

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

### **Eighteenth Session Geneva, May 9 to 13, 2011**

#### **THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: DRAFT ARTICLES**

*Document prepared by the Secretariat*

#### **INTRODUCTION**

1. During the First Intersessional Working Group (IWG 1), which met from July 19 to 23, 2010, six informal open-ended drafting groups prepared draft articles on traditional cultural expressions. These draft articles were commented on and augmented with options by the IWG 1 plenary on July 23, 2010.
2. As requested by IWG 1, the Secretariat prepared a document incorporating the draft articles prepared at IWG 1, which was made available as document WIPO/GRTKF/IC/17/9 at the seventeenth session of the Committee (IGC 17), which took place from December 6 to 10, 2010. In addition to the draft articles themselves, that document included (i) the introduction made by the rapporteur(s) of the relevant drafting groups; (ii) comments on the proposed articles made by the experts in the IWG 1 plenary on July 23, 2010; and, (iii) alternative options presented by experts on the same day.
3. At IGC 17, the draft articles contained in WIPO/GRTKF/IC/17/9 were discussed and an informal open-ended drafting group was established by the Committee to further streamline the articles.
4. The Committee took note of the text of the draft articles prepared by the drafting group, a copy of which text the Committee requested be added to the report of the seventeenth

session of the Committee. The Committee also requested that the text be made available as a working document for this session. The text appears in the annex to the present document.

5. In addition, and with a view to further refining the draft articles and, in particular, reducing the number of options and alternative proposals, the Committee invited the Committee's Chair, with the assistance of his Vice-chairs, to undertake informal consultations with all delegations before the next session of the Committee and to prepare, if possible, a further draft of the articles (a Chair's text) for consideration by the Committee, as it wishes, at its next session. It has not been possible for the Chair to prepare a further draft of the articles. A note on the consultation process has been prepared and is being made available as document WIPO/GRTKF/IC/18/INF/10.
6. The present document is a revised version of *The Protection of Traditional Cultural Expressions: Draft Articles* (document WIPO/GRTKF/IC/18/4). The revision comprises the update concerning the Chair's consultation process in paragraph 5 above. The revision also consists of the removal of the brackets around Article 4(4), to align the present draft articles with the report of the seventeenth session, document WIPO/GRTKF/IC/17/12/Prov. 2.

*Preparation and structure of this document*

7. In the interest of keeping the present document as concise and clear as possible, in the Annex, in line with the decisions of the Committee at its seventeenth session, amendments proposed by Member States are reflected in the text. Proposed insertions are underlined, while words or phrases that a Member State has proposed be deleted or has questioned are put between square brackets. Drafting proposals from observers which received Member State support are included. Slashes separate drafting options. None of the text featured in the footnotes is from the Secretariat.

8. *The Committee is invited to review and comment on the articles contained in the Annex towards developing a revised and updated version thereof.*

[Annex follows]

ANNEX

OBJECTIVES (to be discussed at a later stage)

The protection of traditional cultural expressions should aim to:

Recognize value

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

Promote respect

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

Meet the actual needs of communities

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

Prevent the misappropriation and misuse of traditional cultural expressions

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

Empower communities

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

Support customary practices and community cooperation

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

Contribute to safeguarding traditional cultures

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

Encourage community innovation and creativity

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

communities:

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

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

Contribute to cultural diversity

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

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

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

Preclude unauthorized IP rights

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

Enhance certainty, transparency and mutual confidence

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

GENERAL GUIDING PRINCIPLES (to be discussed at a later stage)

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

ARTICLE 1  
SUBJECT MATTER OF PROTECTION

1. "Traditional cultural expressions"<sup>1</sup> are any form, tangible or intangible, or a combination thereof, in which traditional culture and knowledge are embodied and have been passed on [from generation to generation], / tangible or intangible forms of creativity of the beneficiaries, as defined in Article 2 including, but not limited to:
  - (a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, [signs,] names, [and symbols];
  - (b) [musical or sound expressions, such as songs, [rhythms,] and instrumental music, the sounds which are the expression of rituals;
  - (c) expressions by action, such as dances, plays, ceremonies, rituals, rituals in sacred places and peregrinations, [sports and [traditional]] games, puppet performances, and other performances, whether fixed or unfixed;
  - (d) tangible expressions, such as material expressions of art, [handicrafts,] [works of mas,] [architecture,] and tangible [spiritual forms], and sacred places.
2. Protection [shall] should extend to any traditional cultural expression which is the [unique] / indicative / characteristic product of a people or community, including an indigenous people or local community and cultural communities or nations as defined in Article 2, and [belongs to] is used and developed by that people or community [as part of their cultural or social identity or heritage]. Protected traditional cultural expressions shall be:
  - (a) the products of [creative intellectual activity,] including communal creativity;
  - (b) indicative of [authenticity/being genuine] of the cultural and social identity and cultural heritage of indigenous peoples and communities and traditional and other cultural communities; and
  - (c) maintained, used or developed by nations, states, indigenous peoples and communities and traditional and other cultural communities, or by individuals having the right or responsibility to do so in accordance with the customary land tenure system or law / customary normative systems or traditional/ancestral practices of those indigenous peoples and communities and traditional and other cultural communities, or has an affiliation with an indigenous/traditional community.
3. The specific choice of terms to denote the protected subject matter should be determined at the national, regional, and sub-regional levels.

