs referred to the spiritual value of life. TCEs were expressions of the identity of indigenous peoples, their memory and their souls. It referred to singing, dancing and so on that was in constant evolution and constant transformation and change. It was very difficult to define as tomorrow these manifestations would be slightly different. It was ultimately the memory of humankind that was constantly evolving. How could this be translated into commercial merchandise? Some knowledge and TCEs were secret for indigenous peoples. What could be done in these circumstances was to say what indigenous peoples wanted to protect and for whom. Indigenous peoples were trying to protect TCEs from illicit use and piracy...”⁷⁷

Ecuador

“... Through its legislation, Ecuador guaranteed the existence of TCEs, and protected the collective IP of its ancestral knowledge; similarly, it stimulated creativity and innovation in local communities. In that regard, the Delegation supported the comments made by Amauta Yuyay, and also considered that in particular the sounds and whistles produced by ancestral instruments, by the same human being, should be protected and included in the criteria for the definition of TCEs.”⁷⁸

International Indian Treaty Council (IITC)

“... its TK and TCEs were alive and had developed over time collectively with its peoples. Many of its cultures were manifested in traditional and contemporary arts. The authenticity, quality and cultural integrity of its TK and art forms had been maintained throughout the generations. TK was dynamic and could not be limited to a specific definition ... Thus, collective indigenous TK could be said to contain all the intellectual creations, knowledge of the use of natural resources which indigenous peoples had used and produced, throughout their history, including their indigenous knowledge of the sustainable use of biodiversity in the field of medicine and food products, and other fields could be mentioned, in which indigenous peoples had their TK...”⁷⁹

⁷⁶ WIPO/GRTKF/IC/11/15 Prov.

⁷⁷ WIPO/GRTKF/IC/11/15 Prov.

⁷⁸ WIPO/GRTKF/IC/11/15 Prov.

⁷⁹ WIPO/GRTKF/IC/11/15 Prov.

Kyrgyzstan

“... the draft legislation of Kyrgyzstan for TCEs/EoFs had a provision that TCEs were based on traditions and culture of a community, giving protection to this community for its TCEs, particularly in the area of handicraft and arts, taking into consideration social and cultural aspects which had an influence on arts, handicrafts, literature, music, dancing and festivities. In this legislation, the protection of folklore particularly took into consideration oral traditions.”⁸⁰

Brazil

“... there was a need for an adequate and effective protection at the international level of TCEs/EoFs. Such protection could be pursued by mainly two kinds of measures or mechanisms. The first were defensive mechanisms which should be designed and implemented to prevent misappropriation of TCEs. Among those defensive mechanisms, Brazil wished to point out the role must be played by the twin principles of prior informed consent and access and benefit-sharing. Those twin principles were enshrined in the CBD. The second kind of measures would be positive measures or, more accurately, IP mechanisms. The Committee should also consider the adequacy of IP mechanisms to provide for the protection of TCEs ... The concept or definition to be developed should take into consideration that TCEs/EoFs had a dynamic, evolving and iterative nature. That protection must not be in any way of contingent upon registration. That was something that the Delegation had been repeating in the Committee and it was of utmost relevance that the protection should be granted without conditioning it to registration...”⁸¹

Ogiek Peoples Development Program (OPDP)

“Many terms may be used in defining TCE in relation to cultural identity and solidarity in livelihoods. For instance among the Ogiek People, TCE is experience during circumcisions (rites of passage), marriage, burial and while hunting. Traditional cultural expression therefore is a source of identifying traditional way of life which human is born and brought up. Folklore has been applied in tradition informal education to provide stories, tales to the young generations so as to sharpen their understanding in relation to their parents and strangers. An expression of folklore has been vital in warning young generations against of the community norms.”⁸²

“... a definition should recognize the cultural identity, collective ownership and transmission from elders to younger generations.”⁸³

⁸⁰ WIPO/GRTKF/IC/11/15 Prov.

⁸¹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

⁸² WIPO/GRTKF/IC/11/4(a)

⁸³ WIPO/GRTKF/IC/11/15 Prov.

Mexico

“... TCEs meant all those primary or other expressions of a local community or indigenous people, which referred to the literary, artistic, technical or practical spheres, popular art or crafts, handed down from generation to generation in their own languages, uses and customs. These could be tangible or intangible, were closely related to TK, and either had or did not have an identifiable author...”⁸⁴

Arts Law Centre of Australia

“... It is important that the definition recognizes the dynamic nature of Traditional Cultural Expressions i.e. they are living cultures rather than museum pieces...”⁸⁵

New Zealand

“... This was particularly important given the evolving nature of knowledge and culture ... They also agreed that TK and particularly *mātauranga Māori* (Māori knowledge) and its cultural expressions were often orally transmitted and distinctly linked to the local culture and to the relationship that the community had to the land and its natural resources. The key characteristics of TK and TCEs were that they: originated, were preserved and transmitted in a traditional context; were transmitted from generation to generation; pertained to a particular local or indigenous people or community; were not static, but rather evolved as communities responded to new challenges and needs; and were collective in nature ... the term ‘traditional’ in “traditional knowledge and cultural expressions” did not necessarily imply that the knowledge or cultural expressions were old or unscientific in nature. They might be new tradition-based evolutionary creations or innovations, which built upon cultural traditions and emerged when individuals and communities took up the new challenges and realities presented by their social and physical environment...”⁸⁶

“... There is currently no agreed formal definition of what are considered TK and TCEs. TK has been generally defined in the context of the Convention on Biological Diversity as “*knowledge, innovations and practices of indigenous and local communities around the world, developed from experience gained over the centuries and adapted to the local culture and environment, and passed on orally from generation to generation.*” ... “*Toi te whenua, knowledge is based in land. Identity is anchored to it. To be landless is to lose your soul.*” (Dr Hirini Moko Mead) The importance of the land and the environment to Māori cannot be overstated. It is reflected through whakapapa (genealogy), ancestral place names and tribal histories. The regard with which Māori held land was a reflection of the close relationship that Māori had with their ancestors. Māori see themselves as not only “of the land” but “as the land”.

⁸⁴ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

⁸⁵ WIPO/GRTKF/IC/11/4(a) Add. 2

⁸⁶ WIPO/GRTKF/IC/11/15 Prov.

“The Māori believe that the earth is the elemental womb to which we must all return. Folded within her, carefully placed, bones complete the cycle; for as she gives, so does she receive.” (Dr Ngahuia Te Awekotuku, 1982)

Not only was land important to Māori, but also the water that flows through it. It is said that all water originates from the pain of the separation of Ranginui (Sky Father) and Papatūānuku (Mother Earth) and is endowed with a mauri or life force of its own. (Reference: *He Hinatore ki te Ao Māori*) Māori knowledge or mātauranga Māori originates from that ancestral and multigenerational relationship (whakapapa) to the culture, the land and its resources.

“Knowledge was created over time, not by a single author or inventor. It was the repository of culture and identity. The benefits were shared. It could neither be owned nor sold. Not all knowledge was available to everyone; its custodians had responsibilities for its protection and use.” (Moana Jackson)

Those custodial responsibilities have been defined by the Waitangi Tribunal in the context of the Treaty of Waitangi claim WAI 262⁸⁷, using the Māori concept of ‘kaitiaki’ (custodianship or guardianship) in relation to mātauranga Māori (Māori knowledge) and Māori taonga (treasured belongings - which include cultural expressions, natural resources, and knowledge systems)...⁸⁸

Japan

“... There were TCEs that were handed down only to certain individuals within a small community through strict rituals, and there were also TCEs in a wider sense, such as those that had taken root as part of the national traditional culture of a country among its citizens in general, and were used by city dwellers and might be at times even be used commercially. Among these, the criteria that divided those that were protected from those that were not were unclear. Applying these words too loosely would bring about a fear of according IP protection to traditional culture in general. Such a consequence was not appropriate, as it would unfairly limit the public domain. On the other hand, if one were rigidly to interpret the meaning of these words and limit the scope of protection, it would be necessary to have a justifiable explanation as to why certain types of expressions were protected while others are not. (2) Criteria to fall under public domain due to uses outside the community: It was understood that TCEs/EoF fell into the public domain once they had lost their link with a certain community. However, it was unclear what extent of uses outside the community would be sufficient to render a TCE/EoF public domain. Geographically, it was unclear how much the use should expand outside the community for a TCEs/EoF to be in the public domain. Time-wise, it was unclear as

⁸⁷ The Waitangi Tribunal is a commission of inquiry mandated by statute to look into and report on allegations of breach of the Treaty of Waitangi, the founding document of New Zealand. Claimants in the WAI 262 claim, also known as the Fauna and Flora Claim, have raised concerns in relation to IPRs and the protection of mātauranga Māori. Closing submissions in the WAI 262 inquiry were heard in June 2007. The Waitangi Tribunal is presently in its report writing phase.

⁸⁸ WIPO/GRTKF/IC/11/4(a) Add.

to how long the TCEs/EoF should be used by non-community members for it to fall in the public domain. It was inappropriate to deny public domain status to TCEs/EoF that had been used outside the community for centuries in the past, as this would lead to the denial of the fruit of cultural development through cultural exchange.

(3) Non-traditional cultural expressions: It was unclear why non-traditional cultural expressions that had fallen under the public domain should not be protected while TCEs were to be protected ... (4) TCEs/EoF “that should be protected”: There was a view that the meaning of the expression TCEs/EoF could be made clear if requirements for protecting TCEs/EoF were clearly established, even if the meaning of the expression TCEs/EoF itself was vague. However, it should be noted that no consensus about “protection” had yet been reached ...

Would the TCEs/EoF be made widely available to the public (as were patents and copyrights) with the aim of enhancing technology and culture for succeeding generations? Or, would the maintenance of TCEs/EoF itself be regarded as serving the public interest? Taking into all these questions into account, discussions should focus on public interest and the return of benefits to the society. Without discussing such public interest, it would not be made clear if any protection was necessary or what should be protected. The subject matter of protection might vary by the form/level of protection. The level of protection required to ensure that TCEs/EoF were respected could cover a substantially wide range of cultural expressions. If the level of protection was that of granting an exclusive right, the scope of the subject matter would be greatly narrowed. In addition, levels such as granting a right to remuneration or providing government subsidies for its conservation were also conceivable. To clarify the expression “TCEs/EoF that should be protected,” a discussion about public interest, identification of existing problems, and practical needs for protection was indispensable, the Delegation concluded.”⁸⁹

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

“We consider that this question can be divided into two parts, the first relating to the specific definition of traditional cultural expressions, which must reflect the concept of the devising of an original creation by a group of individuals constituting a community and which has developed these indigenous creations since ancestral times, and the fact that said creations, including changes thereto, have been handed down from generation to generation, have been perpetuated in time up to the present and continue in force. The subject of the traditional cultural expression must belong to and be recognized as the work of the specific community which has devised and transmitted it...”⁹⁰

⁸⁹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

⁹⁰ WIPO/GRTKF/IC/11/4(a)

D. What other related terms, concepts and issues may also require clarification?

United States of America

“... would appreciate learning more about, among other things, specific successful national and indigenous experiences in defining “traditional culture,” including: (i) temporal issues (for example, how many generations or years were required for expression to qualify as “traditional”); (ii) geographic issues (for example, how was protection accorded, if at all, for widely diffused expressions); (iii) what criteria were used to determine whether the expressions, appearances, or manifestations of a traditional culture were “characteristic” of the “cultural or social identity” of a particular traditional culture; (iv) the many definitions of TCEs/EoF in use by Member States today...”⁹¹

Canada

“... Some of the issues that the IGC needs to address in detail are what is meant by “traditional” and clarity as to which persons or entities fall within the scope of the term “communities”.”⁹²

Japan

“... the expression “traditional cultural expressions/expression of folklore” gave a rough idea of its general meaning, but from a legal perspective, the expression remained very vague. In WIPO/GRTKF/IC/6/3, paragraph 50 listed the common elements that appeared in definitions of TCEs/EoF in national laws of member States as follows: handed down from one generation to another, either orally or by imitation; reflect a community’s cultural and social identity; consist of characteristic elements of a community’s heritage; made by ‘authors unknown’ and/or by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so; constantly evolving, developing and being recreated within the community. With regard to these common elements, there were the following problems and difficulties: (1) The range of the meaning of certain words and the scope of public domain. It was not clear how words such as “traditional”, “handed down from one generation to another”, “heritage” and “characteristic” were to be interpreted and applied. These words covered a wide spectrum ... WIPO/GRTKF/IC/5/3, paragraph 42(c), had listed examples such as works by Shakespeare, heritage of Greek, Egyptian and Roman cultures and had posed a question: “Should ‘traditional’ creations enjoy a privileged status vis-à-vis other public domain ‘non-traditional’ creations?” This question was still unanswered by the Committee ... The following opinions about the List of Issues were just for the purpose of discussion and did not mean that Japan agreed to start discussing the listed issues for any other purpose than for clarifying issues. The

⁹¹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

⁹² WIPO/GRTKF/IC/11/4(a) Add.

criteria for “TCEs/EoF that should be protected” were inextricably linked with the criteria for judging what benefits society could enjoy through the protection of TCEs/EoF...”⁹³

E. How should greater clarity on the meaning and scope of TCEs/EoF be achieved?

Australia

“... further discussion is required about how TCE/EoF should be defined. Australia would support discussion which also focuses on the general characteristics of TCE/EoF as recognised by Indigenous communities. This should help to identify the range of materials that protection has traditionally been provided for. Australia notes that under existing copyright protection some embodiments of TCE/EoF in a material form fall within existing categories of protected subject matter. Australia considers it important that such material should only be considered to be TCE/EoF where there is a clear link between it, the indigenous creator or performer, and the Indigenous community from which the material derives. Australia would encourage discussion of the aspects of a definition based on such a framework. The potentially broad scope of TCE/EoF provides challenges if the protection of such materials is to be consistent with protections that already exist under the international framework of IP protection.”⁹⁴

Thailand

“... However, cultural situations varied from region from region and from country to country, and even from community to community within each country. In this connection, the Delegation hoped that further development measures, particularly the sharing of best practices, capacity building and technical workshops, should be further promoted to allow the deepening and further clarification of this underlying concept...”⁹⁵

Hokotehi Moriori Trust

“... In response to the comment of the Delegation of Japan that it did not know why TCEs in public domain should be protected when non-TCEs such as the works of Shakespeare could not, the representative noted that the concept of “public domain” was a western construct and one not recognized by indigenous peoples; Western systems introduced through hundreds of years of colonization had greatly and adversely impacted TK systems; and, the protection of TCEs was fundamental to the maintenance, survival and integrity of indigenous peoples cultures and their identities as distinct peoples within modern day societies. The representative illustrated his intervention by referring to cases in which “Maori Mix” and “Natural Spirit” cigarettes, displaying an Indian Chief in headdress smoking a long peace pipe, were being marketed and sold without the knowledge or consent of Maori people. Indigenous

⁹³ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

⁹⁴ WIPO/GRTKF/IC/11/4(a) Add.

⁹⁵ WIPO/GRTKF/IC/11/15 Prov.

peoples needed to have control over how their TCEs were used and by whom because of the growing culturally offensive uses by companies promoting the sale of their products. The representative agreed with the Delegation of New Zealand that there was a need to be careful in defining something that continued to evolve and grow. The interventions by the Saami Council and Tupaj Amaru that TCEs were connected and important to the identity of the cultures of indigenous peoples were also supported.”⁹⁶

United States of America

“... This comprehensive approach to defining TCEs/EoF might prove, from time to time, helpful in the discussions. In particular, the United States of America noted that the general criteria may serve as helpful background as the discussion advances. Nonetheless, for the same reasons that have proved so frustrating to the Committee in the past, broadly worded definitions that, in turn, were based on vague, undefined concepts, as the Delegation of Japan had usefully pointed out, did not hold great promise in advancing our work. However satisfying such broad formulations might be in suggesting the vast scope, richness and diversity of TCEs/EoF, in the end, they might not serve the Committee well in its task of defining with greater precision the gaps in protection for TCEs/EoF. The United States of America recommended a more concrete, focused, fact-based approach to the work of the Committee ... The United States of America would be interested in learning more about definitions of folklore used by other Member States in managing cultural heritage collections. For example, the United States of America had a useful working definition of folklore that was legislatively mandated in the American Folklife Preservation Act of 1976. While this definition had been very helpful in advancing the protection, promotion and preservation of folklore in the United States of America, it might not necessarily fit the needs of all other countries and communities. The United States of America would be very interested in exchanging similar definitions with other Member States. Finally, the Delegation agreed with the Delegation of Italy that it might be useful to consider existing definitions of folklore in other appropriate international agreements.”⁹⁷

“The IGC has made considerable progress in identifying the broad contours of the subject matter of TCEs/EoF ... Nonetheless, to date, the members of the IGC have not had the opportunity to undertake a focused discussion of the subject matter of TCEs/EoF. Building on its prior work, the IGC is now in the position to examine in greater detail the subject matter of TCEs/EoF. Such a discussion should draw deeply on both national experiences (for example, under national copyright laws, sui generis laws, customary laws, and other laws) and the experiences of indigenous peoples and traditional and other cultural communities (footnote in submission: The United States uses the phrase “indigenous peoples and traditional and other cultural communities,” which appears in a number of WIPO IGC documents, but notes that the Committee has not reached agreement on the use of this phrase).

⁹⁶ WIPO/GRTKF/IC/11/15 Prov.

⁹⁷ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

By casting its net broadly, the IGC could advance its understanding of many recurring conceptual and practical issues regarding the subject matter of TCEs/EoF. For example, the recurring issue of whether the subject matter of TCEs/EoF is limited to community-oriented artistic and literary productions requires further examination. An important related issue is delineating with greater precision, if possible, the boundaries between TCEs/EoF and traditional knowledge (TK). IGC discussion of the subject matter of TCEs/EoF should be informed by the most recent national experiences, including the approaches of WIPO Members in defining TCEs/EoF, whether for purposes of protection or exclusion.

The IGC would benefit greatly from learning more about the experiences of indigenous peoples and traditional and other cultural communities in defining the subject matter of TCEs/EoF. Such a discussion should be informed by both legal measures (such as the definition of TCEs/EoF under customary law, whether codified or not) and non-legal measures (such as the use of tribal registries and electronic databases). A focused discussion should also address the question of how to identify an association between a particular TCEs/EoF and a particular indigenous people or traditional or other cultural community.

The issue of defining TCEs/EoF also includes the difficult question of identifying TCEs/EoF, or elements thereof, that “should be protected.” As noted in our general comments, the United States understands the use of the term “protection” to include a broad range of measures (including legal and non-legal measures) to address specific issues and concerns related to TCEs/EoF and TK. It would be productive for the IGC to examine in greater detail what TCEs/EoF, or related elements, are capable of protection under existing legal and non-legal mechanisms.”⁹⁸

Canada

“... there were two parts to defining protectable TCEs: first, developing an appropriate definition of TCEs, and second, determining the full scope of the protectable subject matter. Both represented a challenge given the complexity of the issues and the particularities of all Member States. The Delegation further believed that achieving consensus on the objectives of protecting TCEs could help to define the subject matter that was to be protected and assist with terminological clarity.”⁹⁹

⁹⁸ WIPO/GRTKF/IC/11/4(a)

⁹⁹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

F. What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?

Norway

“... In our opinion the discussions in the IGC as well as the IGC documents provide an extensive basis for the understanding of what expressions should be protected.”¹⁰⁰

South Africa

“Whilst we agree with the definition provided in Article 3 of document WIPO/GRTKF/10/5, South Africa recommends the inclusion that “Indigenous Knowledge (IK) will be passed from generation to generation and between generations.”

In addition to the current definition South Africa proposes the following:

- to include under the term “traditional knowledge” technical know-how and spirituality (Article 3.2);
- to include ‘memory’ amongst resources section under article 3; and,
- Under Article 4 (iii), to add “traditional and local”

South Africa will continue to use the term Indigenous Knowledge (IK) as opposed to the use of Traditional Knowledge (TK). The use of this terminology is in sync with our IKS policy, proposed amendments to our IP legislations, and draft Access and Benefit regulations etc. This might support the use of IK as opposed to TK.”¹⁰¹

Colombia

“The definition contained in the proposed Article 1 of the substantive provisions detailed in documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/10/4 refers to the “creativity of the individual”. We consider that there is no need to refer to the creativity of an individual when speaking of a collective task. However, the problem lies not so much in the applicability of the criterion of creativity to a group but in the practical definition of the criterion as such. Furthermore, the list included in the above Article should scarcely be a list and must not be restrictive.”¹⁰²

¹⁰⁰ WIPO/GRTKF/IC/11/4(a)

¹⁰¹ WIPO/GRTKF/IC/11/4(a), South Africa’s comment has been added here as the comment refers to both TK and TCEs.

¹⁰² WIPO/GRTKF/IC/11/4(a)

Thailand

“... the draft description of TCEs/EoF in the draft objectives and principles was adequate, and that it would be very happy to go along with any consensus that could be achieved on this very fundamental question in order to pave the ground for future advancement of the work...”¹⁰³

Burkina Faso

“... its intervention was associated with the statements made on behalf of the African Group. The Delegation stated that the definition contained in Article 1 of WIPO/GRTKF/IC/11/4(c) provided a good basis for work ... Finally, the Delegation said that there was good reason to change the wording of Article 1, paragraph (a), by adding the words “in particular” after the word “comprise”.”¹⁰⁴

Algeria, on behalf of the African Group

“... In relation to the Issues, and specifically on the question of definition, the African Group noted the incremental work that had been done in defining TCEs as contained in Article 1 of the substantive provisions in WIPO/GRTKF/IC/11/4(c), which had drawn from national and regional experiences as well as existing international instruments. The Group was therefore of the view that the definition in Article 1 provided a satisfactory basis for future work...”¹⁰⁵

Islamic Republic of Iran

“... the definition in the current text was generally acceptable and was a good base definition...”¹⁰⁶

Indonesia

“... the definition of TCEs contained in the draft provisions in WIPO/GRTKF/11/4(c) was acceptable. Nevertheless, there was still one element that had not been included, which was related to theater. Therefore, it was proposed to add wording as follows to the definition: “theater, included, among other: puppet performance, and folk drama.” This wording could be inserted after the sub-paragraph (iii) of the definition.”¹⁰⁷

¹⁰³ WIPO/GRTKF/IC/11/15 Prov.

¹⁰⁴ WIPO/GRTKF/IC/11/15 Prov.

¹⁰⁵ WIPO/GRTKF/IC/11/15 Prov.

¹⁰⁶ WIPO/GRTKF/IC/11/15 Prov.

¹⁰⁷ WIPO/GRTKF/IC/11/15 Prov.

Morocco

“... At the previous session of the Committee, delegations had made enormous efforts to try to find a definition of TCEs and the result was document WIPO/GRTKF/IC/11/4 (c), which should be the basis of any future discussion on this matter. The definition in Article 1 of this document was acceptable for the Delegation. It contained numerous elements and was the result of tremendous efforts to take into account definitions in other conventions or treaties...”¹⁰⁸

Cameroon

“... So the “expression” or the “representation”, as WIPO/GRTKF/IC/11/4 (c) said, needed to be the representation of that traditional culture and that TK. These were the specific aspects/elements of a TCE, as reflected in the document referred to. However, reference to “any forms, whether tangible and intangible” seemed superfluous. This seemed circular and confusing, and should be deleted. Then one would have the actual substance of the definition.”¹⁰⁹

Tupac Amaru

“... indigenous peoples, particularly the Tupaj Amaru, were confused because the documents before the Committee made almost no reference to the original document which described the TCEs to be protected. So what should be protected as TCEs? The contributions made by Committee participants were not definitions but proposals. The Committee had asked for new proposals for article 1 of the substantive provisions, but this had not been provided. The Tupaj Amaru movement wished to contribute from an indigenous point of view regarding the definition of cultural expressions ... WIPO, UNESCO, the CBD and other bodies and institutions already had a clear definition. What was needed was a consensus on what one was trying to protect as TCEs/EoFs. Tupaj Amaru would like to broaden Article 1 of the definition and introduce other elements like designs, sculpture, photography, engravings, sacred objects, and writings. Its language, for example, quecha, had been stolen and was now in the British Museum. Musical instruments were also in western museums. The representative referred also to the studies that had been carried out by Dr. Erica Irene Diaz for the Working Group on Indigenous Populations which should be studied.”¹¹⁰

Ecuador

“... wished to see the Committee’s work on TK and TCEs lead, in the near future, to legally binding international instruments...”¹¹¹

¹⁰⁸ WIPO/GRTKF/IC/11/15 Prov.

¹⁰⁹ WIPO/GRTKF/IC/11/15 Prov.

¹¹⁰ WIPO/GRTKF/IC/11/15 Prov.

¹¹¹ WIPO/GRTKF/IC/11/15 Prov.

Hokotehi Moriori Trust

“... While definitions could be problematic, the current wide definition of TCEs was preferable to a more narrow approach being advocated by some member states...”¹¹²

China

“... the definition of TCEs contained in the present draft provisions was relatively comprehensive and flexible, and thanked the Secretariat for its extensive and effective work in this regard. The Delegation was ready to accept the definition as the basis for further deliberations...”¹¹³

United States of America

“... Some delegations had suggested that Article 1 of the Annex to WIPO/GRTKF/IC/11/4 (c) would provide an “adequate basis” for a discussion of the definition of TCEs/EoF. In the view of the United States of America, the efforts of the Committee to define TCEs/EoF, while providing helpful background information, also embodied and illustrated the very challenges that the Committee had faced and continued to face in defining with precision TCEs/EoF. As would be recalled, this provision attempted to capture the richness and diversity of TCEs/EoF by canvassing the broad array of materials that might be regarded as “expressive” of a “traditional culture” or “traditional knowledge”...”¹¹⁴

“... This progress has drawn on the pioneering work of the WIPO-UNESCO Model Provisions for National Laws for the Protection of Expressions Against Illicit Exploitation and Other Prejudicial Actions. It also has benefited from the excellent work of the International Bureau (IB) in compiling a wealth of materials and distilling key elements of definitions for TCEs/EoF from regional frameworks, national copyright laws, and other laws...”¹¹⁵

Brazil

“... In conclusion, the Delegation believed that the definition proposed in Article 1 of the annex to WIPO/GRTKF/IC/10/4, represented an adequate basis to discuss this issue.”¹¹⁶

“... The provisions defining the subject matter of the international instrument should reflect the idea that ECTs/EoFs have a dynamic and iterative (in the sense that it represents a process) nature. Accordingly, expressions that may characterize more recently established communities or identities should not be left unprotected, as they equally qualify as TCEs/EoFs. With respect to musical expressions, musical styles in

¹¹² WIPO/GRTKF/IC/11/15 Prov.

¹¹³ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

¹¹⁴ WIPO/GRTKF/IC/11/15 Prov.

¹¹⁵ WIPO/GRTKF/IC/11/4(a)

¹¹⁶ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

particular, the protection sought after is aimed at the particular rather than the general, i.e., there is little sense in ascribing entitlement to a musical style as a tradition that, by the very cultural dynamics of mankind, is transmitted and shared among many groups and societies.”¹¹⁷

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

“... thanked the Secretariat for its commendable work in producing such detailed documents which covered all the issues that were being debated and without which it would be impossible to reach relevant conclusions. FILAIE comprised an enormous number of artists who expressed themselves in Spanish and Portuguese, and consisted of management societies from Mexico, Central America, South America and, in Europe, the Iberian Peninsula. The Delegation said that it had perceived a fair degree of consensus between the government delegations on continuing to work to adopt a relevant resolution, so that the General Assembly of Member States could take decisions with a view to an international instrument. ... The representative also said that WIPO had acted on and responded to the basic questions that had been raised in relation to TCEs and which were contained in WIPO/GRTKF/IC/11/4(a), to which reference was made ... FILAIE considered that protection was required, preferably through an international instrument which covered, defended and protected the TCEs which were the subject of misappropriation. The best way to achieve such protection was through IP rules, already referred to in both the Berne Convention and in the WPPT...”¹¹⁸

Arts Law Centre of Australia

“... the definition as set out in Article 1 of the Revised Draft Provisions for the protection of TCEs in WIPO/GRTKF/IC/4/11(c) provided a useful starting point. In addition, it was suggested that satisfying Article 1 (a) (cc) might make it difficult for some indigenous communities in Australia to gain protection of their TCEs due to their dislocation and the breakdown of customary law. This was a direct result of Government policies over the last two centuries. It would be better if the definition provided greater recognition of this reality, only requiring that TCEs be “maintained, used or developed ... in accordance with customary law OR practices of that community.” Otherwise it was possible that having to prove the relevant customary law would be extremely difficult for some indigenous communities.”¹¹⁹

¹¹⁷ WIPO/GRTKF/IC/11/4(a)

¹¹⁸ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

¹¹⁹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add. 2

New Zealand

“... The working definition for TCEs in article 1 of WIPO/GRTKF/IC/11/4(c) reflected a strong focus on IP ... The individuals and organizations with whom the Delegation had consulted domestically on the article 1 working definition had said that they generally agreed with it, as it appeared to cover most areas of concern...”¹²⁰

“... However, the draft at Article 4 suggests that to be eligible for specific protection against misuse or misappropriation, more precision is needed, and that TK should (i) exist in a traditional and intergenerational context; (ii) be distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and (iii) be integral to the cultural identity of an indigenous or traditional community or people which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. This relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.” ...¹²¹

¹²⁰ WIPO/GRTKF/IC/11/15 Prov.

¹²¹ WIPO/GRTKF/IC/11/4(a) Add.

ISSUE II. WHO SHOULD BENEFIT FROM ANY SUCH PROTECTION OR WHO WOULD HOLD THE RIGHTS TO PROTECTABLE TCES/EOF?

Introductory note by Secretariat

The written comments and oral interventions on this Issue dealt with two main, related questions, namely, who, in any *sui generis* system, (i) should benefit from the protection of TCES/EOF, and (ii) should hold rights to TCES/EOF? Despite the complexity of this Issue, many Delegations agreed that greater clarity on this Issue was critical. Related questions that were raised included the role of the State as a right holder, the place of individuals as beneficiaries and/or rights holders, how the “link” between a right holder, such as a community, and a TCE should be construed and identified, how “regional folklore” and folklore belonging to more than one community in the same country ought to be dealt with, whether or not the draft provision in WIPO/GRTKF/IC/12/4 (c) was useful, and whether there were other related terms and concepts that required clarification. The desirability of formalities, such as registration, related to the vesting of rights or certain benefits in TCES/EOF was also raised under this Issue (and other Issues too).

Accordingly, the comments and interventions have been organized under the following clusters:

- (A) Which persons, communities or entities are identified as potential (i) beneficiaries of protection and/or (ii) rights holders?;
- (B) How should beneficiaries and rights holders be identified? How should the “link” between a TCE and a beneficiary/right holder be determined?;
- (C) In cases of the same or similar TCES/EOF found in more than one community and/or country, how should beneficiaries/rights holders be identified?;
- (D) How should greater clarification on the meaning and scope of beneficiaries/rights holders be achieved? What other related terms and concepts may also require clarification?
- (E) What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?

A. Which persons, communities or entities are identified as potential (i) beneficiaries of protection and/or (ii) rights holders? What is the role, if any, of the State? Could individuals be rights holders in TCEs/EoF?

Originators and custodians

International Publishers Association (IPA)

“For publishers to be able to publish works related to TCEs/EoF with economic and legal certainty, a clear and concise definition of who could be potential beneficiaries is required, leaving no room for ambiguity. Only the originators or custodians of TCEs should benefit from protection...”¹²²

Various possible beneficiaries and owners, including the State and individuals

Kyrgyzstan

“Owners of traditional cultural expressions (folklore) are as follows – nations, national persons and legal entities creating and preserving traditional cultural expressions (folklore).

State shall benefit from use of traditional cultural expressions (folklore), which cultural heritage covers respective traditional cultural expressions (folklore).”¹²³

South Africa

“... the current system of protecting IPRs is limited to private monopoly rights and therefore incompatible with the protection of IK. We proceed on the premise that IK is held as part of a community’s heritage passed down from generation to generation, and should not be allowed either to be privatized or commercially exploited for individual gain; or to slip into the “public domain.” Hence, our assertion is that the first beneficiary of indigenous knowledge must be the community directly connected with the knowledge accessed and to be protected.

Read conjointly with the aforesaid we propose that where there is no clear and/or identifiable beneficiary the State or its delegated authority will act as the custodian of the rights, and the products derived from the IPR/TK of the communities...”¹²⁴

¹²² WIPO/GRTKF/IC/11/4(a)

¹²³ WIPO/GRTKF/IC/11/4(a)

¹²⁴ WIPO/GRTKF/IC/11/4(a)

Algeria, on behalf of the African Group

“... TCEs were held in trust as part of a community’s heritage that was passed down from one generation to another and was, therefore, commonly owned by that community. In this context, the beneficiaries of the protection of TCEs should be: (i) the holders of TCEs in the form of the local and traditional communities, as well as recognized individuals within such communities who created, preserved, used and/or transmitted the knowledge in a traditional context, and, (ii) those upon whom rights had been conferred by the rights holders as defined above through prior informed consent, who might be individuals or legal entities including extractors of TCEs, researchers, collectors and extractors of information regarding TCEs and technical research and development institutions...”¹²⁵

Tunisia

“Governments, peoples and holders of such knowledge.”¹²⁶

Guatemala

“Decree No. 25-2006 of the National Congress, Convention for the Safeguarding of the Intangible Cultural Heritage, states:

Sustainable development communities, groups and individuals...”¹²⁷

Ghana

“The beneficiaries of the protection of folklore may be divided into two categories viz:-

1. Holders or Owners of the folklore viz individuals, traditional communities, casts, families, ethnic groups, nations and sub regions. For instance, in West Africa except with slight differences in species and use, kente, yam, gari, and palm fruits are widely used in the sub region.
2. Derived right owners such as modern researchers, innovators and extractors of folklore.

The beneficiaries of protection under the instrument must include indigenous communities, nations and sub-regions which own and maintain the folklore and secondary owners of rights such as collectors, researchers, extractors and developers.

Researchers, collectors and extractors of information regarding folklore to be given limited recognition. Shared serendipity applications of folklore (that is discoveries

¹²⁵ WIPO/GRTKF/IC/11/15 Prov.

¹²⁶ WIPO/GRTKF/IC/11/4(a)

¹²⁷ WIPO/GRTKF/IC/11/4(a)

made by accident). Provision must be made for shared ownership of the commercial exploitation of knowledge that is developed from folklore...”¹²⁸

Qatar

- (a) “Tradition community as the prime holder of rights and ownership or the group members who hold the rights of protectable TK as representative of society or people.
- (b) The informant as transmitter of traditions.
- (c) The collector who gathered TK and conserved it in archives in good conditions and a methodical manner.”¹²⁹

Russian Association of Indigenous Peoples of the North (RAIPON)

“Authors and performers of the works performed.”¹³⁰

Canada

“... Apart from communities as potential beneficiaries of protection of their TCEs, the Committee should address whether the protection of TCEs should extend to other beneficiaries. Indeed, there might be cases where a particular individual, family, clan or society might be acknowledged as the source of the TCEs. Canada believed this Committee should have further discussions to clarify who were the appropriate potential beneficiaries and rights holders of protectable TCEs.”¹³¹

Communities only

Thailand

“... on the question as to who should benefit from the protection of TCEs/EoF, the holders of the rights to the protected TCEs/EoF should naturally be the community that created, maintained, revived and/or recreated the TCEs and folklore. However, certain traditional expressions or folklore might be regarded as belonging to many levels of communities, local, regional or intercommunal, national or even cross-border, in which case the protection should benefit all levels of these communities. The source of the originator or the creator, be it collective or individual, had always to be given, and consultation with stakeholders should be made prior to the use of the TCEs/EoF outside the context of these traditional communities...”¹³²

¹²⁸ WIPO/GRTKF/IC/11/4(a)

¹²⁹ WIPO/GRTKF/IC/11/4(a)

¹³⁰ WIPO/GRTKF/IC/11/4(a)

¹³¹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

¹³² WIPO/GRTKF/IC/11/15 Prov.

Colombia

“... In the same way as for traditional knowledge, traditional cultural expressions and expressions of folklore generally originate and are maintained collectively, such that the rights derived therefrom should be granted mainly to communities and not to individuals. In this connection, although it is considered appropriate in conceptual terms to assign a right to a group, for practical purposes that group should be represented by a specific body, which gives rise to the question of the recognition and/or legal forum which the particular body must possess in the national legislative sphere.”¹³³

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

“Undoubtedly the sole beneficiary of this type of protection should be the indigenous community or ancestral people that has created an original traditional culture. Such benefit should be channeled towards direct action, through the relevant provisions, so that the maximum benefits accrue directly to the community.”¹³⁴

Saami Council

“... If the Committee wished to make any real progress, it had to stop beating around the bush, and recognize what should be self-evident in a forum with IP rights as mandate – that the right-holders to TCEs were the creators of the same ... The Saami Council submitted that the Committee wrap up the discussion on the issue of beneficiaries at this session with the only logical conclusion: that human creativity vest in the creators.”¹³⁵

Arts Law Centre of Australia

“... but that the rights to TCEs and any benefits should be held by indigenous peoples and their communities who were directly connected to the TCEs ... As a matter of principle, the State should generally not hold or exercise rights on behalf of indigenous communities in view of histories of States misappropriating benefits owing to indigenous people, such as the Stolen Wages cases in Australia. This raised the question of where there was no clear indigenous rights holder or beneficiary whether States should hold rights and benefits in trust for indigenous peoples.”¹³⁶

¹³³ WIPO/GRTKF/IC/11/4(a)

¹³⁴ WIPO/GRTKF/IC/11/4(a)

¹³⁵ WIPO/GRTKF/IC/11/15 Prov.

¹³⁶ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add. 2

Communities as beneficiaries, States as owners

Nicaragua

“The beneficiaries of this knowledge must be the community or the population of the region, and the local government is the owner of these rights.”¹³⁷

General comments

Russian Federation

“Formal interpretation of the provisions of article 3 of the Law of the Russian Federation of October 9, 1992 No. 3612-I “Basics of the legislation of the Russian Federation on culture” allows us to come to a conclusion that folklore can be attributed to cultural values, some expressions of folklore can be attributed to cultural property of the peoples of the Russian Federation and “have all-Russian importance and thus completely belong to the Russian Federation and its subjects without any possibility of transfer to other countries or unions of countries to which the Russian Federation is a participant”.

