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

## Ninth Session
## Geneva, April 24 to 28, 2006

THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/ EXPRESSIONS OF FOLKLORE:

REVISED OBJECTIVES AND PRINCIPLES

*Document prepared by the Secretariat*

CONTENTS

## I. INTRODUCTION

1. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') has extensively reviewed legal and policy options for the protection of traditional cultural expressions (TCEs)/expressions of folklore (EoF), on the basis of several decades of previous WIPO work on protection of TCEs/EoF, comprehensive analyses of existing national and regional legal mechanisms and forms of protection available under existing intellectual property (IP) and other laws, extensive community consultations and fact-finding, case studies and a survey of the international policy and legal environment.

2. At its sixth session, having discussed legal and policy options for the protection of TCEs/EoF (documents WIPO/GRTKF/IC/6/3 and 6/3 Add.), the Committee decided to develop an overview of policy objectives and core principles for the protection of TCEs/EoF. On the basis of guidance provided by the Committee, draft materials were then provided for the Committee to consider at its seventh and eighth sessions as follows:

(i) WIPO/GRTKF/IC/7/3 provided an initial draft of objectives and principles, and was extensively reviewed at the Committee's seventh session;

(ii) the Committee established an intersessional commentary process which drew extensive comments from a wide range of Member States and Committee observers;

(iii) WIPO/GRTKF/IC/8/4 incorporated the comments received from Member States and Committee observers into the draft objectives and principles and was then extensively reviewed at the Committee's eighth session.

3. Document WIPO/GRTKF/IC/7/3 characterized these draft objectives and principles as "possible substantive elements of protection of TCEs/EoF in a manner which leaves open and facilitates future decisions by Member States on the context and legal status which they may assume at the international, regional and national levels." The material in the document was "not, in substance, new to the Committee: it simply distils and structures the existing legal mechanisms and the extensive practical experience with protection of TCEs/EoF that have already been widely discussed by the Committee, and draws essentially on the Committee's own deliberations and the various materials put to the Committee." This document therefore drew on the reported and documented national and regional experience with the protection of TCEs/EoF, of countries and communities in many geographical regions, at every level of economic development, that had been surveyed extensively in previous sessions of the Committee.

4. The document included drafts of:

(i) policy objectives, which could set common general directions for protection and provide a consistent policy framework;

(ii) general guiding principles, which could ensure consistency, balance and effectiveness of substantive principles; and

(iii) specific substantive principles, which could define the legal essence of protection.

5. The Committee decided to deal with the international dimension integrally with its work on the protection of TCEs. Supplementary documents WIPO/GRTKF/IC/6/6 and WIPO/GRTKF/IC/8/6 set out various considerations concerning the international dimension of the work of the Committee. These documents were provided as information resources for

the Committee and remain potentially relevant to its work. For instance, WIPO/GRTKF/IC/8/6 provides information that may be relevant to the international context of the draft objectives and principles.

6. Committee members generally supported the draft objectives and principles in WIPO/GRTKF/IC/7/3 as a basis for continuing work on the protection of TCEs/EoF.[1] A revised version was then prepared, on the basis of the extensive comments made at the seventh session, as well as the comments and specific suggestions for wording, which were provided by a wide cross-section of Committee participants during the intersessional commentary process established by the Committee. This revised version was circulated as the Annex to WIPO/GRTKF/IC/8/4.

7. At the Committee's eighth session, a number of delegations supported the revised version of the provisions (WIPO/GRTKF/IC/8/4) as the basis for continuing work (although not suggesting that the document was necessarily adequate or close to a final form), and a number expressed opposition to further discussion of and consultation on the revised version of specific substantive principles (Part III of the Annex to WIPO/GRTKF/IC/8/4).

8. The Committee agreed at its eighth session that there was broad support for the process and work being undertaken within the Committee on TCEs. However, the Committee "noted the diverse views expressed" on this issue[2] and no specific directions were given concerning the specific basis for the future work of the Committee under this agenda item. The WIPO General Assembly subsequently agreed in October 2005 to renew the mandate of the Committee to continue its current mandate for the 2006-2007 biennium.

9. Noting that the Committee's renewed mandate refers to the international dimension of its work and excludes no outcome, three aspects of the Committee's work regarding TCEs/EoF may need to be considered:

(i) the content or substance of any outcome;
(ii) the form or legal status of any outcome; and
(iii) the consultative and other working procedures necessary to achieve any agreed outcome.

These three aspects are reviewed briefly below.

## II. CONTENT OR SUBSTANCE

10. The present document reproduces in its Annex the most recent version of the draft objectives and principles as were contained in the Annex to document WIPO/GRTKF/IC/8/4. No amendment or update has been made to the objectives and principles in view of the discussions that took place at the Committee's previous session. Documents WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/8/4 provide the full details and origin of this material; the latter document describes in particular the differences between the two versions and the changes made following the commentary process.

11. As in the past, this text is presented without prejudging its status or legal implications. It does, however, present in coherent and focused form the kind of specific questions that may need to be weighed by policymakers at national, regional and international level, when

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1 WIPO/GRTKF/IC/7/15.
2 WIPO/ GRTKF/IC/8/15 Prov., para 163.

considering the appropriate form and means of protection of TCEs/EoF. Accordingly, relevant national, regional and international activities have been addressing the same issues to those set out in the draft objectives and principles. The Committee itself has examined these issues over a number of sessions (see, for example, documents WIPO/GRTKF/IC/2/8, WIPO/GRTKF/IC/3/10, WIPO/GRTKF/IC/4/3, WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3). The recurring issues include the following:

(a) nature of the subject matter of TCEs/EoF, and possible descriptions or definitions;
(b) criteria for protection of subject matter;
(c) identity of owners, bearers or custodians of TCEs/EoF or other beneficiaries of protection;
(d) nature of protection, including the possible need for formalities and the role of registration and other forms of official notice;
(e) scope of rights and exceptions;
(f) duration of protection;
(g) role of government agencies or other authorities;
(h) relationship with conventional IP protection and cultural heritage safeguarding programs;
(i) transitional measures, retroactivity of protection and the role and status of the public domain;
(j) international and regional protection; and
(k) recognition of foreign right holders and other foreign beneficiaries of protection.

