

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

**Twenty-Second Session**  
**Geneva, July 9 to 13, 2012**

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

*Document prepared by the Secretariat*

#### **INTRODUCTION**

1. At the First Intersessional Working Group (IWG 1, July 19 to 23, 2010), draft articles on traditional cultural expressions were prepared by informal, open-ended drafting groups and submitted to the plenary for comments. IWG 1 requested the Secretariat to prepare a document incorporating the draft articles (document WIPO/GRTKF/IC/17/9) for the seventeenth session of the Committee (IGC 17, 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 drafting groups; (ii) comments on the articles made by the experts in plenary; and, (iii) alternative options presented by experts.
2. At IGC 17, the draft articles were discussed and an informal, open-ended drafting group further streamlined the articles. The Committee requested that the text be made available as a working document for the eighteenth session (IGC 18, May 9 to 13, 2011), as document WIPO/GRTKF/IC/18/4/Rev.
3. At IGC 18, the Committee established an informal, open-ended drafting group to further streamline the text. The Committee requested that the text be made available as working document WIPO/GRTKF/IC/19/4 for the nineteenth session (IGC 19, July 18 to 22, 2011).
4. At IGC 19, the Chair invited a facilitator, Ms. Kim Connolly-Stone (New Zealand), to hold consultations in order to streamline the text of Articles 1, 2, 3 and 5. Ms. Connolly-Stone

presented revised articles, together with associated comments and policy considerations, to the Committee plenary for comments. The Committee then requested that document WIPO/GRTKF/IC/19/4 (“The Protection of Traditional Cultural Expressions: Draft Articles”), as amended at IGC 19, be transmitted as a working document to the twenty-second session of the Committee. The present document fulfils this request. The document was also included as part of the Committee’s report to the WIPO General Assembly in 2011 (September 26 to October 5, 2011).

*Preparation and structure of this document*

5. Draft Articles 1, 2, 3 and 5 are those prepared and presented by the facilitator. Draft Articles 4, 6, 7, 8, 9, 10, and 11 are retained from document WIPO/GRTKF/IC/19/4. In the interest of keeping the present document as concise and clear as possible, in the Annex, 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.

6. *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]

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 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;

(ix) promote intellectual and artistic freedom, research and cultural exchange on equitable terms

(x) 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

(xi) 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

(xii) 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

(xiii) 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

(xiv) 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

*Option 1*

1. Traditional cultural expressions are any form of artistic expression, tangible or intangible, in which traditional culture [and knowledge] are embodied including, but not limited to:
  - (a) phonetic or verbal expressions;
  - (b) musical or sound expressions;
  - (c) expressions by action; and
  - (d) tangible expressions of art.
  
2. Protection extends to traditional cultural expressions that are:
  - (a) the result of creative intellectual activity;
  - (b) passed from generation to generation;
  - (c) distinctive of or the unique product of the cultural and social identity and cultural heritage; and
  - (d) maintained, used or developed by the beneficiaries as set out in Article 2.
  
3. The terminology used to describe the protected subject matter should be determined at the national, regional, and sub-regional levels.

*Option 2*

1. Traditional cultural expressions are any form of expressions, tangible or intangible, or a combination thereof, which are indicative of traditional culture and knowledge and have been passed on from generation to generation, 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, traditional sports and games, puppet performances, and other performances, whether fixed or unfixed; and
  - (d) tangible expressions, such as material expressions of art, handicrafts, works of mas, architecture, and tangible spiritual forms, and sacred places.

2. Protection shall extend to any traditional cultural expression that is associated with the cultural and social identity of the beneficiaries as defined in Article 2, and is used, maintained or developed by them as part of their cultural or social identity or heritage in accordance with national law and customary practices.

