

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

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

Document prepared by the Secretariat

INTRODUCTION

1. The present working document is the revised version of working document WIPO/GRTKF/IC/16/4 and reflects the amendments and comments made by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) during its sixteenth session, held from May 3 to 7, 2010, as well as during the subsequent intersessional commenting process, which ended on May 14, 2010. During this written commenting process, comments were received from the following Member States: Japan, Norway and Zambia; and from the following accredited observer: International Council of Museums (ICOM). The written comments, as received, are available online at http://www.wipo.int/tk/en/consultations/draft_provisions/comments-3.html
2. As decided by the IGC at its sixteenth session, a provisional draft of this document was published by June 19, 2010 and was made available at the First Intersessional Working Group (IWG 1) that took place from July 19 to 23, 2010 (see further below).

Preparation and structure of this document

3. In the interest of keeping the present document as concise and current as possible:
 - (a) in the Annex, the original commentary on each objective and principle written at the time that document WIPO/GRTKF/IC/9/4 was prepared has been retained and appears under "Background." It is now augmented with comments and questions raised at the fifteenth and sixteenth sessions of the Committee and during their respective intersessional written commenting process. Comments made previously on document WIPO/GRTKF/IC/9/4 have been removed but remain available to be consulted online;ⁱ
 - (b) in line with the decisions of the Committee at its fifteenth and sixteenth sessions, amendments proposed by Member States at these sessions and during the intersessional commenting processes are reflected in the objectives and principles. Proposed insertions and additions are underlined, while words or phrases that a Member State has proposed be deleted or has questioned are put between square brackets. Slashes separate drafting options. Each drafting proposal is accompanied by a footnote indicating the delegation that made the proposal, and, where applicable, delegations concurring or opposing it, as the case may be. Furthermore, when the delegation provided an explanation for the proposal, it is recorded in the footnote. None of the text featured in the footnotes is from the Secretariat, unless indicated otherwise. The footnote numbering may differ in the various language versions of the present document. The layout and numbering of the paragraphs within the articles have been standardized for the sake of clarity. The Annex also records and attributes other comments made and questions posed at the fifteenth and sixteenth sessions and during the intersessional written commenting processes, as well as drafting suggestions, comments and questions of observers which are recorded for consideration by Member States. The comments and questions are, as far as possible, grouped by issue. Comments related generally to the entire document are reflected at the very end of the document.

Results of the First Intersessional Working Group

4. The First Intersessional Working Group (IWG 1) took place from July 19 to 23, 2010, and addressed traditional cultural expressions/expressions of folklore. The results of the IWG session are reported to this session of the IGC through the following documents:
 - (a) WIPO/GRTKF/IC/17/8, enclosing the Summary Report of IWG 1;
 - (b) WIPO/GRTKF/IC/17/9, enclosing Draft Articles on the Protection of Traditional Cultural Expressions/Expressions of Folklore Prepared at IWG 1;

ⁱ http://www.wipo.int/tk/en/consultations/draft_provisions/comments-1.html

(c) WIPO/GRTKF/IC/17/INF 7, enclosing a Record of the Deliberations at IWG 1.

5. *Taking into account the results of the first IWG session, the Committee is invited to consider the draft provisions contained in the Annex.*

[Annex follows]

ANNEX

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- (f) Complementarity with protection of traditional knowledge
- (g) Respect for rights of and obligations towards indigenous peoples and [other traditional communities] communities and traditional and other cultural communities³
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¹ Delegation of Mexico

² Delegation of Mexico

³ Delegation of Mexico

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⁴ Delegation of Mexico

I. OBJECTIVES

The protection of traditional cultural expressions, or expressions of folklore,⁵ should aim to:

Recognize value

- (i) *recognize that indigenous peoples and communities⁶ and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity;*

Promote respect

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

Meet the actual needs of communities

- (iii) *be guided by the aspirations and expectations expressed directly by indigenous peoples and communities⁷ and by traditional and other cultural communities, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such peoples and communities;*

Prevent the misappropriation and misuse⁸ of traditional cultural expressions/expressions of folklore

- (iv) *provide indigenous peoples and communities⁹ and traditional and other cultural communities with the legal and practical means, including effective enforcement measures, to prevent the misappropriation of their cultural expressions and [derivatives] [adaptations]¹⁰ therefrom, and [control]¹¹ ways in which they are used beyond the customary and traditional context and promote the equitable sharing of benefits arising from their use;*

⁵ Note from the Secretariat: In these provisions, the terms “traditional cultural expressions” and “expressions of folklore” are used as interchangeable synonyms, and may be referred to simply as “TCEs/EoF”. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws

⁶ Delegation of Mexico

⁷ Delegation of Mexico

⁸ Delegation of Mexico

⁹ Delegation of Mexico

¹⁰ Delegation of the United States of America. The Delegation suggested “bracketing” all occurrences of the word “derivatives”. As an alternative to deletion, it proposed replacing “derivatives” with “adaptations”. The concept of “derivatives” did not exist in existing international IP texts in the same way that “adaptations” did. The right of adaptation was a well known right in Article 14 and Article 14*bis* of the Berne Convention, while the “derivatives” concept was established in some national laws. For consistency, “adaptations” was preferred. The Delegation of South Africa opposed the proposal

¹¹ Delegation of Mexico

Empower communities

- (v) *be achieved in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and communities¹² and traditional and other cultural communities to exercise in an effective manner their¹³ rights and authority over their own traditional cultural expressions/expressions of folklore;*

Support customary practices and community cooperation

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

Contribute to safeguarding traditional cultures

- (vii) *contribute to the preservation and safeguarding of the environment in which traditional cultural expressions/expressions of folklore are generated and maintained, for the direct benefit of indigenous peoples and communities¹⁴ and traditional and other cultural communities, and for the benefit of humanity in general;*

Encourage community innovation and creativity

- (viii) *reward and protect tradition-based creativity and innovation especially by indigenous peoples and communities¹⁵ and traditional and other cultural communities;*

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

- (ix) *promote intellectual and artistic freedom, research practices and cultural exchange on terms which are equitable to indigenous peoples and communities¹⁶ and traditional and other cultural communities;*

Contribute to cultural diversity

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

Promote the [community] development of indigenous peoples and communities and traditional and other cultural communities¹⁷ and legitimate trading activities

- (xi) *where so desired by [communities] indigenous peoples and communities and traditional and other cultural communities¹⁸ and their members, promote the use of traditional cultural expressions/expressions of folklore for [community based] the development of indigenous peoples and communities and traditional and other cultural communities¹⁹, recognizing them as an asset of the communities that identify with them, such as through the development and expansion of marketing opportunities for tradition-based creations and innovations;*

¹² Delegation of Mexico

¹³ Delegation of Mexico

¹⁴ Delegation of Mexico

¹⁵ Delegation of Mexico

¹⁶ Delegation of Mexico

¹⁷ Delegation of Mexico

¹⁸ Delegation of Mexico

¹⁹ Delegation of Mexico

Preclude unauthorized IP rights

- (xii) *preclude the grant, exercise and enforcement of intellectual property rights acquired by unauthorized parties over traditional cultural expressions/expressions of folklore and [derivatives] [adaptations²⁰] thereof;*

Enhance certainty, transparency and mutual confidence

- (xiii) *enhance certainty, transparency, mutual respect and understanding in relations between indigenous peoples and communities²¹ and traditional and cultural communities, on the one hand, and academic, commercial, governmental, educational and other users of TCEs/EoF, on the other.*

[Commentary on Objectives follows]

²⁰ Delegation of the United States of America

²¹ Delegation of Mexico

COMMENTARY

OBJECTIVES

Background

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

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

Comments and questions

The Delegation of Spain, on behalf of the European Union and its Member States, said that some of the objectives and principles did not concentrate on the mandate of WIPO, but rather on that of other international fora. For instance, the safeguarding of traditional cultures or communities and the respect among communities fell under the umbrella of different fora.

The Delegation of Zambia said that the objectives fairly reflected the essence of protection. TCEs also had value in relation to matters of morality or “morals” as well as “public order” or maintenance of communal harmony. Further, “positive rights”, i.e., rights not only to prevent misappropriation but also to utilize these resources, could be more pronounced.

GENERAL GUIDING PRINCIPLES

- (a) *Responsiveness to aspirations and expectations of relevant communities*
- (b) *Balance*
- (c) *Respect for and consistency with international and regional agreements and instruments*
- (d) *Flexibility and comprehensiveness*
- (e) *Recognition of the specific nature and characteristics of cultural expression*
- (f) *Complementarity with protection of traditional knowledge*
- (g) *Respect for rights of and obligations towards indigenous peoples and [other traditional communities] communities and traditional and other cultural communities²²*
- (h) *Respect for customary use and transmission of TCEs/EoF*
- (i) *Effectiveness and accessibility of measures for protection*

[Commentary on General Guiding Principles follows]

²² Delegation of Mexico

COMMENTARY

GENERAL GUIDING PRINCIPLES

Background

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

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

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

(b) *Principle of balance*

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

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

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

(d) *Principle of flexibility and comprehensiveness*

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

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

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

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

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

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

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

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

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

(g) *Principle of respect for rights of and obligations towards indigenous peoples and [other traditional communities] communities and traditional and other cultural communities*²³

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

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

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

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

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

Comments and questions

The Delegation of Zambia was of the view that the protection of TCEs needed to be respectful and consistent with international and regional instruments and without prejudice to specific rights and obligations already established under binding legal instruments. Nonetheless, there was a need for clarity regarding the situation where a particular international instrument fettered effective protection. With regard to the principle of "flexibility and comprehensiveness", insofar as it made way for a possibility of a multiplicity of legal mechanisms, multiplicity of instruments by its very nature raised questions about which instrument(s) took priority. It wondered how such a potential rivalry could be resolved.

²³ Delegation of Mexico

I. SUBSTANTIVE PROVISIONS

ARTICLE 1:

SUBJECT MATTER OF PROTECTION

1. *“Traditional cultural expressions” and²⁴ or “expressions of folklore” [are] and²⁵ any forms, [whether]²⁶ tangible [and][and/or²⁷] or²⁸ intangible or a combination thereof²⁹, in which traditional culture and knowledge are expressed, appear or are manifested, [and comprise:]³⁰ and are passed on from generation to generation, including:³¹ / such as but not limited to³² the following forms of expressions or combinations thereof:*
- (a) *phonetic or³³ verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols, etc.³⁴;*
 - (b) *musical or sound³⁵ expressions, such as songs, rhythms, [and]³⁶ instrumental music and popular tales³⁷;*
 - (c) *expressions by action, such as dances, plays, ceremonies, rituals, sports and traditional games³⁸ and other performances, theater, including, among others, puppet performance and folk drama.³⁹*
- whether or not reduced to a material form; and,*
- (d) *tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), wooden⁴⁰ carvings, sculptures, mouldings,⁴¹ pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, food and drink,⁴² needlework, textiles, glassware, carpets, costumes, works of mas,⁴³ toys, gifts and,⁴⁴ handicrafts;*

²⁴ Delegations of Mexico and Venezuela (Bolivarian Republic of)

²⁵ Delegation of Nigeria

²⁶ Delegations of Australia, India, Nepal and Nigeria

²⁷ Delegation of Nigeria. The Delegation suggested replacing “and” with “and/or”

²⁸ Delegations of Australia and India. The Delegations suggested replacing “and” with “or”

²⁹ Delegations of Iran (Islamic Republic of) and Mexico

³⁰ Delegations of Colombia, Egypt, Iran (Islamic Republic of), Mexico, the Philippines and Venezuela (Bolivarian Republic of).