12. As other policy and legislative processes continue to address these issues, further experience has accumulated with protection of TCEs/EoF. The lessons of this experience and the specific policy choices taken at the national and regional levels may shed further light on these issues as the Committee continues to discuss the draft provisions as contained in WIPO/GRTKF/IC/8/4 or any other draft materials. The scope of policy options and legal mechanisms for protection of TCEs/EoF at the national and regional levels was set out in document WIPO/GRTKF/IC/7/4. In line with the request of the Committee at its seventh session, an updated form of this document is being prepared for the Committee as document WIPO/GRTKF/IC/9/INF/4. This may provide additional information on how national and regional processes are implementing objectives and principles, and taking specific policy choices, with regard to the protection of TCEs/EoF.

## IV. FORM OR STATUS

13. The Committee's mandate, as renewed, does not predetermine the form or nature of any outcome of the Committee's work, but equally does not exclude any outcome. Concerning the possible form or status of any outcome, document WIPO/GRTKF/IC/6/6, considered by the Committee at its sixth session, sets out some of the possible approaches as follows:[3]

- A binding international instrument or instruments (e.g. obliging Contracting Parties to apply the prescribed standards in national law), including stand-alone instruments, protocols to existing instruments or special agreements under existing agreements;

[3] WIPO/GRTKF/IC/6/6, paragraph 34.

- A declaration espousing core objectives and principles and establishing the needs and expectations of bearers of TCEs/EoF as a political priority (e.g. as the political basis for a further phase of work possibly aimed at more precise legal outcomes);
- Other forms of soft law or non-binding instruments, such as a statement or recommendation (for instance, recommending, encouraging or urging States to give effect to the prescribed standards in national law and other administrative and non-legal processes and policies);
- Guidelines or model provisions (e.g. providing the basis for cooperation, convergence and mutual compatibility of national legislative initiatives for the protection of TCEs/EoF);
- Authoritative or persuasive interpretations of existing legal instruments (e.g. guiding or encouraging the interpretation of existing obligations in such a way as to enhance the desired protection of TCEs/EoF against misappropriation and misuse).

14. It may also be noted that these options as to legal form of the instrument are not mutually exclusive: past experience shows that several international conventions, in a variety of policy fields, initially took the form of non-binding instruments of one or other kind. Thus, a phased approach is also possible. Equally, the Annex provides possible legal content for instruments at the regional and national level, such as regional or national laws, regulations, decrees or policies.

15. These options are further considered in document WIPO/GRTKF/IC/9/6, and more fully in WIPO/GRTKF/IC/6/6.

## IV. PROCESSES

16. The Committee has also considered various possibilities for consulting upon and developing further draft materials, and what procedural steps may be desirable. This would be additional to the steps already taken to enhance the participation of indigenous and local communities, through accreditation, procedural changes, and the creation of a voluntary fund. At its seventh session, the Committee reviewed a range of possibilities, and established an intersessional commentary process for the further development of the draft objectives and principles. Document WIPO/GRTKF/IC/8/4 included a proposal for a further intersessional commentary process and to ‘consider options for further enhancing the role of the Committee, and possible subsidiary bodies, in directly preparing future drafts’

17. The range of possibilities discussed have included one or more of the following:

- expert-level or subsidiary consultations, for example dealing with specific questions or working through the text from a focused expert perspective;
- intersessional commentary processes, such as those implemented in the past;
- continuing consultations by national governments with stakeholders, especially holders and custodians of TCEs/EoF, as well as consultations through regional bodies and other forums;
- procedural measures such as the institution of panel sessions chaired by traditional and local communities at the beginning of IGC sessions.

Document WIPO/GRTKF/IC/9/6 sets out further background to these possibilities.

## V. CONCLUSION

18. This document has briefly reviewed the possibilities for the Committee to consider in relation to its work on TCEs/EoF under three aspects:

(i) the substance or content of its work;
(ii) the form, nature or legal status of any outcome from its work;
(iii) procedures or methodology required to enhance progress towards any desired outcome.

19. In terms of specific content on TCE protection, the Annex to this document reproduces the most recent version of the text under consideration by the Committee, noting the different positions of Committee members regarding elements of that text. A separate document, WIPO/GRTKF/IC/9/INF/4, a revision of WIPO/GRTKF/IC/7/4, provides updated material on the manner in which national authorities and regional bodies are putting into effect forms of protection that are related to the objectives and principles contained in the Annex.