3. The specific choice of terms to denote the protected subject matter should be determined by national legislation.

## COMMENTARY BY THE FACILITATOR

### *The policy approaches in the options*

Article 1 was revised by the facilitator to more clearly reflect two different policy approaches to the subject matter of protection. These are reflected in two options, as follows:

- The policy approach in Option 1 is to provide a definition of TCEs and eligibility criteria that is as simple as possible, avoids debate about the content and length of the list of eligibility criteria, and leaves flexibility in national law or guidelines to list particular examples, should that be considered desirable.
- The policy approach in Option 2 is to provide a more detailed definition of TCEs and eligibility criteria that provide greater certainty as to the particular subject matter items that are protected through the listing of examples.

### *Comments by the facilitator*

In both options the text was cleaned and simplified to:

- remove repetition in existing drafting options; and
- avoid the need to repeat the list of beneficiaries (by cross referencing to the definition of beneficiaries in Article 2).

The facilitator noted the following in relation to Option 1:

- For the sake of simplicity and building on the approach taken in the traditional knowledge (TK) text, Option 1 first provides a basic description of TCEs, followed by the eligibility criteria.
- In order to resolve the issue of the multiplicity of terms, such as “unique,” “characteristic” and “indicative,” the text borrows from the approach proposed by the Delegation of Norway in the TK text, and reads as follows: “distinctive of or the unique product of.” This provides a choice for national legislation. In Option 2, the formulation used is “characteristic of.”
- In paragraph 1, the facilitator has placed square brackets around the words “traditional knowledge” to highlight that some delegations had difficulty with a definition of TCEs that includes TK. It is suggested that this issue be worked through at a future Committee session.

In Option 2, all square brackets were removed from the lists. It may be that at a future Committee session, the proponents of the “list” approach consider if they agree with all the matters listed.

During informal consultations some delegations raised the issue of whether TCEs in the public domain, protected by an IP right or imbedded in a work protected by an IP right, should fall under the scope of the future instrument. The issue might require further consideration by the Committee.



## ARTICLE 2

### BENEFICIARIES

#### *Option 1*

Beneficiaries of protection for traditional cultural expressions, as defined in Article 1, are indigenous peoples/communities and local communities, who develop, use, hold and maintain the cultural expressions.

#### *Option 2*

Beneficiaries of protection of traditional cultural expressions, as defined in Article 1, are the holders of traditional cultural expressions which may include:

- (a) Indigenous communities;
- (b) local communities;
- (c) traditional communities;
- (d) cultural communities;
- (e) families;
- (f) nations;
- (g) individuals within the categories listed above; and
- (h) where traditional cultural expressions are not specifically attributable to or confined to an indigenous or local community or it is not possible to identify the community that generated it, any national entity determined by domestic law.

#### *Option 3*

Beneficiaries of protection for traditional cultural expressions, as defined under Article 1, are indigenous peoples, local and traditional communities, including small-island states.

## COMMENTARY BY THE FACILITATOR

### *The policy approaches in the options*

The facilitator's text attempts to more clearly reflect the different policy approaches to the issue of beneficiaries. These are reflected in three options, as follows:

- The policy approach in Option 1 is that the beneficiaries of protection are indigenous peoples and local communities (see notes below regarding the reference to indigenous “peoples”).
- The policy approach in Option 2 is that protection should go beyond indigenous peoples and local communities. There were two sets of concerns: (1) the inclusion of the TCEs of nations and (2) the inclusion of individuals or families, as the ones who maintain TCEs.
- Option 3 is an attempt to address the issues of “nations.” It was not possible in the time available to determine the level of support for this option.

### *Comments by the facilitator*

The need for clear definitions of such terms as “local community,” “traditional community,” “cultural community” (this could address the issue of communities in diaspora) and “nation” was raised during informal consultations held by the facilitator. Greater clarity on these definitions could reduce concerns about what was in scope and assist the Committee to agree on a definition of beneficiaries. In the time available, the facilitator was not able to draft suggestions or consider the terms defined in the Glossary, but this matter could be addressed at a future Committee session.

Given that there was widespread support for the approach of referring to the “beneficiaries as defined in Article 2” in other articles, the facilitator used a formulation of drafting which starts with “the beneficiaries of protection are...” rather than “protection shall extend to” in all options.