³¹ Delegation of Mexico

³² Delegations of Colombia, Egypt, Iran (Islamic Republic of), the Philippines and Venezuela (Bolivarian Republic of). The Delegations of Egypt and of the Philippines said that the definition should be left open for further additions. The Delegation of Egypt suggested adding at the end of the preamble paragraph “etc.”, so as to suggest that there were also other forms of TCEs. The Delegation of Iran (Islamic Republic of) was of the view that the definition was generally acceptable, however, given cultural diversity, the examples in the definition should not be considered exclusive

³³ Delegation of Mexico

³⁴ Delegation of Egypt

³⁵ Delegation of Mexico

³⁶ Delegation of Mexico

³⁷ Delegation of Mexico

³⁸ Delegations of Bolivia (Plurinational State of), Mexico and Trinidad and Tobago

³⁹ Delegation of Indonesia

⁴⁰ Delegation of Mexico

⁴¹ Delegations of India and Mexico

⁴² Delegation of Mexico

⁴³ Delegations of Mexico and Trinidad and Tobago

⁴⁴ Delegation of Mexico

musical instruments; stonework, metalwork, spinning,⁴⁵ and architectural and/or funeral⁴⁶ forms.

2. Protection shall extend to those “traditional cultural expressions” or “expressions of folklore” which are:
 - (a) the products of creative intellectual activity, including individual and communal creativity;
 - (b) [characteristic] indicative of authenticity/being genuine⁴⁷ of [a community's] the cultural and social identity and cultural [heritage]⁴⁸ of indigenous peoples and communities and traditional and other cultural communities⁴⁹; and
 - (c) maintained, used or developed by [such community] indigenous peoples and communities and traditional and other cultural communities,⁵⁰ or by individuals having the right or responsibility to do so in accordance with the customary [law]⁵¹ land tenure system or law⁵² / normative systems⁵³ [and] or⁵⁴ traditional/ancestral⁵⁵ practices of [that community] those indigenous peoples and communities and traditional and other cultural communities⁵⁶ , or has an affiliation with an indigenous/traditional community.⁵⁷
3. The specific choice of terms to denote the protected subject matter should be determined at the national, sub-regional⁵⁸ and regional levels.

[Commentary on Article 1 follows]

⁴⁵ Delegation of Mexico

⁴⁶ Delegation of Mexico.

⁴⁷ Delegations of Brazil and Mexico. The Delegation of Brazil suggested that instead of using the word “characteristic”, which was too general, other wording could be used to make it clear that TCEs should be “authentic and genuine”

⁴⁸ Delegation of Brazil. The Delegation suggested that the word “heritage” be replaced by a word closer in meaning to the Spanish “*patrimonio*”. The English version did not reflect the idea, present in the Spanish version, that TCEs had a dynamic and interactive nature

⁴⁹ Delegation of Mexico

⁵⁰ Delegation of Mexico

⁵¹ Delegations of El Salvador, Mexico and Nepal

⁵² Delegation of Nepal

⁵³ Delegations of El Salvador and Mexico

⁵⁴ Delegations of Australia and Mexico

⁵⁵ Delegations of Angola and Mexico

⁵⁶ Delegation of Mexico

⁵⁷ Delegation of Nigeria

⁵⁸ Delegation of Mexico

COMMENTARY

ARTICLE 1: SUBJECT MATTER OF PROTECTION

Background

The suggested article describes the subject matter covered by the provisions. Paragraph (1) sets out both a description of the subject matter itself (“traditional cultural expressions” or “expressions of folklore”) as well as the substantive criteria which specify more precisely which of those expressions would be protectable. The Committee’s discussions have clarified the distinction between description of the subject matter in general, and the more precise delimitation of those TCEs/EoF that are eligible for protection under a specific legal measure. As has been pointed out, not every expression of folklore or of traditional cultures and knowledge could conceivably be the subject of protection within an IP framework.

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

Description of subject matter

The words “or combinations thereof” in paragraph (1) are intended to demonstrate that TCEs/EoF can be both tangible and intangible and have both tangible and intangible components (“mixed expressions”), as has been suggested. Paragraph (1) also makes it clear that oral (non-fixed) expressions would also be protectable, responding to the often oral nature of traditional cultural expression. Fixation would therefore not be a requirement for protection. The protection for “architectural forms” could contribute towards the protection of sacred sites (such as sanctuaries, tombs and memorials) to the extent they are the object of misappropriation and misuse as covered by these provisions.

Criteria for protection

In terms of the criteria set out in paragraph (2), (a) to (c), the suggested provision is to the effect that protectable TCEs/EoF should:

- (i) be intellectual creations and therefore “intellectual property”, including both individual and communal creativity. Differing versions, variations or adaptations of the same expression could qualify as distinct TCEs/EoF if they are sufficiently creative (much like different versions of a work can qualify as copyright works if they are each sufficiently original);
- (ii) have some linkage with a community’s cultural and social identity and cultural heritage. This linkage is embodied by the term “characteristic” which is used to denote that the expressions must be generally recognized as representing a communal identity and heritage. The term “characteristic” is intended to convey notions of “authenticity” or that the protected expressions are “genuine”, “pertain to” or an “attribute of” a particular people or community. Both “community consensus”

and “authenticity” are implicit in the requirement that the expressions, or elements of them, must be “characteristic”: expressions which become generally recognized as characteristic are, as a rule, authentic expressions, recognized as such by the tacit consensus of the community concerned;

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

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

Contemporary creativity/individual creators

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

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

Choice of terms

Member States and other stakeholders have called for flexibility in regard to terminology, amongst other things. Many international IP standards defer to the national level for determining such matters. Hence, to allow for appropriate national policy and legislative development, consultation and evolution, the suggested paragraph (3) recognizes that detailed decisions on terminology should be left to national and regional implementation.

Comments and questions

Structure of Article 1

The Delegation of Switzerland sought to have clarification from the Secretariat on the structure of Article 1. The Delegation asked whether its understanding was correct that all conditions stated in paragraph 2 (a) to (c) applied to all forms of TCEs described in paragraph (1) (a) to (d). If that understanding was correct, the Delegation suggested structuring the text accordingly in order to avoid ambiguities. [Note from the Secretariat: the numbering has been changed to respond to this concern.]

Terminology

The Delegation of the Republic of Korea suggested that, in paragraph (1), the term “traditional” be clearly defined. It believed that the main objective for protecting TCEs was to provide protection to those TCEs containing sufficient value to be protected that would not fall under the scope of the conventional copyright protection regime. As “cultural expressions” could generally be subject for protection under the existing copyright regime, the core concept applicable to deciding the subject matter of TCE protection should be the term “traditional.” Although subparagraph (2)(b) could help in defining this term, using the words “cultural and social identity” and “cultural heritage,” these words too were broad concepts. “Traditional” was, therefore, not clearly defined.

The Delegation of Japan wondered what should fall within the scope of “traditional”. For example, the passing of how many generations would be sufficient to be “traditional”? Further, were there any requirements for a community in which expressions were shared and passed to be regarded as “traditional”? For example, could expressions which are shared and passed within a whole country be regarded as “traditional”?

The Delegations of Cameroon, China, Colombia, the Russian Federation, Spain, Sudan and Switzerland suggested adding an article or glossary setting out definitions of key terms. It was believed to be necessary to use unified terminology for the concepts as the establishment of a working definition of TCEs was one of the prerequisites of a substantive discussion. The Delegation of Switzerland said that existing relevant international terminology, including the definition of “intangible cultural heritage” of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, should also be taken into account by the Committee.

The Delegation of the United States of America noted that the Committee had not determined whether TCEs or expressions of folklore were in fact one and the same, and that the definitions remained open.

The Delegation of Spain, on behalf of the European Union and its Member States, expressed concern regarding the definition, since some forms of TCEs included in the current wording could already be protected by IP rights. An open-ended definition would have the effect of impeding harmonization and transparency when determining the choice of terms at the national, regional or sub-regional level. Moreover, the definition had to include some exceptions, bearing in mind that certain forms of expressions foreseen in Article 1 could not be considered as TCEs. Finally, for the sake of coherence, some terms had to be interpreted through a glossary.

The Delegation of Zambia stated that Article 1 was generally consistent with its own draft law; the only departure was in terminology. Its draft law used “movement such as dances” whereas the draft provisions read “expressions of action such as dances”. Similarly, in relation to Article 1(2)(a), the Zambian draft law added “creative and cumulative intellectual activity”. With

regard to paragraph (3), safeguards were needed to ensure that the terminology employed did not water-down the protected subject matter. Some minimum standards were therefore necessary. Further, the role of the country from which the resources were, in determining the terminology, needed further articulation.

Meaning of “community”

The Delegations of Australia and of the United States of America posed questions related to the concept of members of a “community” and wished to know what the definition of “traditional community” was.

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

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

The representative of the Tulalip Tribes concurred on the issue of communities in Diaspora.

Meaning of “characteristic”

The Delegation of France, in relation to paragraph (2)(b), posed the question as to who determined what was “characteristic” and at which stage that would be done.

In relation to paragraph (2)(b) and in response to the question posed by the Delegation of France, the representative of the Saami Council said that it should be the indigenous people or community themselves who decide on what would be characteristic. For example, he said that the traditional Saami dress would be a TCE under Article 1 as a traditional costume of the Saami people; it could only be the Saami who could really determine whether it was a costume that was signifying the cultural identity or not. It would not be possible for anyone else than the Saami to do so. In most instances and as a general rule, it would have to be up to the community or people from which the TCE originates to determine whether it was culturally significant or not; in relation to paragraph (2)(c), it suggested to replace it with: “affiliated with an indigenous people or community due to its cultural significance to that indigenous people or community”.

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

The Delegation of Germany sought greater clarification on what should be the objective and subject matter of the protection of TCEs.