Legal intellectual property institutes with respect to granting legal protection to an object of intellectual property do not have a single approach to defining the beneficiary.

In copyright the beneficiary is the author (creator) – the person who contributed into the creation of the work, and also the successors, in particular, the heirs of the author.

The institute of related rights considers as the beneficiary the initiator, the organizer, the person that contributed into the distribution of the work.

The institutes of patent law, the so called industrial property, does not also provide for a unity in defining the beneficiary. According to the patent law exclusive rights belong to the patent holder (article 10 of the Patent Law of the Russian Federation of 23 September, 1992 No. 3517-I), who can be the author of the invention, utility model, design (individual due to who’s creative work they were created), his employer (if the object is created in connection with his professional duties) or his successors.

A common feature, uniting all the abovementioned people in copyright and patent law is the contribution, expenses into the creation of object subject to legal protection. Thus, a beneficiary can be any person who has contributed into the creation of an object of his successor.

In respect to the works of folk arts (expressions of folklore) it is impossible to define the person who made a contribution into the creation of the work, was the creator, organizer

¹³⁷ WIPO/GRTKF/IC/11/4(a) Add.

of the process. Due to this and other reasons the objects of folk arts in Russia according to the Law of the Russian Federation “On Copyright and Related Rights” are not granted legal protection.

It is not possible also to define the heirs and successors of the authors of works of folk arts, due not only to the migration of population, but also the resemblance, common features, motifs of the works of folk arts of different peoples. Resemblance of the works is caused not only by the fact that works of folk arts were in many cases arising from one source, and not only by the cultural interaction between the peoples, but also by similar climatic, historical and domestic conditions, which left an imprint on the works of folk arts of many peoples.

In copyright and patent law after the death of the author in cases the author has no heirs all the rights in the works are transferred to the Russian Federation, which can assign the management of property rights to a special body.

Since is it impossible to define the successors in respect of the works of folk arts, we will try to build an analogy with the inheritance law.

Let’s assume that we can consider the state as the beneficiary.

However, the heirs of the author may live on the territories of different states, having different legal systems. As a general rule, provided for in article 1224 of the Civil Code of the Russian Federation concerning the inheritance, the relations on the inheritance are governed by the law of the country where the testator, here – the author, has last lived. Thus, in cases when the heirs of the author can not be defined, but it is clear that the author has last lived in the Russian Federation, the inheritance law of the Russian Federation is used, and thus we can be speaking of the Russian Federation as the successor similar to cases of escheat (article 1151 of the Civil Code).

However, in cases of works of folk arts the testator (the author) can not be defined, nor can be defined his last place of living, and accordingly the law of the country that should be applied to such relations. Thus, it is not clear which state may have pretensions of the rights in the works of folk arts.

The abovementioned speaks for the difficulties in defining the beneficiary, which can not be defined using the present Russian legislation.”¹³⁸

¹³⁸ WIPO/GRTKF/IC/11/4(a)

Individual vs. communal owners

New Zealand

“... Protection for individual creators as opposed to those of the community from which the TK and TCEs originated had to be fully analyzed and understood prior to determining what type of rights should be awarded, if any, or who the rights holders should be...”¹³⁹

B. How should beneficiaries and rights holders be identified? How should the “link” between a TCE and a beneficiary/right holder be construed and determined?

Criteria of origination (“authorship”) and/or continuous use

China

“... beneficiaries should be limited to traditional communities in which TCEs/EoF originated, or which maintain, manage or develop TCEs/EoF or make TCEs/EoF their unique cultural and social characteristics.”¹⁴⁰

Norway

“The beneficiaries should be the custodians (the bearers of the tradition) of the particular TCE/EoF; ie the collective groups – the indigenous peoples or local communities – that has maintained, used and developed the expressions and which still continue to do so...”¹⁴¹

Ogiek Peoples Development Program (OPDP)

“The beneficiaries of the TCE/EoF deserve to hold the rights of protection to their cultural values. Through cultural exhibition, the community holding TCE and practicing earns income from the tourist, researchers and who may in turn be vital to their national development. Any behaviour that promotes and respects the culture and folklore of community using it should be acknowledged. There has to be limitations for attaching to protection of TCE/EoF as they might be misused at wrong places. For instance many scientific institutions use traditional cultural symbols and practices to generate an extra ounce of confidence of certainty. As long as the community still relies on their good cultural practices, then the TCE demands for policies that promotes it for a longer period of time. This will ensure that the future generation has adapted the cultural issues.”¹⁴²

¹³⁹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

¹⁴⁰ WIPO/GRTKF/IC/11/4(a)

¹⁴¹ WIPO/GRTKF/IC/11/4(a)

¹⁴² WIPO/GRTKF/IC/11/4(a)

Guatemala

“... Native communities and peoples that are authors of their expressions of folklore.”¹⁴³

Brazil

“Although it is not always possible to identify one individual author, TCEs/EoFs of ethnic groups and traditional populations have an identifiable collective authorship, given that they belong to a specified group or population – a reason why it is not possible to defend the expressions belong in the public domain. Therefore, entitlement to rights should be collective and in accordance with the interests and traditions of the groups in question. The notion of “author” is an element that attests the complexity of the issue, i.e., oftentimes there is not an identifiable author or authors within the traditional communities. Apart from that, the transmission of such heritage is normally done orally across generations; a certain work is recreated and given renewed meaning over time, which evidences the inherent dynamics of this process of intellectual creation...”¹⁴⁴

Origination not necessary

Italy

“... in Italy, and more broadly in Europe, there were many local communities which were not necessarily indigenous, but nevertheless, had their own TCEs. The Delegation was of opinion that adequate protection should be given to these TCEs as well even if they did not originate from an indigenous community.”¹⁴⁵

Criterion of link to land/territory, and potential difficulties therewith

Mexico

“The protection of traditional cultural expressions/expressions of folklore must be for the benefit of the cultural communities or ethnic groups in the region to which the traditional cultural expression/expression of folklore is specific.”¹⁴⁶

¹⁴³ WIPO/GRTKF/IC/11/4(a)

¹⁴⁴ WIPO/GRTKF/IC/11/4(a)

¹⁴⁵ WIPO/GRTKF/IC/11/15 Prov.

¹⁴⁶ WIPO/GRTKF/IC/11/4(a) Add.

Arts Law Centre of Australia

“... There might be evidentiary difficulties in view of histories of widespread dislocation. For example, in Australia, indigenous groups claiming native title rights who had to prove continuous connection with land had faced huge hurdles in this regard and it was not unusual for cases to take over 10 years to resolve. There should be an assumption in favor of the indigenous community claiming to be custodians of TCEs...”¹⁴⁷

Criterion of descent

New Zealand

“... For Māori, the answer to this question has consistently been ngā uri – all the descendants who whakapapa (genealogically descend) through to the TK and TCEs in question. The structure of Māori communities is organised by iwi (tribe), hapū (sub-tribe), and whānau (family). Māori who have been consulted on this issue have stated that the distribution of benefits and the holding of rights may cause problems, given the customary structure of the communities. Some elements of TK and TCEs may be held by more than one iwi, hapū, or whānau; and elements of TK or TCEs may slightly vary from one iwi, hapū, whānau to another but may still be fundamentally the same TK and TCEs ... Some Māori stakeholders have categorised this issue of rights holders and beneficiaries as being ‘in the too hard basket’ at the moment. However, it is also recognised that a system to manage the holding of rights and the distribution of benefits needs to be designed in accordance with indigenous customs and norms...”¹⁴⁸

“... the rights holders and beneficiaries of any benefits flowing from the use or exploitation of TCEs should be the TCEs holders and creators themselves and their community or communities ... TK was subject to customary laws and protocols and was often collectively “owned” or guarded, and some aspects might be sacred/secret or in the public domain. TK based innovations or expressions might be individual creations, to which communal responsibilities attached, and which might be subject to both formal and customary laws. The Delegation stated that the use of TK and TCEs might also benefit and contribute to the well-being of all New Zealanders as a nation and to humanity as a whole, and often fostered innovation, creativity and growth on a much broader scale than simply the indigenous and local communities from which they originated. Recognition of contributions to innovation and creativity was important and in line with the objectives and principles underlying IP systems and, therefore, any attribution of rights or distribution of benefits generated from the use of TK or TCEs should fairly and equitably recognize those contributions, it was added. Acknowledgement of the sources of innovation and creativity or of the TCE holders’ contributions was important, regardless of who was using the TCEs. Individuals and organizations consulted asserted that it was essential that *whakapapa*, which was a

¹⁴⁷ WIPO/GRTKF/IC/11/4(a) Add. 2 and WIPO/GRTKF/IC/11/15 Prov.

¹⁴⁸ WIPO/GRTKF/IC/11/4(a) Add.

Maori term which could be translated into English as being the source or the genealogical essence/descendence of the TCE, had to be acknowledged.”¹⁴⁹

Need for identifying beneficiaries/owners, and how to do so

International Publishers Association (IPA)

“... and [beneficiaries] must be clearly identifiable through the application of transparent and agreed principles.”¹⁵⁰

Norway

“... Local customs may provide guidance when identifying the appropriate custodians and their representatives.”¹⁵¹

Brazil

“... The Delegation agreed with the Delegation of Norway that local customs might also provide guidance when identifying the appropriate custodians and their representatives...”¹⁵²

Australia

“This issue warrants further discussion. As a starting point Australia recognises that the creator and the community may have related interests to benefit from any protection. The entitlement to the benefits of protection should be determined by reference to national laws and policies, and be consistent with existing international law. Australia can only recognise customary law where it does not conflict with international law and national laws and policies...”¹⁵³

¹⁴⁹ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

¹⁵⁰ WIPO/GRTKF/IC/11/4(a)

¹⁵¹ WIPO/GRTKF/IC/11/4(a)

¹⁵² WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

¹⁵³ WIPO/GRTKF/IC/11/4(a) Add.

C. In cases of the same or similar TCEs/EoF found in more than one community and/or country, how should beneficiaries/rights holders be identified?

Colombia

“On this point it is important to distinguish the concepts of State, country and people or nation. Precisely in countries with great cultural diversity such as Colombia, where 91 indigenous peoples exist with more than 60 different languages and specific systems of organization and government, it is essential to channel benefits appropriately to these peoples or nations which even transcend national borders. In other words, although the concept of cultural community is sufficiently broad to cover even a country or a nation, it is important to establish that benefits may correspond to a nation when dealing with countries made up of a single cultural community, people or nation; or rather that there may be peoples or nations in regions, which in fact transcend territorial limits between neighboring countries. Similarly, the concept of cultural community should be considered to include local or regional identities which do not necessarily constitute different peoples, but although such peoples share the same national language, religion and identity, they possess traditional cultural expressions/expressions of folklore which are specific to and authentic for a particular cultural community, which in turn forms part of a larger cultural community or national society within a country...”¹⁵⁴

United States of America

“... the inherent problem of defining beneficiaries of protection for TCEs/EoF was made all the more difficult in a world where individuals and groups readily crossed national borders and geographic boundaries. In the United States of America, for example, tradition-bearers from almost every cultural group in the world practiced their TCEs/EoF in their new homeland. Thus, The United States of America was acutely aware that TCEs/EoF traveled with each tradition-bearer and TCEs/EoF were often practiced well beyond their original geographic location...”¹⁵⁵

Canada

“... many peoples and communities around the world created and sought to protect what they might consider as TCEs. TCEs might originate with a particular community or might be shared in whole or in part by a number of different communities. When common between communities, it would be important that the Committee clarify whether all or some communities should benefit from protection for their TCEs and the policy implications of such protection...”¹⁵⁶

¹⁵⁴ WIPO/GRTKF/IC/11/4(a)

¹⁵⁵ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

¹⁵⁶ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

Arts Law Centre of Australia

“... A further issue arose where there were multiple communities with responsibility for the TCEs. For example, certain dreaming stories in Australian indigenous culture. There was a need to recognize that there might be more than one community which was the rights holder and should receive benefits in view of the diversity of indigenous cultures in Australia...”¹⁵⁷

D. How should greater clarification on the meaning and scope of beneficiaries/rights holders be achieved? What other related terms and concepts may also require clarification?

Saami Council

“... That said, the fact that as fundamental an issue as who should be the beneficiary of protection was outstanding, indicated a need to clarify some fundamental matters before the Committee could in an effective manner commence crafting an international instrument. Naturally, the answer to essentially all the other listed questions - such as what objective was sought to be achieved through protection, what forms of behavior should be considered unacceptable, the term of protection, and to what extent existing IPRs already afforded protection - would greatly depend on whose rights were being considered ... Until then, the Committee could hardly proceed with its work in a meaningful manner. Clearly, only when it was known whose rights were being addressed could an intelligent debate be held...”¹⁵⁸

United States of America

“... In the deliberations to date, Committee participants have not had the opportunity to undertake a sustained discussion and reach a clear understanding of these complex issues, much less arrive at a consensus on the scope and meaning of such important terms as “indigenous peoples,” “traditional,” and “other cultural communities.”...”¹⁵⁹

“... the Committee would benefit from further study, informed by representatives from many stakeholder groups, including indigenous groups and tradition-bearers, of existing mechanisms to protect TCEs/EoF, with a view toward deepening the understanding of the Committee on the most successful strategies to identify beneficiary groups and to resolve the sometimes competing claims of beneficiaries. This topic included complicated issues related to the web of interests of many stakeholders, including the roles of states and their nationals, immigrant communities, governmental authorities, indigenous peoples and traditional and other cultural communities, subject matter experts, and cultural institutions. The United States of America had listened very carefully to the helpful statement of the Saami Council suggesting that reaching a

¹⁵⁷ WIPO/GRTKF/IC/11/4(a) Add. 2 and WIPO/GRTKF/IC/11/15 Prov.

¹⁵⁸ WIPO/GRTKF/IC/11/15 Prov.

¹⁵⁹ WIPO/GRTKF/IC/11/4(a)

mutual understanding of this fundamental issue should be a high priority because of the interrelationship of this issue to other issues before the Committee ... Many issues needed to be addressed, the Delegation stated. For example, what would constitute an identifiable group? Did an entire national population qualify? Did it need to be an ethnic group? The Delegation of Japan had in its written comments raised an interesting question regarding groups that were not ethnically or kinship based groups, such as certain religious groups. While it was agreed that a precise answer to these questions might be difficult to obtain, it did appear that the Committee should further define what constituted a traditional cultural group, even if this resulted in identifying groups that should be excluded from this definition.”¹⁶⁰

Brazil

“... Other examples highlight the complexity of the issue, such as the fact that many indigenous ethnic groups are not grouped within the same territory and therefore one specific TCE might be shared by different ethnic groups. Despite the complexity of the issue, determination of the beneficiaries of TCE/EoF protection is a critical point of an international instrument...”¹⁶¹

“... Brazil believed that in regard to the definition of the beneficiaries of protection of who should benefit from the protection of TCEs/EoF, it was possible to set out minimum standards at the international level and that a specific definition of eligibility should be left for national legislations. This Committee should address and should recognize the collective authorship and ownership of TCEs/EoF ... No definition would be perfect but it was believed that a minimum definition was achievable and the Delegation was eager to cooperate with other delegations in trying to achieve a common denominator.”¹⁶²

Japan

“... it was unclear what social prerequisites were necessary for a group to be qualified as a “community” which would be the beneficiary of protection. Points that lacked clarity were: (i) community with regard to TCEs/EoF of indeterminable origin: there were many TCEs/EoF whose origin was indeterminable. There were cases where the community that should enforce its rights to receive benefits could not be determined or where more than one community claimed to be the origin of a TCE; (ii) community with regard to “regional folklore”: it was unclear how to treat cases of “regional folklore”, where a community was spread across national borders; (iii) community with regard to “national folklore”: usually, the word “community” implied a certain level of actual communal living. However, when it was so interpreted that nationals of an entire country might be deemed a “community” and could claim ownership of a “national folklore”, the condition of actual communal living became so relaxed as to be non-existent. This was tantamount to saying that TCEs/EoF could be so broad as to include

¹⁶⁰ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a).

¹⁶¹ WIPO/GRTKF/IC/11/4(a)

¹⁶² WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a).

any expression related to a nation's custom or tradition. There was a need to clarify the relationship between "community" and the conditions of "communal living" or the condition of "being handed down"; (iv) traditional communities that were not founded on kinship: it was not clear if the succession of TCEs/EoF over generations by such a community as a religious community, which was not founded on kinship, could be regarded as a beneficiary community. The Delegation could not see any justifiable grounds for an organization which was firmly united to not be deemed as a beneficiary just because the organization members were not biologically related while a loosely united community such as a country (as in the case of "national folklore") was regarded as an eligible beneficiary. WIPO/GRTKF/IC/5/3 paragraph 42 (d) had read, "Is the creation of a *sui generis* IP regime for certain communities (such as indigenous or local peoples, as against all other "non-indigenous" or "non-local" persons) acceptable as a matter of policy?". This question remained unanswered by the Committee; (v) contemporary communities: there were other forms of communities not founded on kinship such as Internet communities. Members of these communities did not live together. The communities had not lasted for more than one generation. The members of these communities gathered together for the same purpose or because of sharing the same idea. Certainly, these communities were not traditional communities and were not considered as beneficiary communities under the traditional definition. However, why these communities should be unfairly discriminated against in comparison with traditional communities was not clear; (vi) communities of immigrants: the question of how to treat TCEs/EoF of immigrants (as opposed to TCEs/EoFs of the indigenous people) had been occasionally raised. However this question remains unanswered. The Delegation then turned to the benefit-sharing mechanism, and stated that it seemed difficult for the mechanism to actually work: (i) There would be many cases where the community could not exercise its rights against outside parties even when it tried to do so, due to lack of a clear decision making mechanism or representative in the community. Especially in the case of "national folklore", whose owner was the nationals of a whole country, it was unclear who held the right for authorization; (ii) Some had proposed that the State might exercise rights in proxy for internal communities. However, some groups of indigenous peoples were opposed to this and there was no consensus. When States were allowed to act as beneficiaries in proxy for indigenous peoples, there was a problem of whether the State would act to truly represent the welfare and benefit of the indigenous peoples; (iii) There was no clear idea of how the benefit would be shared within the community."¹⁶³

¹⁶³ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

New Zealand

“... Further analysis was also needed in order to define what was meant by “benefit”. There was a wide range of benefits that might flow from the use of TCEs. One was not simply dealing with potential economic benefits. Further analysis was needed if one was fully to consider the nature and extent of protection, if any, which should be afforded in the IP context, and what types of benefits should be attributed to IP owners and TCE holders.”¹⁶⁴

Australia

“... Many of the concepts included in the current policy objectives and guiding principles relating to the benefits that should be accorded from protection also warrant further discussion. Those objectives include (ii) Promote respect, (iii) Meet the needs of Communities, and (v) Empower communities.”¹⁶⁵

E. What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?

South Africa

“... In addition to this subsection we propose the insertion of “indigenous, traditional and ‘local’ communities” as well as the insertion of word “traditional” before “knowledge holders”.”¹⁶⁶

Indonesia

“... with regard to the definition of beneficiaries of TCE/EoF as mentioned in the WIPO/GRTKF/IC/11/4(c), Indonesia could go along with it. In order to make it more comprehensive, however, it was proposed that the definition should also include 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 case 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 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

¹⁶⁴ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

¹⁶⁵ WIPO/GRTKF/IC/11/4(a) Add.

¹⁶⁶ WIPO/GRTKF/IC/11/4(a)

the community and it could be extended further as a right holder only if it benefited the communities.”¹⁶⁷

Hokotehi Moriori Trust

“... supported Article 2 in WIPO/GRTKF/IC/11/4(c) and endorsed the statement of the Saami Council. In relation to para. (ii) of the definition, the representative recommended that the words “revive” be included after “maintain, revive, use or develop”. Many indigenous or traditional peoples had through processes of colonization lost many of the TCEs and many, including his own people the Moriori, were reviving the use of those TCEs. A limitation to those TCEs that were maintained or existing would deny indigenous peoples the right to revive their cultural practices.”¹⁶⁸

Saami Council

“... it was most efficient that the Committee had as a starting point for its discussion the concrete language contained in the draft Policy Objectives and Core Principles ... At present, the Policy Objectives and Core Principles, as well as the background documents before this session, were ambiguous on this subject matter and, as a consequence, contradictory. As clarified on page 17 of the Annex to WIPO/GRTKF/IC/11/4 (c), Article 2 of the Substantive Provisions claimed that, if national law so provided, TCEs should vest in a governmental authority, rather than in the people that created the TCEs. Similarly, para. (d) on page 7 of WIPO/GRTKF/IC/4 (c) suggested that states were free to proclaim that TCEs belonged to the state, rather than the people they originated from and para. (f) consequently declared that it was up to national law to decide whether authorization to access TCEs should be granted by the creators of such, or a national authority. The representative stated that the Saami Council found it unacceptable that the documents presented before this session suggested that the cultural heritage of an indigenous people could legally be confiscated by a mere act of legislation. It was also questioned whether this proposal did not go beyond the mandate of WIPO. Was WIPO not supposed to respect, protect and promote the rights of humans to their own creativity? For instance, the 1974 Agreement between the UN and WIPO recognized WIPO as the specialized agency to “promote creative intellectual activity”. Yet these documents offered an alternative system, under which the creators of arts, literature and songs held no rights to the same, but where these rights could legally be appropriated by someone that had nothing to do with the creation at all. In addition, to so suggest contradicted other provisions in the Policy Objectives and Core Principles. Article 1 of the Substantive Provisions defined what constituted TCEs eligible for protection. In doing so, the Article underlined that creativity, to constitute TCEs, had to be characteristic of a community’s cultural and social identity and be maintained, used or developed by the community. The Saami Council supported these criteria. Indeed, it was difficult to see how TCEs could be defined in another way. It was exactly the fact that TCEs had been created in a traditional cultural context that rendered a TCE a TCE. If an element of human creativity had been created outside a traditional cultural context,

¹⁶⁷ WIPO/GRTKF/IC/11/15 Prov.

¹⁶⁸ WIPO/GRTKF/IC/11/15 Prov.

it was hardly distinguishable from conventional art, literature and music, and could consequently presumably be protected by conventional copyright. In the same vein, Article 6 of the Substantive Provisions, addressing the term of protection, proclaimed that TCEs should enjoy protection as long as they continued to be characteristic of a community's cultural and social identity and were maintained or used by the community. The Saami Council supported this provision as well. But from these provisions it also followed that if the subject matter as well as the term of protection of TCEs were defined by their intrinsic connection to an indigenous people, it was also the same people that had complete factual control over the TCEs, in the sense that it was up to the group to decide whether the creativity constituted a TCE, and whether it should continue to do so. This seemed to contradict the suggestion that the TCEs could vest in the state. Was it not strange that the creation process belonged to an indigenous people, but as soon as something had been created, the item belonged to the state; however, the indigenous people could at any time, at its own wish, extinguish the property of the state. This made no sense. Such a provision, if agreed on, would indeed constitute a *sui generis* property right...¹⁶⁹

Algeria on behalf of the African Group

“... The working definition contained in Article 2 of document WIPO/GRTKF/IC/10/4 (c) was a good basis for future work. By way of a general comment, the African Group was examining all the issues and had not found great differences between most of the proposals made by the different groups. It seemed that there were many very common positions on many questions and it would be very helpful if the Secretariat would provide a comprehensive matrix of all the different proposals, so one could compare the different proposals and draw conclusions based on them.”¹⁷⁰

Brazil

“... the definition of the beneficiaries of protection was one of the most fundamental questions contained in the List of Issues ... and Article 2 of the draft provided an adequate basis to discuss this issue...”¹⁷¹

Arts Law Centre of Australia

“... draft Article 2 was a good basis for the discussion ... Article 2 could be problematic if communities were required to prove that they had been “entrusted in accordance with customary law and practices” ...”¹⁷²

¹⁶⁹ WIPO/GRTKF/IC/11/15 Prov.

¹⁷⁰ WIPO/GRTKF/IC/11/15 Prov.

¹⁷¹ WIPO/GRTKF/IC/11/15 Prov.

¹⁷² WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4 (a) Add. 2

ISSUE III: WHAT OBJECTIVE IS SOUGHT TO BE ACHIEVED THROUGH ACCORDING INTELLECTUAL PROPERTY PROTECTION (ECONOMIC RIGHTS, MORAL RIGHTS)?

Introductory note by Secretariat

The written comments and the oral interventions made at the Committee's 11th session identified a wide range of objectives sought to be achieved through according IP protection to TCEs/EoF. At the same time, some Delegations and representatives of observers questioned the need for according IP protection to TCEs/EoF, and many of these stressed the need for clarity on the objectives sought to be achieved and some suggested ways in which further discussion on objectives could take place. Determination of objectives is a complex discussion and clarity on certain terms, concepts and other issues was also identified as a need. Some delegations and representatives also expressed views on the draft provision dealing with this question in WIPO/GRTKF/IC/11/4(c), or its earlier versions.

The comments and interventions have been organized under the following four questions:

- (A) Should intellectual property protection be accorded to TCEs/EoF? Is the clarification of objectives for any such protection an important and valuable step? How should objectives be clarified?
- (B) Which specific objectives were identified as relevant?
- (C) What other related terms, concepts and issues may also require clarification?, and,
- (D) What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?

- A. Should intellectual property protection be accorded to TCEs/EoF? Is the clarification of objectives for any such protection an important and valuable step? How should objectives be clarified?

European Community

“Further to the above general principles, the European Community and its Member States would also like to support the endeavour of the IGC to further clarify the intended object of protection. A clear definition of the object of protection is a prerequisite to engaging further in discussions in this area.”¹⁷³

Portugal on behalf of the European Community and its Member States

“... the Committee’s work had enabled the broad and very complex problem of TCEs/EoF to be better explained and studied in greater depth. However, at the current stage of development, TCEs/EoF did not appear to be amenable to protection, at the international level, as a form of IP. The legal framework and appropriate protection of TCEs/EoF should, by means of specific legal measures, be the subject of more comprehensive work to devise appropriate policies and laws at the national level.”¹⁷⁴

United States of America

“The broadest overall objective of providing intellectual property rights is to promote creativity and innovation. The WIPO Convention provides that the primary objective of WIPO is to “promote the protection of intellectual property.” The 1974 Agreement between the UN and the WIPO recognizes that WIPO is the specialized agency to “promote creative intellectual activity.” Existing systems of intellectual property protection may be used or adapted to address the actual needs of communities, including both economic and non-economic concerns, for qualifying expressions that are or are related to TCEs/EoF. Over the last several sessions and with the strong support of the IB, the IGC has made substantial progress in identifying and articulating a wide range of specific policy objectives for TCEs/EoF—not merely their protection, but also the preservation and promotion of TCEs/EoF. To name just a few of these policy objectives, the IGC has underscored the importance of promoting an environment of respect for TCEs/EoF, contributing to the preservation and safeguarding of TCEs/EoF, and encouraging, rewarding, and protecting authentic tradition-based creativity and innovation. The United States considers that the framing of these policy objectives is not just a useful technique for facilitating discussion within the Committee. Rather, the IGC’s work on the policy framework for the preservation, promotion and protection is an extremely useful tool for policymakers at the national, regional, and international levels. The United States notes that many WIPO Member States, informed by the work of the IGC, already are taking steps to address specific issues and concerns related to the

¹⁷³ WIPO/GRTKF/IC/11/4(a)

¹⁷⁴ WIPO/GRTKF/IC/11/15 Prov.

protection and promotion of TCEs/EoF. Nonetheless, more work remains at the international level. In the view of the United States, the IGC should continue to make a positive contribution to the policy dimension of preserving, promoting and protecting TCEs/EoF. As noted earlier, the United States believes that the IGC can make a significant contribution by reaching agreement on policy objectives and general principles at the international level. More specifically, the IGC may productively focus discussion on the great potential of traditional creativity and innovation to promote economic and cultural development, especially rural development. Regrettably, however, in many nations the policy framework for making decisions about the use (or non-use) of these assets is not in place or fully developed. The IGC may serve an important role in advancing the development of appropriate national policy frameworks for the use of TCEs/EoF by WIPO Member States for economic and cultural development. Consistent with WIPO's mandate, such work should focus on the IPR-related aspects of economic and cultural development, including both economic and moral rights considerations.”¹⁷⁵

“... existing systems of IP protection might be used or adapted to address some of the actual needs of communities, including both economic and non-economic concerns, for qualifying expressions that were, or were related to, TCEs/EoF. Under such circumstances, the objectives of the IP protection might apply equally to community-based and individual-based creativity. In the session's panel of indigenous and local communities, for example, the United States of America had listened very carefully to the presentation of the Arts Law Centre of Australia, which had provided Committee participants with helpful insights into their practical efforts to assist indigenous creators to make use of existing legal mechanisms to protect their works. The United States of America had also been very interested to learn of the recent efforts in Australia to adapt the copyright moral right doctrine to issues of communal creativity. The United States of America further believed that the Committee should continue to articulate and elaborate specific policy objectives for TCEs/EoF. Such policy objectives might include, among others, promoting an environment of respect for TCEs/EoF, contributing to the preservation and safeguarding of TCEs/EoF, and encouraging, rewarding, and protecting authentic tradition-based creativity and innovation. Over the last several sessions, with the strong support of the Secretariat, the Committee had made substantial progress in identifying and articulating a wide range of specific policy objectives for the protection, preservation and promotion of TCEs/EoF. These included the importance of promoting an environment of respect for TCEs/EoF, contributing to the preservation and safeguarding of TCEs, and encouraging, rewarding, and protecting authentic tradition-based creativity and innovation. The United States of America believed that the framing of these policy objectives was not just a useful technique for facilitating discussion within the Committee, but rather that the Committee's work on the policy framework for the preservation, promotion and protection of TCEs/EoF was itself an extremely useful tool for policymakers at the national, regional, and international levels. The United States of America had noted that a number of WIPO Member States, informed by the work of the Committee, were taking steps to address specific issues and concerns related to the preservation, promotion and protection of TCEs/EoF. Nonetheless, more work remained

¹⁷⁵ WIPO/GRTKF/IC/11/4(a)

at the international level. In the view of the United States of America, the Committee should continue to make a positive contribution to the policy dimension of preserving, promoting and protecting TCEs/EoF. The United States of America also believed that the Committee could make a significant contribution by reaching agreement on policy objectives and general guiding principles at the international level. This was an essential first step in reaching an outcome on these matters.”¹⁷⁶

Japan

“There is an opinion that IP right protection should be extended to TCEs/EoF to acknowledge its commercial value. This opinion, however, does not clear in identifying any justifiable reasons why TCEs/EoF should be eligible for such protection. If the purpose of the IP protection of TCEs/EoF is to correct the inequities in economic development or to ensure sustainable development of certain communities by providing a new financial resource, a discussion should be conducted as to whether or not IP protection of TCEs/EoF is an appropriate way to achieve these purposes in the first place. Also, attention should be paid to the fact that protection of TCEs/EoF is not simply a matter of economic policy and its ramifications in terms of impact on cultural development are quite large. Currently, the main purpose of an IP protection system is to give incentive to creators by protecting their creations and to vitalize culture and society. In this context, the right for protection should be valid for only a limited period of time to encourage use by third parties for further development and to secure the balance between the interests of right holders and public interests. However it might be problematic to enable only a certain generation to enjoy the benefits derived from TCEs/EoF that has long been passed down. Moreover, there will be no financial incentive for the generations after the expiration of the IP right to maintain and pass down the TCEs/EoF. On the other hand, from the viewpoint of public interests, it is also inappropriate to grant an IP right that will stay valid forever as it unfairly limits the scope of public domain. There is another opinion that TCEs/EoF should be protected as moral rights considering values that have long been fostered in an indigenous population or local community. If moral rights protection is made applicable to TCEs/EoF, right holders should be protected against any acts infringing their moral rights. However, what acts constitute such moral rights infringement has yet to be clearly defined. Use of TCEs/EoF that inflict mental suffering upon a community should be refrained from, as a matter of moral in general in the same way that derogatory expressions against certain race, religion or sex should be refrained from. However one should be careful in attempting to establish any system of IP rights or similar rights in order to deter such acts, as unnecessarily rigid regulation against expression could harm freedom of speech or development of culture. For serious moral right infringements, protection under the Civil Code or other general laws may be applicable even if no IP right protection is available.”¹⁷⁷

¹⁷⁶ WIPO/GRTKF/IC/11/15 Prov.

¹⁷⁷ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

Canada

“The existing protection of TCEs is most closely associated with copyright law. Generally, there are two approaches to copyright protection. This duality is sometimes referred to as economic versus moral rights-based systems. (The Canadian *Copyright Act* recognizes both approaches). Prior to determining whether additional IP protection or *sui generis* protection should be provided for TCEs and whether it should take the form of an economic or a moral-based right, Member States must agree on the objectives for according protection to TCEs. A consensus on the objectives may also inform a discussion on whether existing mechanisms can be used. In the meantime, it is important that maximum flexibility be maintained in order that the varying legal traditions of Member States are respected. Communities may have different objectives when seeking to “protect” their TCEs such as preservation, promoting diversity, and promoting creativity and innovation. In this context, there has been a growing consensus among a number of delegations that the prevention of “misappropriation” should be the main or core objective. Canada has stated that it shares in the concern regarding the prevention of “misappropriation” and misuse of TCEs... the manner in which the IGC defines its common objective in the context of TCEs should take into account how such an objective may impact on users and the broader public interest, in particular, where IP may impact other important policy initiatives.”¹⁷⁸

“... prior to determining whether additional IP protection or *sui generis* protection should be provided for TCEs and whether it should take the form of an economic or a moral-based right, Member States should agree on the objectives for according protection to TCEs. A consensus on the objectives might also inform a discussion on whether existing mechanisms could be used. In the meantime, it was important that maximum flexibility be maintained in order that the varying legal traditions of Member States were respected. The Delegation would support the suggestion made by the Delegation of the Russian Federation that an exchange of national level experiences would contribute to the discussions. Communities may have different objectives when seeking to “protect” their TCEs such as preservation, promoting diversity, and promoting creativity and innovation. In this context, there had been a growing consensus among a number of delegations that the prevention of “misappropriation” should be the main or core objective. Canada shared in the concern regarding the prevention of “misappropriation” and misuse of TCEs... the manner in which this Committee defined its common objectives in the context of TCEs should take into account how such objectives might impact on users and the broader public interest, in particular, where IP may impact other important policy initiatives.”¹⁷⁹

¹⁷⁸ WIPO/GRTKF/IC/11/4(a) Add.

¹⁷⁹ WIPO/GRTKF/IC/11/15 Prov.

Australia

“... strongly of the view that the key initial step in the development of any approach to the protection of TCE/EoF as it intersects with IP, is to first determine the relevant policy objectives and general guiding principles. A wide range of policy tools may need to be developed to achieve the policy objectives arising out of the many contexts of TCE/EoF. Such an approach may be preferable to a ‘one-size-fits-all’ approach. Member States should be free to choose to implement those policy tools that are of particular relevance to their situations. It is generally recognized that the purpose of IP protection and its economic rights is to encourage and protect creativity. Moral rights extend that protection to recognize the close connection between each creator and their work. Australia recognizes that existing IP regimes already play an important role in conserving and protecting some categories of TCE/EoF embodied in a material form. It is important that any new measures developed to protect TCE/EoF should be consistent with existing IP regimes. Australia considers that the extent of the problem that exists with misappropriated TCE/EoF be explored further so that it can be better understood. In the light of the extensive and very useful work of the IGC to date it may now be beneficial to focus deliberation and analysis on specific priority examples of inappropriate use of TCE/EoF. In this way areas of particular concern, that are considered to have the most serious adverse impacts, could be studied and the full range of policy options to address those issues analysed.”¹⁸⁰

B. Which specific objectives were identified as relevant?

International Publishers Association (IPA)

“... the primary focus should be put on the protection of moral rights. Overall, publishing TCEs/EoF is not a highly profitable business, despite the anecdotal evidence that points to the exceptional cases, rather than the typical publishing enterprise. The focus of any policy in this area must be to incentivise more publishing, not to add costs or commercial uncertainty to an already risky publishing venture. Prescribed economic rights would add to such risks, and disincentivise publishers further from publishing in this area.”¹⁸¹

China

“... the objective of intellectual property protection to realize moral rights and economic rights in TCEs/EoF of the traditional communities.”¹⁸²

¹⁸⁰ WIPO/GRTKF/IC/11/4(a) Add. And WIPO/GRTKF/IC/11/15 Prov.

¹⁸¹ WIPO/GRTKF/IC/11/4(a)

¹⁸² WIPO/GRTKF/IC/11/4(a)

Brazil

“The growing demand for protection of TCEs/EoFs stems from the emergence of a market for products that are environmentally sustainable and that convey ethnic expressions. Such market appeals to a share of the international public opinion that favors projects targeted at forestalling the cultural extinction of traditional populations. A negative byproduct of the emergence of such market, nevertheless, is the increased number of cases of misappropriation of TCEs/EoFs. In view of the preceding situation, an international instrument should, inter alia, clearly ensure communities the entitlement of collective rights, moral and economic, related to their TCEs/EoFs – by means of, for example, the requirement of prior informed consent – so as to contribute to the improvement of their life conditions. Considering that work of the Committee is circumscribed by WIPO’s mandate, one specific objective that must be addressed is the setting out of measures aimed at preventing and curbing the misappropriation of TCEs/EoFs by the granting of IPRs, irrespective of whether such expressions have been registered. Also, since the issue is being discussed within the framework of WIPO, the Committee should examine possible “positive” measures necessary to accommodate protection of TCEs/EoFs under existing categories of intellectual property rights that respect the specific features of the former, and without prejudice to the possibility that Members may decide to accord protection to TCEs/EoFs via “sui generis” systems...”¹⁸³

“... international measures were necessary to prevent the misappropriation of TCEs/EoFs and that the international IP had to give an effective response to the problem of misappropriation. As to the question under discussion, the objective sought was exactly preventing misappropriation of TCEs/EoFs and precluding the granting of unauthorized IP rights. Other objectives would also be achieved by setting up an adequate and effective protection at the international level. These included environmental protection, sustainable development, respect for the moral and spiritual values of traditional and indigenous communities, the prevention of the cultural extinction of those communities and the strengthening of an international market for environmentally-sustainable goods. Therefore, the establishment of an international instrument was necessary and indispensable to ensure communities the entitlement of collective rights over their cultural heritage and TCEs/EoFs. Such an international instrument must contain a requirement of prior and informed consent so as to ensure benefit-sharing and authorized access. The Committee should also look at other positive measures, without prejudice to the possibility that members may decide to accord protection to TCEs/EoFs via a “*sui generis*” systems.”¹⁸⁴

¹⁸³ WIPO/GRTKF/IC/11/4(a)

¹⁸⁴ WIPO/GRTKF/IC/11/15 Prov.