The facilitator noted the following in respect of Option 1:

- The proponents of the more limited definition of beneficiaries reflected in Option 1 had different views on whether to refer to “indigenous peoples” or “indigenous communities.” As a placeholder, acknowledging that it was a matter that required further work to resolve, the facilitator referred to “indigenous peoples/communities” in Option 1.
- There were also different views on whether to also refer to “traditional” or “cultural” communities. The facilitator left these out of the draft, on the understanding that further work was needed on the definition of these terms, as well as concerning the term “local communities” and what it encompasses.
- In Option 1 it could be possible to remove the reference to “who develop...” because that is mentioned in Article 1. However the facilitator did not have the time to complete consultations on that point so the language remained in the draft.

In Option 2 the facilitator included individuals, and initially qualified that with “in accordance with customs of the collective.” That language was not supported by the delegations wishing to include “individuals,” but the concept was something that the Committee could return to.

## ARTICLE 3

### SCOPE OF PROTECTION

#### *Option 1*

The economic and moral interests of the beneficiaries of traditional cultural expressions, as defined in Articles 1 and 2, should/shall be safeguarded as appropriate and according to national law, in a reasonable and balanced manner.

#### *Option 2*

Adequate and effective legal, administrative or policy measures should be provided to:

- (a) prevent the unauthorized disclosure, fixation or other exploitation of secret traditional cultural expressions;
- (b) acknowledge the beneficiaries to be the source of the traditional cultural expression, unless this turns out to be impossible;
- (c) prevent use which distorts or mutilates a traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiary;
- (d) protect against any false or misleading uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries; and
- (e) [there are three options for paragraph (e), which deals with commercial exploitation, ranging from the most flexible to the most prescriptive]

Alternative 1: where appropriate, enable beneficiaries to authorize the commercial exploitation of traditional cultural expressions by others.

Alternative 2: require equitable remuneration to the beneficiaries for 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; and
- (vi) distribution.

Alternative 3: ensure the beneficiaries have exclusive and inalienable collective rights to authorize and prohibit the following in relation to their traditional cultural expressions:

- (i) fixation;
- (ii) reproduction;
- (iii) public performance;
- (iv) translation or adaptation;
- (v) making available or communicating to the public;
- (vi) distribution;
- (vii) any use for commercial purposes, other than their traditional use; and
- (viii) the acquisition or exercise of intellectual property rights.

## COMMENTARY BY THE FACILITATOR

### *The policy approaches in the options*

The facilitator's text attempts to more clearly distil the two basic policy approaches to the issue of scope of protection:

- The policy approach underlying Option 1 is that States should have maximum flexibility to determine the scope of protection.
- The policy approach in Option 2 is more detailed and prescriptive, and contains two options within it. One prescribes the kinds of activities that should be regulated, but to leave flexibility concerning the policy measures to that effect, and the other prescribes a rights-based approach.

### *Comments by the facilitator*

In relation to Option 2, the facilitator noted the following:

- There were several different formulations of elements concerning offensiveness and secret TK, among others. The facilitator tried to distil the key concepts from these. It was not possible to use the precise language put forward by all delegations but there was an attempt to reflect all the concepts. The exact wording could be a matter for the Committee to consider at a future session.
- In developing the alternatives for paragraph (e), the facilitator condensed the two parts of former Alternative 1, Article B (and the new alternative presented by the Delegation of Indonesia on behalf of the Like-Minded Countries), to avoid having two lists (one for signs, symbols, etc. and one for TCEs other than signs) and repeating the protections concerning offensive use and false representation. The remaining two matters from the second category – use for commercial purposes and acquisition of intellectual property rights – were added to the first list of exclusive rights.

Regarding the alternative for equitable remuneration, while that was in the text, the facilitator could not recall any delegation insisting on it. That alternative could be removed at a future Committee session.