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

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

The Delegation of Yemen observed that the Committee was trying to define concepts and trying to find ways of sorting TCEs/EoF into categories. It said that it could be done using pre-defined concepts. Folklore, generally speaking, could be divided into four categories: (1) popular literature, including stories, legends, myths, popular poetry, epics, proverbs, sayings and riddles; (2) architecture, models, uniforms, costumes, etc.; (3) traditions, customs, ritual expressions such as circumcision or birth ceremonies or religious ceremonies or performances and other expressions; (4) artistic performances such as theatre, singing, Sufism, religion, songs, and body expressions. Precise definitions needed to be developed.

The Delegation of Japan asked how the scope of the specific TCEs/EoF could be defined to ensure predictability for users of such expressions and third parties.

Relationship with conventional copyright law

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

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

The Delegation of Norway joined the delegations that had commented on the relationship between the rights established in the provisions and conventional copyright law. Article 1 and the provisions as a whole needed to address the boundary more clearly in order to avoid confusion and unintended overlap with copyright and related rights under existing legal instruments.

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

Relationship with the public domain

The Delegations of Australia and Japan suggested that the impact on the public domain be examined. The Delegation of Japan asked what criteria were used to distinguish the TCEs that were protected from those that were not. Among TCEs, some were handed down only to certain individuals within a small community, while others were handed down in a broader nation-wide cultural context, maintained and used by a wider range of public or sometimes even used commercially. This issue was important since it would have a direct impact on the boundaries of the public domain. Pending the level of protection to be applied to the subject matter, broader definition of TCEs could imply limiting the scope of public domain materials which were currently available. The Delegation also wondered how the expressions belonging to the public domain would be treated and how would the public domain be defined in that context.

The Delegation of Norway voiced the need for a clearer concept of the acts which would constitute misappropriation and misuse. It supported the delegations that had commented on Article 1 and the public domain. The instrument needed to be effective, and, to achieve that, it was necessary to have a clear demarcation between the object of a *sui generis* protection and the public domain. An extensive and rich public domain was a guarantee for the appearance of new voices, cultural innovation and cultural diversity. That needed to be ensured in the new instrument, regardless of its legal status.

Drafting suggestions by observers

The representative of the Ibero-Latin American Federation of Performers (FILAIE), in relation to paragraph (1), suggested to add, after “or are manifested”, the phrase “in original form” in order to have a criterion to identify and reference a particular community. The representative also suggested to delete “and knowledge” to avoid any confusion with TK, which was dealt with separately. In relation to subparagraph (2)(a), the representative suggested to add, after the semicolon, “which was created by former generations” to focus on the true essence of what was being discussed: cultural heritage and legacy.

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

The representative of Tupaj Amaru proposed the following text for Article 1:

“Article 1

Protected material

- (1) Verbal expressions, such as folk tales and legends, folk poetry, stories, epic poems, riddles, other narrations; words, signs, sacred names and symbols;
- (2) Musical expressions, such as songs and indigenous instrumental music, music on percussion instruments and woodwinds;
- (3) Expressions by action, such as dances, plays, ceremonies, ritual expressions and other folkloric performances;

- (4) Tangible expressions, such as art, drawings, paintings, sculptures, pottery, terracotta, mosaic, woodwork and jewelry; basketwork, needlework, textiles, glasswork, pencils, clothing, handicrafts; and
- (5) Musical instruments and architectural works.

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

ARTICLE 2:

BENEFICIARIES

Measures for the protection of national⁵⁹ traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples and communities⁶⁰, individual groups, families, tribes, nations⁶¹ and traditional and other cultural communities or the nation⁶² / or the countries, to which a traditional cultural expression/expression of folklore is specific^{63,64}.

- (a) *in whom the custody, care and safeguarding of the TCEs/EoF are [entrusted] existing⁶⁵ in accordance with their customary law [and] or⁶⁶ practices; and*
- (b) *who maintain, control⁶⁷, use or develop the traditional cultural expressions/expressions of folklore as being [characteristic] authentic and genuine⁶⁸ of their cultural and social identity and cultural heritage.*

[Commentary on Article 2 follows]

⁵⁹ Delegation of Morocco. The Delegation said that a nation had its own folklore, “national” folklore; however there was no mention of “national” TCEs

⁶⁰ Delegation of Mexico

⁶¹ Delegation of Iran (Islamic Republic of). The Delegation believed that the rights of holders were considered in the framework of the rights of society. In that regard, national legislation was important and could not be ignored. The rights of local communities who were real owners and their consent should particularly be observed

⁶² Delegation of Morocco. The Delegation said that the term “traditional communities” was much too broad and should be defined in a clearer and more precise way. See note 59

⁶³ Delegation of Mexico

⁶⁴ Note from the Secretariat: The broad and inclusive term “indigenous peoples and traditional and other cultural communities”, or simply “communities” in short, is used at this stage in these draft provisions. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws

⁶⁵ Delegation of India. The Delegation said that the term “entrusted” could have certain legal ramifications in terms of requiring evidence of the custody, care and safeguarding being entrusted to a particular community

⁶⁶ Delegation of Australia. The Delegation said that there would be difficulties in proving the relevant customary law for indigenous communities

⁶⁷ Delegation of Trinidad and Tobago

⁶⁸ Delegation of Brazil. The Delegation reiterated its comments made under Article 1 regarding the English equivalent to the Spanish “*patrimonio*”. See note 48

COMMENTARY

ARTICLE 2: BENEFICIARIES

Background

Many stakeholders have emphasized that TCEs/EoF are generally regarded as collectively originated and held, so that any rights and interests in this material should vest in communities rather than individuals. Some laws for the protection of TCEs/EoF provide rights directly to concerned peoples and communities. On the other hand, many vest rights in a Governmental authority, often providing that proceeds from the granting of rights to use the TCEs/EoF shall be applied towards national heritage, social welfare and culture related programs. The African Group has stated that principles for the protection of TCEs/EoF should “Recognize the role of the State in the preservation and protection of traditional knowledge and expressions of folklore.”⁶⁹

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

Article 2, and the provisions as a whole, contemplate that more than one community may qualify for protection of their TCEs/EoF in line with the criteria in Article 1. Existing *sui generis* laws provide for this possibility, such as the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge of Panama, 2000 and the related Executive Decree of 2001 (“the Panama Law”)⁷⁰, and the Peruvian Law of 2002 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources (“the Peru Law, 2002”).⁷¹ This also touches upon the allocation of rights or distribution of benefits among communities which share the same or similar TCEs/EoF in different countries (so-called “regional folklore”). This is dealt with further in Articles 4, “Management of Rights” and 7, “Formalities”.

The term “cultural communities” is intended to be broad enough to include also the nationals of an entire country, a “nation”, in cases where TCEs/EoF are regarded as “national folklore” and belonging to all of the people of a particular country. This complements and accords with the practice in other policy areas.⁷² Therefore, a national law could, for example, state that all nationals are the beneficiaries of protection.

⁶⁹ WIPO/GRTKF/IC/6/12

⁷⁰ Article 5, Decree

⁷¹ Article 10

⁷² See Glossary on Intangible Cultural Heritage, Netherlands National Commission for UNESCO, 2002 (“... a nation can be a cultural community”)

Communities/individuals

As discussed in relation to Article 1, these provisions are intended primarily to benefit communities, including in cases where a TCE/EoF is created or developed by an individual member of a community. The essential characteristics of “traditional” creations are that they contain motifs, a style or other items that are characteristic of and identify a tradition and a community that still bears and practices it. Thus, even where an individual has developed a tradition-based creation within his or her customary context, it is regarded from a community perspective as the product of social and communal creative processes. The creation is, therefore, not “owned” by the individual but “controlled” by the community, according to indigenous and customary legal systems and practices.⁷³ This is what marks such a creation as “traditional”.

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

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

Comments and questions

Scope of beneficiaries

The Delegation of El Salvador suggested that other groups should also be referred to in addition to “indigenous peoples and traditional and other cultural communities.”

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

⁷³ See generally WIPO/GRTKF/IC/6/3

The Delegation of the Republic of Korea stated that the provision did not fully address the issue of legitimate beneficiaries of TCE protection. Different communities could share the same or similar forms of TCEs or their TCEs could have similar features, which could make it difficult for potential users to find the legitimate beneficiaries or rights holders of the TCEs they wished to use. In addition, without a clear scope of beneficiaries, the TCE registration offices, as referred to in Article 7(2)(d), would be highly burdened when resolving disputes.

The Delegation of Japan asked how the boundary of beneficiaries of the specific TCEs/EoF could be defined. It also wondered what were the objective requirements for beneficiaries of the specific TCEs/EoF, and how could predictability on beneficiaries of the specific TCEs/EoF be ensured for its users.

The Delegation of Zambia stated that individuals could also be beneficiaries in their own right.

Customary law

The representative of the Arts Law Center of Australia suggested that, in relation to paragraph (a), the requirement that communities prove that they had been entrusted with the custody, care and safeguarding of the TCEs/EoF in accordance with their customary law and practices be deleted and that a presumption should apply in favor of the indigenous community claiming to have been entrusted with the custody, care and safeguarding of the TCEs/EoF. She suggested rephrasing the paragraph for it to read: "in whom the custody, care and safeguarding of the TCEs/EoF are entrusted". She also said that the end of the sentence should be deleted, and that a new clause should be added at the end of the provision, reading: "The Indigenous peoples and traditional and other cultural communities claiming the benefit of the measures for the protection of TCEs/EoF are presumed to have been entrusted with the custody, care and safeguarding of those TCEs/EoF". Alternatively, and as a minimum, she suggested that the following change should be made: "in whom the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with their customary law or practices". She also said that in Australia, indigenous peoples considered it disrespectful to use the term indigenous otherwise than with a capital "I" and that therefore, the word "indigenous" should be with a capital I throughout the text. She said that this spelling was consistent with the one used in the Declaration on the Rights of Indigenous Peoples.

The representative of Tupaj Amaru suggested that the article end with the following sentence: "The States will adopt effective means to ensure the prior informed consent of the interested peoples to guarantee the respect and legal protection of traditional cultural expressions".