Kyrgyzstan

“The objective of protection of traditional cultural expressions (folklore) are as follows – protection, contribution to renaissance, use, distribution and preservation thereof since traditional cultural expressions (folklore) are a part of cultural heritage of particular nation.”¹⁸⁵

Norway

“... the main objectives of protection in regard of TCEs/EoF are:

- to prevent misappropriation
- to preclude the granting of unauthorized IP rights.

Furthermore, protection should seek to:

- ensure prior informed consent and exchanges based on mutually agreed terms
- promote equitable benefit-sharing
- promote conservation and sustainable use.

By providing protection, one also secures recognition and respect of the intrinsic value of TCE/EoF. The rationale behind Norway’s view is further elaborated in document WIPO/GRTKF/IC/9/12 paragraphs 21 – 24.”¹⁸⁶

Ghana

1. To acknowledge ownership of folklore
2. To protect the rights of the owners.
3. To encourage collection, storage, collation, retrieval and use of folklore
4. To facilitate research extraction and development rights in folklore
5. To make same available for the benefit of mankind.
6. To guarantee adequate remuneration to the beneficiaries.”¹⁸⁷

Russian Federation

“We can mark out several components of the protection granted at present by the intellectual property institutes: the so called “positive” protection and the “prohibitive” protection. For example, in copyright, the aim of granting the so called “positive” protection: promoting by the state the interest in creating the works (encouraging creative activities of the author, remuneration for the expenses of the author for the creation of the work, remuneration for the work); the proprietary rights given to the author are designed to reach this goal. The author may as use the work himself, as grant these rights to a third party for remuneration. Let’s assume that the aim of granting protection to the works of folk arts is also the encouragement of creativity. However, this aim is not fully applicable to works of folk arts. If the wok of literature or art is

¹⁸⁵ WIPO/GRTKF/IC/11/4(a)

¹⁸⁶ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

¹⁸⁷ WIPO/GRTKF/IC/11/4(a)

created at present as a result of a creative activity it is granted the copyright protection in the Russian Federation. And when we speak of the compensation of the expenses made in the past, the question of the person who has born the expenses arises, because it is impossible to define such a person. The aim of granting the so called “prohibitory” protection is: impossibility of unauthorized use, prohibition of certain actions, which may lead to unfavorable consequences for the author. However, the institutes of intellectual property create such a prohibition for a certain period of time, after the lapse of which the proprietary right are terminated and the object (e.g. the work) falls into public domain (in particular, p.1 article 28 of the Law of the Russian federation of July 9, 1993 No. 5351-I “On Copyright and Related Rights”), and the works in the public domain can be used freely (p. 2 article 28 of the Copyright law). Attention should also be paid to the personal non-proprietary rights: the right to be recognized as the author, the rights for the name, the protection of the work from any distortion or any other acts that could harm honor and dignity of the author. Did the initial author want to be identified, show his attribution to a certain community, because the works of folk arts (expressions of folklore) expressed in a material form a marking could be made: names, symbols, stigmas, signs. Or did the creator initially aim to remain anonymous to show that the work created is an aspiration of a whole nationality and the aim of the work is not the profit (material or not): fame or remuneration, but possibly another aim was followed: domestic, educational, informational, etc, because the work of folk arts as a folks wisdom may often contain the rules of conduction, moral norms. The above said proves that the aim of the legal regulation of relations connected with the use of works of folk arts is the preservation and development of the originality of the peoples, protection of honor and dignity of the representatives of peoples, creative labor of which led to the creation of works of folk arts. Legal regulation of relations on the exploitation of works of folk arts can not be conducted by creating norm providing for exclusive rights, because they are aimed at creating monopoly for the rightholder of the works. Intellectual property institutes are tightly connected with the personality of the creator of the work. Only the rightholder can define how his work should be used. Intellectual property institutes, in particular copyright law, is aimed at the promotion of creativity though encouragement of the creators of work and do not deal with issues of preservation and development of works, thus, this institutes are aimed to solve social and economic problems, which are different from the protection of works of folk arts. Thus, in respect of works of folk arts the moral (non-proprietary) rights seem to be important, including the protection of works from any distortion or other acts capable of harming the honor or dignity.”¹⁸⁸

“... Based on what had been said in relation to the definition of a rights holder and irrespective of the approach to resolving that issue[Note from WIPO Secretariat: see comments under Issue II above], the Delegation believed that the creation of protection could be aimed at preventing the appropriation of authorship and the derivation of some kind of benefit from such appropriation. It should be pointed out that currently the problem of preserving folklore and its development was also important, since many works of folklore could be lost forever.”¹⁸⁹

¹⁸⁸ WIPO/GRTKF/IC/11/4(a)

¹⁸⁹ WIPO/GRTKF/IC/11/15 Prov.

Qatar

“Moral, cultural and economic rights against misuse and robbery or otherwise, either national, international.”¹⁹⁰

Mexico

“Traditional cultural expressions/expressions of folklore must be protected against any distortion, mutilation or other modification made with the purpose of causing damage thereto or harm to the reputation or image of the community or ethnic group to which such expressions belong.”¹⁹¹

“... a first objective was to promote and protect cultural diversity, as well as the tangible or intangible cultural heritage. TCEs had to be protected against any distortion, mutilation or other modification made with the purpose of causing damage thereto or harm to the reputation or image of the indigenous community or people to which such expressions belonged. Moreover, the right of indigenous peoples and communities to oppose the use of their TCEs should be recognized, if those representing such communities legally did not give “free prior informed consent”, including in cases where the communities did not have legal representation.”¹⁹²

South Africa

“Some, but not all, of our concerns would be met by the recommendations set out by the below mentioned objectives for IP protections. Hence we support the introduction of:

- Sustainable development;
- Preservation.

Within this context we draw attention to the fact IP protection should be distinguished from the concepts of 'preservation' and 'safeguarding.' By contrast safeguarding in the context of cultural heritage refers generally to the identification, documentation, transmission, revitalization and promotion of cultural heritage in order to ensure its maintenance or viability.

- Promotion.

South Africa views that the recognition and promotion of IP protection for contemporary creativity can in turn support such economic development.

- South Africa notes that there now appears to be wide recognition that IP protocols have the ultimate objective of enhancing social welfare. Hence the potential socio-economic benefit needs to be emphasized.
- Social cohesion.
- Prevent misappropriation / abuse
- Protect against unauthorised use of existing IPR

¹⁹⁰ WIPO/GRTKF/IC/11/4(a)

¹⁹¹ WIPO/GRTKF/IC/11/4(a) Add.

¹⁹² WIPO/GRTKF/IC/11/15 Prov.

- South Africa endorses the comments subsumed in draft objectives WIPO document WIPO/GRTKF/IC/10/5, pages 3 to 5.

The range of the overall protection of the social and cultural communities from which the IK emerges recognising IK as a knowledge system, the rights of the holders of such knowledge must be guaranteed - e.g. against appropriation from outside the community, and to issues of fairness and justice in benefit sharing. South Africa asserts that for IP protection to transpire it should be compatible with and supportive of a wide range of policy objectives related to the protection and conservations of IK, including:

- a. the establishment of legal certainty regarding rights in IK,
- b. the survival of indigenous cultures - which translates into matter of survival as an Indigenous people and as a community,
- c. the recognition of customary law and practices governing IK,
- d. the recognition of customary laws and protocols that govern the creation, transmission, reproduction and utilisation of IK,
- e. the repatriation of cultural heritage, and
- f. the recording, maintenance, protection and promotion of oral traditions.”¹⁹³

Russian Association of Indigenous Peoples of the North (RAIPON)

“Economic rights and moral rights.”¹⁹⁴

Colombia

“... the fundamental issue is that of informed consent prior to use or exploitation and reward through benefits for the community. Similarly, we believe that the right of paternity should be recognized in favor of the community. This is in accordance with the objectives contained in documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/10/4, which are applicable irrespective of whether this is in accordance with the intellectual property system or a *sui generis* instrument, for which reason we support them.”¹⁹⁵

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

“The proposed objective should include both economic and moral rights. We favor the legal formula of rights of remuneration relating to public communication, fixation, reproduction, etc., collectively managed either through the community itself, as the sole holder of the rights, or through effective collective rights administration organizations.”¹⁹⁶

¹⁹³ WIPO/GRTKF/IC/11/4(a)

¹⁹⁴ WIPO/GRTKF/IC/11/4(a)

¹⁹⁵ WIPO/GRTKF/IC/11/4(a)

¹⁹⁶ WIPO/GRTKF/IC/11/4(a)

Tunisia

“... The objectives of the action undertaken to protect intellectual property are as follows:

- A. The safeguarding of the memory of a nation and its identity.
- B. The creation of employment at reduced cost.
- C. Promotion and enhancement.
- D. The preservation and protection of traditional knowledge in order to prevent its exploitation and unlawful commercial and non-commercial use.
- E. The enhancement of regional and local resources.
- F. The sustainable development of such knowledge as an indicator of the specific nature of a nation in the process of globalization.”¹⁹⁷

Guatemala

“Decree No. 25-2006 of the National Congress, Convention for the Safeguarding of the Intangible Cultural Heritage, states: Respect for the intangible cultural heritage of communities, groups and individuals concerning the awareness at the local, national and international level of the importance of the intangible cultural heritage and its reciprocal recognition. Safeguarding means the measures designed to guarantee the viability of the intangible cultural heritage, including identification, documentation, research, preservation, protection, promotion, enhancement, transmission, basically through formal and informal education, and the revitalization of the various aspects of the heritage. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, ratified by the Government of Guatemala on August 21, 2006, published in the Journal of Central America on March 23, 2007... Expressions of folklore constitute manifestations of intellectual creativity, which merit protection based on that granted to intellectual productions, for the development and continuation of those expressions, both in the country and abroad, without harming the legitimate interests concerned.”¹⁹⁸

New Zealand

“... the objectives should be to: (i) prevent misappropriation, misuse, and misrepresentation of TCEs, (ii) foster and encourage more respectful practices by individuals and organizations who wish to use TCEs, in accordance with customary laws and protocols associated with TCEs, (iii) strengthen and recognize the application of customary laws and protocols in relation to TCEs, (iv) ensure proper attribution of IP through recognition of TCEs contributions to creative and innovative endeavors; (v) promote fair and equitable sharing of benefits (economic or otherwise) flowing from the use of TK and TCEs, (vi) recognize collective responsibilities associated with TK and TCEs. Some observers and Members States had indicated that a tension might exist between Western or European based models of law and world views, and indigenous laws, customs and world views. The commoditization of culture could be seen as an example of this perceived divergence. One principle to be followed in according

¹⁹⁷ WIPO/GRTKF/IC/11/4(a)

¹⁹⁸ WIPO/GRTKF/IC/11/4(a)

protection for TCEs should consist of balancing the competing views and expectations in relation to the use of TCEs to the general satisfaction of all. This was also in line with the objectives to promote intellectual and artistic freedom, research and cultural exchange on equitable terms, and the objective to enhance certainty, transparency and mutual confidence. Other peripheral, but important, objectives would be to: (i) raise awareness, domestically and internationally, of issues at the interface between TCEs and IP (for example through education and best practice mechanisms), (ii) assist indigenous and local communities to preserve, develop, and promote their TCEs and support their traditional structures of creation, preservation and transmission, (iii) assist in the safeguard and promotion of cultural integrity and diversity, (iv) promote positive working relationships that enhanced or built mutual respect, trust and cooperation between stakeholders, (v) assure consistency with, and promote respect and adherence to, related international rights of indigenous and local communities, and, (vi) promote respect and adherence to domestic rights of indigenous and local communities. The Delegation also supported Australia's comment that Committee Members must retain the flexibility necessary to adapt their system in accordance with domestic reality."¹⁹⁹

Nicaragua

"As regards economic rights, the exclusive nature of the exploitation of said knowledge must be guaranteed, as well as the right to authorize or prohibit said exploitation, while moral rights are collective (regional or community) rights."²⁰⁰

India

"... the objective of according IP protection to TCEs was to prevent their misappropriation and to ensure economic returns to the communities who had been nurturing and developing them. Therefore, provision of both economic rights and moral rights was essential. Economic rights would contribute to capacity building and, thereby, conservation and positive development of the TCEs. Moral rights would pave the way for appropriate recognition and acknowledgement by others of the TCEs."²⁰¹

Algeria, on behalf of the African Group

"... the objectives of according IP protection to TCEs should include the following: to prevent misappropriation; to confer upon knowledge holders the right to exploit their TCEs; to prohibit unauthorized exploitation and dissemination of protected TCEs without the prior informed consent of the knowledge holders; to regulate access to biological resources and associated TCEs; to promote equitable benefit sharing arising from the use of genetic resources and associated TCEs; to ensure that the IP system was compatible with the provisions of international instruments governing access to, and use, of TCEs especially in regards to prior informed consent, benefit sharing and disclosure of origin; to promote creativity and innovation based on TCEs and practices

¹⁹⁹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/4(a) Add.

²⁰⁰ WIPO/GRTKF/IC/11/4(a) Add.

²⁰¹ WIPO/GRTKF/IC/11/15 Prov.

towards sustainable development; and, to develop databases, registries and other appropriate mechanisms for the collection, collation, storage, retrieval and appropriate use of TCEs.”²⁰²

Arts Law Centre of Australia

“... Key objectives covered both economic and moral rights and included (i) the need to preserve indigenous cultural heritage from damage and destruction, given that damage to TCEs caused harm to indigenous people themselves; (ii) recognizing the increased market value of TCEs put greater pressures on indigenous cultures and increased the likelihood of misappropriation; (iii) providing stronger protections would encourage best practice and should prevent misappropriation; (iv) indigenous communities should have control over management of TCEs. Third parties wanting to use TCEs should obtain the consent of the indigenous rights holders and any benefits should be shared by Indigenous communities; (v) there was a need to stop misappropriation of TCEs whether or not registered. A registration requirement should not be a condition of obtaining benefits or protection. Finally, the representative noted that while the Arts Law Centre, through its Artists in the Black service, was using the current legal framework available to provide some level of protection for TCEs, it had not been suggested that these provided adequate levels of protection for TCEs. In fact, there were serious limitations in the protection existing frameworks were able to provide.”²⁰³

Ethiopia

“... whereas the international recognition and protection of the rights of traditional communities to their cultural expressions had a direct economic and moral bearing, the objectives of the outcome sought by the Delegation in the Committee should not be limited to these considerations. The objective should be to recognize existing rights under international law and international human rights law. This objective had a direct correlation with other rights, such as the right to culture, the right to cultural self-determination and the right to development. This was not a regime of morality but of entitlements and rights. The basis of such protection should be neither moral nor economic, but was rather found in the realm of rights. The Delegation drew attention to General Comment No. 17 of the Committee on Economic, Social and Cultural Rights which recognized the rights of communities to benefit from the protection of moral and material interests resulting from the protection of the moral and material interests resulting from any scientific, literary or artistic production, and referred in particular to paragraph 15 of that General Comment. The Delegation stated that international protection for TCEs should give concrete realization to these human rights norms.”²⁰⁴

²⁰² WIPO/GRTKF/IC/11/15 Prov.

²⁰³ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/4(a) Add. 2

²⁰⁴ WIPO/GRTKF/IC/11/15 Prov.

Indonesia

“... the objectives sought to be achieved by according IP protection, without prejudice to the possibility of granting protection to TCE/EoF via *sui generis* systems, were both the moral and economic rights. Economic rights referred not only to cash money but also revenue in other forms that could generate prosperity for the communities. This should be facilitated by the existing IP system and in the spirit of respecting national law. Regarding the role of the State, it might also play a role as a facilitator in regulating the economic rights of the communities.”²⁰⁵

Thailand

“... the benefit should include other aspects in addition to economic rights. For most traditional communities in Thailand, the moral and spiritual acknowledgment and the recognition and respect of the community’s right and dignity, as bearer of valuable traditions, were considered of equal importance. This should also be explicitly stated in the terms of the protection... the fundamental objective of protection was to defend TCEs against all kind of misuse, misappropriation, whether moral, spiritual or economic, and to preserve them. However, in some cases, the communities owning or holding the rights might not be adequately aware of their rights or the necessity to preserve their traditions, or the fact that their traditions were being misused or misappropriated and in such case, preventive protection should be the objective. For this purpose, the best preventive measure was capacity building and education to be provided to the members of the community in order to promote their awareness and to encourage the formulation of an appropriate code of conduct as an internal mechanism to protect their traditions against decline, misuse or misappropriation.”²⁰⁶

Sudan

“[The Delegation expressed] full support for the statement made by the Delegation of Algeria on behalf of the African Group. Political and social support should be mobilized and traditional communities made aware of their rights with a view to enhancing creative cultural diversity and to enable indigenous communities to benefit from and make use of their cultural productions. The Delegation called for an exchange of experience, on the international level, on the means of protection.”²⁰⁷

Islamic Republic of Iran

“... the legal binding instrument(s), inclusive of *sui generis* regimes, must contain: (i) strengthening of the innovations of right holders, (ii) respect for the spiritual and intellectual assets, (iii) preservation of moral and economic rights, particular of indigenous communities, (iv) prior consent should be respected, and (v) rights of access of people to the benefits of folklore.”²⁰⁸

²⁰⁵ WIPO/GRTKF/IC/11/15 Prov.

²⁰⁶ WIPO/GRTKF/IC/11/15 Prov.

²⁰⁷ WIPO/GRTKF/IC/11/15 Prov.

²⁰⁸ WIPO/GRTKF/IC/11/15 Prov.

Yemen

“... to prevent misuse or misappropriation of the TCEs [of local communities].”²⁰⁹

Italy

“... it was useful to recall what already existed in the international legal framework, especially article 6bis of the Berne Convention which protected the moral rights of every work, more specifically, works that were in the public domain. In respect of the economic rights related to such works, protection should be granted by national jurisdictions in a way that was efficient and affordable to each national level. The Delegation also referred to the protection granted to performances of expressions of folklore by the WIPO Performances and Phonograms Treaty (WPPT).”²¹⁰

Morocco

“... It was necessary to ensure that the rights holders could benefit because of the recognition of their economic rights which were the prime guarantee that it would be possible to move forward, disseminate the heritage and draw benefit from it. The Delegation supported the statement made by Algeria on behalf on the African Group, reaffirming that the protection of TCEs was needed in order legally to disseminate the TCEs at international level.”²¹¹

C. What other related terms, concepts and issues may also require clarification?
--

Canada

“... the term “misappropriation” is a complex term.”²¹²

²⁰⁹ WIPO/GRTKF/IC/11/15 Prov.

²¹⁰ WIPO/GRTKF/IC/11/15 prov.

²¹¹ WIPO/GRTKF/IC/11/15 Prov.

²¹² WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

D. What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?

Saudi Arabia

“... the objectives of the protection of TCEs, as provided for in WIPO/GRTKF/IC/11/4 (c), were convincingly wide and comprehensive, ranging from moral to economic, and from intellectual, artistic and cultural to protectionist objectives. However, undeclared political objectives underpinned the provisions and the commentaries in the document. Such objectives were often complex and undistinguishable from one another: a moral objective could not be achieved, in some cases, without the corresponding economic objective, and *vice-versa*. Moreover, objectives could be viewed from different angles with varying degree of priority or significance. While acknowledging that economic objectives could be necessary to enable the achievement of other objectives provided for in the document and, more particularly, the protectionist ones, the Delegation was of the view that exaggerated emphasis could not always guarantee the safeguarding and protection of TCEs from distortion and misuse, but could rather be a main reason why prohibited acts, such as distortion, occurred, particularly where TCEs, reflecting a wide range of values and traditions, became mere products assimilated to any other material good circulating in the market. The Delegation hoped that the importance of the issue be scaled down as much as possible.”²¹³

Indonesia

“... the objectives set out in WIPO/GRTKF/11/4 (c) were a good basis for discussion.”²¹⁴

Ghana

“The objective for the protection of Folklore as provided in document GRTKF/9/INF/5 is too limited. It is true that some researchers, extractors and innovators who come by folklore, most often misappropriate this knowledge. The source of the information is not acknowledged and little or no financial benefit ensure to the owners or holders of the knowledge from the exploitation of the folklore. Misappropriation should not be the only basis or objective for the protection of folklore. It is necessary to expand the objectives for the protection of folklore.”²¹⁵

Colombia

[See also under A above].

²¹³ WIPO/GRTKF/IC/11/15 Prov.

²¹⁴ WIPO/GRTKF/IC/11/15 Prov.

²¹⁵ WIPO/GRTKF/IC/11/4(a)

Brazil

“... the draft objectives proposed in document WIPO/GRTKF/IC/10/4, transcribed below, represent adequate basis to discuss the issue, in particular objective number (xii) – Preclude unauthorized IP rights – that touches more directly upon WIPO’s competences: [the comment then reproduces the draft Objectives of WIPO/GRTKF/IC/10/4 in full]”²¹⁶

Arts Law Centre of Australia

“... the objectives set out in WIPO/GRTKF/IC/11/4 (c) formed a useful basis for further discussions.”²¹⁷

²¹⁶ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

²¹⁷ WIPO/GRTKF/IC/11/15 Prov.

ITEM IV: WHAT FORMS OF BEHAVIOR IN RELATION TO THE
PROTECTABLE TCEs/EoF SHOULD BE CONSIDERED
UNACCEPTABLE/ILLEGAL?

Introductory Note by the Secretariat

In their written comments and oral interventions, some delegations questioned the principle underlying this Issue, in other words, they questioned whether forms of behavior in relation to TCEs/EoF ought to be considered unacceptable or illegal. Some of these pointed out that TCEs/EoF already receive some protection under existing IPRs (see also Issue VII below). Many delegations referred to the need to protect TCEs/EoF against a variety of behaviors, such as “distortion”, “disrespect”, “denigration”, “piracy”, “copying”, “unauthorized collection”, “exploitation”, “disclosure”, “abuse”, “unfair use”, “failure to pay equitable compensation”, and “commercialization”. Several delegations provided illustrative lists of various forms of behavior which would in their view be unacceptable and/or illegal, and examples of “misappropriations.” Certain key terms and concepts were identified as requiring further clarification and certain delegations expressed opposition to the protection of TCEs/EoF being conditional upon any registration requirement. Finally, a number of comments and interventions expressed views on the draft article corresponding to this Issue (draft article 3)

Accordingly, the comments and interventions have been clustered as follows:

- (A) Comments on the principle: Are any forms of behavior in relation to TCEs/EoF already considered unacceptable/illegal? Should any additional forms of behavior be capable of being considered unacceptable/illegal?
- (B) Specific suggestions and examples: What specific forms of behavior in relation to TCEs/EoF should be considered unacceptable/illegal? Should different types/categories of TCEs/EoF receive different levels of protection? Should any form or level of protection be subject to any prior registration or other formality?
- (C) Which related terms, concepts and issues may also require clarification?
- (D) What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?

A. Comments on the principle: Are any forms of behavior in relation to TCEs/EoF already considered unacceptable/illegal? Should any additional forms of behavior be capable of being considered unacceptable/illegal?

Forms of TCEs/EoF already protected

Australia

“... notes that copyright protection already applies to a range of material that includes many forms of TCE/EoF that have been reduced to a material form. Unauthorised copying or communication of recently created TCE/EoF that are original works is already regulated both internationally and nationally through copyright treaties and laws...”²¹⁸

Doubts as to need for additional protection/suggestions as to how to explore this Issue further

Japan

“... unacceptable/illegal acts could vary depending on the form of protection for TCEs/EoF. As it had mentioned under Issue 3, the Delegation was of the view that there was no clear justifiable reason why TCEs/EoF would be eligible for IP protection. Japan was greatly concerned on extending IP protection to TCEs/EoF...However, one should be careful in attempting to establish any system of IP rights or similar rights in order to deter such acts, as unnecessarily rigid regulation against expression could harm freedom of speech or development of culture. Moreover, when defining unacceptable/illegal acts, a fact finding survey should be conducted to find out what damage was incurred by what kinds of acts.”²¹⁹

Canada

“... communities and individuals around the world had historically drawn upon and co-mingled materials, ideas and other aspects of culture from one another. In some instances, these actions could be considered to be positive acts of “appropriation” for which individuals and communities would not express concern. However, there could be other cases where individuals and communities could view such acts in relation to TCEs as “misappropriation”...”²²⁰

²¹⁸ WIPO/GRTKF/IC/11/4(a) Add.

²¹⁹ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

²²⁰ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

United States of America

“... more work remained to be accomplished to identify specific forms of behavior regarded as unacceptable or illegal by indigenous peoples and traditional and other cultural communities with respect to their TCEs/EoF. To advance a sustained, focused and robust discussion of these issues, the Committee should explore the broad range of behaviors regarded by indigenous peoples and traditional and other cultural communities as unacceptable or illegal, including many examples already identified in the Committee’s documents. It had been noted, for example, that insulting, degrading and/or culturally and spiritually offensive use of TCEs/EoF was a form of behavior regarded as unacceptable or illegal by indigenous peoples and traditional and other cultural communities. The United States of America noted that such offensive behaviors were inextricably tied to specific cultural groups and communities and that more work was needed on a case-by-case basis to gain a deeper, mutual understanding of such offensive behaviors. Building on such a fact-based foundation, the United States of America encouraged the Committee to deepen its understanding of these concerns by examining and discussing in detail the existing mechanisms, including legal, both IP and non-IP and non-legal measures, which were available to address these specific issues or concerns. The Committee would then be able identify gaps, if any, in existing mechanisms at the domestic and/or international levels to address the specific issues or concerns. Finally, the United States of America noted that Member States remained very far apart on fundamental issues related to the protection, promotion and preservation of TCEs/EoF. However, the United States of America remained firmly committed to engaging in the kind of robust and sustained discussion, informed by national experiences, needed to bridge these differences ... recalled that previous documents had already distilled a broad range of behaviors regarded as unacceptable or illegal, including: unauthorized reproduction, adaptation and subsequent commercialization of TCEs/EoF, with no sharing of economic benefits; use of TCEs/EoF in ways that are insulting, degrading and/or culturally and spiritually offensive; unauthorized access to and disclosure and use of sacred/secret materials; appropriation of traditional languages; unauthorized fixation of live performances of TCEs/EoF and subsequent acts in relation to those fixations; appropriation of the reputation or distinctive character of TCEs/EoF in ways that evoke an authentic traditional product, by use of misleading or false indications as to authenticity or origin, or adoption of their methods of manufacture and ‘style’; failure to acknowledge the traditional source of a tradition-based creation or innovation; and, granting of erroneous industrial property rights over TCEs/EoF and derivatives thereof. The Delegation noted that these had been discussed in the past, but perhaps not in the depth required, and therefore, building on this foundation, the Committee should deepen its understanding of these concerns by examining and discussing in detail the existing mechanisms, including legal (both IPR and non-IPR) and non-legal measures, that were available to address these specific issues or concerns. The Committee would then be able identify gaps, if any, in existing mechanisms at the domestic and/or international levels to address the specific issues or concerns.”²²¹

²²¹ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

Hokotehi Moriori Trust

“... A number of Member States had indicated that further work remained to be done and they were calling for examples of misappropriation of TCEs to be produced to the Committee. He urged those Member States to reread the fact-finding mission prepared by the Secretariat in 1998 and also urged those Member States who were still unclear about this to read the numerous submissions made by indigenous peoples’ groups over the last seven years. He also urged those parties to read the various other documents that were available from the Secretariat which recorded in detail the various examples from around the world of misappropriation of TCEs that indigenous peoples were concerned with...”²²²

A human rights-based approach

Saami Council

“... aligned itself with the comments made earlier by the Delegation of Ethiopia, pointing out that protection of TCEs should be in conformity with human rights standards. In the same line, the Saami Council particularly encouraged participants of the Committee and the Secretariat to study Article 15 of the Covenant of Economic, Social and Cultural Rights and the General Comment on the same Article, which had underlined that the provision had, in addition to an individual dimension, a collective one, and hence stipulated that indigenous peoples and communities held human rights to their collective creativity. Any international instrument agreed on by the Committee should thus be in conformity with this provision.”²²³

²²² WIPO/GRTKF/IC/11/15 Prov.

²²³ WIPO/GRTKF/IC/11/15 Prov.

B. Specific suggestions and examples: What specific forms of behavior in relation to TCEs/EoF should be considered unacceptable/illegal? Should different types/categories of TCEs/EoF receive different levels of protection? Should any form or level of protection be subject to any prior registration or other formality?

Acknowledgement of source

International Publishers Association (IPA)

“... IPA could envisage a requirement that the publication or other use of TCEs/EoF should be done only with appropriate acknowledgement of the source.”²²⁴

Derogatory use

Japan

“... Any use of TCEs/EoF that could inflict mental suffering upon a community should be refrained from, as a matter of morality in general in the same way that derogatory expressions against a certain race, religion or sex should be refrained from...”²²⁵

Behavior that “damages” TCEs/EoF

Kyrgyzstan

“Illegal appropriation, falsification and other actions damaging traditional cultural expressions (folklore) shall be considered illegal actions.”²²⁶

Absence of prior consent

Russian Association of Indigenous Peoples of the North (RAIPON)

“The unlawful or commercial use of copies of and tunes from works without the consent of the authors and performers.”²²⁷

²²⁴ WIPO/GRTKF/IC/11/4(a)

²²⁵ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

²²⁶ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

²²⁷ WIPO/GRTKF/IC/11/4(a)

Various

Ghana

- a. “Unauthorized collection of folklore from the right owners.
- b. Non acknowledge of the rights of the owners or holders of the folklore
- c. Exploitation of the protected folklore without the consent or authorization of the owner of folklore.
- d. Publishing the protected information without the authorization nor observance of the moral right in the folklore
- e. Unreasonable withholding of information on folklore by the holders from researchers.”²²⁸

Qatar

“Misuse, robbery, unethical infringement, illicit exploitation, prejudicial actions and misappropriation.”²²⁹

South Africa

“Misappropriation

South Africa is of the view that any acquisition or appropriation of indigenous knowledge, traditional cultural expressions and genetic resources by unfair or illicit means constitutes an act of misappropriation. We further propose that any commercial benefit derived from the use of indigenous knowledge, traditional cultural expressions and genetic resources contrary to any honest practice that gains inequitable monetary advantage constitutes misappropriation. This is also applicable to person/s accessing the knowledge that knows or is negligent in failing to know...

Distortion

South Africa is concerned at the rampant manipulation and distortion of indigenous knowledge, traditional cultural expressions and genetic resources. Given the nature of indigenous knowledge, traditional cultural expressions and genetic resources the presentation of indigenous cultural material in a manner of promoting integrity requires careful consideration.

Contrary to Constitution/ domestic legislation/ international instruments/ human rights

South Africa has a bundle of legislation that seeks to protect indigenous knowledge, traditional cultural expressions and genetic resources hence we are the view that any violation of these pieces of legislation will constitute behaviour which is unacceptable.

²²⁸ WIPO/GRTKF/IC/11/4(a)

²²⁹ WIPO/GRTKF/IC/11/4(a)

Disrespect/denigration

In concert with South Africa's proposal on access and benefit sharing regulations we support the inclusion of the following text to this sub-section, "Failure to obtain prior informed consent- unauthorised usage."

We are steadfast in our stance that any person without the prior informed consent of the community uses knowledge, an innovation or a practice in a manner inconsistent with our proposed (draft) access and benefit sharing regulations commits an illegal act."²³⁰

Tunisia

- "Piracy, unauthorized use of such knowledge.
- Copying (counterfeiting)."²³¹

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

"In general, any form of appropriation, in the broad sense of this concept, which can be reflected in specific civil, administrative or criminal provisions..."²³²

Guatemala

"Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (WIPO/GRTKF/IC/2).

Commercialization on a global scale without due respect for the cultural and economic interests of the communities in which they originated and without the peoples that are authors of their expressions of folklore receiving any share of the benefits of such exploitation."²³³

Russian Federation

"Taking into consideration the provisions cited in point 3, the unacceptable forms of behavior should be:

- illegal appropriation of authorship;
- acts of use of works of folk arts harming the dignity of the representatives of peoples the works of folk arts of which are used."²³⁴

²³⁰ WIPO/GRTKF/IC/11/4(a)

²³¹ WIPO/GRTKF/IC/11/4(a)

²³² WIPO/GRTKF/IC/11/4(a)

²³³ WIPO/GRTKF/IC/11/4(a)

²³⁴ WIPO/GRTKF/IC/11/4(a)

Norway

“... At the very least there was a need to avoid all unauthorized exploitation for economic gain. In addition to this, there was a need to ensure that the source would be acknowledged in all uses, such as reproduction and communication to the public of the TCEs. The Committee should also find ways to prevent offensive uses of TCEs.”²³⁵

“Unacceptable behavior includes at least all:

- unauthorized exploitation for economic gain
- exploitation that does not acknowledge the source of the TCE/EoF
- offensive use

A common, core understanding of at least these three elements are necessary.”²³⁶

Nicaragua

“Individual exploitation and commercialization and variation in the processes of preparation or production that do not comply with the transmission of said knowledge and which are designed for large-scale exploitation by companies from outside the community.”²³⁷

Mexico

“... that any distortion, mutilation or other modification made with the purpose of causing damage to the TCEs/EoF developed and perpetuated in a community or indigenous people, or with the aim of causing harm to the reputation or image of the community, indigenous people or region to which such expressions belonged, should be considered illegal and unacceptable. The failure to mention the community, indigenous people or region to which the TCEs/EoF belonged in any fixation, representation, publication, communication or use in any form should be considered illegal and unacceptable. In addition, the Delegation joined those who have spoken in favor of how “free prior informed consent” should accompany the protection of TCEs/EoF.”²³⁸

India

“... misappropriation of TCEs/EoF should be considered illegal and inappropriate, if acquired by theft, bribery, inducement, fraud, misrepresentation, deceit, or breach of confidence or fiduciary relationship. Acquisition of information, including recording for commercial use such as for broadcasting, telecasting, advertisement, without the PIC of the holders and traditional users of such TCEs/EoF, would amount to misappropriation. This would also include unauthorized disclosure of secret or spiritual TCEs. Commercialization of TCEs/EoF without just and appropriate compensation should also be considered an illegal and unacceptable act. Equitable compensation

²³⁵ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

²³⁶ WIPO/GRTKF/IC/11/4(a)

²³⁷ WIPO/GRTKF/IC/11/4(a) Add.

²³⁸ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

should be paid to the communities concerned. However, this would only be possible with a legally binding international instrument.”²³⁹

Indonesia

“... it also stressed some acts that were considered unacceptable or illegal, which include the utilization of TCEs/EoF: (1) without authorization from the community involved; (2) without having received any written agreement from the community concerned; (3) that would result in a negative impression towards the community concerned; (4) that could result in the community concerned feeling disgraced or disrespected...”²⁴⁰

Algeria on behalf of the African Group

“... speaking on behalf of the African Group, held the view that behaviors considered unacceptable in relation to protectable TCEs should comprise the following: (i) misappropriation; (ii) unfair and abusive use; (iii) acts that could constitute denigration and disrespect; (iv) distortion; (v) acts contrary to existing national, regional and international legislations; (vi) suppression of the rights of knowledge holders in any form; (vii) withholding of results of researches based on GR derived from TCEs; (viii) violation of rules regarding the confidentiality and sacredness which governed practices and observance of TCEs; (ix) disclosure of protected information without the authorization of knowledge holders.”²⁴¹

China

“... the primary objective of according IP protection to TCEs was to prevent misuse and promote innovation. The Delegation supported the protection of TCEs through various effective means such as IP, customary law and competition law. In particular, the Delegation indicated that the following forms of behavior, as a minimum, should be considered unacceptable or illegal: (1) unauthorized reproduction, publication, adaptation, broadcasting, public performance, distribution, or rental of TCEs or their derivative forms; (2) use of TCEs without indicating their source; and (3) distortion, degrading, mutilation, denigration, insulting or other similar actions in relation to TCEs.”²⁴²

Morocco

“... focused on the need to protect the traditional nature of TCEs/EoF. It was for that reason that it considered any behavior departing from this customary framework towards commercialization unacceptable and illicit. This would include any behavior aimed at illegally disseminating, broadcasting, copying or translating of TCEs. All these types of behavior should require previous authorization, or else they would be

²³⁹ WIPO/GRTKF/IC/11/15 Prov.

²⁴⁰ WIPO/GRTKF/IC/11/15 Prov.

²⁴¹ WIPO/GRTKF/IC/11/15 Prov.

²⁴² WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

“illicit exploitation”. It would also be fair that whenever TCEs were made public, the sources should be quoted by citing the name of the community and the region as these were perceived as the source of the knowledge and culture.”²⁴³

Ogiek Peoples Development Program (OPDP)

“... among the Ogiek Community misappropriation and misuse of TCEs were offensive and could have spiritual and physical repercussions in their cosmological system. The representative suggested that to protect TCEs proper redress mechanisms should be in force, so that the parties/communities whom the TCEs belonged to would be compensated in cases of misuse. Furthermore, cultural mapping should be conducted to identify the extent to which TCEs were used that would initially require community consultation and participation.”²⁴⁴

Thailand

“... this Issue was a complex one, as traditions and sense of decorum differed from community to community. However, for international protection, the Committee should consider this question from two perspectives. From the IP perspective, the Delegation felt that the protection under the existing international instruments should be adapted so as to include unauthorized use, distortion and failure to share the benefit that should be due to the rights holders and to cover all forms of behaviors that, in the understanding of all concerned, were considered acts of illegality. The second perspective was more complicated, which entailed what acts should be unacceptable. Here, the aspect of moral and spiritual rights protection should be added as it should include any behavior that would imply disrespect, insult, mockery or insensitivity to the traditional community’s code of conduct, or insensitive to the human rights and cultural dignity of the traditional community. The Delegation was of the view that traditional communities owning the rights to protection should be encouraged to formulate their own code of conduct or customary laws as a *sui generis* system of protection that would be recognized by the international instrument.”²⁴⁵

Saami Council

“... moral rights – and in particular the right against misappropriations – could play a greater role in the protection of TCEs compared with conventional IP rights. Nonetheless, any relevant protection of TCEs should not be void of economic rights, and should include, for instance, a protection designed for indigenous peoples to use certain elements of their culture for commercial purposes as well as a protection against commercial exploitation of TCEs by non-members, also if this would not infringe any moral rights as understood in an IP context...”²⁴⁶

²⁴³ WIPO/GRTKF/IC/11/15 Prov.