*20. The Committee is invited to:*

*(i) consider the possibilities for advancing its work on the protection of TCEs, including the substance or content of possible outcomes of this work, the form or legal status of any such outcome, and the preferred procedures required to achieve any such outcome;*

*(ii) continue to review and comment on the draft provisions contained in the Annex, including in the light of continuing updates on the experience at the community, national and regional levels;*

*(iii) consider an appropriate process to develop revised and updated materials on protection of TCEs for the tenth session of the Committee, in view of any outcomes considered possible from the current extended mandate of the Committee; and*

*(vi) develop options for further enhancing the role of the Committee, and possible subsidiary bodies, in directly preparing future drafts of this material.*

[Annex follows]

ANNEX

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

## POLICY OBJECTIVES AND CORE PRINCIPLES

CONTENTS

*N.B. These draft provisions are reproduced unaltered from the Annex of document WIPO/GRTKF/IC/8/4, considered by the Intergovernmental Committee on Intellectual Property and Genetic Resources and Folklore ('the Committee') at its eighth session. Committee members have expressed diverse views on the acceptability of this material as a basis for future work, in particular regarding certain passages of Part III: Substantive Principles. WIPO/GRTKF/IC/8/15 sets out these diverse views in full.*

III. SUBSTANTIVE PRINCIPLES

1. Subject Matter of Protection
2. Beneficiaries
3. Acts of Misappropriation (Scope of Protection)
4. Management of Rights
5. Exceptions and Limitations
6. Term of Protection
7. Formalities
8. Sanctions, Remedies and Exercise of Rights
9. Transitional Measures
10. Relationship with Intellectual Property Protection and Other Forms of Protection, Preservation and Promotion
11. International and Regional Protection

## I. OBJECTIVES

*The protection of traditional cultural expressions, or expressions of folklore,*[1] *should aim to:*

*Recognize value*

(i) *recognize that indigenous peoples 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 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 of traditional cultural expressions/expressions of folklore*

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

*Empower communities*

(v) *be achieved in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and traditional and other cultural communities to exercise 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;*

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[1] 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.

*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 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 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 traditional and other cultural communities;*

*Contribute to cultural diversity*

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

*Promote community development and legitimate trading activities*

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

*Preclude unauthorized IP rights*

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

*Enhance certainty, transparency and mutual confidence*

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

[Commentary on Objectives follows]

# COMMENTARY

## OBJECTIVES

Background

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

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

Revisions as compared with previous draft in document WIPO/GRTKF/IC/7/3

Several changes have been made to the original draft objectives annexed to WIPO/GRTKF/IC/7/3, in the light of interventions made at the seventh session of the Committee and the written comments received from, amongst others, Colombia, the Islamic Republic of Iran, New Zealand, the United States of America, *l'Organisation africaine de la propriete intellectuelle (OAPI)*, the Saami Council, the Inuit Circumpolar Conference (ICC), the Assembly of First Nations, and the International Trade Mark Association (INTA).

Some of the previous objectives are more in the nature of general guiding principles rather than objectives as such, and have been transferred to that section (see below).[2] These include the objectives relating to respect for and cooperation with relevant international agreements, and complementarity with the protection afforded to TK *stricto sensu*. Some new objectives have been added, such as an objective relating to preventing the misappropriation of TCEs/EoF, as suggested by more than one Committee participant.[3] Two Committee participants in particular suggested that a distinction be made between those objectives more directly related to the protection of TCEs/EoF at the IP interface and other objectives relating to other policy areas which the provisions should take into account and not run counter to.[4] While such objectives may not have been formally set apart in the draft, certain have been rephrased to take these comments into account.

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2 As noted for example by Iran (the Islamic Republic of) at the seventh session of the Committee (WIPO/GRTKF/IC/7/15 Prov. para. 78).

3 For example, China at the seventh session of the Committee (WIPO/GRTKF/IC/7/15 Prov. Para. 75), and comments by Colombia and the Saami Council.

4 See intervention by ARIPO at the seventh session (WIPO/GRTKF/IC/7/15 Prov. Par. 89) and comments by New Zealand.

## II. GENERAL GUIDING PRINCIPLES

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

*(b) Principle of balance*

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

*(d) Principle of flexibility and comprehensiveness*

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

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

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

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

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

[Commentary on General Guiding Principles follows]

COMMENTARY

GENERAL GUIDING PRINCIPLES

Background

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

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

This principle recognizes that protection for TCEs/EoF should reflect the aspirations and expectations of indigenous peoples and traditional and other cultural communities. This means, in particular, that the protection of TCEs/EoF should recognize and apply indigenous and customary laws and protocols as far as possible, promote complementary use of positive and defensive protection measures, address both cultural and economic aspects of development, prevent insulting, derogatory and offensive acts in particular, promote cooperation among communities and not engender competition or conflicts between them[5], 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.[6] Protection for TCEs/EoF should not be invoked in order to infringe human rights guaranteed by international law or to limit the scope thereof.

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5 See Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, 1993, paragraph 2.5, for example.

6 Comment of the Saami Council.

*(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."[7]

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.[8]

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.[9]

*(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".

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7 Four Directions Council, 'Forests, Indigenous Peoples and Biodiversity,' Submission to the Secretariat for the CBD, 1996.

8 See interventions at seventh session of the Committee by, among others, Azerbaijan, Japan and the Syrian Arab Republic, and the comments by Australia, Iran (Islamic Republic of) and New Zealand.

9 Article 34.

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 *stricto sensu* (TK) 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*

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. See further below under "Comments received on earlier version of the general guiding principles (WIPO/GRTKF/IC/7/3)".

*(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.

<u>Comments received on earlier version of the general guiding principles (WIPO/GRTKF/IC/7/3)</u>

These revised general guiding principles were prepared in the light of comments received from, among others, Colombia, the Islamic Republic of Iran, New Zealand, the

United States of America, the Assembly of First Nations, *l'Organisation africaine de la propriété intellectuelle* (OAPI), the Saami Council, the Inuit Circumpolar Conference (ICC) and the International Trademark Association (INTA).

As already noted, commentators observed that some objectives are more in the nature of general guiding principles. They have accordingly been transferred to this section. These include objectives relating to respect for and cooperation with relevant international agreements and complementarity with the protection afforded to TK.