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<sup>1</sup> "Traditional cultural expressions" and "expressions of folklore" are synonymous for the purposes of this text.

ARTICLE 2  
BENEFICIARIES

Measures for the protection of traditional cultural expressions shall/should be for the benefit of the:

*Option 1:* Indigenous Peoples, communities<sup>2</sup> and nations, Local Communities and Cultural Communities [and individuals of those communities]

*Option 2:* Peoples and Communities, [for example] including Indigenous Peoples, Communities, Local Communities, Cultural Communities, and/or Nations, and individual groups and families and minorities.

[in whom the [custody, and] safeguarding of the traditional cultural expressions are [entrusted [or by whom they are held] presumed to be vested] in accordance with:]

[*Option 1:* the relevant national/domestic laws and/or practices

*Option 2:* their laws and/or practices, including customary law and community protocols]

[[and] or who maintain, control, use or develop the traditional cultural expressions as being [characteristic or genuine] indicative expressions of their cultural and social identity and cultural heritage. In case a traditional cultural expression is specific to a nation, the authority as determined by the national/domestic law.]

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<sup>2</sup> Footnote explaining different layers of communities.

## ARTICLE 3

### SCOPE OF PROTECTION

#### Article A Secret Traditional Cultural Expressions

In respect of protected traditional cultural expressions, which are kept secret by the beneficiaries / indigenous people [or] local or cultural community, or nation, that people [or] community or nation shall/should have the means, through adequate and effective [legal and practical] appropriate measures, to prevent any unauthorized fixation, disclosure, use, or other exploitation.

#### *Alternative 1* Article B Rights Secured for Other [Protected] Traditional Cultural Expressions

In respect of [protected] traditional cultural expressions, there shall be adequate and effective legal and practical measures to ensure that the relevant beneficiaries under Article 2 [IPLC] has the exclusive and inalienable collective right to authorize and prohibit the following:

a) in respect of traditional cultural expressions other than words, signs, names and symbols:

- i) fixation;
- ii) reproduction;
- iii) public performance;
- iv) translation or adaptation;
- v) making available or communicating to the public;
- vi) distribution;

and

b) in respect of traditional cultural expressions which are words, signs, names and symbols, including derivatives thereof:

- i) any use for commercial purposes, other than their traditional use;
- ii) acquisition or exercise of intellectual property rights;
- iii) the offering for sale or sale of articles that are falsely represented as traditional cultural expressions made by the beneficiaries as defined under Article 2;
- iv) any use that disparages, offends, or falsely suggests a connection with the beneficiaries as defined under Article 2 or brings them into contempt or disrepute.

[In the case where the unauthorized user of a protected traditional cultural expression made a [genuine good faith] proven effort to locate the beneficiary of these rights and did not, the beneficiary shall be entitled only to equitable remuneration or benefit-sharing, subject to the provisions of Article C [for the use already made and with authorization for the continued use].]

#### Article C Attribution, Reputation, and Integrity

The beneficiaries / indigenous people [or] local community or nation shall have the right to be acknowledged to be the source of the protected traditional cultural expression except where omission is dictated by the manner of the use and to object to any distortion, mutilation or other modification of, or other derogatory action, including any false, confusing or misleading indications which, in relation to goods or services, suggest any endorsement by or linkage with such indigenous peoples, local communities and nations, / in relation to the said traditional cultural expression which would be prejudicial to the beneficiaries / indigenous people [or] local community's [or nation's] reputation or integrity.



*Alternative 2*  
Article B

The economic and moral interests of the beneficiaries of traditional cultural expressions, as defined in Articles 1 and 2, [should] [shall] be safeguarded in a reasonable and balanced manner.