²⁴⁴ WIPO/GRTKF/IC/11/15 Prov.

²⁴⁵ WIPO/GRTKF/IC/11/15 Prov.

²⁴⁶ WIPO/GRTKF/IC/11/15 Prov.

Brazil

“... the problem of misappropriation of TCEs/EoF required an adequate, effective and robust international response within the IP system. As to Issue 4, acts of misappropriation should be considered illegal and unacceptable, specifically those acts that were perpetrated by the use of IP mechanisms. Other acts should also be considered illegal and unacceptable such as derogative actions capable of offending spiritual and cultural values of the community. The Delegation understood that a requirement of PIC should figure as a central principle and mechanism in an international system for the protection of TCEs/EoF. Indeed, an effective way of evaluating whether an act would constitute misappropriation was by evaluating the existence of PIC...”²⁴⁷

New Zealand

“... New Zealand’s domestic experience to date indicated that forms of behavior in relation to TCEs that should be considered unacceptable should include: (i) use of TCEs without adequate consultation with or permission from the TCEs holders; (ii) unauthorized reproduction, adaptation and commercialization with no sharing of benefits, economic or otherwise, with the TCEs holders ... (iii) use of TCEs which would be contrary to or disrespectful of customary laws, protocols, and practices in relation to such TCEs; (iv) use of TCEs in a way that would be insulting, degrading, culturally or spiritually offensive; (v) manufacture, importation/exportation and/or sale of fake traditional souvenirs as ‘indigenous’ or ‘authentic’ and the misrepresentation of TCEs in terms of its integrity, or the attempt to associate and market products or services in a fashion that would lead consumers to reasonably assume that the TCEs holders supported or endorsed the product or service in question; (vi) unauthorized access to and disclosure of sacred-secret TCEs, such as burial sites, and objects of spiritual and cultural significance; (vii) failure to recognize and acknowledge the source of a tradition-based innovation or creation and the TCEs holders themselves; (viii) failure to recognize and acknowledge the contribution that TCEs would make to innovations and creative endeavors; (ix) the granting of erroneous or invalid IPRs over TCEs and adaptations thereof...”²⁴⁸

“... For example, appropriation of a traditional language for use outside of the customary cultural context without authorisation from the indigenous people (-s) or local community (-ies) whose language is being appropriated...”²⁴⁹

²⁴⁷ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

²⁴⁸ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

²⁴⁹ WIPO/GRTKF/IC/11/4(a) Add.

Arts Law Centre of Australia

“... the primary objective should be to provide a range of protections for behaviors falling under the broad heading of “misappropriation”... Behaviors that should be addressed would include: (i) use of TCEs without the consent of the custodians, such as reproduction, adaptation, publication, performance, broadcasting, communication to the public; (ii) commercialization of TCEs without financial benefit sharing; (iii) derogatory treatment of TCEs; (iv) damage or destruction of TCEs; (v) no attribution, or incorrect attribution, of custodians of TCEs; (vi) disclosure of secret and sacred materials; and, (vii) fixations of live performances and ceremonies without consent.”²⁵⁰

Comments on prior registration/notification or other formality

Colombia

“... Protection is derived solely from creation and therefore the Government of Colombia does not agree to consider registration and notification as a condition for the exercise of the right to prior informed consent. The moral and economic rights protected should be the same and have the same enforcement measures (civil, criminal and administrative)...”²⁵¹

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

“... In general, the looting to which peoples and communities are subject by third parties must be avoided, which logically implies intellectual property protection and knowledge thereof, with relevant registrations designed to produce an inventory/register in relation to third parties.”²⁵²

Ethiopia

“... The trademark of some aspects of TCEs was their orality. Subjecting these to registration and notification, to be protected through the mechanism of PIC, could lead to their erosion and could often provide an excuse for their non-recognition.”²⁵³

Saami Council

“... the requirement for TCEs to be registered for PIC to be applicable, could for cultural and other purposes be impractical...”²⁵⁴

²⁵⁰ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add. 2

²⁵¹ WIPO/GRTKF/IC/11/4(a)

²⁵² WIPO/GRTKF/IC/11/4(a)

²⁵³ WIPO/GRTKF/IC/11/15 Prov.

²⁵⁴ WIPO/GRTKF/IC/11/15 Prov.

Brazil

“An international instrument for the protection of TCEs/EoFs negotiated in an IP forum such as WIPO should not overlook the need to provide for measures aimed at curbing acts of misappropriation... Among these measures, the requirement for prior informed consent should apply to all TCEs/EoFs, registered or not. Registration should not be a condition for the enforcement of rights by the communities in question. Furthermore, one important criterium to assess whether an act constitutes misappropriation is the existence of prior informed consent by the community in question...”²⁵⁵

Arts Law Centre of Australia

“... The rights and ability to access remedies should not be predicated upon TCEs being registered...”²⁵⁶

TCEs/EoF of cultural and spiritual value

Colombia

“... As regards the TCEs/EoF of cultural and spiritual value, it is important to consider that some indigenous peoples have expressed the view that, where different levels and types of knowledge exist, those should be dealt with differently, but precisely those which are in the spiritual dimension should be seen from a defensive perspective, since in principle economic interests do not exist in between, but expectations of a transcendental and spiritual nature. Consequently, strict protection must exist and mechanisms distinct from registration or notification be established in order to regulate and make the right to prior informed consent effective. A *sui generis* system of protection must establish a limit on those TCEs/EoF which, owing to their spiritual and sacred nature, cannot be commercialized. Peoples and communities have their own authorities which must protect and keep custody of such knowledge with their specific legal and justice systems, and the competent national authority shall be responsible for protecting this right and strengthening the authorities and organizations of peoples and communities so that they may exercise the right. Similarly, the existence of scientific evidence of collective ownership of TCEs/EoF must be sufficient proof to enjoy the right to prior informed consent, even where registration or notification does not exist in the competent government bodies for the protection of intellectual property rights. Scientific evidence includes ethnographical studies, monographs, scientific compilations and publications, produced both by social and natural scientists, and by members of the communities which carry out specific research as a strategy to recover and revitalize TCEs/EoF. Furthermore, in complex geopolitical contexts, the major expectation of cultural communities relates to guaranteeing their physical and cultural continuity, owing to the different kinds of pressure which they face. In these contexts, the protection of TCEs/EoF moves on to another level but, for a different reason, such expressions cease to be legal subjects and therefore requirements must not be

²⁵⁵ WIPO/GRTKF/IC/11/4(a)

²⁵⁶ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add. 2

established which in certain cases are unachievable for communities. In other words, the rights of the most vulnerable peoples and communities must be guaranteed as a matter of priority and without condition in contexts of conflict and displacement.”²⁵⁷

Interaction between international, national and community level regulation

Norway

“... the Committee’s work had an international dimension, although it recognized that different communities and regions could need additional flexibility to develop appropriate solutions. In its opinion however, there were several common issues that probably needed an international response...”²⁵⁸

Hokotehi Moriori Trust

“... called for some kind of mechanism, not only domestic but international, that could give indigenous peoples some assurance that they could enforce compliance against any culturally inappropriate or misappropriation of their TCEs. The representative added that the Hokotehi Moriori Trust supported the development of a robust binding international instrument or instruments for the reason that, even if there was a domestic law in New Zealand preventing such breaches from occurring, the Moriori people could prevent misappropriation at the international level. Only a binding international instrument would give these people the tools to prevent these acts from occurring...”²⁵⁹

Specific examples of “misappropriation”

Hokotehi Moriori Trust

“... told of a woman on the Chatham Island who ran a tourist business and wished to produce a series of coffee mugs with an image of a Moriori human figure labeled onto the mugs. The representative argued that placing those images onto a coffee mug would be culturally offensive to the Moriori people. The representative considered his ancestors to be unique among Polynesian peoples for carving the images of a deceased person onto living trees as a communication to that person but also as a way of sending that person’s spirit back to the ancient homeland. Thus, those human carved figures had great significance to the Moriori people. At present, these figures were available in the public domain. The representative also referred to another person who had gone to the Chathams in 1957 and sketched all of the 2000 figures available and published these in a book. From a legal point of view, there was nothing that could be done to prevent these acts. However, the Moriori people wished to insist that the images were their cultural and IP rights. These images still retained significant spiritual and cultural significance to the people for which anyone that would want to use those images or other images would require PIC. If there was to be any commercial benefit, should

²⁵⁷ WIPO/GRTKF/IC/11/4(a)

²⁵⁸ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

²⁵⁹ WIPO/GRTKF/IC/11/15 Prov.

approval be given, then a royalty should be paid. These illustrations showed those Member States who were still uncertain about where indigenous peoples were coming from... The representative shared his personal experience in dealing with Lego International which had used Maori names on plastic toys. Initially Lego had responded that there was nothing legally the company was doing wrong. However, the representative had pointed out that it was morally, ethically and culturally inappropriate to use Maori names. Lego had then decided not to produce any further toys with Maori names on them without the peoples' PIC. The representative concluded that it was possible for mechanisms to be developed. However, there was a need for goodwill as the current IP regime did not seem to provide protections that were necessary to accommodate indigenous peoples' concerns."²⁶⁰

Tupaj Amaru

"... related a story about his journey to the plateaus of Bolivia, Peru and the Chilean border region. He had traveled there with an elder of the Quechua tribe to visit the sacred site of this community. The people there seemed to be skeptical because of negative past experiences with anthropological researchers who had gone to these sacred sites to know about the community's traditions. Therefore, it seemed to be difficult to visit the place as the communities were trying to safeguard their heritage and their patrimony, and these would not be comparable to something that could be bought and sold. This was just one of the cases of the violation of the customary rights of indigenous peoples. The representative stated that anthropologists and researchers were responsible for trafficking in the sacred items of the indigenous peoples and local communities. Referring also to other examples from Mexico and the Aztecs, the representative called for action to be taken by the Committee on protecting the cultural and intellectual heritage of indigenous peoples as these objects seemed to constantly be pirated at all levels."²⁶¹

Amauta Yuyay

"... noted that the huge number of tourists which visited the famous ornate ponchos square in Otavalo, Ecuador did so through multinational companies and only made quick visits to the age-old square, took thousands of photographs, made quick purchases and took advantage of discounts. In other words, the relationship was based solely on money. There was no human relationship, no sense of cultural commitment and the Amauta felt adversely affected, as an indigenous people, by such a relationship. The representative said that it was therefore necessary to create protection instruments to safeguard the heritage in order to generate a more auspicious relationship between the parties that visited the area, were they tourists or multinational companies. The representative therefore proposed a relationship based on a new concept of tourism, EDUTOURISM, which would provide education through tourism."²⁶²

²⁶⁰ WIPO/GRTKF/IC/11/15 Prov.

²⁶¹ WIPO/GRTKF/IC/11/15 Prov.

²⁶² WIPO/GRTKF/IC/11/15 Prov.

Saami Council

“... As an illustrative example, following colonization, the Saami people shared a large part of their traditional territories with the non-Saami population. To survive as distinct peoples, it was absolutely imperative for them to defend and preserve the cultural boundaries between them and the non-Saami peoples, by reserving their cultural denominators for Saami use exclusively. In the recent Miss World Competition, Miss Finland had chosen to wear a Saami traditional dress in the evening gown event. Such behavior would not necessarily come across as misappropriation from an IP perspective. However, such behavior was not only culturally offensive, but also served to dilute the borders between the Saami and Finnish cultures, and in the longer run, would contribute to the assimilation of the Saami peoples into the Finnish society. Such act should hence, in any relevant protection system for TCEs, be prohibited. This was how moral rights in the context of TCEs and collectives should be understood...”²⁶³

C. Which related terms, concepts and issues may also require clarification?

“Unacceptability”

International Publishers Association (IPA)

“IPA is concerned by the introduction of the notion of “unacceptability” in the ongoing discussions. “Unacceptability” is not a legal term and means different things to different people. IPA recommends the use of clear and unambiguous terms throughout the ongoing discussions...”²⁶⁴

Ethiopia

“... had discomfort with the wording “unacceptable”, which was perceived as vague, relative and non-legal jargon. The Delegation considered the word “illegal” as an appropriate description...”²⁶⁵

“Misappropriation”

Australia

“... supports further discussion of the term ‘misappropriation’ to ensure that the term is fully considered and understood ... Australia also considers that the work of the IGC would benefit from a discussion of national experiences regarding the exploitation of TCE/EoF.”²⁶⁶

²⁶³ WIPO/GRTKF/IC/11/15 Prov.

²⁶⁴ WIPO/GRTKF/IC/11/4(a)

²⁶⁵ WIPO/GRTKF/IC/11/15 Prov.

²⁶⁶ WIPO/GRTKF/IC/11/4(a) Add.

Portugal on behalf of the European Community and its Member States

“... most TCEs/EoF were in the public domain and that the process of modern cultural creation required, on many occasions, the influence and even certain uses in good faith of said TCEs/EoF. In a communication society, cultural creation was based on reciprocal cultural exchanges and dialogues, and thought should be given to the negative forms of use. For that reason, in the current context the characterization of “misappropriation” appeared to require greater study.”²⁶⁷

Canada

“... shares the concern regarding the prevention of “misappropriation” and misuse of TCEs ... At the same time, how the IGC defines its common objective in the context of TCEs should take into account how such an objective may impact on users and the broader public interest...”²⁶⁸

“... “misappropriation” had been interpreted as a complex term, and as a number of Member States had pointed out, “misappropriation” could mean different things to different people. If “misappropriation” was to be the primary focus of the future work of the Committee, Canada was of the view that more work should be directed at achieving a consensus as to what specific forms of behavior in relation to TCEs would constitute “misappropriation”.”²⁶⁹

Norway

“... the Committee would need a common understanding on what would constitute misappropriation. This would be the only way it could obtain an adequate and effective protection against misappropriation and misuse, as well as unauthorized IP rights...”²⁷⁰

See also *Saami Council* below.

“Public domain”

Burkina Faso

“... responded to the statement made by the Delegation of Portugal on behalf of the European Community and its Member States which had expressed the view that in Europe most TCE/EoF were often in the public domain and that their protection could constitute an obstacle to modern creation. The Delegation considered that the folklore situation was not the same in every country. Nevertheless, such differences should not prevent a compromise through a common text. Such compromise, within the framework of a legal instrument, could consist in setting aside cases where in a

²⁶⁷ WIPO/GRTKF/IC/11/15 Prov.

²⁶⁸ WIPO/GRTKF/IC/11/4 (a) Add.

²⁶⁹ WIPO/GRTKF/IC/11/4 (a) Add. and WIPO/GRTKF/IC/11/15 Prov.

²⁷⁰ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

particular country a TCE/EoF would be in the public domain in accordance with the customs or practices of the community concerned.”²⁷¹

“Behaviors”

Ethiopia

“... this item should not refer to “behaviors” as such but acts of certain character as accurately reflected under article 3 of WIPO/GRTKF/11/4 (c)...”²⁷²

“Adaptation” and “benefit”

New Zealand

“... more work would be required to define the term “adaptation” of TCEs and as the Delegation had stated under Issue 2 on what was intended by the term “benefit” ... The Delegation reiterated that the creation of works or inventions that were adaptations or derivatives of TCEs was a form of behavior that would require further analysis in order to determine what should be considered unacceptable.”²⁷³

“Culturally significant”

Saami Council

“... it was imperative that the terms “culturally significant” and “misappropriations” were understood from the perspective of the culture and people whose TCEs were being protected. As elaborated upon by the representative of the Hokotehi Moriori Trust, from an indigenous perspective, protection of TCEs were very much about defending the cultural identity of distinct peoples. Utilization of elements of their cultures that from a conventional IP-perspective could not come across as misappropriation, could nonetheless be harmful to their cultures...”²⁷⁴

²⁷¹ WIPO/GRTKF/IC/11/15 Prov.

²⁷² WIPO/GRTKF/IC/11/15 Prov.

²⁷³ WIPO/GRTKF/IC/11/4 (a) Add. and WIPO/GRTKF/IC/11/15 Prov.

²⁷⁴ WIPO/GRTKF/IC/11/15 Prov.

D. What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?

South Africa

“... Regarding document WIPO/GRTKF/IC/10/4 we query protection against the misappropriation of indigenous knowledge. Our particular concern regards:

- What is fair use and what is misappropriation?
- Is the public domain legitimate?”²⁷⁵

Colombia

“Article 3 of the substantive provisions contained in documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/10/4 considers the protection of expressions of folklore that are registered separately from those expressions that are not registered, even though in relation to copyright registration is declaratory and does not constitute rights...”²⁷⁶

Indonesia

“... a provision containing any acquisition, appropriation or utilization of TCEs/EoF by unfair or illicit means constituting an act of misappropriation would be essential. Although it believed that Article 3 of WIPO/GRTKF/11/4 (c) was a good basis for negotiation ... The Delegation stated that the measures mentioned in WIPO/GRTKF/11/4 (c) should also include any change of form of TCEs/EoF.”²⁷⁷

Saami Council

“... Article 3 of WIPO/GRTKF/IC/11/4 (c) constituted a workable starting point for future discussions on this point ... The Saami Council believed that the Delegation of Brazil had made a significant contribution to Article 3 of WIPO/GRTKF/IC/11/4 (c) through its comments on the List of Issues in WIPO/GRTKF/IC/11/4 (a)...”²⁷⁸

Hokotehi Moriori Trust

“... supported the representative of the Saami Council in considering that Article 3 of WIPO/GRTKF/IC/11/4 (c) was an appropriate starting point for elaborating mechanisms for protection against misappropriation...”²⁷⁹

²⁷⁵ WIPO/GRTKF/IC/11/4(a)

²⁷⁶ WIPO/GRTKF/IC/11/4(a)

²⁷⁷ WIPO/GRTKF/IC/11/15 Prov.

²⁷⁸ WIPO/GRTKF/IC/11/15 Prov.

²⁷⁹ WIPO/GRTKF/IC/11/15 Prov.

Brazil

“... Therefore, it pointed out that the draft provision contained in Article 3 of WIPO/GRTKF/IC/11/4 (c) would be an adequate and mature basis for discussion, as long as the protection of TCEs/EoF would not be conditioned on registration or notification.”²⁸⁰

²⁸⁰ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

ISSUE V: SHOULD THERE BE ANY EXCEPTIONS OR LIMITATIONS TO RIGHTS ATTACHING TO PROTECTABLE TCES/EOF?

Introductory note by the Secretariat

Some delegations did not believe it was appropriate for the Committee to discuss this Issue at this time in the absence of greater clarity on the reasons for and the objectives to be served by the protection of TCES/EOF within an IP framework. Among many, there was broad agreement that, in the event that new forms of protection for TCES/EOF were to be established, the protection of TCES/EOF should be subject to limitations and exceptions, and certain specific suggestions were advanced. Such exceptions and limitations should be developed taking into account the very nature of TCES/EOF, the manner in which they are used as part of the daily activities of the communities concerned and other interested parties. It was particularly stressed that no system for the protection of TCES/EOF should restrict access to and use of the TCES/EOF by their traditional custodians, and many stated that customary laws and norms are a good point of reference to determining, and interpreting, suitable exceptions and limitations. Written comments and oral interventions also expressed views on the draft provision on this question in WIPO/GRTKF/IC/11/4 (c), namely draft article 5.

Taking the above into account, the comments and interventions have been clustered as follows:

- (A) Comments on timing of discussion of this Issue: Should a discussion on exceptions and limitations take place at this time?
- (B) Comments on substance: Would exceptions and limitations to any TCE/EOF protection that may be established be necessary? If so, which principles should determine which exceptions and limitations would be necessary? Which specific exceptions and limitations were suggested?
- (C) Which related terms, concepts and issues may also require clarification?
- (D) What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?

A. Comments on timing of discussion of this Issue: Should a discussion on exceptions and limitations take place at this time?

International Publishers Association (IPA)

“IPA opposes a hasty and premature protection of TCEs/EoF through an IP related framework and therefore does not at this stage want to comment on limitations and exceptions to balance a possible framework of TCE protection.”²⁸¹

South Africa

“South Africa has not yet developed a detailed proposal dealing with issues to these provisions, but we would be happy to provide such a proposal to the Committee when completed.”²⁸²

Australia

“As noted in the response to Question 4 copyright protection already applies to a range of material that includes many forms of TCE/EoF. The protection of that material is already subject to a range of exceptions recognised internationally and in national IP regimes. Australia supports further discussion of whether similar or new exceptions would be appropriate for TCE/EoF identified as not covered by existing IP laws.”²⁸³

Thailand

“... expressed its satisfaction that exceptions to rights were being considered at this stage. Although it could be premature to go into details, the Delegation found it useful to hear the views of various delegations...”²⁸⁴

Canada

“... it was premature to address the issue of exceptions or limitations to rights attaching to protectable TCEs at this juncture, given that their nature and scope would depend on a number of factors, such as the scope of protectable subject matter and the type of protection provided to TCEs. In addition, inappropriate, administratively inefficient or ineffective exceptions and limitations could end up stifling creativity and innovation ... in society and the economy ... Consequently, the impact on creators, inventors, users and the broader public interest should be taken into account in the discussions ... when

²⁸¹ WIPO/GRTKF/IC/11/4(a)

²⁸² WIPO/GRTKF/IC/11/4(a)

²⁸³ WIPO/GRTKF/IC/11/4(a) Add.

²⁸⁴ WIPO/GRTKF/IC/11/15 Prov.

developing appropriate exceptions or limitations to any type of rights attaching to protectable TCEs.”²⁸⁵

Russian Federation

“... provisions relating to limitations or exceptions could be precisely formulated after the provisions relating to the aims of protection for TCEs (Issue 3) and unlawful acts in relation to TCEs (Issue 4) had been clarified...”²⁸⁶

“Taking into consideration points 3 and 4, any exceptions or limitations would not be expedient...”²⁸⁷

Japan

“... reiterated its belief that that any justifiable reasons for IP protection for TCEs/EoF had not been clearly identified and sufficiently explained. In this respect, Japan had a serious concern. Japan was not in a position to enter into discussions based on rights or protection, ...”²⁸⁸

Brazil

“... convinced that the protection of TCEs/EoF was an issue that enjoyed sufficient density and maturity and that this Committee could and should engage in a substantive discussion on the rights to be granted and relevant exceptions and limitations...”²⁸⁹

United States of America

“... agreed with the Delegation of Canada that it was premature for the Committee to undertake a focused discussion of “exceptions and limitations attaching to rights to protectable TCEs/EoF.” It was of the view that, first, as currently framed, the issue could tilt in a particular policy direction that would not be warranted at this stage of the Committee’s deliberations since there was no consensus on a rights-based approach to address specific issues and concerns regarding TCEs/EoF. Second, such a discussion could have the unintended consequence of polarizing the discussion, thereby impeding rather than advancing the work of the Committee. From a general perspective, the Committee should continue its work in identifying the extent of existing mechanisms to address specific issues and concerns that have been raised in the Committee and identifying any perceived gaps, including appropriate and applicable exceptions and limitations. Once existing mechanisms to address a specific issue and concern related to

²⁸⁵ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

²⁸⁶ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

²⁸⁷ WIPO/GRTKF/IC/11/4(a)

²⁸⁸ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

²⁸⁹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

protectable TCEs/EoF had been identified, the Committee would then be in position to evaluate related limitations and exceptions.”²⁹⁰

Nigeria

“... As had been the experience in other areas of IP, exceptions and limitations were always subject to further consideration as the society met new challenges. The Delegation did not see the discussions on the possible limitations and exceptions as premature in view of the fact that the Committee, even if in a question and answer format was already addressing the possibility of some kind of protection...”²⁹¹

Hokotehi Moriori Trust

“... commented on the statement made by the Delegation of Japan in which it had stated that it was not convinced of the need to protect TCEs using IP or any other means. The representative asked why after seven years Japan still asked this question. He wondered whether the Delegation had been listening to what indigenous peoples had been saying or not reading all the information in the Committee’s documents which had explained in great detail why TCEs needed protection. He stated that with greatest respect this could not be a credible position for the Delegation of Japan to maintain.”²⁹²

B. Comments on substance: Would exceptions and limitations to any TCE/EoF protection that may be established be necessary? If so, which principles should determine which exceptions and limitations would be necessary? Which specific exceptions and limitations were suggested?

Exceptions and limitations necessary, governing principles and specific suggestions

Portugal on behalf of the European Community and its Member States

“... on behalf of the European Community and its Member States, considered that should an instrument for protecting TCEs/EoF with the creation of rights be produced, it was necessary to provide for exceptions and limitations.”²⁹³

Japan

“... but when discussing exceptions and limitations consideration should be given to the balance between the interests of rights holders and the public interest, although such a balance could vary according to the form of protection and the scope of illegal acts provided for.”²⁹⁴

²⁹⁰ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

²⁹¹ WIPO/GRTKF/IC/11/15 Prov.

²⁹² WIPO/GRTKF/IC/11/15 Prov.

²⁹³ WIPO/GRTKF/IC/11/15 Prov.

²⁹⁴ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

Kyrgyzstan

“Exceptions and limitations shall be provided in respect of use of traditional cultural expressions (folklore).”²⁹⁵

Ghana

“This instrument shall not affect the following

- i) Traditional systems of access, use or exchange of folklore knowledge.
- ii) Access, use and exchange of knowledge and technologies by and between local communities.

The sharing of benefits based upon customary practices of the concerned local communities, provided that the exception shall not be taken to apply to any person or persons not living in the traditional and customary way of life relevant to the conservation and sustainable use of folklore

- iii) the continued availability of traditional knowledge for the customary practice, exchange, use and transmission of folklore by traditional knowledge holders
- iv) the use of traditional medicine for household purposes; use in government hospitals, especially by traditional knowledge holders attached to such hospitals; or use for other public health purposes
- v) Regime of storage categorization of traditional medical practices
- vi) Any use of the traditional knowledge or TCE for the benefit of the public.”²⁹⁶

Norway

“Taking inspiration from traditional intellectual property law, limitations on the protection of TCEs/EoF should be examined. In particular the possibility of non-commercial and respectful use including use in education and research, should be considered. Measures aiming to safeguard the protection and preservation of cultural and traditional heritage should also be developed. Any such public interest measures should ensure that the TCE/EoF in question are treated with respect.”²⁹⁷

Qatar

“For cultural, educational, research and information purposes and otherwise.”²⁹⁸

²⁹⁵ WIPO/GRTKF/IC/11/4(a)

²⁹⁶ WIPO/GRTKF/IC/11/4(a)

²⁹⁷ WIPO/GRTKF/IC/11/4(a)

²⁹⁸ WIPO/GRTKF/IC/11/4(a)

Russian Association of Indigenous Peoples of the North (RAIPON)

“The right of priority to use traditional knowledge for commercial purposes, granted by representatives of indigenous peoples and encouragement of persons related to indigenous peoples, to make commercial use of traditional knowledge through the provision of essential capital and conditions for such use by persons and organizations of indigenous peoples. Documentation by specialists of traditional knowledge (including their whole range as listed above) of persons and communities related to indigenous peoples, which they wish to use for commercial purposes, or in cases of the unauthorized use of such knowledge by persons not related to indigenous peoples.”²⁹⁹

Colombia

“We agree to the existence of exceptions or limitations to rights attaching to protectable traditional knowledge, provided that the measures for the protection of TCEs/EoF cannot restrict the use of such knowledge in the habitual and traditional community context ... In general, we consider that exceptions must be formulated openly, provided that minimum conditions are satisfied. This corresponds to the three steps rule in copyright and that of Article 30 of the TRIPS Agreement on patents.”³⁰⁰

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

“Yes, in this area consideration should be given to physical handicaps which may affect persons and at times make access to traditional culture impossible; everything related to teaching and education should also be envisaged and, in general, those limitations contained in current international treaties and national legislation relating to copyright, performers and producers, are included in the aforementioned provisions.”³⁰¹

Nicaragua

“Yes, above all for medicinal purposes in case of national emergency.”³⁰²

India

“... like with any other IP rights, there should be exceptions and limitations to the rights accorded to TCEs/EoF, since protection mechanisms were not to unduly restrict the use of TCEs/EoF. What were required were safeguards against misappropriation and misuse and the means to bring deserving economic returns to the preservers and developers of such TCEs/EoF...”³⁰³

²⁹⁹ WIPO/GRTKF/IC/11/4(a)

³⁰⁰ WIPO/GRTKF/IC/11/4(a)

³⁰¹ WIPO/GRTKF/IC/11/4(a)

³⁰² WIPO/GRTKF/IC/11/4(a) Add.

³⁰³ WIPO/GRTKF/IC/11/15 Prov.

Morocco

“... Exceptions for learning and quoting sources from a commercial context would help to achieve the necessary balance between, on the one hand, the recognition of rights holders’ rights and, on the other, exceptions and limitations in order to facilitate access to this heritage.”³⁰⁴

Indonesia

“... suggested that exceptions or limitations also needed to include the following matters: (i) utilization of TCEs/EoF in the context of education, science and public health according to national law while ensuring that this utilization would not be for commercial purposes and would not affect the TCEs/EoF holder disadvantageously. This utilization should also mention the source of origin of the TCEs/EoF, and be respectful of the TCEs/EoF holder; (ii) in case of member(s) of the community, they could freely utilize or perform TCEs/EoF within their own community in their traditional or customary context; (iii) in case of domestic utilization within a national jurisdiction, the utilization should have authorization by the respective TCEs/EoF holder ; and (vi) individuals who have developed their TCEs/EoF within the customary context should be allowed to exploit their copyright. In this regard, the customary law or the State could require them to fulfill the conditions of PIC, disclosure of origin and the sharing of benefits with the community.”³⁰⁵

Thailand

“... In principle, the Delegation felt that exceptions should be allowed in cases that could benefit the public interest as well as the interests of the traditional communities themselves. These exceptions should not be harmful to the communities’ traditions, and could, for example, be for the purpose of education and transmission to the younger generations, or for scientific study and research, or in the case of a national inventory. However, as a general rule, consultations with the rights holders should always be made and, as far as possible, their consent should be obtained and their participation encouraged.”³⁰⁶

Islamic Republic of Iran

“... It was of the view that acts where no permission would be necessary should be clear. Examples of such acts could be teaching purposes, personal use, using of folklore to create a new work and partial use. Nonetheless, the protection should not provide a monopoly to the rights holders which would prevent the public from having access to these TCEs/EoF. There was a need for balance in the binding instrument as in any other

³⁰⁴ WIPO/GRTKF/IC/11/15 Prov.

³⁰⁵ WIPO/GRTKF/IC/11/15 Prov.

³⁰⁶ WIPO/GRTKF/IC/11/15 Prov.

binding instruments. The Delegation generally aligned itself with the Delegation of Algeria speaking on behalf of the African Group.”³⁰⁷

Mexico

“In the measures for protection of traditional cultural expressions/expressions of folklore, the free use of such expressions shall be permitted, provided that they are not distorted, mutilated or modified so as to cause damage to the TCEs/EoF developed and perpetuated in a community or ethnic group, or to cause harm to the reputation or image of the community, ethnic group or region to which such expressions belong, provided that they are not exploited commercially.”³⁰⁸

Russian Federation

“... proposed that protection granted for TCEs should not limit the freedom of access to cultural values, cultural rights of citizens, based on the preservation and development of the cultural specificity of peoples, cultural exchange, study, research, and private use.”³⁰⁹

Brazil

“... the misappropriation of TCEs/EoF was a global problem that required a global response. That response should be satisfactory, effective and robust and should come from the international IP system. Brazil held the view that an international instrument for the protection of TCEs/EoF should contain provisions on limitations and exceptions. Those limitations and exceptions would allow for utilizations in cases of public interest, safeguarding cases of non-commercial and respectful use such as uses for the purpose of teaching and learning, for criticism or review...”³¹⁰

China

“... highlighted the need to provide for limitations or exceptions in a *sui generis* system for the protection of TCEs. The Delegation believed that the protection of TCEs should not affect cultural dissemination and innovation ... considered that, in particular, limitations and exceptions should be established, provided that: (1) the protection of TCEs should not affect the use of TCEs by members of the communities according to their customary laws or practices; (2) subject to the required indication of source, exceptions be established in the following cases: (a) use for scientific research or education purposes; (b) use for personal study, research or appreciation; (c) use for reporting news or current events; (d) use by governmental organs for carrying out their duties; (e) use for archive or inventory purposes; and, (f) use for national security;

³⁰⁷ WIPO/GRTKF/IC/11/15 Prov.

³⁰⁸ WIPO/GRTKF/IC/11/4(a) Add.

³⁰⁹ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

³¹⁰ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

and, (3) non-voluntary licenses may be applied to the use of TCEs in the form of adaptation.”³¹¹

Sudan

“... expressed its support for the statement made by the Delegation of Algeria on behalf of the African Group... [and] noted, however, the necessity of maintaining a balance in order to avoid excessive discussions on the need for protection. ... tourism-related promotion campaigns and beauty competitions depended to a large extent on cultural and folkloric expressions, and that indigenous peoples should share in the material and moral benefits derived from such activities.”³¹²

Algeria on behalf of the African Group

“... this was one of the key questions ... any legal instrument should strike a balance taking into account the interest of all parties concerned. Some delegations had raised questions and concerns which were legitimate. ... supported the statement made by the Delegation of Burkina Faso in its response to the statement made by the Delegation of Portugal on behalf of the European Community and its Member States. Along the same lines, the African Group suggested that in any international instrument there should be exceptions. However, it stated that there were other rights that should also be fully respected. The exceptions should be allowed with the view to creating a balance. The African Group believed that the protection of TCEs should not be prejudicial to the continued availability of TCEs for their practice, exchange, use and transmission by their holders within the traditional context. Another exemption should be the use of TCEs for benefit of the public. The African Group also acknowledged exemptions for non-commercial uses such as teaching, research, personal and private use, criticism or review, reporting of news or current events and the making of recordings and reproductions for inclusion in an archive or inventory exclusively for the purpose of safeguarding cultural heritage for as long as such exceptions were not offensive to and would not adversely affect the interest of the communities concerned.”³¹³

Nigeria

“... supported the statement made by the Delegation of Algeria on behalf of the African Group. Nigeria was of the view that a determination of the limits of rights and the proper definition of the available exceptions had become a twin issue of great concern to holders and users of IP rights. The Delegation acknowledged that this recognition had not always played out in the most balanced manner in the case of classical IP. In fact, it had often been defined narrowly to increase the burden of the system upon user countries, many of which were among the developing and least developed countries. Notwithstanding this, the Delegation was convinced that for rights to truly serve the interests of society, they should not only work for the benefit of the right owners but

³¹¹ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

³¹² WIPO/GRTKF/IC/11/15 Prov.

³¹³ WIPO/GRTKF/IC/11/15 Prov.

should also, of necessity, be made subject to the greater good of the wider community. TCEs were increasingly becoming raw materials for use in other fields of creative endeavors which included music, literature and other artistic expressions. Often the borrowers derived more commercial benefits from the derivative works than the original TCEs holders. While acknowledging that TCEs needed special treatment, the Delegation was of the view that exceptions and limitations should take cognizance of the very nature of TCEs, the manner in which they were used as part of the daily activities of the communities concerned and other interested parties. However, when defining the limitations and exceptions for TCEs, care should be taken not to erode the very TCEs sought to be protected as TCEs were a very fragile subject matter that had suffered from many years of neglect and abuses ... Nigeria had legislation for the protection of TCEs/EoF which also provided for exceptions and limitations. Some of the exceptions included utilization for educational purposes and utilizations for illustration in an original copyright work and the borrowing TCEs/EoF for creating original works as well as incidental uses. The Delegation was of the view that special exceptions should be provided for use by nationals of a country especially where the TCEs concerned was considered to be part of the national patrimony. It was the view of the Delegation that where TCEs were used outside their traditional contexts, there should be adequate acknowledgement of their source.”³¹⁴

Ukraine

“... when reference was made to the conventional rules of copyright and the lawful use of copyright subject matter, this also included the exceptions which provided for the means of free use of such subject matter. Taking into account the fact that the use of TCEs/EoF was a specific trend and that without the use of priceless national treasures the development of nations was impossible, it was necessary to pay very close attention to the question of the free use of such subject matter and free access to them when examining issues relating to the unlawful use of TCEs/EoF.”³¹⁵

Guatemala

“[after referring to national laws and international conventions ratified by Guatemala]... Use for pedagogical activity purposes. Use for the purposes of illustrating an author’s original work, provided that the scope of such use is compatible with good use. Taking of expressions of folklore for the purposes of creating an original work of one or more authors... where the use of expressions of folklore is fortuitous, including *inter alia* the use of any expression of folklore that can be seen or heard in the course of an event for information purposes concerning said event by means of photography, broadcasting, sound or visual recording, provided that the scope of said use is justified for information purposes. Use of objects incorporating the expressions of folklore which are permanently located in a place in which they can be seen by the public, if the use consists in including their image in a photograph, film or television program.”³¹⁶

³¹⁴ WIPO/GRTKF/IC/11/15 Prov.

³¹⁵ WIPO/GRTKF/IC/11/15 Prov.

³¹⁶ WIPO/GRTKF/IC/11/4(a)

No exceptions and limitations, or exceptions and limitations subject to certain conditions

Tunisia

“The rights attaching to protectable traditional knowledge should not be subject either to exceptions or to limitations (an inventory list should be drawn up). Tunisia is now equipped with a body within the Ministry of Culture and Heritage Protection, responsible for producing a list of and devising technical specifications for references in this area.”³¹⁷

Arts Law Centre of Australia

“... From the perspective of the history of appropriation of TCEs by academics and cultural institutions, such as museums, galleries, and archives, the representative was of the view that there could be problems if exceptions were to be allowed for: (i) non-commercial research or study; and (ii) inclusion in archives, libraries, museums and galleries. There was a need for a requirement in which adequate controls by indigenous peoples would be in place before allowing these exceptions.”³¹⁸

Tupaj Amaru

“... there should be limitations and exceptions for non-profit and public interest reasons under the condition that they had the prior consent of the indigenous peoples.”³¹⁹

How to determine appropriate exceptions and limitations

Saudi Arabia

“... queried who would have the right to decide on exceptions. What should the role be of the holders and the owners of the heritage concerned in this context? The Delegation believed that exceptions in the case of teaching could be used in a correct way but also in an incorrect way. The same thing would apply to certain other elements in the text, such as criticisms or evaluations. Consequently the Delegation stated that the Committee should find clearer and more precise measures to cover this area.”³²⁰

³¹⁷ WIPO/GRTKF/IC/11/4(a)

³¹⁸ WIPO/GRTKF/IC/11/4(a) Add. 2 and WIPO/GRTKF/IC/11/15 Prov.