In addition, the new principle (g) follows directly a proposal made by the Tulalip Tribes at the Committee's seventh session[10]. Comments from the Inuit Circumpolar Conference (ICC) and the Saami Council made similar points, which have also been taken into account in the revision of the objectives. The wording of the suggested principle has been drawn from that suggested by the Tulalip Tribes, with adjustments for editorial consistency with the other general guiding principles. The commentary seeks to explain and amplify the principle, again drawing directly from the wording used by the Tulalip Tribes. However, it is not assumed that the suggested wording of principle (g) necessarily fully captures the essence of the wording proposed by the Tulalip Tribes, which was: "Nothing in the application of any principle shall release the State from respecting existing rights and obligations towards holders of TCEs/EoF and TK or prejudice the further elaboration of these rights and obligations."

[10] WIPO/GRTKF/IC/7/15 Prov. Para. 97.

## III. SUBSTANTIVE PROVISIONS

### ARTICLE 1:

### SUBJECT MATTER OF PROTECTION

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

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

*(ii) musical expressions, such as songs and instrumental music;*

*(iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances,*

*whether or not reduced to a material form; and,*

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

*which are:*

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

– *(bb) characteristic of a community's cultural and social identity and cultural heritage; and*

– *(cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.*

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

[Commentary on Article 1 follows]

COMMENTARY

ARTICLE 1: SUBJECT MATTER OF PROTECTION

Background

The suggested article describes the subject matter covered by the provisions. Paragraph (a) sets out both a description of the subject matter itself ("traditional cultural expressions" or "expressions of folklore") as well as the substantive criteria which specify more precisely which of those expressions would be protectable. The Committee's discussions have clarified the distinction between description of the subject matter in general, and the more precise delimitation of those TCEs/EoF that are eligible for protection under a specific legal measure. As has been pointed out, not every expression of folklore or of traditional cultures and knowledge could conceivably be the subject of protection within an IP framework.[11]

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

*Description of subject matter*

The words "or combinations thereof" in paragraph (a) are intended to demonstrate that TCEs/EoF can be both tangible and intangible and have both tangible and intangible components ("mixed expressions"), as has been suggested.[12] Paragraph (a) also makes it clear that oral (non-fixed) expressions would also be protectable, responding to the often oral nature of traditional cultural expression. Fixation would therefore not be a requirement for protection.[13] The protection for "architectural forms" could contribute towards the protection of sacred sites (such as sanctuaries, tombs and memorials) to the extent they are the object of misappropriation and misuse as covered by these provisions.

*Criteria for protection*

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

(i) be intellectual creations and therefore "intellectual property", including both individual and communal creativity. Differing versions, variations or adaptations of the same expression could qualify as distinctTCEs/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

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11 Intervention by Nigeria (WIPO/GRTKF/IC/6/14, par. 43).

12 Comments and previous statements by Iran (the Islamic Republic of) .

13 See comments by Colombia.

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;[14]

(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".[15] Expressions which may characterize more recently established communities or identities would not be covered.[16]

*Contemporary creativity/individual creators*

As discussed in previous documents,[17] 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[18]) 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

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14 See Commentary to the Model Provisions, 1982. See also comments of Colombia.

15 For example, discussions with Professor Edi Sedyawati and others at National Consultation Forum on Intellectual Property and Traditional Knowledge and Cultural Expressions/Folklore, Indonesia, November 30 and December 1, 2004 and UNESCO Expert Meeting on 'Inventorying Cultural Heritage', Paris, March 17 and 18, 2005.

16 See, for example, the concerns in this regard of the International Publishers Association (IPA) as reflected in their comments.

17 See in particular WIPO/GRTKF/IC/6/3.

18 See comments by the Inuit Circumpolar Conference (ICC) which support this approach and provide these examples. See also paras. 2.2 and 2.5 of the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, 1993. Discussions with members of the Scientific Committee of OAPI refer.

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 sub-paragraph (b) recognizes that detailed decisions on terminology should be left to national and regional implementation.

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

Previously, the description of the subject matter and the criteria for protection were set out in two provisions, B.1 and B.2. However, B.1 was drawn almost directly from the Model Provisions, 1982, and contained some criteria which overlapped with B.2, as some commentators pointed out. Thus, the former B.1 and B.2 have been consolidated into one provision.

Previous discussions also suggested that the definition in the Model Provisions, 1982 was, while a useful starting point, dated and in need of further consideration. The revised article draws from the Model Provisions, 1982 but also more directly from other more recent models, such as the Pacific Model, 2002. The word "folk" has been removed as suggested, and other refinements to the language and structure have been made in response to various comments and other inputs. A specific reference to body-painting has been added because of the importance of this form of expression to communities and possible uncertainty as to whether it is sufficiently "tangible" to qualify as a tangible TCE/EoF.[19]

The revised provision is intended to be more precise and clear, in response to comments that the scope of subject matter appeared too wide and imprecise.[20] The criteria that determine which TCEs/EoF are protectable further delimit this scope; in addition, the nature of the protection provided by the provisions, notably in Article 3 'Acts of Misappropriation (Scope of Protection)', further clarify the reach of the provisions.

One country suggested deletion of the criterion in paragraph (ii) of the former provision B. 2 (which read: "characteristic of a community's distinctive cultural identity and traditional heritage developed and maintained by it"), because it would impose too heavy a burden of proof on communities.[21] This suggestion certainly merits further consideration.

Previous discussions have also addressed the place and role of individuals in the creation and "ownership" of TCEs/EoF. Certain comments also did so, as did other inputs received.[22] The provisions and commentary have been adjusted in an effort to deal more adequately with these issues, but further reflection might be necessary.

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19 See discussions in WIPO/GRTKF/IC/5/3.