ARTICLE 3:

ACTS OF MISAPPROPRIATION AND MISUSE⁷⁴ (SCOPE OF PROTECTION)

Contribute to the promotion and protection of the diversity of cultural expressions.⁷⁵

Promote intellectual and artistic freedom, research practices and cultural exchange on terms which are equitable to indigenous peoples and traditional and other cultural communities⁷⁶, as well as for the users of traditional cultural expressions/expressions of folklore and which reflect the broader interests of society.⁷⁷

Promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore.⁷⁸

Be achieved in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and communities and traditional and other cultural communities to exercise in an effective manner their rights and authority over their own traditional cultural expressions/expressions of folklore.⁷⁹

Respect the continuing customary use, development, exchange and transmission of traditional cultural expressions/expressions of folklore by, within and between communities.⁸⁰

Traditional cultural expressions/expressions of folklore [of particular value or significance] registered or notified⁸¹

1. *In respect of traditional cultural expressions/expressions of folklore [of particular cultural or spiritual value or significance to a community, and]⁸² [which have been registered or notified as referred to in Article 7]⁸³, there shall be adequate and effective legal and*

⁷⁴ Delegation of Mexico

⁷⁵ Delegation of Canada. The Delegation proposed adding a “chapeau” to the article. It was important that the objectives were reflected in the articles, as the three parts of the document were interlinked and could not be treated in isolation. The substantive draft provisions would sound more comprehensive and enable the Committee to make better and informed decisions on the content of the articles. The chapeau could be used as a preamble to an international instrument on TCEs. This is Objective ix. When addressing the issue of misappropriation, it was important to keep in mind that cultures grew by, for example, learning from other cultures

⁷⁶ Delegation of Canada. See note 75. This is Objective x.

⁷⁷ Delegation of Canada. See note 75. This is proposed added text to Objective x.

⁷⁸ Delegation of Australia. It was important to refer back to objectives iii, v and vii.

⁷⁹ Delegation of Australia. See note 78

⁸⁰ Delegation of Australia. See note 78

⁸¹ Delegation of Mexico

⁸² Delegation of Mexico

⁸³ Delegation of Australia. The Delegation wondered whether the economic and moral rights would be determined by the provision or be dependant on government registration. Consideration had to be given to leaving the option open to the communities, as to whether they could exercise their rights through a national authority, through another type of organization acting on their behalf, or to exercise their rights themselves within their communities

practical measures to ensure that the [relevant community]⁸⁴ beneficiaries, that may be a nation, a people or an indigenous community or other community,⁸⁵ / indigenous people or traditional and other cultural community⁸⁶ can prevent or stop⁸⁷ the following acts taking place [without its free, prior and informed consent]⁸⁸:

- (a) *in respect of such traditional cultural expressions/expressions of folklore [other than words, signs, names and symbols]⁸⁹:*
- (i) *the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography) of the traditional cultural expressions/expressions of folklore or [derivatives] [adaptations]⁹⁰ thereof;*
 - (ii) *any use of the traditional cultural expressions/expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the [community] indigenous peoples and communities and traditional and other cultural communities⁹¹ or the nation⁹² as the source or owner⁹³ of the traditional cultural expressions/expressions of folklore, except where omission is dictated by the manner of the use⁹⁴;*
 - (iii) *any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore, done in order to cause harm thereto or any action that may be prejudicial to the expressions, that would offend against or would damage the reputation, customary values or cultural identity or integrity of the community⁹⁵ or nation⁹⁶ / to the reputation or image of the community, indigenous peoples and communities or region or nation⁹⁷ to which they belong⁹⁸ or any action that may be prejudicial to the expressions that would*

⁸⁴ Delegations of Mexico and of Morocco. Both delegations suggested alternative text. In addition, the Delegation of the United States of America suggested using the phrase: “relevant community” throughout the document. The phrase would be best defined in Article 2. Long phrases such as “relevant indigenous people or community, traditional and other cultural community” did not serve clarity. The Delegation of South Africa opposed this change and suggested keeping “relevant indigenous people or community, traditional and other cultural community”

⁸⁵ Delegation of Morocco. This language was proposed to ensure that the beneficiaries could be a nation

⁸⁶ Delegation of Mexico

⁸⁷ Delegation of Algeria. This addition is to reflect situations during which the act is taking place

⁸⁸ Delegation of India. The Delegation of South Africa opposed this change and proposed keeping the phrase in the text

⁸⁹ Delegation of South Africa

⁹⁰ Delegation of the United States of America. See note 10

⁹¹ Delegation of Mexico

⁹² Delegation of Egypt. The Delegation stated that there were countries where there was only one single community, because cultural harmony prevailed. Egypt's history went back many years. It had a longstanding, rich and diverse culture which made for a harmonious and homogenous cultural weave. For that reason, the Delegation wished to include in the document, when referring to indigenous peoples and communities, the term “nations”. The Delegation of Morocco concurred

⁹³ Delegation of Zambia. It suggested that the communities also be recognized as owners of the works, because of the particular meaning in law of “ownership”, which included a positive right. That reflected the rights of ownership

⁹⁴ Delegation of the United States of America. The Delegation recommended that the provision include a phrase taken from Article 5 of the WPPT: “except where omission is dictated by the manner of the use”. The Delegation explained that in practical circumstances it was not always possible or appropriate to provide attribution

⁹⁵ Delegation of Zambia. proposed addition

⁹⁶ Delegation of Egypt. See note 92. The Delegation of Morocco concurred

⁹⁷ Delegation of Egypt. See note 92. The Delegation of Morocco concurred

⁹⁸ Delegation of Mexico

offend against or would damage the reputation, customary values or cultural identity or integrity of the community⁹⁹; and

- (iv) [the acquisition or exercise by unfair or unconscionable action¹⁰⁰ of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof]¹⁰¹.
- (b) in respect of words, signs, names and symbols which are such traditional cultural expressions/expressions of folklore, [any use of the traditional cultural expressions/expressions of folklore or [derivatives] [adaptations]¹⁰² thereof for commercial purposes or other than their traditional use¹⁰³, or the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or [derivatives] [adaptations]¹⁰⁴ thereof.]¹⁰⁵ the offering for sale or sale, of articles that are falsely represented as traditional cultural expressions/expressions of folklore made by indigenous people,¹⁰⁶ [which disparages, offends or falsely suggests a connection with the [community] beneficiaries, that may be a nation, a people or an indigenous community or other community,¹⁰⁷ / indigenous peoples and communities and traditional and other cultural communities¹⁰⁸ concerned, or brings [the community] them¹⁰⁹ into contempt or disrepute]¹¹⁰;
- (c) any fixation, representation, publication, communication or use in any form of the traditional cultural expressions/expressions of folklore which make no mention of the community, indigenous peoples or communities or region or nation¹¹¹ to which they belong¹¹² / which is not legitimate and which does not faithfully reflect the region to which these communities belong¹¹³, except where omission is dictated by the manner of the use.¹¹⁴

⁹⁹ Delegation of Zambia

¹⁰⁰ Delegation of Australia. The provision was preventing the individual indigenous creator from obtaining copyright/related rights and exercising those rights through for example licensing. That had to remain an option to an indigenous artist or author. Consideration had to be given to basic policy objectives on the relationship between the individual rights of an indigenous creator over a work and the rights of a community related thereto

¹⁰¹ Delegation of Australia. See note 100

¹⁰² Delegation of the United States of America. See note 10

¹⁰³ Delegation of Morocco

¹⁰⁴ Delegation of the United States of America. See note 10

¹⁰⁵ Delegation of Australia. The Delegation suggested replacing the phrase “any use of the traditional cultural expressions/expressions of folklore ... or [derivatives] adaptations thereof” with “the offering for sale or sale, of articles that are falsely represented as traditional cultural expressions/expressions of folklore made by indigenous people”. The Delegation suggested this alternate wording to specifically cover misappropriation. It said that it would assist further discussion as to whether such acts should be regarded as misappropriation

¹⁰⁶ Delegation of Australia. See note 105

¹⁰⁷ Delegation of Morocco. See note 85

¹⁰⁸ Delegation of Mexico

¹⁰⁹ Delegation of Mexico

¹¹⁰ Delegation of Venezuela (Bolivarian Republic of). The Delegation said that the rights should be full rights and not be conditional

¹¹¹ Delegation of Egypt. See note 92. The Delegation of Morocco concurred

¹¹² Delegation of Mexico

¹¹³ Delegation of Morocco

¹¹⁴ Delegation of the United States of America. See note 94

Other traditional cultural expressions/expressions of folklore

2. *In respect of the use and exploitation of other traditional cultural expressions/expressions of folklore not registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to [ensure] guarantee¹¹⁵ that:*

(a) *the relevant [community is] indigenous peoples and communities and traditional and other cultural communities or nation¹¹⁶ are¹¹⁷ identified as the source or owner¹¹⁸ of any work or other production adapted from the traditional cultural expression/expression of folklore, except where omission is dictated by the manner of the use¹¹⁹;*

(b) *any distortion, mutilation or other modification of, or other derogatory action in relation to, a traditional cultural expression/expression of folklore can be prevented or stopped¹²⁰ and/or is subject to [civil or criminal] criminal or civil¹²¹ sanctions;*

(c) *any false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the traditional cultural expression/expression of folklore of [a community] the indigenous peoples and communities and traditional and other cultural communities¹²² or nation¹²³, suggest any endorsement by or linkage with [that community] [such indigenous peoples and communities and traditional and other cultural communities¹²⁴⁻¹²⁵] them, can be prevented or stopped¹²⁶ and/or is subject to [civil or criminal] criminal or civil¹²⁷ sanctions; and*

(d) 2 OPTIONS

OPTION A: [where the use or exploitation is for gainful intent,]¹²⁸ there [should] shall¹²⁹ be [equitable remuneration or]¹³⁰ benefit-sharing on terms determined by [the Agency]

¹¹⁵ Delegation of Algeria

¹¹⁶ Delegation of Egypt. See note 92. The Delegation of Morocco concurred

¹¹⁷ Delegation of Mexico

¹¹⁸ Delegation of Zambia. See note 93

¹¹⁹ Delegation of the United States of America. See note 94

¹²⁰ Delegation of Algeria. See note 87

¹²¹ Delegation of Venezuela (Bolivarian Republic of). The Delegation referred to the Venezuelan system, in which criminal and civil courts were separate, and where criminal and civil actions were taken in a case, the civil proceedings had to wait for a decision to be taken in the criminal proceedings, before a civil decision was taken, as the criminal proceedings prevailed over civil proceedings. Under the Venezuelan legal system only purely criminal or purely civil actions could be taken. It therefore argued that the drafting of subparagraph 3(b)(ii) was confusing, and proposed that the paragraph be amended to read “criminal or civil”

¹²² Delegation of Mexico

¹²³ Delegation of Egypt. See note 92. The Delegation of Morocco concurred

¹²⁴ Delegation of Mexico. The Delegation suggested replacing “that community” with “such indigenous peoples and communities and traditional and other cultural communities”

¹²⁵ A delegation proposed substituting the phrase with the pronoun “them”

¹²⁶ Delegation of Algeria. See note 87

¹²⁷ Delegation of Venezuela (Bolivarian Republic of). See note 121

¹²⁸ Delegation of Venezuela (Bolivarian Republic of). The use or exploitation could not be subject to any condition. It was obvious that the use or exploitation was in order to make profit, because, as the word “exploitation” was so strong, it implicitly suggested that it was being done for profit. The Delegation of South Africa concurred