³¹⁹ WIPO/GRTKF/IC/11/15 Prov.

³²⁰ WIPO/GRTKF/IC/11/15 Prov.

New Zealand

“...The current exceptions and limitations in the IP system provided that a significant amount of TCEs did not qualify for protection. New *sui generis* mechanisms and/or rights could be needed to address this gap in protection. Without in-depth analysis and discussion of this issue and its implications for Members States, indigenous peoples and local communities, it would be difficult to fully assess which exceptions or limitations should attach to mechanisms and/or rights for the protection of TCEs. The Delegation considered that it would be inappropriate to solely refer to current IP types of exceptions and limitations in answering this question. The exceptions and limitations should also be informed by customary laws, protocols and practices associated with TCEs, as well as by broader humanitarian and environmental objectives and principles.”³²¹

C. Which related terms, concepts and issues may also require clarification?

TCEs/EoF

New Zealand

“... items not resulting from intellectual activity and heritage in the broader sense, such as human remains and languages, in general, were excluded from the WIPO definition of TCEs. There could be situations where such elements of traditional culture would be misappropriated, misused, or misrepresented in the IP context, and, therefore, they should also form part of the analysis...”³²²

“Adaptation” and “derivatives”

New Zealand

“...The Delegation referred to its statement made under Issue 4 in which it had stated that the creation of works or inventions that were adaptations or derivatives of TCEs was a form of behavior that required further analysis in order to determine what should be considered unacceptable, and where exceptions or limitations could be established in the IP context...”³²³

³²¹ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

³²² WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

³²³ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

D. What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?

Colombia

“... In general, we support the contents of the proposed Article 5 of the substantive provisions contained in documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/10/4...”³²⁴

India

“... In this connection, the formulation proposed in article 5 of WIPO/GRTKF/IC/11/4 (c) formed an adequate basis for consideration.”³²⁵

Morocco

“... acknowledged that a number of efforts had been made over the years and many proposals had been made which constituted a good foundation. All these efforts were embedded in WIPO/GRTKF/IC/11/4 (c)...”³²⁶

Indonesia

“... Article 5 in WIPO/GRTKF/11/4 (c) was a good basis for discussion...”³²⁷

Islamic Republic of Iran

“... Article 5 of WIPO/GRTKF/IC/11/4 (c) was a good basis for the discussion...”³²⁸

Hokotehi Moriori Trust

“... (1) PIC should be required in Article 5(a)(iii) because he believed that it would be better to have preventative measures than to wait for any offences to be caused to a “relevant community”; (2) the word “unrestricted” should be deleted from article 5(b) and be replaced with “appropriate” use in accordance with custom and traditional practice...”³²⁹

³²⁴ WIPO/GRTKF/IC/11/4(a)

³²⁵ WIPO/GRTKF/IC/11/15 Prov.

³²⁶ WIPO/GRTKF/IC/11/15 Prov.

³²⁷ WIPO/GRTKF/IC/11/15 Prov.

³²⁸ WIPO/GRTKF/IC/11/15 Prov.

³²⁹ WIPO/GRTKF/IC/11/15 Prov.

Mexico

“... Article 5 in WIPO/GRTKF/IC/11/4(c) could be a basis for discussion of this subject.”³³⁰

Arts Law Centre of Australia

“... article 5 of WIPO/GRTKF/IC/11/4(c) provided a useful starting point...”³³¹

Brazil

“... acknowledged that the Committee had been discussing the draft provision in WIPO/GRTKF/IC11/4 (c) for a few years already and that the draft was the result of efforts and substantive discussions held in the Committee. Therefore, Brazil believed that Article 5 of WIPO/GRTKF/IC/11/4 (c) constituted an adequate, solid and mature basis for discussion.”³³²

China

“... expressed its appreciation to the Secretariat for the constructive work it had done, and considered the relevant provisions in document WIPO/GRTKF/IC/11/4 (c) were a good basis for further deliberations...”³³³

Ethiopia

“... referring to Article 5(3) in WIPO/GRTKF/IC/11/4(c), the Delegation was of the view that criticism or review was a dependent enterprise or undertaking and that it was rather undertaken as a method of teaching and learning or research, be it commercial or non-commercial, or reporting or in the course of legal proceedings. For this reason, the Delegation considered its inclusion as an independent ground for exceptions and limitations inappropriate. Having said that, it considered that article 5 was a solid foundation for future deliberations. It referred to the commentary to the first paragraph of article 5 which stated that “an overly strict protection could stifle innovation and cultural exchange”. The Delegation acknowledged that innovation and cultural exchange should be to the benefit of traditional communities themselves. There was a need to note that the premises for the protecting TCEs/EoF, on the one hand, and the promotions of innovation and cultural exchange, on the other, were different. Protection of TCEs emerged from the fact that traditional communities would have rights. Innovation and cultural exchange would have to be dealt with differently. In view of the Delegation, innovation and cultural exchange should not function as limitations to these rights, despite their importance. Regarding the makings of recordings and other reproductions of TCEs for the purpose of their inclusion in an archive or inventory for

³³⁰ WIPO/GRTKF/IC/11/15 Prov.

³³¹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add. 2

³³² WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

³³³ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

non-commercial cultural heritage safeguarding purposes, the Delegation was of the view that the conservation of TCEs through the establishment of inventories or archival centres would give the primary responsibility to the State where these communities were located. It could not imagine a situation where such conservation measures could be taken at the international level without a multilateral commitment. However, the Delegation was of the view that it would also be very difficult to accept situations whereby an inventory, albeit for non-commercial purposes, was made outside the environment of the traditional cultural communities without their consent and the involvement of the State where they were located. Should this happen, there would be a proliferation of self-declared, non-commercial archival centres all over where access would become unaccountable to these communities. How could a local community protect its folklore in a library whose establishment was not based on the consent of the communities themselves and found in a distant corner of the world? The Delegation, therefore, recommended inventory, collection or any archival activities to be excluded from the list of limitations or exceptions.”³³⁴

Nigeria

“... For this reason, the Delegation fully supported the statement made by the Delegation of Algeria on behalf of the African Group which was in line with the formulation of Article 5 in WIPO/GRTKF/IC/11/4 (c). That formulation would provide a good basis for further discussion on this issue. The Delegation’s understanding was that the list of exceptions was at this point intended to be closed ... However, in line with the view already expressed by the Delegation that Article 5 of WIPO/IGRTK/IC/11/4(c) formed a good basis for further discussion, the Delegation was prepared to engage in further deliberation with other delegations with a view to improving the text...”³³⁵

³³⁴ WIPO/GRTKF/IC/11/15 Prov.

³³⁵ WIPO/GRTKF/IC/11/15 Prov.

ISSUE VI: FOR HOW LONG SHOULD PROTECTION BE ACCORDED?

Introductory note by the Secretariat

Written comments and oral interventions covered a range of items. While some delegations believed that it was not appropriate for the Committee to discuss this Issue in the absence of greater clarity on the reasons for and the objectives to be served by the protection of TCEs/EoF within an IP framework, other delegations made specific suggestions as to the term of protection that ought to apply to TCEs/EoF.

Some comments and interventions suggested that TCEs/EoF should remain protected for so long as they met certain criteria which the comments and interventions proposed. In this regard, some delegations believed that the draft article on this question in WIPO/GRTKF/IC/11/4 (c) was an adequate basis for future work. Comments and interventions also addressed questions such as: should all TCEs/EoF be protected for the same length of time, or should terms of protection be tailored to particular objectives and forms of TCEs/EoF?; which policy considerations are linked to the term of protection of TCEs/EoF?; to the extent that forms of TCEs/EoF may already be protected by copyright and related rights, are the existing terms of protection in copyright and related rights adequate and suitable? should a distinction in relation to the term of protection be made between economic type rights and moral type rights?

Taking the above into account, the written comments and oral interventions have been clustered as follows:

- (A) Comments on the timing of the discussion of this Issue: Is it appropriate to consider this issue at this time
- (B) Comments on policy considerations: Which policy issues are relevant to consideration of this issue?
- (C) Specific suggestions as to term I: Should the term be “unlimited” or limited in some way? If limited, which criteria should be used to determine the term? Should the term be dependent upon any form of registration or notification and renewal thereof?
- (D) Specific suggestions as to term II: Should certain TCE subject matter be protected for particular periods? Should certain rights attaching to TCEs be protected for particular periods?
- (E) Comments on draft article: What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?

A. Comments on the timing of the discussion of this Issue: Is it appropriate to consider this issue at this time?

Japan

“... Any justifiable reasons why IP right protection should be extended to TCEs/EoF were not clearly explained. In this respect, Japan had a serious concern. Japan was not in a position to enter into discussions on the term of protection...”³³⁶

Canada

“... it was also premature to address the issue of the term of protection at this juncture, given that it would depend on the type of protection provided to TCEs. The approach envisaged and the factors considered would differ whether the protection would be conferred by an active assertion of rights or by defensive measures. In addition, the appropriate term of protection could be influenced by a number of factors such as the goal of protection, the scope of subject matter to be protected, and the associated exceptions.”³³⁷

New Zealand

“... supported Canada’s view that it was premature to discuss this issue and also agreed with the elements enumerated by the Delegation of Canada, which would need to be considered in detail in order to fully determine this issue...”³³⁸

Nigeria

“... it would be begging the question if one were to say that it was premature to find answers to what was to be a clear question as formulated at the last session of the Committee...”³³⁹

Russian Federation

“... proposed that the term of protection could be discussed in more detail only after provisions on the aims and scope of protection had been defined and clarified. In that regard, it pointed out that since TK and TCEs/EoF were based on knowledge handed down from generation to generation, there was no point in discussing the term of protection which could not be defined...”³⁴⁰

³³⁶ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

³³⁷ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

³³⁸ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

³³⁹ WIPO/GRTKF/IC/11/15 Prov.

³⁴⁰ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

United States of America

“... agreed with the Delegation of Canada that it was premature for the Committee to undertake a focused discussion of the duration of possible rights with respect to the protection of TCEs/EoF. This question also appeared to presume a particular outcome, which was not helpful in advancing the work of the Committee. There were many mechanisms available for the protection, preservation and promotion of TCEs/EoF. Some mechanisms that could preserve and maintain TCEs/EoF could be indefinite in length of time, such as protection derived from traditional practice or moral obligations within a cultural group. On the other hand, many existing forms of IP protection were time-limited such as copyright. It reiterated its previous comments in which further discussion was needed on specific issues and concerns related to the protection, promotion, and preservation of TCEs/EoF, along with analysis of possible gaps in the existing measures to address these issues and concerns, before specific solutions could be identified.”³⁴¹

Brazil

“... remained convinced that the misappropriation of TCEs/EoF was a global problem that required a global response and that it was not too early or premature to try to provide that response. It recognized the tremendous efforts done by the Committee in discussing the issue of the protection for TCEs/EoF and stated that the Committee held all the elements necessary for negotiating an international instrument...”³⁴²

Tupaj Amaru

“... referred to the proposal made by the Delegation of Canada that it was premature to discuss the duration of protection. He wondered when after six or seven years of debate and general statements the time would come for substantive discussion of whether there should be limited duration or an unlimited duration...”³⁴³

<p>B. Comments on policy considerations: Which policy issues are relevant to consideration of this issue?</p>

Canada

“... Some Member States and observers have called for perpetual protection, while others Member States have suggested that a better approach might be to consider terms of protection that are more closely tailored to a particular objective and the subject matter of protection. Perpetual protection for TCEs will very likely raise concern for creators and users, and would certainly have implications for the broader public interest. Perpetual IP protection for TCEs could also raise concerns in other forums such as those

³⁴¹ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

³⁴² WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

³⁴³ WIPO/GRTKF/IC/11/15 Prov.

that are seeking to promote cultural diversity, the protection of intangible cultural heritage, or the maintenance of a robust public domain, for example. With respect to IP, there is no single domestic or international standard regarding the length of protection for all forms of protected subject matter. While perpetual protection is not unheard of in IP law, such protection is the exception, not the rule. In most cases the length of protection is for a limited period of time in order to support the objectives of encouraging creativity and innovation and as well as promoting the dissemination of information.”³⁴⁴

Japan

“... but when discussing the term of protection of an IP right, consideration had to be given to the balance between the interests of right holders and public interests although such balance might vary by the form of protection and the scope of illegal acts.”³⁴⁵

Australia

“... Australia would encourage further discussion of the term of protection for TCE/EoF to ensure that their treatment is consistent with existing international standards.”³⁴⁶

New Zealand

“... Most existing IP rights had placed limits on how long the accorded protection should last. Māori stakeholders had clearly indicated that economic growth and/or innovation motivations should not constitute the only incentives for placing limits on the duration of protection for TCEs. Such economic and/or innovation motivations should be balanced with other cultural motivations such as the cultural needs and aspirations of the TCEs holders, in accordance with their customs and protocols ... but the moral types of protection should be perpetual as defined by the customary relationship to those TCEs.”³⁴⁷

³⁴⁴ WIPO/GRTKF/IC/11/4(a) Add.

³⁴⁵ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

³⁴⁶ WIPO/GRTKF/IC/11/4(a) Add.

³⁴⁷ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

C. Specific suggestions as to term I: Should the term be “unlimited” or limited in some way? If limited, which criteria should be used to determine the term? Should the term be dependent upon any form of registration or notification and renewal thereof?

Term of protection should be unlimited

Kyrgyzstan

“The period of traditional cultural expressions (folklore) protection shall not be limited.”³⁴⁸

Ghana

“Folklore is to be protected in perpetuity...”³⁴⁹

Russian Association of Indigenous Peoples of the North (RAIPON)

“These rules should not be limited in time. Only a creative group or author, which has created a traditional cultural expression and performed it to the public, may limit the term of protection.”³⁵⁰

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

“Protection must be granted for an indefinite period owing to the specific nature of the traditional cultural expression which has been created and/or modified through successive generations. This successive generational path cannot be interrupted since it would affect the very essence of traditional culture, and any provision covering the public domain of traditional cultural expressions, albeit through an underlying payment, should be rejected.”³⁵¹

Tunisia

“The term of protection must be unlimited.”³⁵²

³⁴⁸ WIPO/GRTKF/IC/11/4(a)

³⁴⁹ WIPO/GRTKF/IC/11/4(a)

³⁵⁰ WIPO/GRTKF/IC/11/4(a)

³⁵¹ WIPO/GRTKF/IC/11/4(a)

³⁵² WIPO/GRTKF/IC/11/4(a)

South Africa

“South Africa supports the notion that indigenous knowledge, traditional cultural expressions and genetic resources be protected in perpetuity. The need to protect IK is quite obvious that they mean ‘protection’ in the sense of safeguarding the continued existence and development of IK. As repeatedly pointed out by South Africa, this necessarily implies protecting the whole social, economic, cultural and spiritual context of that knowledge, something which simply is not possible to achieve within a confined period of time. Hence, we are proposing for an instrument that protects the holistic, inalienable, collective, and perpetual nature of Indigenous Knowledge Systems for purposes far more expansive than economic benefits.”³⁵³

Nicaragua

“Indefinitely.”³⁵⁴

Thailand

“... supported the position of the African Group. The Delegation believed that the protection of TCEs/EoF should not be limited in time...”³⁵⁵

South Africa on behalf of the African Group

“... The African Group held the view that TCEs should be accorded protection in perpetuity...”³⁵⁶

Morocco

“... TCEs were different in nature from other cultural products because they were the result of being passed down from generation to generation and were therefore perpetual. These communities were still alive and the protection should take these characteristics into account and be granted in perpetuity.”³⁵⁷

Amauta Yuyay

“... the need to protect the visions of indigenous peoples. The representative had listened to the experiences of the Inuit Women’s Organization, including the references to how the women carried their children on their shoulders. The representative and his current family of seven children had always been carried by their mother. He belonged to generations with mothers that had also been carried, thereby helping to create an

³⁵³ WIPO/GRTKF/IC/11/4(a)

³⁵⁴ WIPO/GRTKF/IC/11/4(a) Add.

³⁵⁵ WIPO/GRTKF/IC/11/15 Prov.

³⁵⁶ WIPO/GRTKF/IC/11/15 Prov.

³⁵⁷ WIPO/GRTKF/IC/11/15 Prov.

intimate relationship which honored the senior members of the family. Thus, protection should be perpetuated since it was the very essence of the life of their people.”³⁵⁸

Hokotehi Moriori Trust

“... unlike trademarks, patents and copyright, TCEs were not finite in duration. They continued to be integral to the maintenance of the culture and identities of the indigenous peoples concerned. He agreed with the African Group that protection should be in perpetuity...”³⁵⁹

Mexico

“If the protection is only for the moral rights of traditional cultural expressions/expressions of folklore, it is considered that the term of protection should be indefinite.”³⁶⁰

Tupaj Amaru

“...welcomed the position of the Delegation of South Africa on why there should be no limit on the duration. He emphasized that indigenous peoples and local communities, the holders and guardians of TCEs/EoF, were eternal...”³⁶¹

Indonesia

“... there should not be any limitations on the duration of protection for TCEs/EoF, as these were an important element of the cultural heritage of each nation, in particular the concerned community who had developed and preserved the TCEs/EoF...”³⁶²

Term of protection limited: with reference to copyright and related rights standards

International Publishers Association

“IPA supports the limitation in time of copyright in literary and artistic works. Any term of protection, with the exception of very important core moral rights, must be limited in time so as to ensure that works can re-enter the creative cycle after a certain period. Otherwise, the public domain as a source of inspiration would be unduly restricted. The same principle should apply to any framework for the protection of TCEs/EoF.”³⁶³

³⁵⁸ WIPO/GRTKF/IC/11/15 Prov.

³⁵⁹ WIPO/GRTKF/IC/11/15 Prov.

³⁶⁰ WIPO/GRTKF/IC/11/4(a) Add.

³⁶¹ WIPO/GRTKF/IC/11/15 Prov.

³⁶² WIPO/GRTKF/IC/11/15 Prov.

³⁶³ WIPO/GRTKF/IC/11/4(a)

Italy

“... it could be useful to make some distinctions on the merits of some previous interventions made by other delegations. In fact, if the Committee were to think of protection for moral rights, then no limit of time should be provided and the Delegation was here referring to Article 6bis of the Berne Convention. On the other hand, if the work was not considered as public domain material, the Delegation believed that the term for protection should be fixed. In this direction, Italy referred once again to the terms of protection established by the Berne Convention as outlined in Articles 7 and 7bis of that Convention. It believed that the terms defined in these articles could be applied to TCEs.”³⁶⁴

Tupaj Amaru

“... also commented on the applicability of the Berne Convention in defining the term of protection for TCEs, and wondered what would happen in 50 or 100 years time when the legal protection for TCEs/EoF would have expired. He stated that the holders and the guardians of TCEs would still be there and that it would, therefore, not be appropriate for these peoples to lose their rights as the TCEs/EoF were a part of their identities and their souls. He added that the protection of TCEs/EoF should not be perceived in mercantile terms, in terms of profit in the market economy logic, but rather in terms of the very existence of man, his memory and his soul.”³⁶⁵

Term of protection limited: with reference to the intrinsic nature of TCEs

Norway

“Protection should be provided for as long as the criteria for protection are fulfilled, and thus not necessarily be limited in time.”³⁶⁶

South Africa on behalf of the African Group

“... In view of the distinctive and intergenerational nature of TCEs, the moral and economic rights of the holders of TCEs should last in perpetuity for as long as the TCEs remained integral to their collective identity.”³⁶⁷

³⁶⁴ WIPO/GRTKF/IC/11/15 Prov.

³⁶⁵ WIPO/GRTKF/IC/11/15 Prov.

³⁶⁶ WIPO/GRTKF/IC/11/4(a)

³⁶⁷ WIPO/GRTKF/IC/11/15 Prov.

Colombia

“... expressions of folklore must be protected for as long as they are expressed, appear or are manifested by the community, without distinguishing between registered or unregistered and secret expressions of folklore.”³⁶⁸

India

“... the duration of protection for TCEs/EoF should be unlimited like that of geographical indications. The protection should endure for as long as the TCEs/EoF continued to meet the criteria for protection.”³⁶⁹

Yemen

“... unlike patents or trademarks that constituted personal property, TCEs belonged to peoples and communities. It concluded that protection should not be limited in time, but should rather endure for as long as the TCEs continued to meet the criteria for protection and be transmitted from one generation to another.”³⁷⁰

Arts Law Centre of Australia

“... Protection should be provided in perpetuity or as long as the communities existed to act as custodians of their TCEs.”³⁷¹

China

“... considered that, as long as a particular TCE remained a sign or a symbol representing a traditional or local community, and as long as there existed a linkage between them, no special time limit should be artificially imposed on the protection of the TCE...”³⁷²

Egypt

“... confirmed the dynamic nature of TCEs, transmitted from one generation to another and from an individual to one or more individuals, while continuously subjected to such modifications, additions and deletions as would comply with the collective needs and practices of the holders. Without their dynamic character, TCEs would lose their value as such, hence the need for protection for as long as that dynamic character maintained TCEs in practice and circulation.”³⁷³

³⁶⁸ WIPO/GRTKF/IC/11/4(a)

³⁶⁹ WIPO/GRTKF/IC/11/15 Prov.

³⁷⁰ WIPO/GRTKF/IC/11/15 Prov.

³⁷¹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add. 2

³⁷² WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

³⁷³ WIPO/GRTKF/IC/11/15 Prov.

Ogiek Peoples Development Program (OPDP)

“... as long as the community still relied on its TCEs then the draft should opt for a longer period of protection. This would ensure that future generation would have adapted the TCEs for their livelihood.”³⁷⁴

Brazil

“... protection should not be limited in time. Due to the specific characteristic of TCEs/EoF, protection should be available and should endure for as long as the TCEs/EoF remained in the tradition of the community. In this respect, the term of protection should only be dependent on the criteria for protection. Once a TCEs/EoF had met these criteria, protection should be accorded without need for any further requirement, such as previous registration...”³⁷⁵

“... such as the difficulty to identify a specific author, TCEs/EoFs should deserve protection for as long as the symbolic features that originated the expression in question remain in the tradition of the community that holds it...”³⁷⁶

New Zealand

“... New Zealand’s domestic discussions with stakeholders on this issue had indicated that the protection for TCEs should be accorded in perpetuity, or until there was no one who were *whakapapa* (genealogically connected) to the source of the TK or TCEs, or as long as there were *uri* (descendants) who wanted to assert the protection.”³⁷⁷

Registration and/or notification requirements

Colombia

“Limiting the length of the term of protection to the existence of registration or notification limits the scope of the instrument, contradicts the established objectives and principles, and makes more difficult the defense of rights which, owing to their nature, must not be subject to prescription, particularly in the case of indigenous peoples whose law of origin or specific right is one, whole and permanent...”³⁷⁸

³⁷⁴ WIPO/GRTKF/IC/11/15 Prov.

³⁷⁵ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

³⁷⁶ WIPO/GRTKF/IC/11/4(a)

³⁷⁷ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

³⁷⁸ WIPO/GRTKF/IC/11/4(a)

Hokotehi Moriori Trust

“... Protection should not be limited to those TCEs that had been registered because many indigenous peoples lived in remote communities...”³⁷⁹

[See also *Indonesia* below]

Arts Law Centre of Australia

“... once the registration requirement was removed as it was inappropriate for many remote indigenous communities...”³⁸⁰

Other general comments

Guatemala

“... In no case may protection be interpreted so as to obstruct the normal use and development of expressions of folklore.”³⁸¹

Qatar

“To be discussed in the light of that the TK archive which holding the materials acting as the competent authority and could take the responsibility of granting proper use of TKs.”³⁸²

Hokotehi Moriori Trust

“... As part of the Wai 262 claim, Maori tribes had put forward a number of suggested options and models for how protection regimes could work in practice. The representative called upon those Member States who were unclear about the mechanisms of protection that indigenous peoples were seeking, to read the many materials and documents that had been prepared for the Committee and the relevant case studies that had been submitted by States and indigenous peoples over the past seven years. He also suggested that the Secretariat compile a list of documents and other information identifying the work that had been done to date by the Secretariat on these issues.”³⁸³

³⁷⁹ WIPO/GRTKF/IC/11/15 Prov.

³⁸⁰ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add. 2

³⁸¹ WIPO/GRTKF/IC/11/4(a)

³⁸² WIPO/GRTKF/IC/11/4(a)

³⁸³ WIPO/GRTKF/IC/11/15 Prov.

C. Specific suggestions on term II: Should certain TCE subject matter be protected for particular periods? Should certain rights attaching to TCEs be protected for particular periods?

TCEs of commercial value

Nigeria

“... wished to support the statement made by South Africa on behalf of the African Group on Issue 6 ... The very cause of TCE would make perpetual duration an appealing and more appropriate option. However, the Delegation had made the point at the 5th and 6th sessions that there was nothing inherently wrong or contradictory in defining TCEs within a timeframe of duration, especially those cases that were only of commercial importance or orientation. This could help to provide some balance in the competing interests of the originating communities and improve certainty ... Finally, the Delegation did not subscribe to the description of TCEs as being in the public domain since they had never enjoyed any formal protection.”³⁸⁴

Derivatives and “extractions”

Ghana

“... However derivatives and extractions from the knowledge or secondary / related rights are to be protected in line with the term of protection of intellectual property rights such as patents copyright, etc.”³⁸⁵

Distinctions between economic and moral rights

Nigeria

“... The Delegation was, therefore, prepared to engage further on the desirability or workability of a dual duration regime, particularly along the lines of economic/moral rights as suggested by New Zealand and Italy...”³⁸⁶

New Zealand

“... However, some stakeholders had indicated that the duration for any economic types of protection accorded in relation to TCEs could be shorter ...”³⁸⁷

³⁸⁴ WIPO/GRTKF/IC/11/15 Prov.

³⁸⁵ WIPO/GRTKF/IC/11/4(a)

³⁸⁶ WIPO/GRTKF/IC/11/15 Prov.

³⁸⁷ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

Italy [this extraction also appears elsewhere]

“... it could be useful to make some distinctions on the merits of some previous interventions made by other delegations. In fact, if the Committee were to think of protection for moral rights, then no limit of time should be provided and the Delegation was here referring to Article 6bis of the Berne Convention. On the other hand, if the work was not considered as public domain material, the Delegation believed that the term for protection should be fixed. In this direction, Italy referred once again to the terms of protection established by the Berne Convention as outlined in Articles 7 and 7bis of that Convention. It believed that the terms defined in these articles could be applied to TCEs.”³⁸⁸

TCEs/EoF protected by existing copyright and related rights

Australia

“Those types of TCE/EoF already protected as works by copyright law, generally enjoy protection for the life of the author and 70 years...”³⁸⁹

Russian Federation

“... In cases where the rights of individual figures, such as performers of national songs, were referred to from among the representatives of indigenous peoples, the current legislation on related rights would be applicable and the term of protection for such performances would be limited and defined in accordance with that legislation.”³⁹⁰

Secret TCEs

Indonesia [this extraction also appears elsewhere]

“... protection of secret TCEs/EoF should not be solely limited to the secrecy aspect but these should be protected for as long as the criteria of protection were fulfilled.”³⁹¹

Burkina Faso [this extraction also appears elsewhere]

“... The draft provision [draft Article 6(ii)] terminated protection when expressions of folklore that had previously been secret ceased to be so. Since protection did not result from the secret nature, there was no reason to attach such consequence to disclosure.”³⁹²

³⁸⁸ WIPO/GRTKF/IC/11/15 Prov.

³⁸⁹ WIPO/GRTKF/IC/11/4(a) Add.

³⁹⁰ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

³⁹¹ WIPO/GRTKF/IC/11/15 Prov.

³⁹² WIPO/GRTKF/IC/11/15 Prov.

China [this extraction also appears elsewhere]

“... associated itself with the comments made by the Delegation of Burkina Faso concerning draft Article 6(ii), and requested the Committee to make further clarification on the term of protection for secret TCEs...”³⁹³

D. What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?

Indonesia

“... In respect of paragraph 1 of Article 6 in WIPO/GRTKF/IC/11/4 (c), where it was mentioned that protection “shall endure for so long as they remained registered or notified as referred in article 7”, the Delegation was of the view that there should not be any limitations on the term of protection for TCEs/EoF based on a registration system. It believed that protection should not be limited to either registration or notification, since the TCEs/EoF would have already existed a hundred years ago. Regarding paragraph 2 of Article 6, the Delegation was of the view that protection of secret TCEs/EoF should not be solely limited to the secrecy aspect but these should be protected for as long as the criteria of protection were fulfilled.”³⁹⁴

Thailand

“... The draft provision in Article 6 of WIPO/GRTKF/IC/11/4 (c) should be used as basis for discussion. Particularly draft Article 6(ii) should be considered in consultation with traditional communities.”³⁹⁵

Burkina Faso

“... pointed out that the rule contained in Article 6, paragraph (ii) of WIPO/GRTKF/IC/11/4 (c) was not appropriate . The draft provision terminated protection when expressions of folklore that had previously been secret ceased to be so. Since protection did not result from the secret nature, there was no reason to attach such consequence to disclosure.”³⁹⁶

³⁹³ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

³⁹⁴ WIPO/GRTKF/IC/11/15 Prov.

³⁹⁵ WIPO/GRTKF/IC/11/15 Prov.

³⁹⁶ WIPO/GRTKF/IC/11/15 Prov.

China

“... itself with the comments made by the Delegation of Burkina Faso concerning draft Article 6(ii), and requested the Committee to make further clarification on the term of protection for secret TCEs...”³⁹⁷

South Africa on behalf of the African Group

“The Delegation of South Africa, on behalf of the African Group, stated that Article 6 in WIPO/GRTKF/IC/11/4(c) provided an advisory beginning for further discussion...”³⁹⁸

Brazil

“... The draft provision contained in Article 6 of WIPO/GRTKF/IC/11/4(c) provided a sufficient basis for discussing the issue.”³⁹⁹

China

“... considered Article 6 in WIPO/GRTKF/IC/11/4(c) a basis for further discussion.”⁴⁰⁰

Arts Law Centre of Australia

“... Article 6 provided an adequate starting point...”⁴⁰¹

³⁹⁷ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

³⁹⁸ WIPO/GRTKF/IC/11/15 Prov.

³⁹⁹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

⁴⁰⁰ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

⁴⁰¹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add. 2

ISSUE VII – TO WHAT EXTENT DO EXISTING IPRS ALREADY AFFORD PROTECTION? WHAT GAPS NEED TO BE FILLED?

Introductory note by the Secretariat

The comments and interventions on this Issue canvassed the relationship between existing IPRs and the protection of TCEs/EoF in general terms, as well as specific examples of cases in which TCEs/EoF have received protection by existing IPRs and/or in which gaps were identified. In relation to such gaps, various suggestions were made as to how such gaps should be filled. Suggestions were also made by some as to how the Committee could explore the relationship between TCEs/EoF and IPRs. Accordingly, the comments and interventions have been clustered into three main sets:

- (A) What general comments were there on the relationship between objectives identified for the protection of TCEs/EoF (see Issue III above) and existing IP systems? Are IP systems designed for and/or suitable for protecting TCEs/EoF? Were particular principles or concepts of existing IPRs identified as problematic in relation to protecting TCEs/EoF? How could the Committee explore the relationship between existing IPRs and TCEs/EoF further?;
- (B) What specific examples are there of TCEs/EoF, or forms thereof, receiving protection, to some degree at least, from existing IPRs and/or from other laws? Are there “gaps” between the protection afforded and the objectives identified for the protection of TCEs/EoF, and, if so, what specific examples were provided? Did any of the comments and interventions refer to specific cases, laws or other measures?; and,
- (C) In cases of “gaps”, what solutions were proposed? What other (non-IP) laws and measures might be useful in providing comprehensive protection for TCEs/EoF?

A. What general comments were there on the relationship between objectives identified for the protection of TCEs/EoF (see Issue III above) and existing IP systems? Are IP systems designed for and/or suitable for protecting TCEs/EoF? Were particular principles or concepts of existing IPRs identified as problematic in relation to protecting TCEs/EoF? How could the Committee explore the relationship between existing IPRs and TCEs/EoF further?

General comments

European Community

“Some, albeit limited, protection can be offered already by existing intellectual property rules. However, it should be clear that when talking about protecting expressions of folklore by intellectual property, the latter is, and in fact can only be usefully applied with respect to the economic and not the purely ethnic or religious aspects of folklore. Indeed, endeavouring to protect ethnic or religious issues by intellectual property would stretch intellectual property beyond its recognized objectives of fostering creativity and investments.”⁴⁰²

China

“... the current intellectual property system only provides partial protection to TCEs/EoF...”⁴⁰³

Kyrgyzstan

“There is no appropriate normative and legal base directly traditional cultural expressions (folklore) protection – this is a gap in the legislation of the Kyrgyz Republic...”⁴⁰⁴

Norway

“... However, the traditional IPRs are not targeted to protect TCE/EoF. Therefore, the specific characteristics and needs are not necessarily appropriately addressed. Furthermore, the protection accorded is fragmented, varies between different jurisdictions and types of TCE/EoF and does not necessarily recognize TCE/EoF as eligible for protection.”⁴⁰⁵

⁴⁰² WIPO/GRTKF/IC/11/4(a)

⁴⁰³ WIPO/GRTKF/IC/11/4(a)

⁴⁰⁴ WIPO/GRTKF/IC/11/4(a)

⁴⁰⁵ WIPO/GRTKF/IC/11/4(a)

South Africa

“... believes IPR applications that include or are based on IK should be specifically excluded from existing IPR protection...”⁴⁰⁶

Russian Association of Indigenous Peoples (RAIPON)

“No response.”⁴⁰⁷

Colombia

“Intellectual property legislation does not envisage any type of protection for traditional cultural expressions.”⁴⁰⁸

Tunisia

“Traditional knowledge is considered to be a nebulous concept which cannot be protected with a single system of laws, in this case those relating to intellectual property. The intellectual property system cannot recognize the collective ownership of practices and knowledge handed down from generation to generation. It may, however, be considered that if intellectual property can help in one way or the other to protect traditional knowledge and to lead to the recognition of its lawful owners, it will already have the merit of recognizing their collective creativity...”⁴⁰⁹

Nicaragua

“There is no protection for traditional knowledge in Nicaragua.”⁴¹⁰

Nigeria

“... wished to draw to the attention of the Committee the excellent report of the WIPO fact-finding missions, which showed clearly a gap between the goals of the classical IP system and the needs and expectations of the communities concerned. This proved convincingly that the present IP system was never designed for and did not adequately protect TCEs.”⁴¹¹

⁴⁰⁶ WIPO/GRTKF/IC/11/4(a)

⁴⁰⁷ WIPO/GRTKF/IC/11/4(a)

⁴⁰⁸ WIPO/GRTKF/IC/11/4(a)

⁴⁰⁹ WIPO/GRTKF/IC/11/4(a)

⁴¹⁰ WIPO/GRTKF/IC/11/4(a) Add.

⁴¹¹ WIPO/GRTKF/IC/11/15 Prov.

India

“... stated that traditional IP laws like copyright or design laws were not applicable to TCEs since it was difficult to establish the conditions of originality and novelty requirements...”⁴¹²

South Africa (on behalf of the African Group)

“... the current IP system did not offer adequate protection of TCEs. However, in some specific cases, elements of TCEs might be protected under the existing IP system. Any viable system of protection had to take into account the communal, holistic and intergenerational nature of TCEs...”⁴¹³

Burkina Faso

“... the protection of TCEs had been an issue that had arisen during the first African meeting on copyright held in Brazzaville in 1963. Since then, the issue had continued to be the subject of discussion. For example, during the revision of the Berne Convention in 1967 the African countries had expressed a concern such that Article 15 of the Convention was drawn up. It was not right to imply that the issue was a new problem and that it was too early to tackle it with concrete proposals. For the Delegation of Burkina Faso, the difficulty was connected to the fundamental issue of the form of intellectual creation: a traditional creation form and a modern creation form. When copyright had appeared in Europe there was also traditional creation, but copyright was conceived to take care of “scholarly” creation while putting popular creation to one side. The criterion of originality was cited as an example. Such criterion was an individualistic criterion. In traditional creation, the creator did not necessarily seek to acquire an identity of his own. He had above all to remain authentic...”⁴¹⁴

American Folklore Society (AFS)

“... it would behoove WIPO to establish expert working committees charged with refining definitions and clarifying issues, and then bringing specific recommendations to the Committee. Other international agencies had used this method successfully, and the AFS believed that there was considerable expert knowledge available to WIPO. AFS would certainly be pleased to participate in such committees, the representative stated. He also pointed out that expert knowledge was available from traditional communities as well as more institutional locations, and that there was considerable expert precedent available from other international initiatives at UNESCO, CBD, and elsewhere. It was therefore suggested that following the 11th session’s discussion of the ten issues, WIPO convene expert working groups. Using the records of the Committee’s discussions and the previous fact-finding and case-study materials prepared by the Secretariat, those expert committees should be charged with finding points of agreement, adding

⁴¹² WIPO/GRTKF/IC/11/15 Prov.

⁴¹³ WIPO/GRTKF/IC/11/15 Prov.