As regards the moral interests, the beneficiaries should have the right to be acknowledged to be the source of the traditional cultural expression unless this turns out to be impossible / except where omission is dictated by the manner of the use and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said traditional cultural expression, which would be prejudicial to the reputation or integrity of the traditional cultural expression.

*Alternative 3*

Adequate and effective [legal or practical] measures should be provided to:

- 1) prevent the [unauthorized fixation, disclosure, use or other exploitation] disclosure of secret traditional cultural expressions;
- 2) require the acknowledgement of beneficiaries<sup>3</sup> as the custodians of their traditional cultural expressions unless this turns out to be impossible;
- 3) protect against the offensive use of traditional cultural expressions which would be prejudicial to the reputation of the beneficiaries or the integrity of traditional cultural expressions;
- 4) protect against the use of the non-authentic traditional cultural expressions in trade that suggests a connection that does not exist with beneficiaries; and
- 5) [where appropriate,] provide equitable remuneration to the beneficiaries for [[enable] ensure the beneficiaries shall have exclusive and inalienable collective rights to authorize] the following uses of traditional cultural expressions:
  - i. fixation
  - ii. reproduction
  - iii. public performance
  - iv. translation or adaptation
  - v. making available or communicating to the public

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<sup>3</sup> To be defined in Article 2.

ARTICLE 4

COLLECTIVE MANAGEMENT OF RIGHTS

1. The collective management of the rights provided for in Article 3 belongs to the beneficiaries as defined in Article 2. [The beneficiaries may authorize [or to] a [designated] national competent authority [(for example, regional, national, or local)] [acting at the request, and on behalf, of the beneficiaries], in accordance with the national/domestic law / their traditional decision-making and government process / international law. Where an authorization[s] is [are to be granted] given, [by] [the] a competent authority may:
  - (a) Grant licenses only after appropriate consultation and with the prior informed consent or approval and involvement of the beneficiaries in accordance with their traditional decision-making and governance processes;
  - (b) Collect monetary or non-monetary benefits from the use of the traditional cultural expressions providing such benefits shall/should be provided directly by the competent authority to the beneficiaries concerned or utilized for their benefits;
  - (c) [such authorizations shall/should be granted to a user by the designated competent authority [only] after appropriate consultation and with the prior informed consent or approval and involvement of the beneficiaries in accordance with their national/domestic procedure and their customary rights [traditional decision-making and governance processes]; and
  - (d) any monetary [or] and non-monetary benefits collected by the competent authority for the use of the traditional cultural expressions shall/should be provided directly by the designated competent authority to the beneficiaries concerned or utilized [for their benefits] for the direct benefit of relevant beneficiaries and the preservation of traditional cultural expressions.]
2. Where so requested by and in consultation with the beneficiaries, [the] a competent authority [shall] may / should
  - (a) conduct awareness-raising, education, advice and guidance functions;
  - (b) monitor uses of traditional cultural expressions for purposes of ensuring fair and appropriate use;
  - (c) establish the criteria to determine any monetary or non-monetary benefits; and,
  - (d) provide assistance in any negotiations for the use of the traditional cultural expressions.
3. [The competent authority shall report to WIPO, each year, and in a transparent way, on the distribution of benefits arising from the use of traditional cultural expressions.]
4. The management of the financial aspects of the rights should be subject to transparency, concerning the sources and amounts of the money collected, the expenditures if any to administer the rights, and the distribution of money to the beneficiaries.

ARTICLE 5  
EXCEPTIONS AND LIMITATIONS

1. Measures for the protection of traditional cultural expressions should:
  - (a) Not restrict the creation, customary use, transmission, exchange [and development] of traditional cultural expressions within and among communities in [the traditional and customary context by the beneficiaries [as determined by customary laws and practices] consistent with domestic laws of the member states; and
  - (b) Extend only to utilization of traditional cultural expressions taking place [outside the membership of the beneficiary community or] outside traditional or customary context.
2. [It shall be a matter of national/domestic legislation in accordance with the Berne Convention and the WCT to provide exception and to permit the use of protected traditional cultural expressions in certain special cases, provided that such utilization does not conflict with the normal utilization of the traditional cultural expressions by the beneficiary and does not unreasonably prejudice [the legitimate interests of] the beneficiaries.]
2. Alt. Parties may adopt appropriate limitations or exceptions, provided that the use of traditional cultural expressions is compatible with fair practice, acknowledges the indigenous or local community where possible, and is not offensive to the indigenous or local community.
3. Except for the protection of secret traditional cultural expressions against disclosure, to the extent that any act would be permitted under the national/domestic law for works protected by copyright or signs and symbols protected by trademark law, such act shall not be prohibited by the protection of traditional cultural expressions [, provided such exceptions to the protection of traditional cultural expressions are limited to certain special cases that do not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries and do not unreasonably prejudice the legitimate interests of the beneficiaries.]
4. [Regardless of whether such acts are already permitted under paragraph 2 or not, the following acts should be permitted:
  - (a) The making of recordings and other reproductions of traditional cultural expressions for purposes of their inclusion in an archive, inventory, dissemination for non-commercial cultural heritage safeguarding purposes; and incidental uses; and
  - (b) the creation of an original work of authorship by the beneficiaries or in association with them inspired/borrowed by traditional cultural expressions.]