¹²⁹ Delegation of India. That modification was imperative for the following reasons: (1) there was a need to recognize collective ownership with positive exclusive rights of the communities and not just rights to prohibit; (2) the right to assign these rights by agreements had to be recognized, and not only based on the principle of free, prior and informed consent, (3) equitable remuneration systems for any type of TCE/EoF were not acceptable, it was the exclusive right of the community; (4) if the use of TCEs/EoF was

designated [national]¹³¹ authority¹³² referred to in Article 4 in consultation with the relevant [community] indigenous people and communities and traditional and other cultural communities¹³³ or nation¹³⁴; and

OPTION B¹³⁵: [where the use or exploitation is for gainful intent,]¹³⁶ there [should] shall¹³⁷ be [equitable remuneration or]¹³⁸ benefit-sharing on terms determined by the relevant [community] indigenous people and local communities¹³⁹ or nation¹⁴⁰, in consultation with the [Agency] designated [national]¹⁴¹ authority¹⁴² referred to in Article 4; and

Secret traditional cultural expressions/expressions of folklore

3. *There shall be adequate and effective legal and practical measures to ensure that [communities] the indigenous peoples and communities and traditional and other cultural communities¹⁴³ or nation¹⁴⁴ have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret traditional cultural expressions/expressions of folklore.*

[Commentary on Article 3 follows]

[Footnote continued from previous page]

spread all over a nation or country, and not identified with any specific community, the benefit-sharing had to be based on the decision of the national authority

¹³⁰ Delegation of India. See note 129. The Delegations of South Africa and of the United States of America concurred

¹³¹ Delegation of the United States of America. The Delegation said that it was possible that in some circumstances a regional or international authority such as OAPI or ARIPO be chosen by an indigenous or traditional community to be the designated authority

¹³² Delegation of Mexico

¹³³ Delegation of Mexico

¹³⁴ Delegation of Egypt. See note 92. The Delegation of Morocco concurred

¹³⁵ Delegation of the United States of America. The emphasis had to be on the indigenous people and community, their desires, and not on the desires of a designated national authority

¹³⁶ Delegation of Venezuela (Bolivarian Republic of). The use or exploitation could not be subject to any condition. It was obvious that the use or exploitation was in order to make profit, because, as the word "exploitation" was so strong, it implicitly suggested that it was being done for profit. The Delegation of South Africa concurred

¹³⁷ Delegation of India. That modification was imperative for the following reasons: (1) there was a need to recognize collective ownership with positive exclusive rights of the communities and not just rights to prohibit; (2) the right to assign these rights by agreements had to be recognized, and not only based on the principle of free, prior and informed consent, (3) equitable remuneration systems for any type of TCE/EoF were not acceptable, it was the exclusive right of the community; (4) if the use of TCEs/EoF was spread all over a nation or country, and not identified with any specific community, the benefit-sharing had to be based on the decision of the national authority

¹³⁸ Delegation of India. See note 129. The Delegations of South Africa and of the United States of America concurred

¹³⁹ Delegation of Mexico

¹⁴⁰ Delegation of Egypt. See note 92. The Delegation of Morocco concurred

¹⁴¹ Delegation of the United States of America. See note 131

¹⁴² Delegation of Mexico

¹⁴³ Delegation of Mexico

¹⁴⁴ Delegation of Egypt. See note 92. The Delegation of Morocco concurred

COMMENTARY

ARTICLE 3: ACTS OF MISAPPROPRIATION AND MISUSE¹⁴⁵ (SCOPE OF PROTECTION)

Background

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

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

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

Summary of draft provision

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

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

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

¹⁴⁵ Delegation of Mexico

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

Specific tailored forms of protection are suggested for words, names, symbols and other designations, drawing on trademark law and special measures already established in this regard in the Andean Community, New Zealand and the United States of America.

In respect of performances which qualify as TCEs/EoF (TCEs/EoF which are “expressions by action”: see Article 1), these may also be registered or notified and so be protected strongly, as suggested. The moral and economic rights proposed include rights modeled on the kinds of rights already provided to other performers, including by in particular the WIPO Performances and Phonograms Treaty, 1996 (WPPT, 1996). This form of protection is without prejudice to the protection available under the WPPT. If such performances were not so registered or notified, they could be protected under (2) or (3) below, depending on the circumstances and the community’s wishes.

For TCEs/EoF not so registered or notified, their use would not be subject to prior authorization but protection would concern *how* the TCEs/EoF were used. These TCEs/EoF could be used, as a source of creative inspiration for example, without the need for prior consent or authorization, in furtherance of creativity and artistic freedom, a key objective as many have stated. However, how the TCEs/EoF are so used would be regulated, drawing mainly upon moral rights and unfair competition principles, with civil and criminal remedies proposed, as well as the payment of an equitable remuneration or equitable benefit-sharing, to be determined by a competent authority. This authority could be the same Agency as referred to in Article 4 “Management of Rights”. This approach is akin perhaps to a compulsory license or equitable remuneration approach, found in national *sui generis* laws concerning TCEs/EoF¹⁴⁶, as well as in conventional copyright law concerning musical works already fixed in sound recordings.¹⁴⁷

Finally, for secret, confidential or undisclosed TCEs/EoF, the suggested provision seeks to clarify that existing protection for confidential or undisclosed information covers TCE-related subject matter, building also upon case-law to this effect.¹⁴⁸ The Mataatua Declaration, 1993 recognizes, amongst other things, that indigenous peoples have the right to “protect and control dissemination” of [their] knowledge.¹⁴⁹

Flexibility as to legal mechanisms for implementation

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

To illustrate this point with a practical example – the suggested principle which states that there ought to be protection against false or misleading indications in trade as to the endorsement by or linkage with a community of tradition-based creations (a typical example is a handicraft sold as

¹⁴⁶ Such as the Bangui Accord, OAPI, as revised in 1999

¹⁴⁷ Article 13, Berne Convention, 1971

¹⁴⁸ *Foster v. Mountford* (1976) 29 FLR 233

¹⁴⁹ Article 2.1

“authentic” or “Indian” when it is not) could be implemented in practice at the national level through *one or more* of the following: (i) the registration and use of certification trademarks by concerned communities; (ii) civil and/or criminal remedies available under general trade practices and labeling laws; (iii) enactment of legislation specifically to provide this form of protection for TCEs/EoF; (iv) the registration and use of geographical indications; and/or (v) common law remedies for “passing off” and laws for the suppression of unfair competition.

Derivative works

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

The suggested provision suggests an adaptation right in respect of TCEs/EoF of particular cultural or spiritual value, subject to prior registration or notification. In respect of other TCEs/EoF, there would be no adaptation right as such, nor prevention of the obtaining of IP rights in the derivative work by its creator. Nor would, in either case, mere “inspiration” be prevented, as is also the case in copyright law, in line with the idea/expression dichotomy.¹⁵⁰ However, it is suggested there be regulation of how derivative works may be exploited, following the general approach of the Pacific Model Law, 2002.

Comments and questions

Enforcement of rights

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

Registration

The Delegation of New Zealand referred to Policy Objective (xiii), which sought to “enhance certainty, transparency and mutual confidence”. Article 3 attempted to deal with the transparency question by introducing the concept of registration, but it was uncertain that registration was an appropriate option, especially given the concerns of indigenous peoples with regard to registration systems, including the risks of documentation. It suggested that the IWG, when considering the scope of protection under Article 3, consider two issues: (1) investigate or recommend any alternative ways that the Draft Provisions could address the transparency objective, and; (2) consider variants of registration that minimized risks, e.g., registration systems where there was no examination and where the indigenous peoples themselves agreed on the content of the registration.

¹⁵⁰ Discussed in WIPO/GRTKF/IC/6/3

Derivatives

The Delegation of the United States of America, as an alternative to the drafting proposals made, suggested going back to the phrasing of the 1982 Model Law, which, instead of providing control over adaptations and derivatives, ensured that the rights established over TCEs did not extend to “the borrowing of expression of folklore for creating an original work of an author or authors”.

The Delegation of South African suggested keeping “derivatives” in the text.

Categories of TCEs

The Delegation of India suggested replacing the three categories of (1) TCEs/EoF of particular cultural or spiritual value or significance, (2) other TCEs/EoF and (3) secret TCEs/EoF with two categories: TCEs/EoF that were known and those kept secret.

Misappropriation

The Delegation of Canada claimed that one of the challenges was to find the necessary balance between the protection of TCEs and acts of misappropriation which contributed to cultural diversity. It posed the following questions, to be addressed by the IWG: Who will be responsible for granting access to TCEs and who may authorize such access? What happens if a TCE is held by more than one community, who decides, who arbitrates? Will work inspired by, or adapted from, a TCE be covered? And how would such protection affect, interact or overlap with protection already granted under existing IP laws? Finally, how is this level of protection, combined with proposals for perpetual protection of TCEs, consistent with demands for a robust public domain?

The Delegation of Zambia suggested that papers be prepared on the kinds of mutilation or distortion existing.

Role of States and the Public Domain

The Delegation of Australia stressed the need for the IWG to examine the effect on both indigenous communities and the public domain in examining circumstances in which states could exercise property rights over non attributed TCEs.

Terminology

The Delegation of the Russian Federation said that the meaning of “indications,” in Article 3(2)(c), was unclear.

The Delegation of South Africa suggested that the IWG discuss definitions, especially of the term “communities”. Its preferred term was “indigenous peoples and local communities”. The Delegation of the United States of America concurred, adding that the definition should be spelled out under Article 2. Its preferred term was “relevant community” or “right holder”. The Delegation of Australia also agreed.

The representative of the Tulalip Tribes disagreed with the “too generalized” phrase “relevant community”.

Scope of protection

The Delegation of Spain, on behalf of the European Union and its Member States, said that a different perspective had to be taken as concerned the required characteristics and scope of protection for TCEs, should the latter be related to the scope of copyright protection.

Stand-alone article

The Delegation of Zambia proposed to include an article dealing solely with the rights to be enjoyed. As Article 3 was followed by one on "Management of Rights," the Delegation expected it to spell out the rights whose management would be prescribed. On the contrary, the Article did not prescribe the rights; it spelled out what acts holders could prevent. It suggested broadening the scope of rights to include positive rights. Whereas that was probably implied, the rights could include the right of holders to be recognized as the source of expressions utilized in the creation of any work or inspired by them. One negative right which nonetheless seemed to have been omitted was the right to prevent unauthorized disclosure and subsequent use of secret expressions of folklore.

Community representative

The Delegation of Japan asked if it was feasible to identify the right person capable of granting prior informed consent without a clear decision-making mechanism or representation of a community.