⁴¹⁴ WIPO/GRTKF/IC/11/15 Prov.

professional perspective, expanding concepts when mandated, and otherwise making specific recommendations. The results of the working group's efforts should be presented to the 12th session of the Committee for discussion, refinement, and further action."⁴¹⁵

Thailand

"... existing IPRs were not adequate to protect TCEs/EoF. However, existing international instruments should be analyzed, and gaps identified so that they could be adapted and further added upon, so that specific needs for the protection of TCEs/EoF could be covered. Understandably, that might be considerable work, but this could be the focus in the next phase of the Committee's work. In addition, the Delegation believed that national laws and/or community-based codes of conduct or customary laws should be promoted as part of capacity building to ensure the preventive protection of TCEs at those levels. It was important, however, that those levels of protection be recognized and made to form a part of international protection."⁴¹⁶

Hokotehi Moriori Trust

"... IPRs could only protect some economic aspects of TCEs but not the values and integrity of the culture which, to indigenous peoples, was the more important."⁴¹⁷

United States of America

"Consistent with the mandate of the WIPO to "promote the protection of intellectual property rights," thereby stimulating innovation and creativity, the IGC has made considerable progress in identifying the role of existing IPRs in addressing specific issues and concerns related to TCEs/EoF, including the role of national copyright, trademark, and trade secret laws, among other laws. Many provisions of existing IPRs already are available for the protection of TCEs/EoF.... The IGC should build on the national experiences of WIPO member states as well as experiences of indigenous peoples in using or adapting existing IPRs to address issues and concerns related to TCEs/EoF. The Secretariat should provide an update on recent efforts to use existing IPRs to address TCEs/EoF. With a new factual baseline, the IGC may wish to consider activities and programs (including regional programs and tool kits) designed to facilitate the exchange of best practices on the use of existing IPRs to address specific local, national or regional issues and concerns related to TCEs/EoF. ... The exchange of information on current national legal and policy developments and identification of successful national practices would advance the work of the IGC. Some Members may raise concerns or specific examples where intellectual property systems are perceived or considered not to be sufficient to preserve, protect or promote TCEs/EoF in a particular context. Such an exchange would help the IGC to identify gaps, if any, in the existing

⁴¹⁵ WIPO/GRTKF/IC/11/15 Prov.

⁴¹⁶ WIPO/GRTKF/IC/11/15 Prov.

⁴¹⁷ WIPO/GRTKF/IC/11/15 Prov.

international framework. These perceived gaps could then be considered and addressed.”⁴¹⁸

“... believed that the Committee should continue its work in identifying and analyzing the use of existing IPRs to address specific issues and concerns related to the protection of TCEs/EoF. Successful experiences at the national, regional, and local levels might provide a basis for identifying “best practices” and models for other Member States and cultural groups. Such a fact-rich approach held great promise in facilitating consensus around achievable goals. In particular, the United States of America suggested that the Committee might wish to consider activities and programs, including regional programs and tool kits, designed to facilitate the exchange of best practices on the use of existing IPRs to address specific local, national or regional issues and concerns related to TCEs/EoF, drawing upon, where appropriate, the best practices of cultural institutions. The United States of America believed that discussion of selected principles and doctrines of unfair competition, contract, cultural heritage, and customary law, where well-suited to address specific issues or concerns, would advance the work of the Committee...”⁴¹⁹

Brazil

“... traditional IPRs were neither targeted nor suitable for TCE/EoF. Traditional IP rights, such as those foreseen by the Berne Convention or the TRIPS agreement, did not adequately address the issue of the protection of TCEs/EoFs and did not meet the concerns of traditional and local communities. The multidimensional nature and specifics of TCE/EoF indicated that there was an urgent need for an international instrument to secure the rights of local, indigenous and traditional communities. It was the view of Brazil that the misappropriation of TCEs/EoFs was a global problem that required a global solution. That solution had to be pursued within the IP system by the establishment of a new international instrument. This Committee had made considerable progress in discussing the issue and the Delegation was eager to engage in a substantive discussion.”⁴²⁰

Canada

“Both IP and non-IP laws and policies can, depending on the objective of protection, protect TCEs. Concerns have been expressed that there is a “gap” in IP law because only someone from the source community should be able to use the traditional song, for example, as the basis of a new work. Whether this represents a gap in IP protection may depend on a number of factors, in particular, the policy objective of protection. For example, is the policy objective to allow only a member of the source community to access and use all the TCEs of his or her community, or is the objective to achieve such protection for a select category of TCEs only? Considerations of the implications of such broad protection for users and the broader public interest should also be

⁴¹⁸ WIPO/GRTKF/IC/11/4 (a)

⁴¹⁹ WIPO/GRTKF/IC/11/15 Prov.

⁴²⁰ WIPO/GRTKF/IC/11/15 Prov.

considered. An identification and analysis of the gaps in the current system would advance the work of the Committee to the benefit of all Member States.”⁴²¹

Australia

“Australia has not carried out a systematic analysis of the extent to which IP already affords protection for TCE/EoF and what gaps need to be filled. In general terms, copyright, trade practices, confidential information and unfair competition laws all have roles to play. More general legal concepts such as contract law, unfair enrichment, fraud and unconscionable conduct may also have strong roles to play... The scope of any broader systemic problem that may exist with the means to address misappropriation of TCE/EoF would benefit from further clarification. That clarification would be assisted by an analysis of problems identified at a national level.”⁴²²

New Zealand

“Intellectual property mechanisms were not designed with the protection of TK and TCEs in mind... The issue as to what extent does the current IPRs system afford protection for TK and TCEs arose in the context of the Treaty of Waitangi claim WAI 262⁴²³ in New Zealand. The Ngāti Kuri, Ngāti Wai and Te Rarawa claimants⁴²⁴ described the relationship between mātauranga Māori (Māori knowledge) and intellectual property rights as follows:

“The Intellectual Property Rights (“IPR”) system, whilst providing a very limited form of protection for mātauranga does not reflect or protect the underlying *values* of traditional and customary knowledge systems. For example IPR are private, monopolistic rights that provide economic protection for the holders of those rights and are for a limited duration in time. Whereas mātauranga Māori (as with indigenous knowledge systems worldwide) are collective by nature, intergenerational and are integral to the ongoing maintenance and survival of Māori culture and identity.

That is not to say that the IPR system does not provide some form of protection for Māori. There have been many examples given in evidence where Māori have used trademarks and copyright to protect the commercial aspects of their works. The key issue for the claimants is that the IPR system is limited to the protection of *economic and commercial* rights. It was not designed to protect *cultural values and identity* associated with mātauranga Māori.”...⁴²⁵

⁴²¹ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

⁴²² WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

⁴²³ [Note by Secretariat: footnote appearing in original submission]: The Waitangi Tribunal is a statutorily created commission of inquiry mandated to look into and report on claims of breach of the Treaty of Waitangi, the founding document of New Zealand. Claimants in the WAI 262 claim, also known as the Fauna and Flora claim, have raised concerns in relation to IPRs and the protection of mātauranga Māori.

⁴²⁴ [Note by Secretariat: footnote appearing in original submission]: Three Māori tribal entities from the Northern portion of New Zealand.

⁴²⁵ WIPO/GRTKF/IC/11/4(a) Add.

References to particular principles and concepts of existing IPRs in relation to TCEs/EoF

European Community

“... [IP] can only be usefully applied with respect to the economic and not the purely ethnic or religious aspects of folklore. Indeed, endeavouring to protect ethnic or religious issues by intellectual property would stretch intellectual property beyond its recognized objectives of fostering creativity and investments.”⁴²⁶

Tunisia

“... The intellectual property system cannot recognize the collective ownership of practices and knowledge handed down from generation to generation...”⁴²⁷

India

“... traditional IP laws like copyright or design laws were not applicable to TCEs since it was difficult to establish the conditions of originality and novelty requirements...”⁴²⁸

South Africa

“... Any viable system of protection had to take into account the communal, holistic and intergenerational nature of TCEs...”⁴²⁹

Burkina Faso

“... the difficulty was connected to the fundamental issue of the form of intellectual creation: a traditional creation form and a modern creation form. When copyright had appeared in Europe there was also traditional creation, but copyright was conceived to take care of “scholarly” creation while putting popular creation to one side. The criterion of originality was cited as an example. Such criterion was an individualistic criterion. In traditional creation, the creator did not necessarily seek to acquire an identity of his own. He had above all to remain authentic...”⁴³⁰

⁴²⁶ WIPO/GRTKF/IC/11/4(a)

⁴²⁷ WIPO/GRTKF/IC/11/4(a)

⁴²⁸ WIPO/GRTKF/IC/11/15 Prov.

⁴²⁹ WIPO/GRTKF/IC/11/15 Prov.

⁴³⁰ WIPO/GRTKF/IC/11/15 Prov.

Hokotehi Moriori Trust

“... IPRs could only protect some economic aspects of TCEs but not the values and integrity of the culture which, to indigenous peoples, was the more important.”⁴³¹

New Zealand

“... The Ngāti Kuri, Ngāti Wai and Te Rarawa claimants⁴³² described the relationship between mātauranga Māori (Māori knowledge) and intellectual property rights as follows: ...“The Intellectual Property Rights (“IPR”) system, whilst providing a very limited form of protection for mātauranga does not reflect or protect the underlying *values* of traditional and customary knowledge systems. For example IPR are private, monopolistic rights that provide economic protection for the holders of those rights and are for a limited duration in time. Whereas mātauranga Māori (as with indigenous knowledge systems worldwide) are collective by nature, intergenerational and are integral to the ongoing maintenance and survival of Māori culture and identity...The key issue for the claimants is that the IPR system is limited to the protection of *economic and commercial* rights. It was not designed to protect *cultural values and identity* associated with mātauranga Māori.”...”⁴³³

B. What specific examples are there of TCEs/EoF, or forms thereof, receiving protection, to some degree at least, from existing IPRs and/or from other laws? Are there “gaps” between the protection afforded and the objectives identified for the protection of TCEs/EoF, and, if so, what specific examples were provided? Did any of the comments and interventions refer to specific cases, laws or other measures?

European Community

“To some extent, *trademark law* can be used to protect certain expressions of folklore, such as designs or symbols. The advantage of this protection is that it makes no novelty requirement and that it can be renewed without limitation, but protection relates only to actual or intended use for certain categories of products or services.

The laws on *industrial designs* provide protection for certain expressions of folklore such as graphical marks on any surface and three-dimensional plastic forms. However, the novelty and originality criteria, ownership and the limited duration of protection are difficult to reconcile with the nature of expressions of folklore.

The laws on *geographical indications* could be applied to certain tangible folklore products (such as carpets, textiles or figures) as protection can be assigned to a territory

⁴³¹ WIPO/GRTKF/IC/11/15 Prov.

⁴³² [Note by Secretariat: footnote appearing in original submission]: Three Māori tribal entities from the Northern portion of New Zealand.

⁴³³ WIPO/GRTKF/IC/11/4(a) Add.

rather than a natural or legal person. However, this protection does not grant exclusive rights as regards the actual good or service itself and will only prevent others from using the indicator: the same folklore could still be reproduced or performed under a different name. The concepts of *unfair competition or unfair trade practice* may provide, where they exist, protection against wrongful commercial use and their scope could be used against industries, which profit from folklore but disregard its traditional nature.

Moreover, some intellectual property protection is already offered to performers of expressions of folklore via Article 2(a) of the WIPO Performances and Phonograms Treaty of 1996. This same Treaty extends moral rights, economic rights in their unfixed performances, a right of reproduction, of distribution, of rental and a right of making available to the same performers. The fact that expressions of folklore are included in the WPPT confirms the fact that expressions of folklore are not works however, and protection is given to performers of expressions of folklore under the concept of neighbouring rights.”⁴³⁴

International Publishers Association (IPA)

“Copyright and trademarks and the protections for designs provide ample protection of economic rights. Moreover, other areas of law may equally afford protection (geographic indications; confidentiality/trade secrets). IPA is not aware of any acute gaps in the area of publishing of TCEs/EoF.”⁴³⁵

Kyrgyzstan

“... we have elaborated the draft law “On the Preservation and Legal Protection of Traditional Cultural Expressions”, which is currently reviewed by stakeholder Ministries of the Kyrgyz Republic.”⁴³⁶

Ghana

“Ghana currently protects the literary, scientific and artistic aspects of Traditional Cultural Expressions, Adinkra and Kente designs, i.e. traditional motifs are protected under the Copyright Act 2005, Act 690. The gaps that needed to be filled are the remaining aspects of folklore such as modes and methods of preparation of traditional foods, medicine.”⁴³⁷

⁴³⁴ WIPO/GRTKF/IC/11/4(a)

⁴³⁵ WIPO/GRTKF/IC/11/4(a)

⁴³⁶ WIPO/GRTKF/IC/11/4(a)

⁴³⁷ WIPO/GRTKF/IC/11/4(a)

Norway

“Existing IPRs (as i.e. regulated in treaties under the auspices of WIPO) already provides varying degrees of protection, depending on the circumstances. For instance the 1996 WPPT protects performers of expressions of folklore...”⁴³⁸

South Africa

“... In IP terms for example patent claims would fail to meet the test of innovation, novelty or inventiveness. But more importantly for local and indigenous communities, such patent claims should be automatically denied because IK is in the community domain; that is, it is already under the jurisdiction of customary practice systems, which protect the IK in perpetuity as the inherent and inalienable cultural property of local and indigenous communities... Under the current provision there are no obligations to the source community, such as obligations to acknowledge the origin of their inspiration, share benefits or respect the cultural and spiritual values and meanings associated with the underlying expression of folklore... *Community rights*: - Definition of novelty and obviousness (patents) are not recognized: We note the difficulty in meeting these requirements such as novelty or originality, and inventive step or non-obviousness (this may be due at least in part to the fact that IK often dates back prior to the time periods associated with conventional IP systems, or are developed in a more diffuse, cumulative and in a collective manner, making invention or authorship difficult to establish at a fixed time)...”⁴³⁹

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

“International treaties contain virtually zero protection for traditional cultural expressions and such protection is omitted from national legislation, apart from specific provisions which are to be found in Panamanian, Tunisian, Moroccan, etc. legislation. A reference to folklore exists only in the international WIPO Performances and Phonograms Treaty (WPPT) of December 20, 1996, where a performer is defined as the person who acts, sings, declaims, etc. ... literary or artistic works or expressions of folklore...”⁴⁴⁰

Tunisia

“... Protection must not prevent the sharing and transmission of traditional knowledge, and geographical indications represent an important element in the same way as territorial specificity.”⁴⁴¹

⁴³⁸ WIPO/GRTKF/IC/11/4(a)

⁴³⁹ WIPO/GRTKF/IC/11/4(a)

⁴⁴⁰ WIPO/GRTKF/IC/11/4(a)

⁴⁴¹ WIPO/GRTKF/IC/11/4(a)

Guatemala

“Decree No. 33-98 and reforms thereto, Decree No. 56-2000 and the Law on Copyright and Related Rights, establish protection for literary, scientific and artistic works, whatever their mode or form of expression. The Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98, establishes rules for the protection, defense, research, conservation and recovery of the property included in the National Cultural Heritage. Among the existing legal gaps mention can be made of the absence of a relevant treaty or agreement, promoted by the World Intellectual Property Organization.”⁴⁴²

Russian Federation

“In Russia at present the legal protection of the works of folk arts (expressions of folklore) within the IP system is not granted: not in copyright, not in patent law, not in any sui generis law. A position has been expressed in scientific literature that there is a possibility of special payments for the use of works of folk arts with a reference to p.3 of article 28 of the Copyright law. According to this article the Government of the Russian Federation can define the cases when special payments must be made for the use on the territory of the Russian Federation of the works in the public domain. Such payments go to the professional funds of authors and the organizations dealing with collective management of authors’ rights, and can not exceed one percent of the profit from the use of such works. This article only deals with works that have fallen into public domain. We should also note that relations in the area of artistic crafts are governed by the Federal Law of January 1, 1999 “On the Public Artistic Crafts”. According to the mentioned law the federal executive bodies should provide economic, social and other conditions for the preservation, renaissance and development of organizations of public artistic crafts, the list of which is approved by the Government of the Russian Federation. In particular, according to the Tax Code of the Russian Federation of July 31, 1998 No. 146-FL tax privileges are provided for the organizations of public artistic crafts. Besides, such organizations are subject for subsidies approved by the Decree of the Ministry of Industry and Energy of April 21, 2006 No. 90. However, works of folk arts can be not only the creations of public artistic crafts. The notion “creation of public artistic craft” which is an artistic article of utilitarian or decorative designation created according to the traditions of such craft covers the articles of decorative and applied arts, such as carvings, embroidery, braided and weaved articles, clothing, ornaments (the list of the types of production and groups of articles of crafts, according to which the articles are attributed to articles of public artistic crafts is approved by the decree of the Ministry of Economic Development and Trade of the Russian Federation of December 28, 1999 No. 555) and does not cover the works of oral creativity, such as national sagas, legends, fairy tales, folk poetry, proverbs, riddles; musical works, such as folk songs and instrumental music; choreographic works, such as folk dances; dramatic works, such as games, performances, ceremonies and other works of folk arts.”⁴⁴³

⁴⁴² WIPO/GRTKF/IC/11/4(a)

⁴⁴³ WIPO/GRTKF/IC/11/4 (a)

Indonesia

“... the existing IP system might not be the right one for the protection of TCE/EoF. One of the reasons was that TCE/EoF were the result of an impersonal, sustainable and gradual process of creativity exercised in a given community by consecutive imitation, while the existing IP regime was based on individuality. The fact that the protection provided by the existing IP regime was available only for individuals and that in many cases the utilization of TCE/EoF was without consent and authorization from the community concerned, showed the gaps necessary to be filled...”⁴⁴⁴

Hokotehi Moriori Trust

“... gaps had been identified in the WIPO FFM Report and many other submissions made to the Committee over the years. The representative supported the Delegation of New Zealand’s written comment in WIPO/GRTKF/IC/11/4(a) which quoted from legal submissions made in the Waitangi Tribunal 262 claim that the IP system did not and was not intended to protect the values and identity underlying the TCEs of indigenous cultures.”⁴⁴⁵

United States of America

“... For example, an original work of visual art created by an individual community artist inspired by or interpreting a traditional design would be eligible for copyright protection...”⁴⁴⁶

Japan

“To date, there has been no IP system around the world which extends direct protection to TCEs/EoF. In certain limited cases, however, TCEs/EoF can be protected under such existing systems as copyright law, trademark law, or unfair competition prevention law systems. Still, the following problems will remain.

Protection under copyright law

In order to be protected by copyright, a certain level of originality is necessary. Also, the holder of right is basically presumed to be an individual, and although there are systems of joint ownership of copyright or copyright owned by legal entities, it is not presumed that the a community directly becomes a copyright holder. Performance of TCEs/EoF can be subject to protection by neighboring rights, even if the performed TCEs/EoF itself does not qualify as a copyrighted work. Term of protection is limited both for copyright and neighboring rights.

⁴⁴⁴ WIPO/GRTKF/IC/11/15 Prov.

⁴⁴⁵ WIPO/GRTKF/IC/11/15 Prov.

⁴⁴⁶ WIPO/GRTKF/IC/11/4(a)

Protection under trademark law

A trademark right is aimed at protecting signs used for goods and services by entrepreneur but not cultural expressions such as TCEs/EoF. Indirect protection of protection of TCEs/EoF under a trademark right might be possible. More specifically, if a trademark right might be able to be granted to a mark of group to which the TCEs/EoF belongs, a brand can be established using the mark of the group.

In addition, with regard to protection of moral rights, copyright law can provide moral rights protection where the TCEs/EoF qualifies as copyrighted work, and civil code or other general laws may also provide protection in cases of serious moral right infringements.

In conclusion, a fair balance has been kept between the protection of TCEs/EoF and the protection of public domain under the IP system and other laws. At this stage there is no perceivable gap between the current system and the necessary forms/level of protection.⁴⁴⁷

Mexico

“... in Mexico, IP rights included authorship rights in the Federal Copyright Law, which provided for the protection of the moral rights of popular cultures or TCEs exclusively, as well as intellectual and industrial property rights. Although indigenous peoples and communities and individuals had used some of those, they had not been sufficient to cover the needs for protection of their TK and TCEs as a result of their cultural diversity and because they did not correspond to their world vision or to the form in which they valued them. The Delegation considered that these were some of the gaps which the Committee should take into account.”⁴⁴⁸

Australia

“... By applying existing IP laws and general legal principles, the Australian courts have effectively dealt with matters involving the unauthorised reproduction of traditional Aboriginal art. Examples of this include:

- In 1988 an action was brought on behalf of an Arnhem Land artist John Bulun Bulun and other Northern Territory artists concerning the unauthorised reproduction of their artworks on T-shirts. Ultimately the proceeding was settled on the basis of the payment of a sum of AUS \$150,000 much of which was distributed to the artists and families concerned. That distribution was based on an agreement which recognised that even though one artist's work had been copied more extensively than the works of others, all were considered to have suffered equally.
- In this case the Court also considered that a fiduciary relationship existed between the artist and the clan group. The artist accordingly had a fiduciary duty

⁴⁴⁷ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

⁴⁴⁸ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

towards his community not to exploit the work in a way that was contrary to the laws and customs of the clan and to take action required to protect the artistic work pursuant to his standing as a copyright owner.

- Between 1992 and 1994 there was a substantial infringement of a number of important and well known Aboriginal artworks by the importation of carpets made in Vietnam which reproduced those artworks. The Court found there had been substantial copying of the artworks. The total claim for damages came to approximately AUS \$190,000...⁴⁴⁹

New Zealand

“Some aspects of existing IPRs can be used to protect TK. For example, the assertion of copyright (including moral rights) over artistic and literary works, which meet the criteria under copyright law, may be possible. However, we note that the resources (financial and otherwise) required for TK and TCEs holders to effectively monitor and enforce their IPRs domestically and internationally may be beyond the means of many indigenous and local communities.

Certain exceptions and criteria in current IP law, such as novelty/prior art and inventiveness/non-obviousness, contrary to morality (such as scandalousness or offensiveness), may also provide grounds upon which indigenous and local communities may object to the granting of IPRs to third parties wishing to inappropriately exploit their TK and TCEs. Again, an issue arises in terms of the capacity for indigenous and local communities to undertake such objections.

It is possible to register collective patents, if the traditional knowledge-based innovation or creation meets the criteria for registration. Traditional knowledge that is passed on from generation to generation will in most instances constitute prior art, unless it has been kept secret, and therefore it will most often not be patentable.

It is also possible for TCEs holders to register trade marks, marks of authenticity (eg. Toi Iho – Māori Made Mark) and designs for certain types of traditional cultural expressions that are intended to be used in the context of trade. However the protection accorded only relates to and is conditional to the use of those TCEs in an economic trade context, which might not be spiritually or culturally acceptable for all TCEs. Conversely, certain elements of TCEs have become part of main stream culture to the point where they can no longer be said to be sufficiently distinctive to distinguish the goods or services of one trade from those of another. In both circumstances, current trade marks law does not fully take account of the realities associated with the protection of TK and TCEs.

The review of the Trade Marks Act 1953, in New Zealand, introduced a series of measures to address concerns of Māori over inappropriate registration of Māori text and imagery as Trade Marks. These took the form of provisions to prevent individuals and

⁴⁴⁹ WIPO/GRTKF/IC/11/4(a)

enterprises from registering Trade Marks that are likely to be offensive to a significant portion of the population, including Māori.

Subsection 17(c) of the Trade Marks Act 2002 prescribes that the Commissioner of Trade Marks “must not register as a Trade Mark or part of a Trade Mark any matter, the use or registration of which would, in the opinion of the Commissioner, be likely to offend a significant section of the community, including Māori.”

In relation to any Trade Marks registered under the former Act, which might today be considered offensive, the 2002 Act provides that any person (including a person who is culturally aggrieved) may seek a declaration of invalidity under the Act. This means that the Commissioner of Trade Marks or the Courts have the ability to declare a Trade Mark invalid if it would not have been registrable under the current 2002 Act.

The Trade Marks Act 2002 also provided for the establishment of an Advisory Committee to the Commissioner of Trade Marks. The function of this Committee as prescribed under the Act is to advise the Commissioner whether the proposed use or registration of a Trade Mark that is, or appears to be, derivative of Māori sign, including text and imagery, is, or is likely to be offensive to Māori.

Some elements of protection can also be found in the common law principle of passing-off, in legal provisions relating to competition and fair trading, and in the law of contracts (e.g. confidentiality agreements, ABS agreements, trade secrets, breach of confidence). However, none of these possible mechanisms of protection have been designed with the primary objective to protect TK and TCEs, hence they often do not fully address the concerns and needs of TK and TCEs holders, and often require a trade-off or compromise on the part of the TK and TCEs holders. For example, many IP experts have praised the merits of the law on trade secrets as a possible option for TK and TCEs holders who wish to protect sacred TK and TCEs from misappropriation and misuse. The compromise may be that the indigenous peoples and local communities that are trying to protect those sacred elements of TK and TCEs, by using such a legal mechanism, are restricted in their ability and liberty to transmit and promote those sacred elements of TK and TCEs within their communities. Those sacred elements may get locked up and kept away from the people and the community. This may have some significant ramifications in terms of the survival, vitality, and integrity of the culture.

In order for trade secrets instruments to be efficient in protecting TK and TCEs, the provisions in such instruments should be in accordance with customary laws and practices, and allow for controlled dissemination of the TK and TCEs within the indigenous and local communities, without the risk of them falling into the public domain. It may be difficult for indigenous and local communities to control the dissemination of TK and TCEs in such a way, given the social context and the prevalence of modern information-sharing technologies such as the internet. The protection context is different from secret-knowledge held by businesses or corporate entities.”⁴⁵⁰

⁴⁵⁰ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

Arts Law Centre of Australia

“IPRs provide limited protections for Traditional Cultural Expressions through the legal mechanisms discussed at previous IGC meetings and documents:

- Copyright
- Moral rights
- Trade marks
- Performers’ rights
- Passing off laws
- Trade Practices/consumer protection laws
- Heritage laws
- Law of confidentiality
- Trade secrets.”⁴⁵¹

“... the gaps that existed in Australia and the laws of many other Member States had previously been set out in the Committee’s working documents. These included: (i) Community or collective ownership of TCEs, (ii) Limited duration of IPRs whereas TCEs needed protection in perpetuity, (iii) Many types of TCEs were oral or performance traditions and not fixed in material form, (iv) TCEs were shared knowledge and handed down from generation to generation rather than individually owned, (v) Some TCEs did not fall within categories of material that had IPR protection e.g. ceremonies...”⁴⁵²

C. In cases of “gaps”, what solutions were proposed? What other (non IP) laws and measures might be useful in providing comprehensive protection for TCEs/EoF?

China

“... In addition to the intellectual property law, the thorough protection of TCEs/EoF requires the protection provided by other laws, e.g. sui generis, the administrative law, and even the criminal law.”⁴⁵³

Qatar

“Existing IPRs are not sufficient according to the nature of TK, It’s better to have a sui-generic system for the protection of TK.”⁴⁵⁴

⁴⁵¹ WIPO/GRTKF/IC/11/4 (a) Add. 2.

⁴⁵² WIPO/GRTKF/IC/11/15 Prov.

⁴⁵³ WIPO/GRTKF/IC/11/4(a)

⁴⁵⁴ WIPO/GRTKF/IC/11/4(a)

South Africa

“... Given this cross generation, communal nature of IK an international instrument is thus most likely to adequately protect – but will have to include elements that goes beyond traditional IPR... The South African Legal Deposit Act, 1997, provides for the protection of the national documentary heritage of the country. As IKS becomes more available in written form and as it stored in electronic databases, provision should be made for the National Library of South Africa and other places of legal deposit to receive copies of such documents *when published commercially*. Provision should also be made for places of legal deposit to gain access to the relevant information stored in such databases (being mindful of the protection of intellectual property rights). The designated places of legal deposit would help preserve published IKS documents and would promote access to heritage information. IKS should therefore be provided for in the Legal Deposit Act, 1997, which is now being amended. This holds true for other countries with legal deposit legislation.”⁴⁵⁵

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

“... In order to resolve this extremely important question, it appears appropriate to draw up an international treaty which contains minimal but effective protection and for said treaty, after its entry into force, to be applied to the nations that sign up to it.”⁴⁵⁶

India

“... What was needed was a new group of IPRs which encompassed all such forms of traditional wisdom.”⁴⁵⁷

South Africa (on behalf of the African Group)

“... The gaps which need to be addressed were: (i) the existing IP system did not recognize community and intergenerational ownership; (ii) the principle of duration was adverse to the intergenerational and evolutionary nature of TCEs; (iii) the present IP system did not have a provision for the sacred/secret, spiritual and ritualistic elements of TCEs.”⁴⁵⁸

Burkina Faso

“... It was not necessary to review the gaps and shortcomings of IP as if it could today be transformed to take traditional creation into account. It was better to intensify the ongoing search for *sui generis* solutions to manage traditional creation.”⁴⁵⁹

⁴⁵⁵ WIPO/GRTKF/IC/11/4(a)

⁴⁵⁶ WIPO/GRTKF/IC/11/4(a)

⁴⁵⁷ WIPO/GRTKF/IC/11/15 Prov.

⁴⁵⁸ WIPO/GRTKF/IC/11/15 Prov.

⁴⁵⁹ WIPO/GRTKF/IC/11/15 Prov.

Italy

“... some modifications to the Berne Convention in order to better specify the beneficiaries of protection could perhaps bring the protection of TCEs to an adequate level. Italy wished to draw the attention of the Committee to Article 15.4 of the Berne Convention, which granted protection to unpublished works of unknown, anonymous authorship, and to Article 7*bis* of the same Convention, which provided protection to joint authorship. It could perhaps be possible to grant protection to local communities as joint anonymous authorship. In so doing, it would be possible to grant to TCEs an adequate level of protection against misappropriation and other violations. It was the opinion of Italy that it would be useful to adopt some common guidelines that could help national legislation to adopt more focused rules on the protection of TCEs.”⁴⁶⁰

Indonesia

“... The establishment of an international treaty system of *sui generis* protection of TCE/EoF was the main alternative. Finally, the Delegation believed that a mere *sui generis* system at the national level was not adequate to ensure comprehensive protection of TCE/EoF.”⁴⁶¹

Hokotehi Moriori Trust

“... There was a need for *sui generis* systems to be developed to fill these gaps because the IPR system did not provide protection for the values underlying TCEs...”⁴⁶²

United States of America

“... Other principles and doctrines from existing IPRs could be adapted to address specific issues and concerns of indigenous and local communities. For instance, moral rights, which are provide for under the Berne Convention, could be adapted to address specific non-economic issues and concerns related to TCE/EoF. Existing IPR principles and doctrines also may be integrated with customary law...The IGC should not stop with canvassing the use of existing IPRs to address TCEs/EoF issues.The United States believes that discussion of selected principles and doctrines of unfair competition, contract, cultural heritage, and customary law, where well-suited to address specific issues or concerns, are fully within the mandate of the IGC. For example, the IGC may wish to consider more closely examining the use of unfair competition law by WIPO Member States to address specific issues related to TCEs/EoF...”⁴⁶³

“... For example, the Committee might wish to consider more closely examining the use of unfair competition law (and related unfair advertising and labeling laws) by WIPO Member States to address specific issues related to TCEs/EoF. The United States of

⁴⁶⁰ WIPO/GRTKF/IC/11/15 Prov.

⁴⁶¹ WIPO/GRTKF/IC/11/15 Prov.

⁴⁶² WIPO/GRTKF/IC/11/15 Prov.

⁴⁶³ WIPO/GRTKF/IC/11/4(a)

America believed that many other principles and doctrines from existing IPRs could be adapted to address specific issues and concerns of indigenous and local communities. For instance, moral rights, which were provided for under the Berne Convention, could be adapted to address specific non-economic issues and concerns related to TCE/EoF. Member States could share national experiences on attempts to integrate moral rights concepts with customary law. In addressing specific issues of actual communities, the relationship of existing IPR principles and doctrines to customary law was a topic that required further discussion within the Committee.”⁴⁶⁴

Brazil

“Without prejudice to the decision Members may take to protect TCEs/EoFs via “sui generis” systems, the Committee should consider the adequacy of IP mechanisms to provide for the protection of TCEs/EoFs by examining, for example, (i) the extent to which rules relating to public domain should be adapted to accommodate appropriate protection of TCEs/EoFs; (ii) changes that might be necessary to accord TCEs/EoFs a term of protection commensurate to their duration in time; (iii) possible modifications in rules governing the validity of IPRs with a view to provide for deterrent mechanisms against misappropriation of TCEs/EoFs.”⁴⁶⁵

Australia

“What gaps need to be filled?”

Acknowledging that no outcome is excluded from the work of the IGC, Australia supports a flexible approach to the protection of TCE/EoF. Programs such as those identified below form part of Australia’s current approach to protecting Indigenous culture and can be considered together with statutory protection for IP generally. These measures seek to ensure that Indigenous communities and their members are better placed to access and benefit from the protection of existing systems.

A flexible approach also ensures that appropriate mechanisms are available to suit the range of needs of Indigenous communities. This flexibility should extend to respect for the diversity of legal systems amongst Member States.

The Australian Government has undertaken to introduce legislation to give Indigenous communities legal standing in certain circumstances to safeguard the integrity of creative works that embody traditional community knowledge. Work is currently being progressed on that legislation.

There are also a number of Australian government programs which provide support for the preservation of Indigenous culture, they include:

⁴⁶⁴ WIPO/GRTKF/IC/11/15 Prov.

⁴⁶⁵ WIPO/GRTKF/IC/11/4(a)

- National Arts and Crafts Industry Support program which provides direct funding support to Indigenous art centres and support organisations to promote professional arts practice and provide pathways to economic independence;
 - Indigenous Culture Support program which provides funding support to preserve, develop and promote Indigenous art and culture within Indigenous communities;
 - an Indigenous visual arts special initiative, which complements the NACIS program and provides for, the training of young and emerging Indigenous artists and art centre workers, upgrading facilities, and funding of specific marketing initiatives:
 - the Australia Council also provides a very broad range of support for Indigenous practitioners, including direct funding and promotion of artists' rights.
- The Australian Cultural Ministers Council (CMC) has also agreed to give priority to Indigenous Intellectual Property (IIP) issues. The key IIP objectives for CMC are:
- promoting greater links between business and Indigenous communities about IIP to enhance greater economic independence;
 - raising awareness in Indigenous communities, consumers and commercial operators of the need to protect IIP; and
 - enhancing coordination of existing networks of Indigenous and non-Indigenous organisations working in the area of IIP.

An Indigenous Intellectual Property Toolkit is currently being finalised to progress these objectives.

The Australian Government has welcomed, and is now considering a Parliamentary Report by the Senate Standing Committee on Environment, Communications, Information Technology and the Arts on its 'Inquiry into Australia's Indigenous visual arts and craft sector' The report 'Indigenous Arts – Securing the future', was released on 21 June 2007. The report contains a comprehensive set of recommendations for strengthening the Indigenous visual arts and craft sector and protecting Indigenous cultural and intellectual property rights through both legislative and non-legislative means.

Australia would support discussion of such non legislative measures by the IGC so that other members can share their experiences."⁴⁶⁶

⁴⁶⁶ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

New Zealand

“... New Zealand is therefore giving thought to the possible development of sui generis models of protection for cultural and intellectual property of Māori, beyond existing intellectual property rights systems. We are mindful that intellectual property rights protection is only one aspect of a broader set of concerns relating to the protection of traditional knowledge and cultural heritage. For New Zealand this means that alternative means of providing protection, additional to that which can be accommodated under the existing intellectual property regime, is being explored at the national level. New Zealand supports further work by the Committee on sui generis systems to protect elements of traditional knowledge not covered by existing intellectual property rights systems.”⁴⁶⁷

Arts Law Centre of Australia

“... In Australia, the Government had been considering the introduction of Indigenous Communal Moral Rights which could provide some protection to communities where TCEs were embodied in a work or subject matter other than a work protected under copyright laws. To date, no legislation had been tabled in Parliament, despite this legislation having been discussed for over three years. If useful legislation was introduced, it would be an encouraging first step but hardly a comprehensive solution to the significant gaps in protection that existed.”⁴⁶⁸

⁴⁶⁷ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

⁴⁶⁸ WIPO/GRTKF/IC/11/15 Prov.

ISSUE VIII: WHAT SANCTIONS OR PENALTIES SHOULD APPLY TO
BEHAVIOR OR ACTS CONSIDERED TO UNACCEPTABLE/ILLEGAL?

Introductory note by the Secretariat

The written comments and oral interventions on this Issue have been clustered as follows:

- (A) General comments: Is it premature to be discussing this Issue? How is the Issue interpreted and how could it have been framed?
- (B) Specific comments: How should sanctions and penalties be designed? Which specific suggestions as to sanctions and penalties were there? Were any national experiences or examples cited?
- (C) What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?

A. General comments: Is it premature to be discussing this Issue? How is the Issue interpreted and how could it have been framed?

International Publishers Association (IPA)

“IPA is concerned by the introduction of the notion of “unacceptability” in the ongoing discussions. “Unacceptability” is not a legal term and means different things to different people. IPA recommends the use of clear and unambiguous terms throughout the ongoing discussions. IPA opposes a hasty protection of TCEs/EoF and therefore does not at this stage want to comment on the question of sanctions or penalties.”⁴⁶⁹

Hokotehi Moriori Trust

“... it was not premature to develop sanctions and penalties as suggested by some Member States...”⁴⁷⁰

Uganda

“... was, therefore, of the view that it was not premature to discuss and provide for sanctions.”⁴⁷¹

United States of America

“... aligned itself with other delegations in believing that a discussion on “sanctions and penalties” would not advance the work of the Committee at this time...”⁴⁷²

Japan

“... sanctions/penalties against unacceptable/illegal acts could vary depending on the level of protection for TCEs/EoF and the level of illegality. It recalled its statement made on Issue 3 in which it had stated that there was no clear justifiable reason why TCEs/EoF should be eligible for IP protection. Japan was greatly concerned by extending IP protection to TCEs/EoF. A fair balance had already been kept between the protection of TCEs/EoF and the protection of the public domain under the existing IP system and other laws. Japan was not convinced that there was a need to introduce any other sanctions/ penalties than those that have already been adopted under the existing systems...”⁴⁷³

⁴⁶⁹ WIPO/GRTKF/IC/11/4(a)

⁴⁷⁰ WIPO/GRTKF/IC/11/15 Prov.

⁴⁷¹ WIPO/GRTKF/IC/11/15 Prov.

⁴⁷² WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a).

⁴⁷³ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a).