ARTICLE 6  
TERM OF PROTECTION

*Option 1*

1. Protection of traditional cultural expressions should endure for as long as the traditional cultural expressions continue to meet the criteria for protection under Article 1 of these provisions; and,
2. The protection granted to traditional cultural expressions against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the community, indigenous peoples and communities or region to which they belong, shall last indefinitely.
3. Secret traditional cultural expressions shall continue to enjoy the protection given to disclosed traditional cultural expressions as long as they continue to meet the criteria for protection under Article 1.

*Option 2*

1. At least as regards the economic aspects of traditional cultural expressions, their protection should be limited in time.

ARTICLE 7  
FORMALITIES

As a general principle, the protection of traditional cultural expressions shall not be subject to any formality.

## ARTICLE 8

### SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

#### *Option 1*

1. Contracting Parties undertake to adopt, as appropriate and in accordance with their legal systems, the measures [necessary] to ensure the application of this instrument.
2. Contracting parties will take measures against the willful or negligent infringement of the economic and/or moral interests of the beneficiaries sufficient to constitute a deterrent to further infringements.
3. The means of redress for safeguarding the protection granted by this instrument should be governed by the legislation of the country where the protection is claimed.

#### *Option 2*

1. 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.
2. If a [designated competent authority] is appointed under Article 4, it may additionally be tasked with advising and assisting the beneficiaries referred to in Article 2 with regard to the enforcement of rights and with instituting remedies provided under this article when appropriate and requested by the beneficiaries.
3. The means of redress for safeguarding the protection granted by this instrument should be governed by the legislation of the country where the protection is claimed.
4. Where traditional cultural expressions are shared by different countries or by indigenous peoples and communities in several jurisdictions, contracting parties should provide cooperation and assistance to facilitate the implementation of enforcement measures provided under this instrument.

#### *Proposed Article 8 bis on Alternative Dispute Resolution*

Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional cultural expression, each party shall be entitled to refer the issue to an independent alternative dispute resolution mechanism, recognized by international and/or national/domestic law.<sup>4</sup>

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<sup>4</sup> Such as the WIPO Arbitration and Mediation Center.

ARTICLE 9  
TRANSITIONAL MEASURES

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

*Option 1*

2. The state should ensure the necessary measures to secure the rights, acknowledged by national/domestic law, already acquired by third parties.

*Option 2*

2. Continuing acts in respect of traditional cultural expressions 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 qualified by paragraph 3.

3. With respect to traditional cultural expressions that have special significance for the relevant communities having rights thereto and which traditional cultural expressions have been taken outside control of such communities, the communities shall have the right to recover such traditional cultural expressions.

ARTICLE 10

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

*Option 1*

Protection for a traditional cultural expression in accordance with [these provisions] this instrument [does not replace and] is complementary to protection and measures that apply to that expression and derivatives/adaptations thereof in accordance with international law under international intellectual property instruments as well as other relevant legal instruments and [programs] plans of action for the safeguarding, preservation, promotion of cultural heritage and the diversity of cultural expressions.

Despite what is stipulated in this option / anything to the contrary, traditional cultural expressions should be protected without time limit for the safeguard of the tangible and intangible cultural heritage of indigenous peoples.

*Option 2*

Protection under this instrument should leave intact and should in no way affect the protection provided for in international legal instruments on intellectual property rights. Consequently, no provision of this instrument may be interpreted as prejudicing such protection.



ARTICLE 11

NATIONAL TREATMENT

The rights and benefits arising from the protection of traditional cultural expressions under national/domestic measures or laws that give effect to these international provisions should be available to all eligible beneficiaries who are nationals or 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.

[End of Annex and of Document]