Drafting suggestions by observers

The representative of the Saami Council suggested that Article 3(1)(b) be deleted, because the signs and symbols of indigenous peoples were too different from trademarks to receive a kind of trademark-like protection. He also suggested to delete, in Article 3(1)(a), the phrase "other than words, signs, names and symbols". Hence, subparagraph (a) should be broadened to any TCE, not only those of particular cultural or spiritual value. Copyright protection should be awarded regardless of the cultural or spiritual value of the TCE. Registration should not be mandatory. He also drew attention to Article 6 of the TK Draft Provisions, which dealt with benefit-sharing. He suggested that the same approach be followed and serve as inspiration. He repeated that the article was too limited; for example, it only dealt with benefit-sharing in the context of "other TCEs", i.e., those that were not culturally and spiritually significant; that could hardly be the idea, he said. He also claimed that benefit-sharing should be recognized as a general principle, which could then be better addressed in one single article, in order to apply to all forms of TCEs. He suggested that Article 6 of the TK Draft Provisions, with relevant amendments, be introduced into the TCE Draft Provisions, thereby taking a general approach to the whole benefit-sharing concept. The representative of the Ethio-Africa Diaspora Union Millennium Council concurred with both points.

The representative of the Ibero-Latin-American Federation of Performers (FILAIE) made three statements regarding Article 3. He stated that the term "relevant" was not at all precise. Also, the authority that was given to communities to prevent constituted a negative affirmation of the right which they had been granted, since to be able to prevent implied the existence of a previous act of appropriation or misuse. The use of the right granted to communities had to be reflected in the text positively and not simply as an entitlement to oppose an act. He suggested that the phrase "which disparages, offends or falsely suggests a connection with [...] into contempt or disrepute" be deleted. He also suggested deleting, in Article 3(2)(d), "where the use or exploitation is for gainful intent" and replacing it with the words "*they are used*" after "*where*", instead of the current wording. Although it was a right granted to indigenous communities, which

took the form of equitable remuneration, the use by a third party in itself should give rise to compensation. It was not necessary to specify that the use was for gainful intent and unfortunately experience showed that some apparently charitable acts brought profits for unscrupulous organizers, who employed that strategy to honor certain peoples, communities, etc. and infringed intellectual property rights. Therefore, any use should be remunerated. Referring to Article 3(1)(a)(iii), he suggested that it read “any distortion, mutilation or other derogatory action in relation to the traditional cultural expressions/expressions of folklore”. It was not necessary to add the subsequent phrase. The representative of the African Regional Intellectual Property Organization (ARIPO) concurred. In subparagraph (1)(b), the representative of FILAIE suggested that the subparagraph stop at “...derivatives thereof”, that the phrase “by third parties” be added and that the subsequent wording in the subparagraph be deleted. The reasoning behind that proposal was to affirm the right of communities positively, which derived from intellectual property, without it being subject to difficult interpretation of moral imperatives, since this had to take into account the notion of an exclusive right, which should and could be exercised fully. He believed that no further interpretation on moral damages or harm was needed once the beneficiaries were determined. The way the paragraph was drafted could create obstacles to the exercise of performers’ and authors’ rights when folklore was adapted. As regards Paragraph (3), the third line of the above paragraph which stated “*have the means*” had to be amended. In the Spanish language version the word “*necesarios*” had to be deleted from “*dispongan de los medios necesarios*” and replaced with the text of the above paragraph (2)(c), and the remainder of the Article had to continue as drafted.

The representative of Tupaj Amaru offered that the text could draw from many UN instruments, in particular, the UN Declaration on the Rights of Indigenous Peoples. He said that the text was not strong enough in many areas and that it should be legally binding. Article 3, in addition to identifying the indigenous peoples and communities and other cultural communities, had to identify the rights and obligations of parties. He asked why the role of the State, which was to defend and protect the rights of indigenous peoples and communities, did not appear in the article. Concerning Article 3(2)(b), he argued that it had to read “prohibited” instead of “prevented,” and that sanctions should be available in both the criminal and civil courts. He also suggested adding, in subparagraph (2)(d), after “designated national authority”, “designated by the indigenous communities referred to in Article 4 in consultation with the relevant indigenous peoples and communities”. Moreover, the term “indigenous or ancestral communities” should replace the vague “cultural communities”. Furthermore, the phrase “whether use or exploitation is for gainful intent” had to be deleted.

The representative of the Indigenous Peoples (Bethelchilokono) of Saint Lucia Governing Council (BGC) wondered how to deal with TCEs that crossed borders within small states. He suggested that it should be left to national laws to deal with that issue. Moreover, he added that the fact that benefit-sharing had to be determined by the national authority did not reflect the experience in the Caribbean or in St. Lucia.

The representative of the Indian Council of South America (CISA) stated, in relation to Article 3(2)(a), that the term “relevant” was not definitive and did not indicate who the indigenous peoples and communities were. He added that Article 3 had to read “the relevant traditional indigenous peoples and communities”. He also said that there had to be a process in which to define who the peoples were, so that the proper agent or authority of the peoples concerned could be dealt with. The representative proposed that the phrase “as referred to in Article 7” be bracketed.

ARTICLE 4:

MANAGEMENT OF RIGHTS

1. *Prior authorizations [to use] to do acts within the rights of indigenous peoples in¹⁵¹ the traditional cultural expressions/expressions of folklore, when required in these provisions, should be obtained either directly from the [community concerned where the community so wishes] indigenous peoples and communities and each of the groups, families, tribes, nations, traditional and other cultural communities or countries¹⁵², or from [an agency] a designated [national]¹⁵³ authority¹⁵⁴ acting at the request, and on behalf, of the [community (from now on referred to as "the Agency"))] indigenous people and community or the traditional and other cultural communities or the nations¹⁵⁵. Where authorizations are granted by the [Agency] authority¹⁵⁶.*
 - (a) *such authorizations should be granted only in appropriate consultation with the relevant indigenous people and¹⁵⁷ community and traditional and other cultural communities¹⁵⁸, in accordance with their traditional decision-making and governance processes;*
 - (b) *any monetary or non-monetary benefits collected by the [Agency] designated [national]¹⁵⁹ authority¹⁶⁰ for the use of the traditional cultural expressions/expressions of folklore should be provided directly by it to the indigenous people and¹⁶¹ community and the traditional and other cultural communities¹⁶² concerned.*
2. *Where so requested by an indigenous people and community and traditional and other cultural communities¹⁶³, the [Agency] designated [national]¹⁶⁴ authority¹⁶⁵ should generally*

¹⁵¹ Delegation of Australia. Clear and settled definitions of rights holders were needed. The first line of Article 4, subparagraph (a), dealt with the use of TCEs which appeared to mix both individual property rights and possible new collective rights. That raised important issues which required further discussion and clarification. In particular, the rights of individual indigenous authors to control the exercise of their property rights in their own creations could not be extinguished without careful consideration. Also, in some countries, including Australia, there were already collective management arrangements that allowed for the use of individual copyright for particular public purposes such as education or teaching purposes. Interference with such arrangements could not be done lightly. It suggested the change in order to make clear that the management of rights was the management of collective peoples' rights, but not the management of individual creators' rights

¹⁵² Delegation of Mexico

¹⁵³ Delegation of the United States of America. See note 131

¹⁵⁴ Delegation of Mexico

¹⁵⁵ Delegation of Mexico

¹⁵⁶ Delegation of Mexico

¹⁵⁷ Delegation of Mexico

¹⁵⁸ Delegation of Mexico

¹⁵⁹ Delegation of the United States of America. See note 131

¹⁶⁰ Delegation of Mexico

¹⁶¹ Delegation of Mexico

¹⁶² Delegation of Mexico

¹⁶³ Delegation of the United States of America. The Delegation suggested starting the article with the phrase "where so requested by an indigenous people and community and traditional and other cultural communities", stating that there was no reason why the entire paragraph should not be conditioned on the request of the indigenous people or the community. Indeed, the indigenous people or community could prefer in the case of secret TCEs that the designated authority not engage in awareness-raising

¹⁶⁴ Delegation of the United States. See note 131

¹⁶⁵ Delegation of Mexico

be tasked with awareness-raising, education, advice and guidance functions. The [Agency] designated [national]¹⁶⁶ authority¹⁶⁷ should also:

- (a) *[where so requested by an indigenous people and¹⁶⁸ community and traditional and other cultural communities.^{169,170}] monitor uses of traditional cultural expressions/expressions of folklore for purposes of ensuring fair and appropriate use as provided for in Article 3 (2); and,*
- (b) *establish the equitable remuneration referred to in Article 3 (2) in consultation with the relevant [community] indigenous peoples and communities and traditional and other cultural communities¹⁷¹.*

[Commentary on Article 4 follows]

¹⁶⁶ Delegation of the United States. See note 131

¹⁶⁷ Delegation of Mexico

¹⁶⁸ Delegation of Mexico

¹⁶⁹ Delegation of Mexico

¹⁷⁰ Delegation of the United States of America. See note 163

¹⁷¹ Delegation of Mexico

COMMENTARY

ARTICLE 4: MANAGEMENT OF RIGHTS

Background

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

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

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

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

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

Comments and questions

The Delegation of Japan said that even if the purpose of the protection of TCEs/EoF was to correct the inequities in economic development and to ensure sustainable development of certain communities by providing new financial resources, it had not been yet justified that granting a right to TCEs/EoF was an appropriate method for achieving such purpose. It also wondered how benefits, which were shared by users of TCEs/EoF, could be distributed to all appropriate beneficiaries in an equitable manner.

The Delegation of Zambia stated that Article 4 had to be preceded by an article spelling out the rights. Article 4 required an emphasis on the fact that protection would not be subject to formalities, i.e., conditional upon registration. This, though, was fairly covered in Article 7.

Drafting suggestions by observers

The representative of the Ibero-Latin-American Federation of Performers (FILAIE) suggested that, in relation to paragraph 4(2), communities living in border regions should select their “Agency”, in the country where they would spend most days per year.