Brazil

“... believed that it was neither early, nor premature to address such an important, fundamental and simple question ... The Delegation stated that the mere existence of this question on the list of issues indicated the maturity of the discussions held in the Committee and recognized the substantial progress made by the Committee...”⁴⁷⁴

Canada

“... it was also premature to address the issue of sanctions or penalties. However, should there be sanctions or penalties, they should be proportional to the harm caused and consistent with a Member State’s international legal obligations...”⁴⁷⁵

New Zealand

“... it might be too early in the process to fully assess this issue...”⁴⁷⁶ ... The New Zealand Government had not made any decisions regarding this issue and was still working through the potential implications for all stakeholders. The Delegation concluded by stating that New Zealand was discussing its domestic experience as a means of informing further analysis of this issue.”⁴⁷⁷

Specific suggestions as to how to advance discussion of this Issue

United States of America

“... believed that the Committee should undertake a focused discussion of specific behaviors and acts regarded as unacceptable or illegal by indigenous peoples and traditional and other cultural communities. Once the Committee could reach a more informed understanding of the specific harms at issue, the Committee would be in a better position to canvas remedies under existing law – including copyright, trademark, patent, unfair competition, trade secret, criminal, and customary law – to determine whether there were gaps in the existing remedial schemes of WIPO Member States.”⁴⁷⁸

Japan

“... did not believe that such a discussion would be unnecessary, but when discussing what sanctions/penalties should be introduced, consideration should be given to the form of protection for TCEs/EoF and the scope of illegal acts. Discussion based on factual information about what damage had been caused by what illegal acts would be essential.”⁴⁷⁹

⁴⁷⁴ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

⁴⁷⁵ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

⁴⁷⁶ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

⁴⁷⁷ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

⁴⁷⁸ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a).

⁴⁷⁹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a).

New Zealand

“... it would be important to first build an ethical foundation and behavioral practices which were consistent with the needs and aspirations of indigenous and local communities before determining what types of sanctions or penalties might be most effective to foster adherence to those practices and deter unacceptable appropriation and use of TCEs...”⁴⁸⁰

China

“... noted that at present there were countries with existing sanctions against illegal behavior. These measures included domestic laws, customary laws and other measures. The Delegation therefore believed that it was necessary to carry out studies on these measures in relation to the behaviors that were TCE misappropriations and considered that countries should think of sanctions in terms of civil and administrative measures, and even in criminal terms.”⁴⁸¹

<p>B. Specific comments: How should sanctions and penalties be designed? Which specific suggestions as to sanctions and penalties were there? Were any national experiences or examples cited?</p>
--

Australia

“... any sanction or penalties should be designed to meet the objectives of the measures put in place and be proportionate and appropriate to the harm caused. A consideration of whether sanctions/penalties under existing laws could be applied should occur before any exploration of other mechanisms, if considered necessary, was undertaken. Introduction of measures without proper evaluation of their enforceability, proportionality to the likely harm, their impact and role was likely to cause uncertainty and not meet the desired objectives. Where measures for the protection of TCEs/EoF were adopted nationally, appropriate enforcement mechanisms should be developed, consistent with international law and national laws and policies, permitting effective action against misappropriation of TCEs/EoF.”⁴⁸²

⁴⁸⁰ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

⁴⁸¹ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

⁴⁸² WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

Ghana

“We suggest that the following provisions in the African Union model law be considered.

- 1) Without prejudice to the existing agencies and authorities, the state shall establish appropriate agencies with the power to ensure compliance with the provisions of the instrument.
- 2) Without prejudice to the exercise of civil and penal actions which may arise from violations of the provisions of the instrument and subsequent regulation, sanctions and penalties to be provided may include:
 - i) written warning
 - ii) fines
 - iii) automatic cancellation / revocation of the permission for access
 - iv) confiscation of collected biological specimens recorded information and equipment
 - v) permanent ban from access to folklore / traditional knowledge such as biological resources / community knowledge and technologies in the country.
- 3) The violation committed shall be publicized in the national and international media and shall be reported by the national competent authority to the secretariats of relevant international conventions and regional bodies.
- 4) When the collector innovator conducts his / her operation outside of national jurisdiction, any alleged violations by such a collector may be prosecuted through the co-operation of the government under whose jurisdiction the collector operates based on the guarantee that the latter has provided.”⁴⁸³

South Africa

- “Internationally legally binding instrument
- Bilateral / MOU’s /Cooperation agreements
- Domestic law within which the transgression took place
- Article on sanctions
- Conciliation, Mediation and arbitration – by independent 3rd parties

South Africa is of the view that penalties could be set in order to recognise the particular gravity of the breach, as well as the financial means of the party involved. Civil procedures would be followed, including use of the civil standard of proof. A suitable appeal mechanism would need to be available to review the exercise of the regulator's or issuing officer's discretion. Following evaluation document WIPO/GRTKF/IC/10/4, it could potentially be extended to other areas of environmental regulation and other

⁴⁸³ WIPO/GRTKF/IC/11/4(a)

regulatory agencies. Our proposed regulations on access and benefit could be used to bench mark standards.”⁴⁸⁴

Qatar

“It is accepted to benefit from the existing IPRs norms in this matter.”⁴⁸⁵

Russian Association of Indigenous Peoples of the North (RAIPON)

“The unlawful use, without the voluntary and conscious consent of authors, of traditional cultural expressions for commercial purposes shall be punishable by the complete removal of profit and circulation of such expressions for the benefit of authors.”⁴⁸⁶

Amauta Yuyay

“... the damage caused by the appropriation and violation of the rights of indigenous peoples had been a historical process, and more than 500 years had passed during which such peoples had been mere witnesses to those violations. The failings were historical and a moral debt existed, which should be paid. As to how to do that was left to the conscience of the now “globalized” world.”⁴⁸⁷

Colombia

“Dispute resolution mechanisms, civil and criminal sanctions, both economic (compensation for damage, fines) and also those which deprive offenders of their freedom.”⁴⁸⁸

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

“In general, criminal protection should be granted against infringers and appropriators of traditional cultural expressions, although reserved for the most serious cases. We consider that administrative measures and border control, with the imposition of heavy fines for offenders, could give excellent results where infringements affect important elements of different nationalities.”⁴⁸⁹

⁴⁸⁴ WIPO/GRTKF/IC/11/4(a)

⁴⁸⁵ WIPO/GRTKF/IC/11/4(a)

⁴⁸⁶ WIPO/GRTKF/IC/11/4(a)

⁴⁸⁷ WIPO/GRTKF/IC/11/15 Prov.

⁴⁸⁸ WIPO/GRTKF/IC/11/4(a).

⁴⁸⁹ WIPO/GRTKF/IC/11/4(a).

Tunisia

“The same sanctions adopted in the field of archeological heritage (the looting of sites) and the sanctions relating to copyright (piracy).”⁴⁹⁰

Russian Federation

“It seems worthwhile to provide for a possibility of administrative liability for acts mentioned in point 4, namely:

- warning (administrative measure, expressed in an official reproof of an individual or a legal entity. The warning is usually given in a written form);
- administrative fine (monetary punishment).”⁴⁹¹

Nicaragua

“Financial sanctions and terms of imprisonment according to the seriousness of the offense.”⁴⁹²

Yemen

“... desired sanctions that could prevent any distortion, mutilation or other modification of, or other derogatory action in relation to, a TCE/EoF, by third parties...”⁴⁹³

Islamic Republic of Iran

“... sanctions and enforcement measures were necessary. They could be civil and criminal remedies and other effective means to protect the rights of the stakeholders. In this area, the criteria in other related international documents could be useful. In general terms, the Delegation aligned itself with the Delegation of Brazil.”⁴⁹⁴

Uganda

“... supported the position of the African Group as articulated by the Delegation of Algeria on providing for sanctions and penalties to protect right holders of TCEs. If rights were conferred, it should be anticipated that they were likely to be breached. In this regard, it was relevant to have a provision on sanctions and penalties...”⁴⁹⁵

⁴⁹⁰ WIPO/GRTKF/IC/11/4(a)

⁴⁹¹ WIPO/GRTKF/IC/11/4(a)

⁴⁹² WIPO/GRTKF/IC/11/4(a) Add.

⁴⁹³ WIPO/GRTKF/IC/11/15 Prov.

⁴⁹⁴ WIPO/GRTKF/IC/11/15 Prov.

⁴⁹⁵ WIPO/GRTKF/IC/11/15 Prov.

Brazil

“... As a general rule, appropriate and effective sanctions should be provided and should apply in cases of misappropriation...”⁴⁹⁶

India

“... accessible, appropriate and adequate enforcement and dispute resolution mechanisms, border measures, sanctions and remedies, including criminal and civil remedies, should be available in cases of breach of the protection for TCEs/EoF. Customary laws and processes and alternative dispute resolution should be used, as far as possible, in enforcement procedures. An agency could be constituted for the management of the rights of the community concerned, which could be tasked with, among other things, advising and assisting 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.”⁴⁹⁷

Algeria on behalf of the African Group

“... Appropriate civil and criminal sanctions/penalties should be applied to behavior or acts considered to be unacceptable/illegal.”⁴⁹⁸

Egypt

“... The infringed interest, in such cases, was viewed more as a public interest than a private one, and the corresponding sanctions should be those that were applicable to potential infringements of public interests as a result of infringing community-owned expressions. Furthermore, such sanctions should include civil and criminal remedies, to be provided for under an international binding instrument.”⁴⁹⁹

Nigeria

“... supported the statement made by the Delegation of Algeria on behalf of the African Group. The Delegation of Nigeria was of the view that any right, in order to be meaningful, should have adequate remedies in cases of breach and should be adaptable to effective enforcement. Informed by the immense documentation of various national experiences that were available to the Committee, the Delegation was convinced that there should be appropriate civil and criminal and administrative provisions to address those acts that could be considered unacceptable and illegal. In doing this, the formulation should draw from similar provisions in other fields. Existing national experiences and mechanisms did not adequately cater for the concerns of local communities and the international dimension of the subject of the discussions. Whatever

⁴⁹⁶ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

⁴⁹⁷ WIPO/GRTKF/IC/11/15 Prov.

⁴⁹⁸ WIPO/GRTKF/IC/11/15 Prov.

⁴⁹⁹ WIPO/GRTKF/IC/11/15 Prov.

formulation that would be agreed upon should be effective and adaptable to the needs of the local communities whom they were intended to benefit and should sufficiently permit the application of the customary laws of those communities...”⁵⁰⁰

New Zealand

“... The Ministry of Economic Development of New Zealand had hosted a workshop on the protection of TK and TCEs in March 2007 to discuss with Māori and other domestic stakeholders the key issues that emerged from the Tenth Session of the Committee. A report on the workshop had been produced in consultation with the participants, which was attached to New Zealand’s written comments in WIPO/GRTKF/IC/11/4(a), as Appendix A . The participants at the workshop had been of the view that there was a need for a formalized framework or “bottom line”, and that penalties should effectively enforce compliance. One group of participants had been in support of economic sanctions, as a possible effective means of deterring businesses from misappropriating, misusing, or misrepresenting TCEs in the context of trade. This was consistent with sanctions that applied to infringements of existing IP rights, which generally provided that infringers should pay some form of compensation to the rights holder. For existing IP rights, infringement was usually a civil matter rather than criminal, although criminal penalties could apply to some forms of copyright infringement. This meant that IP rights holders should take action against infringers. This would not be the most desirable and effective way of enforcing potential IP protection or rights in relation to TCEs, if the holders of those rights had limited resources and capacity to monitor their rights and take action against infringers. Criminal penalties and appropriate resourcing of enforcing agencies, or a combination of both criminal and civil remedies, could be more appropriate. The need for strong legal sanctions, whether economic or otherwise, had been expressed in most of the submissions received by the New Zealand Government. Education and awareness-raising were also seen as important for compliance and enforcement...”⁵⁰¹

China

“... Apart from the national legislation in this regard, the measures should comply with the customs of the indigenous peoples. The Delegation believed that the sanctions such as these would be effective and necessary for protecting TCEs.”⁵⁰²

“We think that civil, administrative and even criminal sanctions or penalties should apply to behavior or acts considered to be unacceptable/illegal.”⁵⁰³

⁵⁰⁰ WIPO/GRTKF/IC/11/15 Prov.

⁵⁰¹ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

⁵⁰² WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

⁵⁰³ WIPO/GRTKF/IC/11/4(a).

Arts Law Centre of Australia

“... A range of civil and criminal sanctions should be available, with criminal sanctions applying to most serious illegal acts. From an indigenous perspective, the most important thing to emphasize was that sanctions should be accessible and enforceable by indigenous peoples.”⁵⁰⁴

On interaction between national and international regulation and nature of possible “instrument”

Indonesia

“... On the other hand, it was also important to consider the role of national law, which would play an important role in ensuring effective protection of TCEs/EoF. In addition, the Delegation believed that although national laws would play an important role, it was still insufficient to rely solely on national laws since the misappropriation of TCEs could also occur at the international level.”⁵⁰⁵

Norway

“Appropriate and effective sanctions should be provided for in national law depending upon the infringement in question. Part III of the TRIPS Agreement provides guidance in this respect.”⁵⁰⁶

Brazil

“... remained convinced that a robust mechanism at the international level was necessary to prevent the misappropriation of TCEs/EoF. Such a mechanism would provide for defensive and positive measures for the protection of the rights of indigenous and traditional communities, particularly the requirements of PIC and access and benefit sharing...”⁵⁰⁷

Portugal on behalf of the European Community and its Member States

“... a framework of sanctions in this area should be within the competence and under the responsibility of each Member State, in particular if consideration was given to a “soft law” type instrument which, in that case, might be an appropriate solution.”⁵⁰⁸

⁵⁰⁴ WIPO/GRTKF/IC/11/4(a) Add. 2 and WIPO/GRTKF/IC/11/15 Prov.

⁵⁰⁵ WIPO/GRTKF/IC/11/15 Prov.

⁵⁰⁶ WIPO/GRTKF/IC/11/4(a)

⁵⁰⁷ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

⁵⁰⁸ WIPO/GRTKF/IC/11/15 Prov.

New Zealand

“... Compliance policy for users of TK and TCEs was suggested as a possible means of achieving the objectives; those should eventually go beyond voluntary measures such best practice guidelines...”⁵⁰⁹

Hokotehi Moriori Trust

“... There was a need to look at developing both “soft” and “hard” law options such as codes of ethics, guidelines, and educational materials. There was also a need for hard law to ensure that if soft law was not working then it could be backed up with sanctions to encourage compliance.”⁵¹⁰

National experiences

Kyrgyzstan

“There are no sanctions or penalties in the legislation of the Kyrgyz Republic for violation of use of traditional cultural expressions (folklore).”⁵¹¹

Guatemala

“Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (WIPO/GRTKF/IC/2).

Confiscation.

Prohibition of storage, import and export.

Guatemalan Penal Code

Establishes offenses against the public faith and national heritage, as well as the looting of that heritage.

Article 332A, added by Article 23 of Decree No. 33-96, which reads: theft and robbery of national treasures. A prison sentence of two to 10 years shall be imposed in the case of Article 246 and a sentence of four to 15 years in the cases of Article 251, where appropriation of the following is undertaken:

- (1) collections and rare specimens of fauna, flora or minerals, or items of palaeontological interest;
- (2) property of scientific, cultural, historical or religious value;

⁵⁰⁹ WIPO/GRTKF/IC/11/4(a) Add.

⁵¹⁰ WIPO/GRTKF/IC/11/15 Prov.

⁵¹¹ WIPO/GRTKF/IC/11/4(a)

- (3) antiques more than 100 years old, inscriptions, coins, engravings, tax or postal stamps of philatelic value;
- (4) objects of ethnological interest;
- (5) manuscripts, books, documents and old publications with historical or artistic value;
- (6) original artifacts, pictures, paintings and drawings, engravings and lithographs with historical or cultural value;
- (7) sound, photographic or cinematographic archives with historical or cultural value;
- (8) articles and objects of furnishing more than 200 years old and old musical instruments with historical or cultural value.

The penalty will be raised by one third where an offense is committed by public servants or officials or persons who, owing to their position or function, are responsible for guarding and keeping custody of the property protected by this Article.

Article 332B, added by Article 24 of Decree 33-96, reads as follows: theft and robbery of archaeological property. A prison sentence of two to 10 years shall be imposed in the case of Article 246 and a prison sentence of four to 15 years in the case of Article 251, where appropriation of the following is undertaken:

1. products of lawful or unlawful archaeological excavations, or of archaeological discoveries;
2. ornaments or parts of archaeological monuments;
3. items or objects of archaeological interest, although they are scattered or located in abandoned areas.

The penalty will be raised by one third where an offense is committed by public servants or officials or by persons who, owing to their position or function, are responsible for guarding and keeping custody of protected property.

Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98.

Article 45. Unlawful export of cultural property. Any person unlawfully exporting property which is part of the National Cultural Heritage shall be sanctioned with a prison sentence of six to 15 years, plus a fine equivalent to twice the value of the cultural property which shall be confiscated. The monetary value of the cultural property shall be determined by the Directorate General of the Cultural and Natural Heritage.”⁵¹²

⁵¹² WIPO/GRTKF/IC/11/4(a)

Mexico

“The Federal Copyright Law states that the fixation, representation, publication, any form of communication or use in any form of a literary and artistic work, protected as popular culture, shall constitute a copyright infringement and shall be sanctioned by the National Copyright Institute with a fine of between 5,000 and 15,000 days’ minimum salary. Similarly, an additional fine of up to 500 days’ minimum salary per day shall be imposed on any person who persists with such an infringement.”⁵¹³

C. What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?

Hokotehi Moriori Trust

“... Article 8 of WIPO/GRTKF/IC/11/4 (c) was a starting point for developing sanctions but needed more work...”⁵¹⁴

Yemen

“... While acknowledging the competence of countries in drafting their own legal provisions for protection, it suggested that the content of WIPO/GRTKF/IC/11/4 (c) prepared by the Secretariat be used as a basis for such sanctions.”⁵¹⁵

Turkey

“... the Article in WIPO/GRTKF/IC/11/4 (c) on sanctions, remedies and exercise of rights could be applicable at the international level. The Delegation found that to some extent national experiences and laws were relevant. However, after listening to the views of many delegations, the Delegation felt that this Article could be perceived as a new norm that would be applicable to third parties outside the national systems, and that these parties would be able to enjoy these rights outside their national systems. From this perspective, the Delegation found that the Article could be applied at the international level.”⁵¹⁶

Indonesia

“... Article 8 of WIPO/GRTKF/IC/11/4 (c) was a good basis for discussion ...”⁵¹⁷

⁵¹³ WIPO/GRTKF/IC/11/4(a) Add.

⁵¹⁴ WIPO/GRTKF/IC/11/15 Prov.

⁵¹⁵ WIPO/GRTKF/IC/11/15 Prov.

⁵¹⁶ WIPO/GRTKF/IC/11/15 Prov.

⁵¹⁷ WIPO/GRTKF/IC/11/15 Prov.

Brazil

“... The draft provision of Article 8 (a) in the Annex of WIPO/GRTKF/IC/11/4 (c) represented an adequate and mature basis to discuss the issue.”⁵¹⁸

Algeria on behalf of the African Group

“The Delegation of Algeria, on behalf of the African Group, supported Article 8 of WIPO/GRTKF/IC/11/4 (c). The Group believed that this was an excellent basis to work on and that the sanctions proposed in that Article could be a useful basis for punishing any infringement of the rights granted to the holders of TK and TCEs/EoF...”⁵¹⁹

Egypt

“... supported the statement made by the Delegation of Algeria on behalf of the African Group. The proposed Article 8 in WIPO/GRTKF/IC/11/4(c) constituted a sound basis for work, bearing in mind that sanctions provided for under existing IP systems were inadequate because they addressed infringers of personal rights, while, in the vast majority of cases, infringements of TCEs/EoF affected community rights...”⁵²⁰

Nigeria

“... As a starting point, the Delegation was convinced that Article 8 of WIPO/GRTKF/IC/11/4(c) was a sufficient basis for further work. The Delegation was in agreement with those other delegations that had called for the exact formulation of this article to be considered further and did not think that it was premature to start doing so.”⁵²¹

Arts Law Centre of Australia

“Article 8 of WIPO/GRTKF/IC/11/4 (c) provided a good basis for further discussion on sanctions...”⁵²²

⁵¹⁸ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

⁵¹⁹ WIPO/GRTKF/IC/11/15 Prov.

⁵²⁰ WIPO/GRTKF/IC/11/15 Prov.

⁵²¹ WIPO/GRTKF/IC/11/15 Prov.

⁵²² WIPO/GRTKF/IC/11/4(a) Add. 2 and WIPO/GRTKF/IC/11/15 Prov.

ISSUE IX: WHICH ISSUES SHOULD BE DEALT WITH INTERNATIONALLY AND WHICH NATIONALLY, OR WHAT DIVISION SHOULD BE MADE BETWEEN INTERNATIONAL REGULATION AND NATIONAL REGULATION?

Introductory note by the Secretariat

The written comments and oral interventions on this Issue have been clustered as follows:

- (A) General comments: Should this Issue be discussed at this time? What is the historical background to this Issue? What does the Issue mean and why is it important? Which national experiences or examples were cited
- (B) Comments on the distinction between international and national regulation: How do or should international and national regulation interact? Does international regulation precede national regulation or *vice versa*? Which issues should be dealt with internationally and/or nationally?
- (C) Which issues have specifically been identified as suitable for national level regulation? What is the function of national regulation?
- (D) Which issues should be dealt with at the international level? What is the function of international regulation?
- (E) What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))

Comments on this Issue also appear under certain of the other Issues.

- A. General comments: Should this Issue be discussed at this time? What is the historical background to this Issue? What does the Issue mean and why is it important? Which national experiences or examples were cited?

Ethiopia

“... The quest for an international regime had a long pedigree. WIPO’s General Assembly had instructed the Committee in 2003 to accelerate its work and to focus on the international dimension. The Committee had to clarify the boundary between the national and international dimensions of its work. The Delegation recalled WIPO’s and UNESCO’s joint groups of experts on the international protection of EoF through the international IP system in 1984. At that time, a few said that the time was not ripe for an international instrument. Ethiopia and hundreds of communities it represented noted that more than 20 years later there were still some who felt that the time was not ripe. The Delegation challenged those who said this to tell the Committee when the time would be ripe. The Delegation encouraged the participation of other international organizations. It concluded by quoting the Special Rapporteur of the Working Group on Indigenous Populations, Dr. Erica-Irene Daes, who had said in 1996 that “at present supplementary reports made clear parallel efforts to reach an international governmental consensus on protection of the heritage of indigenous people were underway in several different United Nations organs and specialized agencies. There was an obvious, urgent need for communication and coordination to ensure consistent and mutually reinforcing results”.⁵²³

Nigeria

“... reiterated the remark made by the Delegation of Burkina Faso in which the concerns of the African countries for the protection of TCEs predated the Stockholm revision of the Berne Convention. The African Working Group on Copyright had, in Brazzaville in 1963 (40 years ago), recommended that EoF be included in the list of works protected under the Berne Convention. Although Article 15.4 of the Berne Convention was supposed to respond to these concerns, it was clear that the revision failed to fully accommodate any of the concerns of TCEs holders. Therefore, the Delegation joined other delegations in asking when the issues would be considered mature for serious discussions beyond merely providing answers to a list of questions...⁵²⁴

⁵²³ WIPO/GRTKF/IC/11/15 Prov.

⁵²⁴ WIPO/GRTKF/IC/11/15 Prov.

Brazil

“... it was neither early nor premature to protect the rights of indigenous and traditional communities. Misappropriation was a pressing problem that required an urgent response. In fact, if nothing were to be done and if nothing were to be agreed on in the short term, the Delegation feared that it might be too late.”⁵²⁵

United States of America

“... a focused discussion on the promotion, preservation and protection of TCEs/EoF required a careful consideration of both the national and international aspects of the complex issues before the Committee. As it had noted earlier, the United States of America believed that the draft provisions were useful as background in informing a sustained discussion of the issues before the Committee, including the national and international aspects of these issues. However, it also wished to underscore its view, and the views of many other delegations, that extensive discussion of the draft provisions would not advance the Committee’s work and may have the unintended consequence of impeding the work. The United States of America further considered that discussion within the Committee should be informed by, not driven by, any particular possible outcome. The United States of America believed that, at this time, the Committee should concentrate its efforts on engaging in sustained, robust discussions of the fundamental issues before it.”⁵²⁶

Japan

“... any justifiable reasons for IP protection being extended to TCEs/EoF had not been clearly identified and sufficiently explained. Japan had a serious concern about establishing a new type of IP right or a *sui-generis* right for the protection of TCEs/EoF as well as about creating a legally binding international instrument that would obligate Member States to establish such a regime...”⁵²⁷

Canada

“... how the Committee addressed the list of issues should be dependent in large measure on the policy objectives identified. Once the objectives were determined, the Committee would be in a position to assess what issues should be addressed at the international level and what issues should be addressed at the domestic level. However, this would be a complex task...”⁵²⁸

⁵²⁵ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

⁵²⁶ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

⁵²⁷ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

⁵²⁸ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

Tunisia

“Currently no legal framework exists for the protection of traditional knowledge at the national level. The protection of traditional knowledge at the national level is essential, and the Code of Protection for the Archeological, Historical and Traditional Arts Heritage, enacted under Law No. 94-35 of February 24, 1994, and which relates essentially to sites and monuments, can be broadened to extend to traditional knowledge.

Agreements and charters between international organizations and States can be produced for the protection of traditional knowledge, similar to what is applied in the field of the built heritage or the environment.”⁵²⁹

Indonesia

“... this question required the Committee to justify the need for an international legally binding instrument and to explore the relationship of national legislation with an international instrument ...”⁵³⁰

National experiences and examples*Guatemala*

“Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98, WIPO/GRTKF/IC/2.

Article 18: temporary exhibitions. In order to hold temporary exhibitions of archaeological, ethnological and artistic objects outside the national territory, the exhibitor or manager shall submit its application to the Ministry of Culture and Sport, which shall contain the following:

- (a) name and general description of the activity;
- (b) duration of the activity, date of inauguration and of closure;
- (c) country, department, state or province in which the exhibition will be held;
- (d) institution, type of building, type of exhibitors, planned security measures, in which the exhibition will be held;
- (e) supervision: in order to guarantee the security of the objects included in the exhibition, these objects shall travel with at least one representative for each of the institutions responsible for the event, and where only one institution is involved they shall travel with a minimum of two persons who shall accompany the cultural property from the city or place of origin to the city where the activity will be held, as well as any change in headquarters. The setting-up and dismantling of the exhibition shall be supervised. The number of persons may vary if the institutions responsible consider it necessary, taking into account the value and size of the

⁵²⁹ WIPO/GRTKF/IC/11/4(a)

⁵³⁰ WIPO/GRTKF/IC/11/15 Prov.

- exhibits. Transportation costs, travel, accommodation and subsistence expenses resulting from what is covered by this section, shall be borne by the applicant;
- (f) The name of the person or institutions responsible for the exhibition;
 - (g) The agreement to obtain, before the cultural property is packaged, insurance against any possible risk in accordance with the valuation made by the dispatching institution.

Article 19. Guarantee agreement. Once an application has been received, a list with the description of the objects, their valuation and physical condition shall be drawn up. A copy of the technical sheet and the corresponding photograph of each object shall be attached, after being issued by the Registry of Cultural Property. Said document shall serve as a basis for the issue of the corresponding State guarantee agreement or insurance policy. The cultural property included in an exhibition may not be confiscated and the receiving country shall guarantee its protection and return.

Article 20. Acceptance. Following acceptance by the applicant institution and with the State agreement and/or insurance policy covering the designated value of the piece or collection, the general state of the museographical exhibits shall be specified, detailing any existing deterioration. The State or legal person concerned with the exhibition shall conclude an agreement with the Ministry of Culture and Sport of Guatemala, which shall regulate the procedures and conditions.

According to the case, the insurance policy or State guarantee agreement shall be received by the Ministry of Culture and Sport which, at the time the exhibits are delivered and received, shall make an official record that, where necessary, the corresponding claims shall be made. When the exhibition of the museographical exhibits ends, before the exhibits are packaged, a detailed record shall be produced of the state of each of the objects included in the exhibition, followed by their packaging and sealing prior to return.

Article 21. Exhibitions. In the case of traveling exhibitions these shall be governed by the same principles of this Law, with responsibility being placed on the country where the exhibits are temporarily displayed. The responsibility of the country and/or institution in which the display of the exhibits is concluded shall end when the country and/or institution in which it is held subsequently receives the exhibits officially.

Article 22. Final selection. Notwithstanding the request made by the country to the institution concerned, the Ministry of Culture and Sport shall have the right of final selection of the items which shall leave the country for the exhibition.

Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98.

Article 11. Exports. The permanent export of cultural property shall be prohibited. However, temporary export, up to a maximum period of three years, may be authorized in the following cases:

- (a) where exhibits will be displayed outside the national territory;
- (b) where they are the subject of scientific research or conservation and restoration duly supervised by the Directorate General of the Cultural and Natural Heritage.”⁵³¹

Creators’ Rights Alliance (CRA)

“... advised that the Indigenous Peoples Caucus of the CRA had a membership of 14 Indigenous Artists Organizations which represented some 10,000 indigenous artists and people in Canada. He stated that in Canada indigenous jurisprudence, knowledge and heritage were uniquely constitutionally protected as an Aboriginal and/or treaty right in Section 35 of the Constitution Act, 1982 and Section 25 in the Charter of Rights. The Charter was said also to recognize the constitutional and legal rights to Aboriginal heritage (s. 27), languages (s. 22) and education (s. 29). The representative added that the federal, provincial and territorial governments of Canada had not clearly claimed jurisdiction or ownership over indigenous knowledge in any public statement, policy or legislation. It therefore appeared to be an implied recognition that indigenous peoples had control and management of their knowledge systems. However, a concise legal affirmation that indigenous knowledge was an Aboriginal right under section 35(1) of the Constitution Act, 1982, was still required. Canada had also approached indigenous knowledge from a self-government perspective, in which it had been willing to negotiate indigenous knowledge as an implicit subject matter of self-government negotiations. The situation in Canada was that legal interpretation of TK and TCE rights was required by the introduction of test cases. This could work in conjunction with or separate from any legislative initiatives which could be taken by Canada to protect and/or regulate TCEs and TK. Canada had been apathetic with regard to taking any significant TK and/or TCE initiatives, he stated. It therefore seemed that legal processes would be necessary to accelerate any progress, as in Australia and New Zealand. Two key points were essential in the Canadian legal context. First, indigenous knowledge was an incidental right of each constitutionally protected Aboriginal and treaty right, and, second, Aboriginal rights, and corresponding Aboriginal TK-based rights, were collective not individual in nature. Canadian Aboriginal groups would use their constitutional and legal leverage to take a rights-based approach to their ownership, management, control and continuation of their knowledge systems. In the case of Cote vs. The Queen (1998), the Supreme Court of Canada had affirmed this as “to ensure the continuity of Aboriginal practices, customs and traditions, a substantive Aboriginal right would include an incidental right to teach such a practice, custom and tradition to a younger generation”. The Supreme Court of Canada had also affirmed customary laws as part of Aboriginal rights as said in Cote, and had stated that “Aboriginal and treaty rights could not be defined in a manner which would accord with common law concepts...Rather, they were the right of Aboriginal people in common with other Aboriginal people to participate in certain practices traditionally engaged in by particular Aboriginal nations in particular territories”. Aboriginal rights were collective rights held by members of the particular Aboriginal nation. Thus, the Supreme Court of Canada had recognized that the assertion of Crown sovereignty did not prohibit a continuing co-existence with Aboriginal customary law. The courts had also held that customary law was neither abrogated nor

⁵³¹ WIPO/GRTKF/IC/11/4(a)

derogated by provincial, territorial or federal law unless there was a “clear and plain” intention of the sovereign power by act of Parliament or legislature. More recently, the Haida case had affirmed Canada’s duty to consult Aboriginal peoples on matters affecting their rights. Nonetheless, there had been no meaningful consultation in Canada with indigenous peoples on matters of TK/TCEs. In the 11th session of the Committee, Canada had continued to make statements which the indigenous peoples in Canada would oppose. Examples were that “it was premature to discuss terms of protection and define TCEs.” In addition, three weeks before the Committee’s meeting the Delegation of Canada had announced to the indigenous representatives who had been attending the Committee that the Canadian Government was no longer providing funding for indigenous participation in the Committee’s process. The fact that misappropriations of TK/TCEs had continued in Canada showed that the *status quo* was far out of line with the legal reality. An example of misappropriation was the appropriated INUKSHUK symbol of the Vancouver 2010 Olympics Logo. Canada was also far behind the many countries mentioned in this forum who had taken steps to regulate and protect TK/TCEs. Canada had not expressed any policy on TK so far and had only made the following disjointed responses to the problem: a) the introduction of the Igloo Trademark in the 1960s that had now fallen out of usage; b) certain government agencies and departments had funded certain research projects related to TK; c) the National Gatherings on Indigenous Knowledge conducted in 2004-2005 (the Report of which was thus far unpublished and awaiting approval at the Prime Minister’s Office since 2005); and, d) the establishment of an inter-departmental committee. These ineffective or otherwise inactive measures were not sufficient to address the complex, salient issues and problems that had been addressed in the Committee and other forums and nation states. Canada had also consistently been among a few countries that opposed the advancement of TK protection, indigenous participation, and indigenous rights in general in the CBD, the WIPO Committee, and other international forums. It was the Delegation of Canada who first spoke against, and was the strongest opposition to, the proposal for increased indigenous participation in the CBD Third ABS Working Group in 2005. Canada had also been one of the delegations that sought to delay consideration of customary law and *sui generis* regimes and continued to have problems with the current TK and TCE documents and other initiatives in the WIPO Committee. Canada was also a leading delegation together with the Russian Federation to oppose the passage of the UN Declaration of the Rights of Indigenous Peoples at the first meeting of the new UN Human Rights Council in June 2006. In 2006, the current Canadian Government announced that it would not honor the Kelowna Accord, a historic agreement between the previous government and indigenous peoples (which had been years in the making) addressing issues of indigenous poverty, poor health and education, and lack of recognition of rights. For this and other reasons, indigenous peoples throughout Canada had organized a series of protest actions across the country that had begun with several blockades of major highways the previous week.”⁵³²

⁵³² WIPO/GRTKF/IC/11/15 Prov.

New Zealand

“... Obviously, there also had been concerns for misappropriation domestically and it had a substantial domestic process underway to address this. New Zealand’s experience had also shown that individuals and organizations from the international community who wished to use indigenous TCEs from New Zealand were often not aware of the customary laws and protocols applicable to such use. Some of those customary laws and protocols were common to a number of indigenous and local communities around the world. Domestically, New Zealand had experiences with the development of codes of ethics, guidelines and/or best practice mechanisms for users of TCEs and for policy makers as one way of ensuring a certain level of respect and appreciation for those customary laws and practices associated with the use of TK and TCEs. The Delegation expressed its willingness to share its experience with the Committee in the future if members felt that would be useful...”⁵³³

Hokotehi Moriori Trust

“... referred to the cigarette examples he had described before. One brand of cigarettes carried a label depicting a First Nations Chief in full feathered headdress and smoking a long peace pipe. Both the feathered headdress and peace pipe were classic TCEs of the First Nations people of the United States of America which explained the reference to “Natural American Spirit” on the packaging. The reference to “Spirit” was perhaps intended to evoke the sense of being associated with the “spirituality” experienced by First Nations people when they performed their peace pipe ceremonies. The pipe ceremony was yet another example of a TCE of these indigenous peoples that was being misappropriated. He offered the cigarettes as a contemporary case study of misappropriation of TCEs to the Delegation of the United States of America with the purpose that the Delegation might wish to discuss this matter with its indigenous First Nations peoples. The representative stated that it was not clear from the package that a trade mark or any other IP right was involved regarding the images used...”⁵³⁴

⁵³³ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

⁵³⁴ WIPO/GRTKF/IC/11/15 Prov.

- B. Comments on the distinction between international and national regulation: How do or should international and national regulation interact? Does international regulation precede national regulation or *vice versa*? Which issues should be dealt with internationally and/or nationally?

General comments

Qatar

- a. “Creating an agreement about the norms of what could be considered as misappropriation, misuse, etc... of TK.
- b. The difficulties of defining the subject matter, the strength and weakness of existing categories of protection.
- c. The issue of enforcement of norms relating to TK.”⁵³⁵

South Africa

“... We propose that mechanisms for enabling or facilitating notification or registration as the basis for recognising an IP right under national law and regional policy be taken into consideration. Hence we are of the view that the OAU Model law be tabled as a possible mechanism. We propose that the model law could be harmonised with the provisions in the IGC, so as to provide a more integrated scheme for recognition and protection of Indigenous and local communities’ intellectual property. If a system for community decision-making and financial returns is devised, it could also pave the way for greater economic, as well as cultural self reliance for these communities.”⁵³⁶

National regulation precedes international regulation

Japan

“... Before discussing ways of internationally addressing this issue, discussions should be conducted on what domestic solutions existed and where their limits lay, and the extent to which contracts and other issues were incapable of addressing this issue. Discussion based on factual information about what damage had been caused by what illegal acts was essential.”⁵³⁷

⁵³⁵ WIPO/GRTKF/IC/11/4(a)

⁵³⁶ WIPO/GRTKF/IC/11/4(a)

⁵³⁷ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

Canada

“... Canada believed that the domestic legal framework and concerns of Member States should guide the shape and direct the Committee’s discussions as to what issues, if any, should be addressed at the international level. In addition, discussions on any potential form of protection at the international level should reflect the particularities of each country and be consistent with its international obligations.”⁵³⁸

International Publishers Association (IPA)

“... Respect for the same principle [the principle of subsidiarity] also requires that international harmonisation should be the conclusion, not the precursor of the development of national regulation.”⁵³⁹

See also *New Zealand* below.