20 For example, comments of the European Community and its Member States and the International Publishers Association (IPA).

21 See comments of Colombia.

22 For example, see discussions at WIPO Asia and the Pacific Regional Seminar on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Daejeon, Republic of

More generally, Colombia suggested that it would be useful to produce a glossary of terms in order to make the provisions easier to understand and to achieve a unified understanding of the articles. OAPI also suggested a definitions section.

Several other changes were made to the previous B.1 and B.2, taking into account comments made by, amongst others, Australia, Colombia, the European Union and its Member States, the Islamic Republic of Iran, the United States of America, the Assembly of First Nations, the International Publishers Association (IPA), *l'Organisation africaine de la propriete intellectuelle* (OAPI), the International Trade Mark Association (INTA) and the Saami Council.

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Korea, October 11 to 13, 2004 and at fifth and sixth sessions of the Committee; comments of the United States of America; and discussions with members of the Scientific Committee of OAPI, in particular, on this point, with Professor Kouliga Nikiema, Burkina Faso.

ARTICLE 2:

BENEFICIARIES

*Measures for the protection of traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples and traditional and other cultural communities:*[23]

*(i) in whom the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with their customary law and practices; and*

*(ii) who maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic of their cultural and social identity and cultural heritage.*

[Commentary on Article 2 follows]

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

COMMENTARY

ARTICLE 2: BENEFICIARIES

Background

Many stakeholders have emphasized that TCEs/EoF are generally regarded as collectively originated and held, so that any rights and interests in this material should vest in communities rather than individuals. Some laws for the protection of TCEs/EoF provide rights directly to concerned peoples and communities. On the other hand, many vest rights in a Governmental authority, often providing that proceeds from the granting of rights to use the TCEs/EoF shall be applied towards national heritage, social welfare and culture related programs. The African Group has stated that principles for the protection of TCEs/EoF should 'Recognize the role of the State in the preservation and protection of traditional knowledge and expressions of folklore.'[24]

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")[25], 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").[26] 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").[27] 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.[28] This complements and accords with the practice in other policy areas.[29] Therefore, a national law could, for example, state that all nationals are the beneficiaries of protection.

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24 WIPO/GRTKF/IC/6/12. See also interventions at the seventh session of the Committee by, for example, Morocco (WIPO/GRTKF/IC/7/15 Prov. Para. 85).

25 Article 5, Decree.

26 Article 10.

27 See comments of the European Union and its Member States and the Russian Federation.

28 See statement by Egypt and Morocco at the Committee's seventh session (WIPO/GRTKF/IC/7/15 Prov.), paras. 69 and 85, and others.

29 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.[30] 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.[31]

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 received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

As compared with the former B.3 in document WIPO/GRTKF/IC/7/3, changes have been made to this provision to take into account comments from, amongst others, Australia, the European Union and its Member States, the Russian Federation, the United States of America and *l'Organisation africaine de la propriété intellectuelle (OAPI*).

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30 See generally WIPO/GRTKF/IC/6/3, and in particular the intervention of the Tulalip Tribes of Washington, Committee Fifth Session (WIPO/GRTKF/IC/5/15, par. 56).

31 Interventions at Committee sessions by Nigeria and Japan, amongst others.

ARTICLE 3:

ACTS OF MISAPPROPRIATION (SCOPE OF PROTECTION)

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

*(a) In respect of traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance to a community, and which have been registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that the relevant community can prevent the following acts taking place without its free, prior and informed consent:*

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

- *the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography) of the traditional cultural expressions/expressions of folklore or derivatives thereof;*

- *any use of the traditional cultural expressions/expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the community as the source of the traditional cultural expressions/expressions of folklore;*

- *any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore; and*

- *the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof;*

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

*Other traditional cultural expressions/expressions of folklore*

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

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

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

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

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

*Secret traditional cultural expressions/expressions of folklore*

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

[Commentary on Article 3 follows]

COMMENTARY

ARTICLE 3: ACTS OF MISAPPROPRIATION (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,[32] 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.[33] Conventional IP protection remains available. See further commentary to Articles 2 "Beneficiaries" and 10 "Relationship with Intellectual Property and Other Forms of Protection and Preservation".

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

*Summary of draft provision*

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

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

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

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

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[32] Interventions at Committee sessions by Nigeria and Japan, amongst others.

[33] See comments by Colombia.

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

(iv) In respect of performances which qualify as TCEs/EoF (TCEs/EoF which are 'expressions by action': see Article 1), these may also be registered or notified and so be protected strongly, as suggested. The moral and economic rights proposed include rights modeled on the kinds of rights already provided to other performers, including by in particular the WIPO Performances and Phonograms Treaty, 1996 (WPPT, 1996). This form of protection is without prejudice to the protection available under the WPPT.[34] If such performances were not so registered or notified, they could be protected under (b) or (c) below, depending on the circumstances and the community's wishes.

(b) For TCEs/EoF not so registered or notified, their use would not be subject to prior authorization but protection would concern *how* the TCEs/EoF were used. These TCEs/EoF could be used, as a source of creative inspiration for example, without the need for prior consent or authorization, in furtherance of creativity and artistic freedom, a key objective as many have stated.[35] However, how the TCEs/EoF are so used would be regulated, drawing mainly upon moral rights and unfair competition principles, with civil and criminal remedies proposed, as well as the payment of an equitable remuneration or equitable benefit-sharing, to be determined by a competent authority. This authority could be the same Agency as referred to in Article 4 "Management of Rights". This approach is akin perhaps to a compulsory license or equitable remuneration approach, found in national *sui generis* laws concerning TCEs/EoF[36], as well as in conventional copyright law concerning musical works already fixed in sound recordings.[37]

(c) Finally, for secret, confidential or undisclosed TCEs/EoF, the suggested provision seeks to clarify that existing protection for confidential or undisclosed information covers TCE-related subject matter, building also upon case-law to this effect.[38] The Mataatua Declaration, 1993 recognizes, amongst other things, that indigenous peoples have the right to "protect and control dissemination" of [their] knowledge.[39]

*Flexibility as to legal mechanisms for implementation*

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

To illustrate this point with a practical example – the suggested principle which states that there ought to be protection against false or misleading indications in trade as to the endorsement by or linkage with a community of tradition-based creations (a typical example is a handicraft sold as 'authentic' or 'Indian' when it is not) could be implemented in practice at the national level through *one or more* of the following: (i) the registration and use of

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34 See comments of Colombia.