ARTICLE 5:

EXCEPTIONS AND LIMITATIONS

1. *Measures for the protection of TCEs/EoF should:*
 - (a) *not restrict or hinder the normal use, transmission, exchange and development of TCEs/EoF within the traditional and customary context by members of the [relevant community] indigenous peoples and communities and traditional and other cultural communities¹⁷² as determined by customary laws and practices;*
 - (b) *extend only to utilizations of TCEs/EoF taking place outside the traditional or customary context, whether or not for commercial gain; and,*
 - (c) *not apply to utilizations of TCEs/EoF in the following cases:*
 - (i) *by way of illustration for teaching and learning;*
 - (ii) *non-commercial research or private study;*
 - (iii) *criticism or review;*
 - (iv) *reporting news or current events;*
 - (v) *use in the course of legal proceedings;*
 - (vi) *the making of recordings and other reproductions of TCEs/EoF for purposes of their inclusion in an non-public¹⁷³ archive or inventory for non-commercial cultural heritage safeguarding purposes; and*
 - (vii) *incidental uses*

provided in each case that such uses are compatible with fair practice, the relevant [community is] indigenous peoples and communities and traditional and other cultural communities are¹⁷⁴ acknowledged as the source of the TCEs/EoF where practicable and possible, and such uses would not be offensive to [the relevant community] such indigenous peoples and communities and traditional and other cultural communities, as long as the traditional cultural expressions/expressions of folklore are not distorted, mutilated or modified so as to cause harm thereto or to the reputation of the community, indigenous peoples and communities or region to which they belong.¹⁷⁵
2. *Measures for the protection of TCEs/EoF could allow, in accordance with custom and traditional practice, unrestricted use of the TCEs/EoF, or certain of them so specified, by all members of a community, including all nationals of a country.*

[Commentary on Article 5 follows]

¹⁷² Delegation of Mexico

¹⁷³ Delegation of Zambia

¹⁷⁴ Delegation of Mexico

¹⁷⁵ Delegation of Mexico

COMMENTARY

ARTICLE 5: EXCEPTIONS AND LIMITATIONS

Background

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

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

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

- (a) paragraph (1)(a) implements objectives and general guiding principles associated with non-interference in and support for the continued use and development of TCEs/EoF by communities, while (1)(b) affirms that these provisions would apply only to 'ex situ' uses of TCEs/EoF, namely uses outside the customary or traditional context, whether for commercial purposes or not;
- (b) paragraph (1)(c) sets out exceptions drawn from the Model Provisions, 1982, the Pacific Islands Model Law, 2002 and copyright laws in general. Certain more specific comments include:
 - (i) Limitations and exceptions for teaching purposes are common in copyright laws. While these are sometimes limited to "face-to-face" teaching (as also in the Pacific Model, 2002), special limitations and exceptions to copyright and related rights for distance learning have also been raised for discussion.¹⁷⁶ The term "teaching and learning" is used for present purposes.
 - (ii) National copyright laws in some cases allow public archives, libraries and the like to make, for non-commercial safeguarding purposes only, reproductions of works and expressions of folklore and keep them available for the public¹⁷⁷, and this is envisaged. In this respect, appropriate contracts, IP check-lists and other guidelines and codes of conduct for museums, archives and inventories of cultural heritage are under development by WIPO. Specific limitations for libraries and archives in copyright law in general have also been raised for discussion.¹⁷⁸
 - (iii) Not all typical copyright exceptions may be appropriate, however, as they might undermine community interests and customary rights – for example, incidental use exceptions which allow a sculpture or work of artistic craftsmanship permanently displayed in a public place to be reproduced in photographs, drawings and in other ways without permission. Thus, exceptions which would be offensive are excluded.

¹⁷⁶ See Proposal by Chile (SCCR/12/3) on the Subject "Exceptions and limitations to copyright and related rights", discussed at the 12th session of the WIPO Standing Committee on Copyright and Related Rights (SCCR), November 2004

¹⁷⁷ An example is the United Kingdom's Copyright, Designs and Patents Act, 1988, Schedule 2, par. 14.1

¹⁷⁸ See Proposal by Chile, above

Comments and questions

The Delegation of Zambia suggested including the elements of the three-step test. The overriding principle was that none of the exceptions could be prejudicial to, nor adversely affect, the interests of the community concerned.

Drafting suggestions by observers

The representative of the Ibero-Latin-American Federation of Performers (FILAIE) suggested that, in subparagraph (1)(c)(vii), the word “incidental” be deleted, or, should the word be retained, that the three-step test be applied to such uses.

The representative of the International Council of Museums (ICOM) suggested adding, in Article 5(1)(c), as the second to last item, the following: “-the preservation of cultural items resulting, directly or indirectly, from TCEs/EoF in museums or other non-profit related cultural institutions. Such preservation should be aimed at conservation, continuation, communication to society, display to the public for educational, research and delight purposes of the world's natural and cultural heritage, present and future, tangible and intangible. The above-mentioned preservation and its goals should always be subject to the rules of fair use”.

ARTICLE 6:

TERM OF PROTECTION

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

- (a) *in so far as TCEs/EoF referred to in Article 3(1) are concerned, their protection under that sub-article shall endure for so long as they remain registered or notified as referred to in Article 7; [and]¹⁷⁹*
- (b) *in so far as secret TCEs/EoF are concerned, their protection as such shall endure for so long as they remain secret; and¹⁸⁰*
- (c) *the protection granted to TCEs/EoF against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the community, indigenous peoples and communities or region to which they belong, shall last indefinitely.¹⁸¹*

[Commentary on Article 6 follows]

¹⁷⁹ Delegation of Mexico

¹⁸⁰ Delegation of Mexico

¹⁸¹ Delegation of Mexico

COMMENTARY

ARTICLE 6: TERM OF PROTECTION

Background

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

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

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

Comments and questions

The Delegation of Japan stated that if the protection of TCE/EoF was meant to provide an incentive for further creation of expressions which could lead to cultural or industrial development by third parties through the use of protected subject matter, indefinite protection of TCE/EoF was inappropriate in consideration of the balance between interests of the right holders and the public.

Drafting suggestions by observers

The representative of the Ibero-Latin-American Federation of Performers (FILAIE) stated that the phrasing of subparagraph (b) could give rise to ambiguity. For this reason, it would be appropriate to add that legal rules applicable to all other forms of TCEs/EoF be also applied to secret TCEs/EoF, when they ceased to be secret.

ARTICLE 7:

FORMALITIES

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

2. *Measures for the protection of specific traditional cultural expressions/expressions of folklore [of particular cultural or spiritual value or significance and for which a level of protection is sought]¹⁸² as provided for in Article 3(1) should require that such traditional cultural expressions/expressions of folklore be notified to or registered with a [competent office or organization] designated [national]¹⁸³ authority¹⁸⁴ by the relevant [community or] indigenous people and community and traditional and other cultural communities¹⁸⁵, by the [Agency referred to in Article 4] designated [national]¹⁸⁶ authority or by a third party¹⁸⁷ acting at the request of and on behalf of the community.*
 - (a) *To the extent that such registration or notification may involve the recording or other fixation of the traditional cultural expressions/expressions of folklore concerned, any intellectual property rights in such recording or fixation should vest in or be assigned to the relevant [community] indigenous peoples and communities or traditional and other cultural communities¹⁸⁸.*
 - (b) *Information on and representations of the traditional cultural expressions/expressions of folklore which have been so registered or notified should be made publicly accessible at least to the extent necessary to provide transparency and certainty to third parties as to which traditional cultural expressions/expressions of folklore are so protected and for whose benefit.*
 - (c) *Such registration or notification is declaratory and does not constitute rights. Without prejudice thereto, entry in the register presumes that the facts recorded therein are true, unless proven otherwise. Any entry as such does not affect the rights of third parties.*
 - (d) *The [office or organization] designated [national]¹⁸⁹ authority¹⁹⁰ receiving such registrations or notifications [should] shall¹⁹¹ resolve any uncertainties [or disputes] and help to resolve disputes arising¹⁹² as to which [communities] indigenous peoples and communities and traditional and other cultural communities¹⁹³, including those in more than one country, should be entitled to registration or notification or should be the beneficiaries of protection as referred to in Article 2, using customary laws, normative*

¹⁸² Delegation of Mexico

¹⁸³ Delegation of the United States of America. See note 131

¹⁸⁴ Delegation of Mexico

¹⁸⁵ Delegation of Mexico

¹⁸⁶ Delegation of the United States of America. See note 131

¹⁸⁷ Delegation of Mexico

¹⁸⁸ Delegation of Mexico

¹⁸⁹ Delegation of the United States of America. See note 131

¹⁹⁰ Delegation of Mexico

¹⁹¹ Delegation of Mexico

¹⁹² Delegation of Mexico

¹⁹³ Delegation of Mexico

systems¹⁹⁴ and processes, alternative dispute resolution (ADR) and existing cultural resources, such as cultural heritage inventories, as far as possible.

[Commentary on Article 7 follows]

¹⁹⁴ Delegation of Mexico. The Delegation explained that “normative systems” comprised knowledge developed and preserved within specific groups of indigenous peoples and communities, and passed on from generation to generation, in oral form. Indigenous normative systems were therefore part of the same cultural matrix as traditional medicine, art and handicrafts, myths of creation, and relationship of exchange, which existed between the communities and with nature. To that extent, internal normative systems constituted TK of indigenous peoples and indigenous peoples should have the right to use their normative systems to resolve any internal disputes that would arise

COMMENTARY

ARTICLE 7: FORMALITIES

Background

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

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

- (a) a first option is to require some form of registration, possibly subject to formal or substantive examination. A registration system may merely have declaratory effect, in which case proof of registration would be used to substantiate a claim of ownership, or it may constitute rights. Some form of registration may provide useful precision, transparency and certainty on which TCEs are protected and for whose benefit;
- (b) a second option would be to require automatic protection without formalities, so that protection would be available as of the moment a TCE is created, similar to copyright.

The suggested provision combines these two approaches.

First, paragraph (1) suggests as a general principle that TCEs/EoF should be protected without formality, following copyright principles and in an endeavor to make protection as easily available as possible.