Issues that could be dealt with both internationally and nationally

Ghana

“Every issue concerning folklore should be dealt with at both the national and international levels especially where, the issue involves two or more different nationals or nations.”⁵⁴⁰

Ogiek Peoples Development Program (OPDP)

“... The issues to be dealt both nationally and internationally should be based on identification and promotion of good traditional practices and prohibits harmful behaviours that may expose these practices to danger.”⁵⁴¹

Interaction/relationship between international and national regulation/division of labor between international and national regulation

International Publishers Association (IPA)

“The principle of subsidiarity requires that only those tasks should be performed at international level which cannot be performed effectively at a more immediate or local level...”⁵⁴²

⁵³⁸ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

⁵³⁹ WIPO/GRTKF/IC/11/4(a)

⁵⁴⁰ WIPO/GRTKF/IC/11/4(a)

⁵⁴¹ WIPO/GRTKF/IC/11/4(a)

⁵⁴² WIPO/GRTKF/IC/11/4(a)

Ogiek Peoples Development Program (OPDP)

“... The policy development internationally should be regulated/ domesticated nationally, hence foreign right holders have to adhere within different jurisdictions.”⁵⁴³

India

“... These provisions could be structured flexibly so that the national regulations could take care of the diversity of the problems while implementing the international obligations. The manner in which the obligations were implemented should be left to the discretion of national regulation.”⁵⁴⁴

Algeria on behalf of the African Group [this extraction also appears elsewhere]

“... WIPO had the responsibility to develop an international framework of norms and standards leading to a legally binding international instrument. With respect of the multicultural and trans-national nature of TCEs, it was the Group’s view that Member States would concurrently develop appropriate national legal frameworks to protect and promote TCEs.”⁵⁴⁵

Indonesia

“... underlined that the international legally binding instrument should establish a minimum standard of protection which would not prohibit national legislation from having tighter protection.”⁵⁴⁶

China

“... there were many acts of infringement of TCEs, especially cross-border. This fact was also mentioned by the Delegation of South Africa. .. it was clear that national legislation would not be enough. If these issues could be settled by national legislation, it would not be necessary for the Committee to meet. The Delegation fully supported the intervention by the Delegation of Algeria speaking on behalf of the African Group. As for the protection of TCEs, the Delegation believed that there were two approaches, the first one being “bottom-up.” This referred to having national legislation first and, once the national legislation had become mature, the international dimension would then be considered. However, this approach would not be able to satisfy the needs at present since modern technology made cross-border infringement acts more prevalent. The other method was “top-down”, which appealed to a lot of people. This referred to the wish to have an internationally binding instrument which could give guidance to the national legislations and, at the same time, settle questions at the international level. Therefore, the Delegation supported the different interventions made, which included

⁵⁴³ WIPO/GRTKF/IC/11/4(a)

⁵⁴⁴ WIPO/GRTKF/IC/11/15 Prov.

⁵⁴⁵ WIPO/GRTKF/IC/11/15 Prov.

⁵⁴⁶ WIPO/GRTKF/IC/11/15 Prov.

that of the Delegation of Brazil. The Delegation expressed its hope that all sides would hold a positive and constructive attitude in the discussion. The Delegation shared a Chinese expression which was to seek common ground and put aside differences. It therefore hoped that the Committee would find its common ground.”⁵⁴⁷

Australia

“... while noting that no outcome was excluded from the work of the Committee, it favored solutions to particular issues, if they were needed, to be in the form of non-binding mechanisms as this provided for greater flexibility and choice of implementation at the national level.”⁵⁴⁸

Nicaragua

“... agreed with the Delegation of Brazil with respect to the flexibility in national legislation and the introduction of an element of PIC by the communities concerned...”⁵⁴⁹

Hokotehi Moriori Trust

“... unless there was some mechanism in place already to protect TCEs in this context, a process and appropriate mechanisms at both the national and international level would be necessary to deal with these situations which were increasing every year. This was clearly an area where a *sui generis* system, including legal and customary protocols, operating within the national country concerned to protect against this form of misappropriation, supported by cross border legal mechanisms and sanctions and an over arching international regime, would be necessary to provide for issues of PIC, access and benefit sharing and appropriate sanctions where necessary...”⁵⁵⁰

United States of America

“... Further, it should be recognized that all issues raised in the IGC are being dealt with internationally even if the result of the international deliberations would be for agreed actions to be taken at the national level.”⁵⁵¹

Brazil

“... There was a need to provide for core elements and to set forth a minimum standard of protection. However, the Delegation understood that there was a need for setting aside some flexibility for national legislations...”⁵⁵²

⁵⁴⁷ WIPO/GRTKF/IC/11/15 Prov.

⁵⁴⁸ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

⁵⁴⁹ WIPO/GRTKF/IC/11/15 Prov.

⁵⁵⁰ WIPO/GRTKF/IC/11/15 Prov.

⁵⁵¹ WIPO/GRTKF/IC/11/4(a)

⁵⁵² WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

Norway

“... considered without prejudice to the nature of any instrument, that there were core elements that should be dealt with on the international level, thus, providing a minimum standard. Nevertheless, the need for flexibility should also be recognized and appropriately addressed.”⁵⁵³

“... One system of protection does not necessarily fit all and different concerns locally or related to the specific subject matter should also be taken into account.”⁵⁵⁴

Mexico

“... considered it desirable that protection be granted to TCEs/EoF internationally to be in line with or directed towards the protection granted to such expressions at the national level. However, it was important to retain a degree of flexibility allowing the cultural diversity of these expressions to be taken into account.”⁵⁵⁵

“It is considered that the protection that must be granted to traditional cultural expressions/expressions of folklore at the international level (within WIPO) should coincide with the intellectual property protection granted to such expressions at the national level, so that this protection complements the protection provided for in other international conventions and national laws, thus avoiding the duplication of unnecessary efforts and resources.”⁵⁵⁶

New Zealand

“... it was also important to retain flexibility for countries to develop solutions and mechanisms appropriate to their own unique characteristics and circumstances. While the development of *sui generis* systems at the international level was an objective that some States supported, this should not preclude the development of country or region-specific alternative approaches to protecting the knowledge and practices of indigenous communities. This was particularly important given the “culturally distinctive” nature of TCEs, and the possibility of other domestic legal sources of rights in relation to TCEs that could need to be taken into account such as, indigenous and human rights and the Treaty of Waitangi. However, the Delegation was still considering whether there was a need for measures, legal or otherwise, to achieve extra territorial protection of TCEs and their holders. An examination of facts and case studies would be important in this assessment. Part of New Zealand’s domestic assessment included (i) measures to prevent the misappropriation, misuse, and misrepresentation of TCEs accessed from the public domain, such as cross-state sources and the internet; (ii) measures to ensure that reasonable attempts were made to identify the origin of TCEs and their holders prior to

⁵⁵³ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

⁵⁵⁴ WIPO/GRTKF/IC/11/4(a)

⁵⁵⁵ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

⁵⁵⁶ WIPO/GRTKF/IC/11/4(a) Add.

using them; and (iii) measures to ensure proper attribution of IP rights in relation to TCEs, and recognition of the contribution that TCEs would make to innovation and creative endeavors; fair negotiation of access to TCEs and ownership of any IP rights that could emerge from their use; and equitable sharing of benefits flowing from the use of TCEs in the context of the IP system...”⁵⁵⁷

“... An international instrument, while facilitating protection of New Zealand TK and TCEs in other countries, may limit the ability of New Zealand to tailor its protection system to suit the particular domestic circumstances, as the instrument will need to be acceptable to and appropriate for groups in the rest of the World. In the Waitangi Tribunal claim WAI 262⁵⁵⁸, the Ngāti Kuri, Ngāti Wai and Te Rarawa claimants (three Māori tribal entities from the Northern portion of New Zealand) submitted that:

“While there are efforts being made at the international level such as the World Intellectual Property Organisation (WIPO), to develop policies and guidelines for protection of traditional knowledge this is occurring within and thus subject to, the existing IPR system. New Zealand has a unique opportunity to develop a new and innovative system that draws from both tikanga Māori (Māori protocol and values) and tikanga Pakeha (Western protocol and values) systems to create a new and innovative system of protection. ... Such a framework would have tikanga Māori (Māori protocol and values) as a starting point and would provide more protection for Māori whilst providing greater certainty for non-Māori who wish to access mātauranga (Māori knowledge) or work collaboratively with Māori in research and development of indigenous flora and fauna.”...⁵⁵⁹

Reasons give for /need for international instrument

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

“We consider that in order to focus appropriately on the protection under consideration, there is no more effective formula than the drawing-up of an international treaty to which the majority of Member States could sign up. Once this international treaty has been prepared, it would be necessary to complement or establish original legal protection for traditional cultural expressions. Since there is virtually no national rule on the subject, it is difficult to determine it at the national level.”⁵⁶⁰

⁵⁵⁷ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

⁵⁵⁸ [Note by Secretariat: original footnote in comment] The Waitangi Tribunal is a statutorily created commission of inquiry mandated to look into and report on claims of breach of the Treaty of Waitangi, the founding document of New Zealand. Claimants in the WAI 262 claim, also known as the Fauna and Flora claim, have raised concerns in relation to IPRs and the protection of mātauranga Māori.

⁵⁵⁹ WIPO/GRTKF/IC/11/4(a) Add.

⁵⁶⁰ WIPO/GRTKF/IC/11/4(a)

Kyrgyzstan

“Problems: imperfection of the national legislation in this field, lack of traditional cultural expressions (folklore) protection system as such etc. It is presumed that at international level there will be unified approach in solution of common tasks in order to protect traditional cultural expressions (folklore).”⁵⁶¹

Algeria

“... some countries were not keen on having an international instrument in such an important area. An international instrument for the protection of TCEs would, however, help the Committee to draft legislation nationally and determine national procedures, reciprocity, penalties for illegal actions, and border measures, such as those called for by the WTO through TRIPS. On the other hand, the Delegation wondered that should only national legislation prevail, on what basis national countries would legislate? It also wondered how those issues should be dealt with at the international level should particular problems concerning two or more countries occur? ... It also acknowledged that country experiences were very valuable. However, as this was the eleventh session of the Committee, the Delegation felt that the Committee should speed up its work and reach a consensus so as to draft an international instrument and provisions for countries to develop their own national provisions.”⁵⁶²

Algeria on behalf of the African Group [this extraction also appears elsewhere]

“... protection of TCEs was far from a purely national issue. According the Group, WIPO had the responsibility to develop an international framework of norms and standards leading to a legally binding international instrument...”⁵⁶³

Nicaragua

“... the protection of TK in its broadest sense was crucial if one was to prevent misappropriation of these very vital pieces of knowledge. Such protection was not premature. The Delegation believed that it was crucial to have a binding instrument at international level and that illegal acts should be punished... Finally, the Delegation felt that the current IP system contained only a commercial element and that it was, therefore, necessary to create a *sui generis* instrument with the view to effectively protect TCEs and TK.”⁵⁶⁴

⁵⁶¹ WIPO/GRTKF/IC/11/4(a)

⁵⁶² WIPO/GRTKF/IC/11/15 Prov.

⁵⁶³ WIPO/GRTKF/IC/11/15 Prov.

⁵⁶⁴ WIPO/GRTKF/IC/11/15 Prov.

Nigeria

“... There were various national laws for the protection of TCEs, but these did not adequately cover the concerns for cross-border uses and exploitations. Considering that global integration had created a global village in which matters of rights were now so common place, it observed that action was required, like in so many other areas, to protect TCEs and create a protection zone for the value and the originality of products whether they were modern or whether they came from traditional communities. For this reason, action was needed for the protection of TCEs at the international level.”⁵⁶⁵

Morocco

“... reiterated the importance of the international dimension of protection for TCEs/EoF and expressed its concern for illegal use. The Delegation reiterated that there was a need for a binding international instrument for setting the rules and governing use of this cultural wealth. National rules were not enough as these did not go beyond the borders of the country concerned. Protecting such expressions at the national level was necessary, something the Moroccan Government had accomplished in the last few years. The country’s legislation dealt with licenses for the use of TCEs/EoF, it set up a system of compensation in cases of violations and illegal use, and sanctions running from fines to imprisonments were in place. National legislation was, however, limited to the local regions. The use of TCEs could be found in audio-visual productions throughout the world. For example, it would be possible to see TCEs/EoF through satellite broadcasts, television broadcasts and in cinemas. The Delegation expressed its concerns for these uses and exploitations of TCEs/EoF and, therefore, it felt that the Committee should find suitable international means of protection, which would contain rules applicable at international level. The Committee should take into account the existing international standards with respect to national treatment and most favored nation status at the international level. The Delegation believed that there was a strong need for rules governing the protection of TCEs in a balanced and suitable way.”⁵⁶⁶

South Africa

“... joined other delegations in consistently calling on the Committee to work towards building a consensus on the necessity for developing an international legally binding instrument. It was convinced that the work of protecting indigenous knowledge went beyond national responsibility and, consequently, called for an international legally binding instrument. The Delegation noted that there was a growing consensus across many delegations concerning the need for appropriate, balanced and just measures for the protection of TCEs. It described the well-known case involving the song “The Lion Sleeps Tonight” to illustrate the need for national, regional and international protection of TCEs.”⁵⁶⁷

⁵⁶⁵ WIPO/GRTKF/IC/11/15 Prov.

⁵⁶⁶ WIPO/GRTKF/IC/11/15 Prov.

⁵⁶⁷ WIPO/GRTKF/IC/11/15 Prov.

India

“... the protection of TCEs/EoF needed to be tackled at the international level in order to be effective. This was why the Delegation believed that there was a need for a legally binding international instrument on the subject.”⁵⁶⁸

Libya

“... supported the statement made by the Delegation of Algeria on behalf of the African Group as it believed that it already reflected all the concerns of the Group. The Delegation commented that (1) the Committee had already held more than 10 sessions so far; (2) WIPO had deployed major efforts from the first session on; and, (3) that the Member States had participated actively. It acknowledged the progress made by the Committee with respect to IP and the protection of TK and TCEs. The results the Committee had achieved were to reform the need to look at these matters in greater detail. Libya placed greater importance on TCEs as it believed that these were part of humanity’s heritage. The Delegation felt that TCEs should faithfully be passed on to the next generation. It also felt that it was necessary to disseminate these TCEs. A national centre for TCEs had already been set up, which was one of the very few centres in the Arab world that protected and preserved non-tangible expressions. The Delegation felt that it should safeguard these since they were part of the very authenticity of peoples. Some countries did not have legislation and measures to protect their TCEs and the marketing thereof. For that reason, the Delegation felt that it was vital to have an international instrument and that there was a need to transmit local TCEs as to make them available to the rest of the world as part of the world’s heritage. The Delegation believed that the Committee should look at all of these matters quite effectively. It concluded that a legally binding international instrument would require the Committee to be aware of the need for such an instrument in order to protect all IP rights. It believed that if countries were not aware of the need to protect IP, it would not be possible to achieve an international instrument which would enable the Member States to achieve their objectives and would not allow communities to achieve the necessary progress in this field.”⁵⁶⁹

Arts Law Centre of Australia

“... an international treaty which was binding on signatories should be a fundamental goal for the protection of TCEs. Providing the means of enforcement across States was important given that in Australia, for example, there was widespread infringement of the TCEs of indigenous Australians through extensive importation of “Aboriginal-style” arts and crafts which were sold on the tourist market without any involvement of, or benefit to, the indigenous peoples. As long as the work did not breach the Australian national consumer protection laws or copyright laws, there was no prohibition on such

⁵⁶⁸ WIPO/GRTKF/IC/11/15 Prov.

⁵⁶⁹ WIPO/GRTKF/IC/11/15 Prov.

behavior. An international treaty would, therefore, provide a useful framework to develop an adequate system of national legislation.”⁵⁷⁰

Regional and bilateral agreements

Hokotehi Moriori Trust

“... members countries could, in addition to a robust binding international regime, include protective clauses for TCEs in bilateral and multilateral trade agreements with each other. In FTAs with some Pacific Island countries, New Zealand had included provisions that preserved rights of Maori under the Treaty of Waitangi.”⁵⁷¹

Indonesia

“... In addition to this, regional instruments could also be an effective way of addressing those issues.”⁵⁷²

Coordination with other international instruments and forums

South Africa

“... there needs to be coordination and clarification of linkages with the other elements of other international protocols and conventions...”⁵⁷³

Australia

“... consultation and cooperation with other international forums should inform the Committee’s work. This was important to ensure that any approach adopted was consistent with relevant provisions of existing international instruments.”⁵⁷⁴

⁵⁷⁰ WIPO/GRTKF/IC/11/4(a) Add. 2 and WIPO/GRTKF/IC/11/15 Prov.

⁵⁷¹ WIPO/GRTKF/IC/11/15 Prov.

⁵⁷² WIPO/GRTKF/IC/11/15 Prov.

⁵⁷³ WIPO/GRTKF/IC/11/4(a)

⁵⁷⁴ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

C. Which issues have specifically been identified as suitable for national level regulation? What is the function of national regulation?

Russian Association of Indigenous Peoples of the North (RAIPON)

“... at national level – protection mechanisms.”⁵⁷⁵

Russian Federation

“The issues of preservation and dissemination of folklore should be dealt with at a national level...”⁵⁷⁶

Ethiopia

“... Governments, through their national laws, should work toward greater attention being paid to the preservation, conservation, documentation, development and legal protection of TK and TCEs/EoF...”⁵⁷⁷

Saudi Arabia

“... Hence, use of such expressions should be dealt with at both national and regional levels.”⁵⁷⁸

Indonesia

“... The national legislation could regulate the owners of TCEs/EoF and their utilization, but, in fact, national legislation could not address all the issues in a comprehensive manner, such as the issues of territoriality, globalization and the international commercialization of TCEs/EoF, as well as the appropriate recognition of foreign right holders...”⁵⁷⁹

Brazil

“... However, national legislations should be entitled to provide for, *inter alia*: (1) rules on benefit-sharing; (2) management of rights relating to TCEs/EoF; and, (3) specific sanctions applying in cases of misappropriation...”⁵⁸⁰

⁵⁷⁵ WIPO/GRTKF/IC/11/4(a)

⁵⁷⁶ WIPO/GRTKF/IC/11/4(a)

⁵⁷⁷ WIPO/GRTKF/IC/11/15 Prov.

⁵⁷⁸ WIPO/GRTKF/IC/11/15 Prov.

⁵⁷⁹ WIPO/GRTKF/IC/11/15 Prov.

⁵⁸⁰ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

D. Which issues should be dealt with at the international level? What is the function of international regulation?

Russian Association of Indigenous Peoples of the North (RAIPON)

“At international level general principles should be examined (see paragraph 5)...”⁵⁸¹

Russian Federation

“... and the issues concerning cultural exchange may be treated at the international level.”⁵⁸²

Ethiopia

“... The Delegation held the view that the protection and treatment of foreign nationals was just one element of the international dimension of the outcome it wished to see emerge from the Committee’s work. It believed that issues such as national treatment, assimilation and fair and equitable treatment should form part of an international regime. However, the same text the Committee was discussing could form part of the international regime that the Delegation wished to see...”⁵⁸³

Saudi Arabia

“... these legal problems should be dealt with internationally but with respect to documentation of TCEs and their protection...”⁵⁸⁴

India

“... The international regulation should address the scope, object and nature of protection of TCEs/EoF...”⁵⁸⁵

Indonesia

“... the international system would also deal with disputes and enforcement, on one hand, and, on the other, the international instrument would also offer positive protection, which was required to address cross boundary issues...”⁵⁸⁶

⁵⁸¹ WIPO/GRTKF/IC/11/4(a)

⁵⁸² WIPO/GRTKF/IC/11/4(a)

⁵⁸³ WIPO/GRTKF/IC/11/15 Prov.

⁵⁸⁴ WIPO/GRTKF/IC/11/15 Prov.

⁵⁸⁵ WIPO/GRTKF/IC/11/15 Prov.

⁵⁸⁶ WIPO/GRTKF/IC/11/15 Prov.

China

“... at the international level the cross-border protection of TCEs/EoF should be coordinated.”⁵⁸⁷

Brazil

“... an international instrument was required to address the problem of the misappropriation of TCEs/EoF. The international instrument should afford the same treatment as nationals or treatment no less favorable ... Accordingly, minimum rules should be set out at the international level, such as: (i) the requirement that use of TCEs/EoF should be conditional upon PIC; (ii) recognition of rights over TCEs/EoF to the communities they were related to; and, (iii) ways and means to protect such rights...”⁵⁸⁸

“... (ii) reference of cases that may represent acts of misappropriation; ...”⁵⁸⁹

New Zealand

“... it was important to note that any protection that was provided in New Zealand for TCEs did not extend to other States, unless provided for in international bilateral or multilateral instruments. The New Zealand experience had shown that numerous incidents of misappropriation, misuse, and misrepresentation of TCEs had occurred outside New Zealand and, for this reason, it was interested in exploring the international dimension of protection of TCEs ... The international concepts of reciprocity, national treatment, and most favored nation status were concepts that needed to be considered when analyzing international relationships relating to the use of TCEs across state borders.”⁵⁹⁰

“... protection of TK and TCEs is needed at an international level in order to provide Members States and its citizens with recourse mechanisms to prevent such misappropriation, misuse, and misrepresentation from occurring outside of the source country...”⁵⁹¹

⁵⁸⁷ WIPO/GRTKF/IC/11/4(a).

⁵⁸⁸ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

⁵⁸⁹ WIPO/GRTKF/IC/11/4(a).

⁵⁹⁰ WIPO/GRTKF/IC/11/4(a) Add. and WIPO/GRTKF/IC/11/15 Prov.

⁵⁹¹ WIPO/GRTKF/IC/11/4(a) Add.

E. What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?

Colombia

“We support what is stated on this subject in the proposed Article 11 of the substantive provisions contained in documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/10/4.”⁵⁹²

Brazil

“... The draft provision in Article 11 of WIPO/GRTKF/IC/11/4 represented a mature and adequate basis for discussion...”⁵⁹³

Ethiopia

“... supported the statement to be made by the Delegation of Algeria speaking on behalf of the African Group. The inclusion of international protection in the texts before the Committee was remarkable yet the provisions needed to take into account a number of elements. First, Article 14 of WIPO/GRTKF/IC/11/5(c), for example, did not mention the division of labor that should exist between the international regime and the national or domestic system. Second, this Article made reference to what it called “international standards” yet it did not define the nature and component of these standards. The commentary in relation to that Article stated that “an essential element of addressing this dimension was to establish standards of treatment which would apply to foreign nationals in respect of the protection of TK”...”⁵⁹⁴

Algeria

“... acknowledged the provisions contained on this question in WIPO/GRTKF/IC/11/4 (c)...”⁵⁹⁵

Saudi Arabia

“... the regional dimension, in addition to the national and international dimension, with respect to the protection of TCEs should be added to the Article related to this issue because many of these expressions belonged to neighboring States, especially States that were geographically close together...”⁵⁹⁶

⁵⁹² WIPO/GRTKF/IC/11/4(a)

⁵⁹³ WIPO/GRTKF/IC/11/4(a) and WIPO/GRTKF/IC/11/15 Prov.

⁵⁹⁴ WIPO/GRTKF/IC/11/15 Prov.

⁵⁹⁵ WIPO/GRTKF/IC/11/15 Prov.

⁵⁹⁶ WIPO/GRTKF/IC/11/15 Prov.

Nigeria

“... The Delegation referred to paragraphs 22 and 23 of WIPO/GRTKF/IC/2/8. It considered WIPO/GRTKF/IC/2/8 to contain an accurate account of past efforts, 20 years ago, to extend the protection of folklore beyond the borders of the countries from which it was derived. The Delegation quoted paragraph 23 of WIPO/GRTKF/IC/2/8 in which it was stated that “the great majority of the participants considered that it was premature to establish an international treaty since there was not sufficient experience available as regard to the protection of EoF at the national level” ...”⁵⁹⁷

⁵⁹⁷ WIPO/GRTKF/IC/11/15 Prov.

ISSUE X: HOW SHOULD FOREIGN RIGHTS HOLDERS/BENEFICIARIES BE TREATED

Introductory note by the Secretariat

The written comments and oral interventions on this Issue have been clustered as follows:

- (A) General comments: What does this Issue mean? Which considerations apply when discussing it? How should it be resolved?
- (B) Specific comments: Should foreigners and nationals be treated equally? If so, according to which principle (for example, national treatment and/or reciprocity and/or mutual recognition)?
- (C) What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?

A. General comments: What does this Issue mean? Which considerations apply when discussing it? How should it be resolved?

Japan

“... Treatment of foreign rights holders and beneficiaries would therefore depend on the type of protection TCEs would be granted and the corresponding international regulations.”⁵⁹⁸

Canada

“Should future work of the Committee focus on foreign rights holders or beneficiaries, it should be guided by the overarching principle of consistency with international obligations of Member States.”⁵⁹⁹

Sudan

“... indigenous peoples were entitled to protection under an international instrument that would recognize their rights as a historical heritage and a source of pride. It was only an objective moral duty that such rights were protected from mutilation and distortion, and the resulting material income to be used for monitoring, support and development purposes. The Delegation suggested that any exploitation of folkloric expressions be subject to indicating the geographical and human origin, and obtaining the prior consent of the initial right holder.”⁶⁰⁰

Kyrgyzstan

“It is presumed that rights of foreign holders of traditional cultural expressions (folklore) would be provided pursuant to legislation of respective country.”⁶⁰¹

South Africa

“At the international level there is significant level of support for opposing the granting of patents on non-original inventions. For example, more than a dozen organizations from around the world got together to oppose the EPO Neem patent and the entire process took five years. However, South Africa takes note that the current process of opposition is, however, extremely expensive and time consuming. A recent suggestion by the USPTO provides a rational approach to solve these problems. International instrumentations should take into consideration past abuse as well as the vulnerability of

⁵⁹⁸ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a).

⁵⁹⁹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

⁶⁰⁰ WIPO/GRTKF/IC/11/15 Prov.

⁶⁰¹ WIPO/GRTKF/IC/11/4(a)

the communities and should seek to elevate the rights of communities over the rights of multinational consortiums.”⁶⁰²

Guatemala

“Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98.

Article 65. Conclusion of agreements. The Government of Guatemala shall conclude with the foreign governments it deems appropriate bilateral and regional agreements in order to avoid the unlawful trafficking of the cultural property of the contracting countries.

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO/GRTKF/IC/2.

Protection of expressions of foreign folklore. The expressions of folklore developed and perpetuated in a foreign country shall be protected:

- (h) subject to the reservation of reciprocity, or
- (i) on the basis of treaties and other agreements.”⁶⁰³

Ghana

“Nothing in this convention may be interpreted as altering the status or diminishing the level of protection under any convention affecting the rights and obligations of states parties deriving from international instruments relating to intellectual property rights or to the use of biological and ecological resources to which they are parties...”⁶⁰⁴

Japan

“... no justifiable reasons why IP protection should be extended to folklore had been clearly identified and sufficiently explained. Japan had a serious concern as to establishing a new type of IP right or a *sui generis* right for the protection of TCEs, as well as on creating a legally binding international instrument that would obligate Member States to establish such a regime...”⁶⁰⁵

⁶⁰² WIPO/GRTKF/IC/11/4(a)

⁶⁰³ WIPO/GRTKF/IC/11/4(a)

⁶⁰⁴ WIPO/GRTKF/IC/11/4(a)

⁶⁰⁵ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

Canada

“... discussions on the treatment of foreign rights holders or beneficiaries should take place after the Committee had identified the objectives and the intended beneficiaries...”⁶⁰⁶

Australia

“... further work was needed to determine how foreign nationals should be treated. Principles such as the level of protection or criteria for protection needed to be determined before more specific issues concerning the rights of foreign holders/beneficiaries could be addressed...”⁶⁰⁷

United States of America

“... it would not be helpful at this time for the Committee to undertake a focused discussion of the treatment of foreign rights holders/beneficiaries ... one of the guiding principles extensively discussed within the Committee was respect for relevant international agreements. It understood this principle to include the fundamental principle of national treatment, or non-discrimination with respect to foreign rights holders. In its view, this bedrock principle of international IP law should continue to inform the spirit of discussions within the Committee.”⁶⁰⁸

New Zealand

“... referred to its response to Issue 9 as part of its response to Issue 10. As stated, it was still considering whether there was a need for measures (legal or otherwise) to achieve extra territorial protection of TCEs and their holders. It had not yet undertaken an in-depth analysis of the potential implications of this issue ... However, some obligations in relation to TCEs could originate from domestic non-IP sources of law, such as any recognized indigenous rights contained in the Treaty of Waitangi. Those unique and exclusive rights should not have to be reciprocal, unless agreed by Member States ... The Delegation concluded that the exercise of delving deeper into the substance of the key issues associated with the protection of TK and TCEs had been a constructive step on which the Committee should expand.”⁶⁰⁹

⁶⁰⁶ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

⁶⁰⁷ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

⁶⁰⁸ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

⁶⁰⁹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(A) Add.

Algeria on behalf of the African Group

“... The Group also called upon the Secretariat to compile a comprehensive matrix that would identify areas of common ground and divergences in which this matrix could then form the basis for further deliberations on WIPO/GRTKF/IC/11/4 and WIPO/GRTKF/IC/11/5.”⁶¹⁰

<p>B. Specific comments: Should foreigners and nationals be treated equally? If so, according to which principle (for example, national treatment and/or reciprocity and/or mutual recognition)?</p>
--

Equal treatment: general comments

International Publishers Association (IPA)

“All beneficiaries should be treated equally.”⁶¹¹

Ghana

“... Foreign right holders/beneficiaries should be given equal treatment.”⁶¹²

Qatar

“The same treatment of native beneficiaries.”⁶¹³

Egypt

“... believed that with respect to beneficiaries, it felt that there should be no difference between nationals and foreigners because it did not wish to be accused of chauvinism or of wishing to limit benefit. In other words, the Delegation was of the view that TCEs were part of humanity heritage and humanity as a whole should be able to benefit from the full heritage of the indigenous and local communities. The Delegation stated that these communities were the owners of TK, GR and TCEs. The communities were therefore entitled to benefit therefrom. However, as it stated earlier, these TCEs were part of the heritage of all humanity and all humanity should have the right to enjoy it. Therefore, the Delegation reiterated that the Committee should not distinguish between a national and a foreigner in this area.”⁶¹⁴

⁶¹⁰ WIPO/GRTKF/IC/11/15 Prov.

⁶¹¹ WIPO/GRTKF/IC/11/4(a)

⁶¹² WIPO/GRTKF/IC/11/4(a)

⁶¹³ WIPO/GRTKF/IC/11/4(a)

⁶¹⁴ WIPO/GRTKF/IC/11/15 Prov.

Nigeria

“... the provisions of the international instrument, which was the expected outcome of the work of the Committee, should as much as possible accord the same treatment to local and foreign right holders and beneficiaries without derogating from existing international instruments...”⁶¹⁵

Reciprocity

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

“In exactly the same way as nationals, with the establishment of appropriate systems of reciprocity...”⁶¹⁶

National treatment

Brazil

“...an international instrument was required to address the problems of misappropriation of TCEs. This international instrument should afford the same treatment to foreigners as nationals or treatment on no less favourable terms...”⁶¹⁷

New Zealand

“... The comments received by New Zealand to date from stakeholders indicated that if it were to provide protection for TCEs originating from New Zealand, the same protection should be extended to TCEs originating from other States, if they so chose ... From New Zealand’s experience to date, the protection should apply to all foreign TCEs, not only those which came from countries that provided protection to New Zealand TCEs; and New Zealand rights holders should receive the same treatment in other countries...”⁶¹⁸

Mexico

“...in view of the fact that both the Federal Copyright Law of Mexico and the Berne Convention provided for the principle of national treatment, it was considered that foreign rights holders should enjoy the same rights as nationals...”⁶¹⁹

⁶¹⁵ WIPO/GRTKF/IC/11/15 Prov.

⁶¹⁶ WIPO/GRTKF/IC/11/4(a)

⁶¹⁷ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a)

⁶¹⁸ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

⁶¹⁹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

Arts Law Centre

“Principle of national treatment should be applied...”⁶²⁰

Nicaragua

“National treatment (without discrimination).”⁶²¹

Indonesia

“... the protection, benefits and advantages available to TCE holders under national legislations, that gave effects to these international standards, should be made available to all eligible TCE holders, whose nationals or habitual residence of a prescribed country was defined by international obligations or undertakings ... In concluding, the Delegation believed that the national treatment principle with agreed mutual recognition was an acceptable principle and it believed that an international legally binding instrument was necessary to ensure the implementation of this national treatment principle.”⁶²²

Russian Federation

“... foreign rightholders/ beneficiaries should be accorded similar treatment as own national, i.e. national treatment”⁶²³

India

“... the rights and benefits arising from the protection of TCEs under national measures or laws, which would give effect to international agreements, should be available to all eligible beneficiaries who were nationals or habitual residents of a prescribed country as defined by international agreements. Eligible foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who were nationals of the country of protection, as well as the rights and benefits specifically granted by the international instruments.”⁶²⁴

Australia

“... noted that one of the fundamental principles of existing international IP agreements was the principle of “national treatment”. It believed that consideration of this principle should be the basis for further discussion of this issue.”⁶²⁵

⁶²⁰ WIPO/GRTKF/IC/11/4(a) Add. 2

⁶²¹ WIPO/GRTKF/IC/11/4(a) Add.

⁶²² WIPO/GRTKF/IC/11/15 Prov.

⁶²³ WIPO/GRTKF/IC/11/4(a)

⁶²⁴ WIPO/GRTKF/IC/11/15 Prov.

⁶²⁵ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

United States of America

“... It noted, however, that one of the guiding principles extensively discussed within the Committee was respect for relevant international agreements. It understood this principle to include the fundamental principle of national treatment, or non-discrimination with respect to foreign rights holders. In its view, this bedrock principle of international IP law should continue to inform the spirit of discussions within the Committee.”⁶²⁶

National treatment and/or reciprocity

Algeria on behalf of the African Group

“... foreign right holders/beneficiaries should be treated in the same way as the local beneficiaries according to the principles of national treatment or reciprocity. In view of the special nature of TCEs, the Group was of the view that the application of the principle of national treatment for TCEs should be given further consideration...”⁶²⁷

China

“We hold that the principles of national treatment and reciprocity should be applied.”⁶²⁸

Norway

“With regard to the custodian’s economic and moral rights, as provided for in accordance with the proposed recommendation set out in document WIPO/GRTKF/IC/9/12 paragraph 38 national treatment and MFN should be granted, with the possibility for reciprocity provisions.”⁶²⁹

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

“In exactly the same way as nationals, with the establishment of appropriate systems of reciprocity. In other words, the principle of national treatment should apply.”⁶³⁰

Yemen

“... foreigners should enjoy national treatment on basis of reciprocity.”⁶³¹

⁶²⁶ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a).

⁶²⁷ WIPO/GRTKF/IC/11/15 Prov.

⁶²⁸ WIPO/GRTKF/IC/11/4(a)

⁶²⁹ WIPO/GRTKF/IC/11/4(a)

⁶³⁰ WIPO/GRTKF/IC/11/4(a)

⁶³¹ WIPO/GRTKF/IC/11/15 Prov.

National treatment and mutual recognition

Indonesia

“... the national treatment principle with agreed mutual recognition was an acceptable principle and it believed that an international legally binding instrument was necessary to ensure the implementation of this national treatment principle.”⁶³²

Foreigners cannot be owners or beneficiaries of rights

Tunisia

“The right of ownership of traditional knowledge is linked to the community and the nation, and territoriality is therefore an important element. Foreign nationals cannot be owners or beneficiaries of rights.”⁶³³

<p>C. What comments are there, if any, on the draft provision dealing with this issue in WIPO/GRTKF/IC/12/4(c) or earlier versions of this document (such as WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/11/4(c))?</p>
--

Norway

“With regard to the custodian’s economic and moral rights, as provided for in accordance with the proposed recommendation set out in document WIPO/GRTKF/IC/9/12 paragraph 38 national treatment and MFN should be granted, with the possibility for reciprocity provisions.”⁶³⁴

Colombia

“We support what is stated on this subject in the proposed Article 11 of the substantive provisions contained in documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/10/4.”⁶³⁵

Arts Law Centre

“... Article 11 provides a useful basis for discussion.”⁶³⁶

⁶³² WIPO/GRTKF/IC/11/15 Prov.

⁶³³ WIPO/GRTKF/IC/11/4(a).

⁶³⁴ WIPO/GRTKF/IC/11/4(a).

⁶³⁵ WIPO/GRTKF/IC/11/4(a).

⁶³⁶ WIPO/GRTKF/IC/11/4(a) Add. 2

Namibia

“... On all the 10 issues and the articles set out in WIPO/GRTKF/IC/11/4, the Delegation expressed its satisfaction that they contained adequate information which could form the basis for future work in terms of a desired conclusion, the international legally binding instrument.”⁶³⁷

Ethiopia

“ ... the [African] Group’s comments needed to be included in WIPO/GRTKF/IC/11/4 (c) to enrich the revised provisions for the protection of TCEs. The Delegation pointed out it was not simply answering questions but that it was attempting was to enrich these provisions.”⁶³⁸

Nigeria

“... believed that the present formulation in Article 11 of WIPO/GRTKF/IC/11/4 (c) was a good starting point for the treatment of foreign right holders and beneficiaries. The Delegation was of the view that the provisions of the international instrument, which was the expected outcome of the work of the Committee, should as much as possible accord the same treatment to local and foreign right holders and beneficiaries without derogating from existing international instruments. The Delegation expressed its willingness to engage in further deliberations with a view to addressing any concerns that may be raised by any other Delegations without asserting that these discussions would at this point be premature.”⁶³⁹

Brazil

“... draft Article 11 of WIPO/GRTKF/IC/11/4(c) was a mature and an adequate basis for discussion. In concluding the first list of issues, the Delegation wished to highlight that it had heard many interventions stating that the draft provisions outlined in WIPO/GRTKF/11/4 (c) were an excellent basis for discussion and that this was a proof of the mature nature of the discussions that the Committee was having and of the considerable progress that the Committee had made. It was neither early nor premature to protect the rights of indigenous and traditional communities. It was convinced that the Committee had a sufficient basis for discussion and that the Committee should engage into that discussion as soon as possible.”⁶⁴⁰

⁶³⁷ WIPO/GRTKF/IC/11/15 Prov.

⁶³⁸ WIPO/GRTKF/IC/11/15 Prov.

⁶³⁹ WIPO/GRTKF/IC/11/15 Prov.

⁶⁴⁰ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a).

Mexico

“... The Delegation therefore considered that Article 11 of document WIPO/GRTKF/IC/11/4(c) was a good basis for discussion.”⁶⁴¹

Russian Association of Indigenous Peoples of the North (RAIPON)

“No response.”⁶⁴²

[End of Annex and of Document]

⁶⁴¹ WIPO/GRTKF/IC/11/15 Prov. and WIPO/GRTKF/IC/11/4(a) Add.

⁶⁴² WIPO/GRTKF/IC/11/4(a).