35 For examples, interventions by Azerbaijan and the European Community and its Member States, seventh session of the Committee (WIPO/GRTKF/IC/7/15 Prov.).

36 Such as the Bangui Accord, OAPI, as revised in 1999.

37 Article 13, Berne Convention, 1971.

38 Foster v. Mountford (1976) 29 FLR 233.

39 Article 2.1.

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.[40]

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.[41] 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 received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

Several structural, formatting and substantive changes were made to the earlier version of this article, which was B.5 in document WIPO/GRTKF/IC/7/3, in the light of interventions made at the seventh session of the Committee by, amongst others, Azerbaijan, Egypt and Japan, comments made by Australia, Colombia, the European Union and its Member States, the United States of America, the Assembly of First Nations, the Saami Council, the International Publishers Association, and the International Trademark Association (INTA), and during other discussions, with the Scientific Committee of OAPI for example.

Following comments made in particular by the African Group and Egypt at the Committee's seventh session, this article now more clearly refers to the term "misappropriation". The rights set out in the previous provision B.5 each corresponded to specific acts of misappropriation without using the term as such, and this has now been rectified.

Following interventions at the seventh session and other comments, performances which are TCEs/EoF are no longer treated as a distinct "layer" in the draft article. They may be protected either in accordance with one of the suggested "layers" in (a), (b) or (c) of the article, in accordance with the community's wishes; in addition, more conventional protection for performers of "expressions of folklore" remains available under the WPPT, 1996, as Colombia and others pointed out.[42]

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40 See also comments of Australia, and WIPO/GRTKF/IC/5/3 and subsequent documents.

41 Discussed in WIPO/GRTKF/IC/6/3.

42 See comments of Colombia.

ARTICLE 4:

MANAGEMENT OF RIGHTS

*(a) Prior authorizations to use traditional cultural expressions/expressions of folklore, when required in these provisions, should be obtained either directly from the community concerned where the community so wishes, or from an agency acting at the request, and on behalf, of the community (from now on referred to as "the Agency"). Where authorizations are granted by the Agency:*

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

*(ii) any monetary or non-monetary benefits collected by the Agency for the use of the traditional cultural expressions/expressions of folklore should be provided directly by it to the community concerned.*

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

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

*(ii) establish the equitable remuneration referred to in Article 3 (b) in consultation with the relevant community.*

[Commentary on Article 4 follows]

COMMENTARY

ARTICLE 4: MANAGEMENT OF RIGHTS

Background

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

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

An agency fulfilling these kinds of roles is provided for in the Model Provisions, 1982, the Indigenous Peoples Rights Act of 1997 of the Philippines (the Philippines Law, 1997), the Pacific Model Law, 2002 and in many national laws providing *sui generis* protection for TCEs/EoF. Several Member States have expressed support for an 'authority' in such cases.[43]

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 propriete intellectuelle (OAPI)* have, for example, noted the possible role of regional organizations in relation to the protection of TCEs/EoF and TK.[44] 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 received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

As compared with the corresponding provision B.4 in document WIPO/GRTKF/IC/7/3, changes have been made to take into account statements by, amongst others, Japan at the seventh session of the Committee, as well as the written comments of Colombia, the European Union and its Member States, the United States of America, the Assembly of First Nations and the Saami Council. Some of these interventions and comments had also indicated that provision B.4 had been too detailed and prescriptive. Colombia and the Saami Council in particular expressed serious reservations about any agency or authority acting on behalf of indigenous peoples. This underscores the need for any agency or authority to derive its entitlement to act from the explicit wishes and authority of the community concerned.

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[43] African Group (WIPO/GRTKF/IC/6/12); interventions at the seventh session of the Committee by the European Union and its Member States, Japan and Morocco (WIPO/GRTKF/IC/7/15 Prov.); comments of the European Union and its Member States.

[44] For example, intervention by ARIPO at seventh session of the Committee (WIPO/GRTKF/IC/7/15 Prov. Para. 89) and previously.

ARTICLE 5:

EXCEPTIONS AND LIMITATIONS

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

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

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

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

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

*provided in each case that such uses are compatible with fair practice, the relevant community is acknowledged as the source of the TCEs/EoF where practicable and possible, and such uses would not be offensive to the relevant community.*

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

[Commentary on Article 5 follows]

# COMMENTARY

## ARTICLE 5: EXCEPTIONS AND LIMITATIONS

Background

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

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

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

(a) paragraph (a) 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 (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 (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.[45] The term "teaching and learning" is used for present purposes.

(ii) National copyright laws in some cases allow public archives, libraries and the like to make, for non-commercial safeguarding purposes only, reproductions of works and expressions of folklore and keep them available for the public[46], 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.[47]

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

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[45] 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.

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

[47] See Proposal by Chile, above.