Second, some form of registration or notification is, however, proposed for those TCEs/EoF for which, under Article 3(1), would receive the strongest protection:

- (i) registration or notification is optional only and a matter for decision by relevant communities. Registration or notification is not an obligation; protection remains available under Article 3(2) for unregistered TCEs/EoF. There would be no need to register or notify secret TCEs/EoF because secret TCEs/EoF are separately protected under Article 3(3). This registration option is applicable only in cases where communities wish to obtain strict, prior informed consent protection for TCEs/EoF which are already known and publicly available;
- (ii) the provision draws broadly from existing copyright registration systems, the Database of Native American Insignia in the United States of America, the Panama Law, 2000, the Andean Decision 351, and the Peru Law, 2002 (see generally WIPO/GRTKF/IC/7/3 and earlier documents for information on these laws);
- (iii) a regional organization could conceivably administer such a registration or notification system. ARIPO and OAPI have, for example, noted the role of regional organizations in this area. While these provisions may have initial application at the national level, thus implying national registers or other notification systems, eventually some form of regional and international register could form part of possible eventual regional and international systems of protection. Such an international system of notification/registration could perhaps draw from existing

systems such as Article 6~~ter~~ of the Paris Convention or the registration system provided for in Article 5 of the Lisbon Agreement for the International Registration of Appellations of Origin, 1958;

- (iv) it is suggested that the office or organization at which such registrations or notifications may be made, and which would seek to resolve disputes, should not be the same as the Agency referred to in Article 4;
- (v) it is made clear that it is only a community which claims protection of a particular TCE/EoF that can register or notify the TCE/EoF, or, in cases where the community is not able to do so, the Agency referred to in Article 4, acting at the request and in the interests of the community;
- (vi) in resolving disputes between communities, including communities from more than one country, the draft article suggests that the registration office or organization use customary laws and processes and alternative dispute resolution (ADR) as far as possible. These are suggested in order to achieve as far as possible objectives and principles relating to customary law and non-conflict between communities. In so far as taking existing cultural resources into account, the office or organization could refer also to cultural heritage inventories, lists and collections such as those established under the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003. There may, more broadly, be some opportunities for developing synergies between inventories established or being established for cultural heritage preservation purposes (such as States Parties are obliged to do under the UNESCO Convention referred to) and the kind of registers or notification systems suggested here. Indeed, measures could be developed to ensure that cultural heritage inventories, lists and collections could reinforce, support and facilitate the implementation of *sui generis* provisions for the protection of TCEs/EoF (and TK).¹⁹⁵ WIPO is working with relevant stakeholders in examining these questions further;
- (vii) in order for the provision not to be too prescriptive however, further questions of implementation could be left to national and regional laws. Enabling legislation, regulations or administrative measures could provide guidance on issues such as: (a) the manner in which applications for notification or registration should be made; (b) to what extent and for what purposes applications are examined by the registration office; (c) measures to ensure that the registration or notification of TCEs/EoF is accessible and affordable; (d) public access to information concerning which TCEs/EoF have been registered or notified; (e) appeals against the registration or notification of TCEs/EoF; (f) the resolution by the registration office of disputes relating to which community or communities should be entitled to benefit from the protection of a TCE/EoF, including competing claims from communities from more than one country; and (g) the legal effect of notification or registration.

Recording, fixation and documentation of TCEs/EoF

¹⁹⁵ See UNESCO Expert Meeting on Inventorying Intangible Cultural Heritage, March 17 and 18, 2005

The role of documentation, recording and fixation of TCEs/EoF and its relationship with IP protection has been discussed at length in previous documents and publications.¹⁹⁶ In brief, previous discussions have identified certain IP-related concerns with documentation initiatives. For example, copyright and related rights in the documentation, recordings and fixations would almost always vest not in the communities themselves but in those who undertake the documentation, recording or fixation. Second, documentation and recordal of TCEs/EoF, particularly if made available in digitized form, make the TCEs/EoF more accessible and available and may undermine the efforts of communities to protect them. For these reasons, the proposed article provides that any IP rights in recordings made specifically for registration purposes should vest in the relevant communities. Indeed, fixing in material form TCEs/EoF which would not otherwise be protectable, establishes new IP rights in the fixation and these IP rights could be used indirectly to protect the TCEs/EoF themselves (this strategy has been used for example to protect ancient rock art).¹⁹⁷ It is furthermore clear that the recording and documentation of TCEs/EoF is a valuable if not essential component of cultural heritage safeguarding programs. WIPO is undertaking further work on the IP aspects and implications of recording and documentation of TCEs/EoF in cooperation with other stakeholders. The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, 1993 urges indigenous peoples *inter alia* to “develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge”.¹⁹⁸

Comments and questions

Relationship with “characteristics” of TCEs

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

The Delegation of Japan said that, from the viewpoint of predictability for users, clearer definitions of TCEs/EoF and beneficiaries were needed, especially if any protection was to be given to TCEs/EoF irrespective of formality.

Relationship with “beneficiaries”

The Delegation of Zambia said that Article 7 fairly reflected its own draft law, save insofar as it presupposed that TCEs would always be held by a community. Article 7(2)(a), for instance, did not envisage an assignment to an entity other than a community.

¹⁹⁶ See WIPO/GRTKF/IC/5/3, WIPO/GRTKF/IC/6/3 and WIPO/GRTKF/IC/7/3, for example

¹⁹⁷ See, for example, Janke, 'Unauthorized Reproduction of Rock Art' in Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions, WIPO, 2003

¹⁹⁸ Article 1.3

ARTICLE 8:

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

1. *Accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies, including criminal and civil remedies, [should] shall¹⁹⁹ be available in cases of breach of the protection for traditional cultural expressions/expressions of folklore.*

2. *The [Agency] designated [national]²⁰⁰ authority²⁰¹ referred to in Article 4 should be tasked with, among other things, advising and assisting [communities] indigenous peoples and communities and traditional and other cultural communities²⁰² with regard to the enforcement of rights and with instituting civil, criminal and administrative proceedings on their behalf when appropriate and requested by them.*

[Commentary on Article 8 follows]

¹⁹⁹ Delegation of Mexico

²⁰⁰ Delegation of the United States of America. See note 131

²⁰¹ Delegation of Mexico

²⁰² Delegation of Mexico

COMMENTARY

ARTICLE 8: SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

Background

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

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

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

Comments and questions

The Delegation of Zambia considered the sanctions adequate. There was a need, however, to frame the article in a manner that demonstrated that those were minimum standards and obligatory. The Agency could also be mandated to resolve disputes among communities, applying customary laws, local information sources and extra judicial means in settling disputes.

ARTICLE 9:

TRANSITIONAL MEASURES

1. *These provisions apply to all traditional cultural expressions/expressions of folklore which, at the moment of the provisions coming into force, fulfill the criteria set out in Article 1.*
2. *Continuing acts in respect of traditional cultural expressions/expressions of folklore that had commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, should be brought into conformity with the provisions within a reasonable period of time after they enter into force, subject to respect for rights previously acquired by third parties.*

[Commentary on Article 9 follows]

COMMENTARY

ARTICLE 9: TRANSITIONAL MEASURES

Background

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

As many Committee participants have pointed out, this question touches directly upon the notion of the “public domain”. Previous documents have pointed out that a “clearer understanding of the role, contours and boundaries of the public domain is vital in the development of an appropriate policy framework for the IP protection of TCEs.”²⁰³ Committee participants have stated that the public domain was not a concept recognized by indigenous peoples and/or that as expressions of folklore *stricto sensu* had never been protected under IP they could not be said to have entered a “public domain”. In the words of the Tulalip Tribes: “It is for this reason that indigenous peoples have generally called for the protection of knowledge that the Western system has considered to be in the ‘public domain,’ as it is their position that this knowledge has been, is, and will be regulated by customary law. Its existence in the ‘public domain’ has not been caused by their failing to take the steps necessary to protect the knowledge in the Western IP system, but from a failure from governments and citizens to recognize and respect the customary law regulating its use”.²⁰⁴

Several options are apparent in existing laws:

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

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

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

²⁰³ See for example WIPO/GRTKF/IC/5/3 and subsequent documents

²⁰⁴ Statement at fifth session of the Committee, also available at <http://www.wipo.int/tk/en/igc/ngo/ngopapers.html>

ARTICLE 10:

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

Protection for traditional cultural expressions/expressions of folklore in accordance with these provisions does not replace and is complementary to protection applicable to traditional cultural expressions/expressions of folklore and [derivatives] [adaptations]²⁰⁵ thereof under other intellectual property laws, laws and programs for the safeguarding, preservation and promotion of cultural heritage, and other legal and non-legal measures available for the protection and preservation of traditional cultural expressions/expressions of folklore.

[Commentary on Article 10 follows]

²⁰⁵ Delegation of the United States of America. See note 10

COMMENTARY

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

Background

Relationship with IP laws

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

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

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

Relationship with non-IP measures

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

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

The provisions are intended to complement and work together with laws and measures for the preservation and safeguarding of intangible cultural heritage. In some cases, existing cultural heritage measures, institutions and programs could be made use of in support of these principles,

thus avoiding a duplication of effort and resources. Which modalities and approaches are adopted will also depend upon the nature of the TCEs to be protected, and the policy objectives that protection aims to advance.

ARTICLE 11:

INTERNATIONAL AND REGIONAL PROTECTION

The rights and benefits arising from the protection of traditional cultural expressions/expressions of folklore under national measures or laws that give effect to these international provisions should be available to all eligible beneficiaries who are nationals or [habitual]²⁰⁶ residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country of protection, as well as the rights and benefits specifically granted by these international provisions.

[Commentary on Article 11 follows]

²⁰⁶ Delegation of Mexico

COMMENTARY

ARTICLE 11: INTERNATIONAL AND REGIONAL PROTECTION

Background

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

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

- (a) The Berne Convention (Article 5) provides that “(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention”, and that “protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors”;
- (b) The Rome Convention, 1961, in so far as performers are concerned, provides as follows: “For the purposes of this Convention, national treatment shall mean the treatment accorded by the domestic law of the Contracting State in which protection is claimed: (a) to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory; . . . National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention” (Article 2); and,
- (c) The WPPT, 1996 states as follows: “Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty”.

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

Berne Convention (Article 3(2)) provides that authors who are not nationals of one of the countries of the [Berne] Union but who have their habitual residence in one of them shall, for the purposes of the Convention, be assimilated to nationals of that country.

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

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

The protection of foreign holders of rights in TCEs/EoF is, however, a complex question as Committee participants have pointed out. The Delegation of Egypt, for example, stated at the seventh session: “. . . TCEs/EoF were often part of the shared cultural heritage of countries. Their regional and international protection was therefore a complex issue and it was necessary to be very careful. Countries would have to consult with each other before adopting any legal measures in this regard.”²⁰⁷ Morocco noted the need for “wider consultation involving all interested parties before the establishment of legal protection mechanisms”.²⁰⁸ In view of this complexity, Committee discussions have thus far provided little specific guidance on this technical question and existing TCE *sui generis* national laws either do not protect foreign rightsholders at all or show a mix of approaches.

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

Further drafts of these provisions could, depending on the Committee’s wishes, explore more deeply the kinds of technical provisions found in international instruments, such as provisions dealing with points of attachment, assimilation, protection in the country of origin and independent protection. They could also address further the question of “regional folklore” and

²⁰⁷ WIPO/GRTKF/IC/7/15 Prov. Par. 69

²⁰⁸ WIPO/GRTKF/IC/7/15 Prov. Par. 85

the practical relationship between the international dimension and the suggested registration/notification of TCEs/EoF (see Articles 3(a) and 7 above). As stated in the commentary to those articles, they currently refer to national registers, but there could eventually be envisaged some form of regional and/or international registers, drawing from, for example, Article 6~~ter~~ of the Paris Convention or the registration system provided for in Article 5 of the Lisbon Agreement for the International Registration of Appellations of Origin, 1958.

GENERAL COMMENTS

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

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

The Delegation of Japan suggested that, in discussing substantive provisions, the general guiding principles on flexibility and comprehensiveness be respected and duly reflected in the wording of each article.

[End of Annex and of document]