## 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 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 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 may
  - (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

#### *Option 1*

1. Measures for the protection of traditional cultural expressions should not restrict the creation, customary use, transmission, exchange and development of traditional cultural expressions by the beneficiaries, within and among communities, in the traditional and customary context [consistent with national laws of the member states].
2. Limitations on protection should extend only to the utilization of traditional cultural expressions taking place outside the membership of the beneficiary community or outside traditional or cultural context.
3. Member States may adopt appropriate limitations or exceptions under national law, provided that the use of traditional cultural expressions:

#### Alternative 1:

- (a) acknowledges the beneficiaries, where possible;
- (b) is not offensive or derogatory to the beneficiaries; and
- (c) is compatible with fair practice.

#### Alternative 2:

- (a) does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries; and
  - (b) does not unreasonably prejudice the legitimate interests of the beneficiaries.
4. Regardless of whether such acts are already permitted under Article 5 (3) or not, the following should be permitted: the use of traditional cultural expressions in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research and presentation.

#### *Option 2*

1. Measures for the protection of traditional cultural expressions should not restrict the creation, customary use, transmission, exchange and development of traditional cultural expressions by the beneficiaries, within and among communities, in the traditional and customary context [consistent with national laws of the member states].
2. Limitations on protection should extend only to the utilization of traditional cultural expressions taking place outside the membership of the beneficiary community or outside traditional or cultural context.
3. Member States may adopt appropriate limitations or exceptions under national law, provided that the use of traditional cultural expressions:

Alternative 1:

- (a) acknowledges the beneficiaries, where possible;
- (b) is not offensive or derogatory to the beneficiaries; and
- (c) is compatible with fair practice.

Alternative 2:

- (a) does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries; and
  - (b) does not unreasonably prejudice the legitimate interests of the beneficiaries.
4. Regardless of whether such acts are already permitted under Article 5 (3) or not, the following should be permitted:
- (a) the use of traditional cultural expressions in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research and presentation;
  - (b) the creation of an original work of authorship inspired by traditional cultural expressions.
5. Except for the protection of secret traditional cultural expressions against disclosure, to the extent that any act would be permitted under the national 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.



## COMMENTARY BY THE FACILITATOR

### *The policy approaches in the options*

The facilitator's text attempts to more clearly distil the two basic policy approaches to the issue of exceptions and limitations. There are two options, as follows:

- Option 1 allows for less exceptions than Option 2, so when combined with Article 3 (on the scope of protection), it provides greater protection overall for TCEs than Option 2.
- Option 2 allows for more exceptions than Option 1, so when combined with Article 3, it provides less protection for TCEs overall than Option 1.

### *Comments by the facilitator*

There seemed to be wide-ranging agreement on some elements of the text on exceptions, particularly: not affecting customary use, having a test for developing domestic exceptions, and having some sort of exception for cultural institutions. The areas where there was no agreement were those of derivative works and existing exceptions under copyright and trademark law.

On the test for developing domestic exceptions, the facilitator had initially merged the two options that existed in the original text, but that was not supported by some delegations, so the criteria were separated into two alternatives.

Another sticking point was the relevance of customary or domestic law in paragraph 1. The facilitator parked that issue by square-bracketing the reference to national law to reflect that there was no agreement on that matter. During the plenary it was subsequently recalled that the informal drafting group at IGC 18 had agreed to use the term "national," so this is a matter that could be rationalized at a future meeting of the Committee.

Regarding the exception for cultural institutions, the facilitator had initially amended the paragraph to address concerns expressed by representatives of indigenous peoples that cultural institutions should not act offensively. These concerns were not widely supported, so the amendment was removed, however that approach could be taken up by the Committee at a later point.

Regarding the exception for derivative works, there had been a suggestion during the facilitator's consultations that more work be done on that issue and on what was meant by "inspired by." This could help better gauge the scope of the exception.

## 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*

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 law.<sup>1</sup>

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<sup>1</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 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*

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.

2. 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 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]