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

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

There were relatively few comments on this provision, but comments were provided by Colombia, the European Union and its Member States, the Islamic Republic of Iran, the United States of America, and the Saami Council. Discussions held with members of the Scientific Committee of *l'Organisation africaine de la propriete intellectuelle (OAPI)* also identified difficulties with paragraph (c) of the previous provision B. 6 as it was felt that a general application of typical IP exceptions and limitations to TCEs/EoF was too imprecise.[48] The new formulation seeks to address this concern by providing greater precision, drawing from the Model Provisions, 1982, the Pacific Islands Model Law, 2002 and copyright laws in general. On the other hand, Colombia suggested a broader statement of principle (referring for example to cultural interest and/or the existence or otherwise of gainful intent), leaving it to Member States to establish those exceptions and limitations it wishes.

[48] Discussions with the Scientific Committee of *l'Organisation africaine de la propriete intellectuelle*; intervention by Morocco at the seventh session of the Committee (WIPO/GRTKF/IC/7/15 Prov. Para. 85).

ARTICLE 6:

TERM OF PROTECTION

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

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

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

[Commentary on Article 6 follows]

## COMMENTARY

## ARTICLE 6: TERM OF PROTECTION

Background

Many indigenous peoples and traditional communities desire indefinite protection for at least some aspects of expressions of their traditional cultures. Calls for indefinite protection are closely linked to calls for retroactive protection (see Article 9 "Transitional Measures" below). On the other hand, it is generally seen as integral to the balance within the IP system that the term of protection not be indefinite, so that works ultimately enter the 'public domain'.[49]

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 received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

Several interventions during the seventh session of the Committee and some written comments suggested that a single term covering all TCEs/EoF was inappropriate and that different terms could be envisaged for different forms of TCE/EoF.[50] Indeed, different forms of IP are protected for different lengths of time. On the other hand, literary and artistic works and performances are generally protected for the same period, while marks are potentially protectable for an indefinite period. The suggested provision merges these ideas to suggest a potentially indefinite term for all three forms of TCE/EoF, subject to new specific provisions for certain TCEs/EoF, namely registered or notified TCEs/EoF and secret TCEs/EoF. However, this aspect, and the subject matter of the provision as a whole, requires further reflection, as several Committee participants have pointed out.[51]

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49 See for example the comments of the European Union and its Member States.

50 See for example statements by Japan and Morocco (WIPO/GRTKF/IC/7/15 Prov., Paras. 68 and 85).

51 See, for example, intervention of Iran (the Islamic Republic of) at the Committee's seventh session (WIPO/GRTKF/IC/7/15 Prov. Para. 78) and comments of the European Union and its Member States, the United States of America and the International Trademark Association (INTA). Discussions at the WIPO Asia and the Pacific Regional Seminar on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Daejeon, Republic of Korea, October 11 to 13, 2004, also identified a need for careful consideration of this provision.

A number of comments suggested removal of paragraph (b) of the earlier provision B. 7, and this change has been made.[52]

Other comments relating to this provision were those from Colombia, the European Union and its Member States, the Russian Federation, the United States of America, the Assembly of First Nations, the Saami Council and the International Trademark Association (INTA).

[52] See comments of OAPI and the Assembly of First Nations.

ARTICLE 7:

FORMALITIES

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

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

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

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

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

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

[Commentary on Article 7 follows]

COMMENTARY

ARTICLE 7: FORMALITIES

Background

It has been suggested that the acquisition and maintenance of protection should be practically feasible, especially from the point of view of traditional communities, and not create excessive administrative burdens for right holders or administrators alike.[53] Equally important, is the need, expressed by several stakeholders such as external researchers and other users of TCEs/EoF, for certainty and transparency in their relations with communities.

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

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

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

The suggested provision combines these two approaches.

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

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

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

(ii) the provision draws broadly from existing copyright registration systems, the Database of Native American Insignia in the United States of America[54], 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

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53 See also comments of the Assembly of First Nations.

54 Described and discussed in previous documents, such as WIPO/GRTKF/IC/5/3.

organizations in this area.[55] 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;[56]

(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;[57]

(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).[58] 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.

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55 Intervention at seventh session of the Committee (WIPO/GRTKF/IC/7/15 Prov. Para. 89) and previously.

56 See comments by the European Community and its Member States on previous provision B.9.

57 See comments by the Saami Council.

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

*Recording, fixation and documentation of TCEs/EoF*

The role of documentation, recording and fixation of TCEs/EoF and its relationship with IP protection has been discussed at length in previous documents and publications.[59] 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).[60] 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".[61]

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

The revised provision retains the basic "no formalities" approach, as many have argued for.[62] Some have, however, argued against such an approach, which requires further reflection.[63]

The previous provision B. 8 in WIPO/GRTKF/IC/7/3 also offered some form of registration or notification as an option. Based on interventions made at the seventh session of the Committee and on the written comments received, the revised provision suggests registration or notification as a requirement for the protection of TCEs/EoF of particular cultural or spiritual significance, for which strong PIC-based protection would be applicable.[64] Various other changes have been made taking into account comments from, amongst others, Colombia, the European Union and its Member States, the International Trademark Association (INTA), the Assembly of First Nations and the Saami Council.

Colombia in particular suggested specific wording taken from articles 52 and 53 of Andean Decision 351 on Copyright and Neighboring Rights. The wording suggested was: "The protection granted to TCEs/EoF and the works derived therefrom shall not be subject to

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

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

61 Article 1.3.

62 See also comments of Colombia.

63 Comments of the United States of America.

64 Comments by the European Union and its Member States and the International Trademark Association (INTA).

any kind of formality. Consequently, the omission of recordal does not prevent the enjoyment or exercise of the rights recognized. Recordal is declaratory and does not constitute rights. Without prejudice thereto, entry into the register presumes that the facts and acts recorded therein are true, unless proven otherwise. Any entry does not affect the rights of third parties."[65]

[65] See comments of Colombia.

ARTICLE 8:

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

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

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

[Commentary on Article 8 follows]

## COMMENTARY

## ARTICLE 8: SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

Background

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

Communities and others have pointed out that the remedies available under current law may not be appropriate to deter infringing use of the works of an indigenous copyright holder, or may not provide for damages equivalent to the degree of cultural and non-economic damage caused by the infringing use. References have also been made to the desirability of alternative dispute resolution (ADR) in this area.[66]

Member States have pointed out the necessity of appropriate guidance and practical experiences with sanctions, remedies and enforcement.[67]

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

Certain changes were made to the previous provision B.9 in document WIPO/GRTKF/IC/7/3, in the light of comments received from amongst others the Islamic Republic of Iran, the European Union and its Member States and the United States of America.

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66 GRULAC (WIPO/GRTKF/IC/1/5, Annex I, p.9), Asian Group (WIPO/GRTKF/IC/2/10), African Group (WIPO/GRTKF/IC/3/15).

67 See interventions by Kenya and Morocco (WIPO/GRTKF/IC/7/15 Prov. Paras. 80 and 85).

ARTICLE 9:

TRANSITIONAL MEASURES

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

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

[Commentary on Article 9 follows]

COMMENTARY

ARTICLE 9: TRANSITIONAL MEASURES

Background

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

As many Committee participants have pointed out, this question touches directly upon the notion of the " public domain". Previous documents have pointed out that a "clearer understanding of the role, contours and boundaries of the public domain is vital in the development of an appropriate policy framework for the IP protection of TCEs."[68] 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."[69]

Several options are apparent in existing laws:

(i) retroactivity of the law, which means that all previous, ongoing and new utilizations of TCEs would become subject to authorization under the new law or regulation;

(ii) non-retroactivity, which means that only those new utilizations would come under the law or regulation that had not been commenced before their entry into force; and

(iii) an intermediate solution, in terms of which utilizations which become subject to authorization under the law or regulation but were commenced without authorization before the entry into force, should be brought to an end before the expiry of a certain period (if no relevant authorization is obtained by the user in the meantime, as required).

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

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

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[68] See for example WIPO/GRTKF/IC/5/3 and subsequent documents.

[69] Statement at fifth session of the Committee, also available at http://www.wipo.int/tk/en/igc/ngo/ngopapers.html

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

This provision was revised in the light of statements on the " public domain" made at previous sessions of the Committee, statements made at the seventh session by *inter alia* New Zealand and Mr. Maui Solomon[70], and comments received from amongst others the European Union and its Member States, the United States of America, *l'Organisation africaine de la propriete intellectuelle* (OAPI), the Islamic Republic of Iran, the International Trademark Association (INTA) and the Saami Council. Certain comments drew attention to the complexity of these matters and urged further reflection by the Committee.

[70] WIPO/GRTKF/IC/7/15 Prov. Para. 70.

ARTICLE 10:

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

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

[Commentary on Article 10 follows]

COMMENTARY

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

Background

*Relationship with IP laws*

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

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

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

*Relationship with non-IP measures*

It has also been discussed widely that comprehensive protection may require a range of proprietary and non-proprietary, including non-IP, tools. Non-IP approaches that may be relevant and useful include trade practices and marketing laws; laws of privacy and rights of publicity; law of defamation; contracts and licenses; cultural heritage registers, inventories and databases; customary and indigenous laws and protocols; cultural heritage preservation and promotion laws and programs[71]; 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,

[71] The comments of the former Yugoslav Republic of Macedonia provided information on, amongst other things, its cultural heritage laws and programs.

and each may, working together, have a role to play in a comprehensive approach to protection.[72]

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.

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

The previous provision B.11 has been modified to take into account also non-legal and non-IP measures as suggested by several Committee participants. The revised provision now also follows more closely the corresponding provision in the Model Provisions, 1982. More generally, comments on this provision were received from, among others, the European Union and its Member States, the former Yugoslav Republic of Macedonia, the Russian Federation, the United States of America, the Saami Council and the International Trademark Association (INTA).

[72] See also comments of New Zealand on WIPO/GRTKF/IC/7/3.

ARTICLE 11:

INTERNATIONAL AND REGIONAL PROTECTION

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

[Commentary on Article 11 follows]

COMMENTARY

ARTICLE 11: INTERNATIONAL AND REGIONAL PROTECTION

Background

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

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

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

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

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

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

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

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

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

The protection of foreign holders of rights in TCEs/EoF is, however, a complex question as Committee participants have pointed out. The Delegation of Egypt, for example, stated at the seventh session: ". . . TCEs/EoF were often part of the shared cultural heritage of countries. Their regional and international protection was therefore a complex issue and it was necessary to be very careful. Countries would have to consult with each other before adopting any legal measures in this regard."[73] Morocco noted the need for "wider consultation involving all interested parties before the establishment of legal protection mechanisms."[74] In view of this complexity, Committee discussions have thus far provided little specific guidance on this technical question and existing TCE *sui generis* national laws either do not protect foreign rightsholders at all or show a mix of approaches.

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

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

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[73] WIPO/GRTKF/IC/7/15 Prov. Par. 69.
[74] WIPO/GRTKF/IC/7/15 Prov. Par. 85.

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

Comments received on earlier version of this provision (WIPO/GRTKF/IC/7/3)

As already noted, several interventions at the seventh session and comments observed that this is a complex issue requiring further careful consideration, as noted above. Few if any interventions or comments made specific proposals in regard to the technical question identified above.

[End of Annex and of document]