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REPORT FROM HIS EXCELLENCY AMBASSADOR PHILIP RICHARD OWADE ON KEY ISSUES PENDING FROM THE 2010-2011 BIENNIUM

Document submitted by His Excellency Ambassador Philip Richard Owade

1. At the Nineteenth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the IGC"), held from July 18 to 22, 2011, the IGC Chair for the 2010-2011 biennium, His Excellency Ambassador Philip Owade indicated that he may prepare a summary of some of the key issues that he believed needed to be taken forward to the next round of negotiations.

2. Ambassador Owade has prepared such a report and provided it to the Secretariat.

3. The Annex to this document contains the part of the said report dealing with traditional cultural expressions.

4. The IGC is invited to take note of this document and the Annex to it.

[Annex follows]

INTRODUCTION

1. I had the honor of chairing the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the IGC") in 2010 and 2011. During this biennium, the Committee was able to make considerable progress in developing texts for traditional cultural expressions (TCEs), traditional knowledge (TK) and genetic resources (GRs). However, certain policy issues still remain unresolved, and, as the IGC enters a new mandate and new phase in its work, under a new Chair, I thought it might be useful if I were to try to summarize the key issues as I see them on each of the IGC's themes, namely TCEs, TK and GRs.

2. I have therefore prepared notes on the three themes and given them to the Secretariat. I have instructed the Secretariat to make the TCEs section available for the present session. The GRs section was made available at the IGC's Twentieth Session (February 14 to 22, 2012) and the TK section at the Twenty-First Session (April 16 to 20, 2012).

3. These notes are merely an attempt to capture the policy issues that seem to me to be the most important in the negotiations of the IGC and to identify some of the main views on them. The notes may help to frame and focus the IGC's continuing discussions. Of course, the IGC and its new Chair are not bound to follow or use these notes but I hope they may be helpful.

4. In preparing these notes, I have referred to the more recent main documents and reports prepared for the IGC, as well as the various notes I made while I was the Chair.

NOTES ON KEY TCE ISSUES

Article 1 – Subject Matter of Protection

1. Article 1 is made up of three parts: (1) a basic description of protected subject matter, (2) eligibility criteria for protection and (3) choice of terminology.

2. Article 1 contains two options, reflecting two policy approaches:

- Option 1 provides a streamlined definition of TCEs and eligibility criteria that leaves flexibility in national law or guidelines to list particular examples of TCEs.

- Option 2 provides a detailed definition of TCEs and eligibility criteria that provide greater certainty about protected subject matter through the listing of examples.

3. The list of examples in paragraph 1 of both Options is disputed. There is no agreement on the inclusion of the list (Option 2) or simply of introductory categories (Option 1). The general idea, expressed by many delegations, is that an international instrument would provide a broad framework, which would enable each country to specify which of its cultural elements may be protected. Other delegations state that the list of examples provides certainty and clarity and ensures that particular items are protected.

4. In Option 1, the list is limited to the introductory category labels. It has been argued that the categories are clear but that the examples are too detailed and create confusion. One possibility would be for the list of examples to appear in "clarifying notes" where items could be added later on.

5. There is no consensus on the phrase "or a combination thereof" after "tangible or intangible" in paragraph 1; the phrase only appears in Option 2. The IGC is also still

considering a reference to the fixation requirement. Currently, only Option 2 refers to "whether fixed or unfixed."

6. Still in paragraph 1, some delegations are not prepared to accept the inclusion of a reference to TK. Therefore the draft, in Option 1, contains square brackets around the words "traditional knowledge."

7. There is disagreement on the qualifier "artistic" as used with "expression" as currently provided in Option 1.

8. Paragraph 2 sets out the substantive eligibility criteria that specify which TCEs would be protectable. There is no consensus over the preferred use of the terms "characteristic," "indicative" or "unique." In Option 1, the wording in subparagraph 2(c) leaves the choice to national legislation. Option 2 uses "associated with."

Article 2 – Beneficiaries

9. The scope of beneficiaries is one of the key outstanding policy issues. There is no agreement on the extent to which the instrument should extend beyond indigenous peoples and local communities. The identification of the beneficiaries is closely related to the scope of the instrument as a whole.

10. The IGC has widely supported the approach that other articles throughout the instrument would simply use the term "beneficiaries," referring to the definition in Article 2.

11. The article contains three options:

- In Option 1, the beneficiaries are only indigenous peoples and local communities.
- In Option 2, protection goes beyond and includes other potential beneficiaries. There are two sets of issues: (1) the inclusion of "nations" and (2) the inclusion of "individuals" or "families."
- Option 3 attempts to address the issue of "nations." This option deals with the TCEs of people who are identified and who rightfully should be beneficiaries, but who are not indigenous peoples or local communities.

12. Option 1 limits the scope to indigenous peoples and local communities. There remain divergences in terms of terminology: some prefer indigenous "peoples," while others prefer "communities." There have been suggestions that the word "Indigenous" be capitalized throughout the text.

13. In Option 2, the terms "local," "traditional" and "cultural" community (including communities in diasporas) and "nation" need to be clarified to reduce concerns and assist the IGC in agreeing on a definition of beneficiaries.

14. There are important links between Articles 1 and 2, and the IGC could consider cross-referencing to avoid duplication and redundancy (such as the phrase "who develop, use, hold or maintain traditional cultural expressions" in Option 1).

15. There is no agreement on including the term "nation" (and, to a certain extent, "state") in the definition of beneficiaries. The IGC could distinguish "nation" —as understood by some States as referring to "state"— from "indigenous nation." Some argue that use of the term "nation" alludes to the national protection of cultural heritage, which is not addressed by WIPO. One delegation has suggested replacing "nations" with "societies" and this option could be looked into by the IGC.

16. Furthermore, there is no consensus on whether individuals, within a community, could be considered beneficiaries. The text on TK provides for such cases and so does Option 2.

17. Furthermore, the IGC might wish to consider whether more than one community could qualify for protection over the same or similar TCEs. This touches upon the allocation of rights and distribution of benefits among communities in different countries.

18. Another issue is the use of the singular "indigenous people" which, it is suggested, could be put in the plural "peoples" throughout the text, so as to be consistent with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Article 3 – Scope of Protection

19. Article 3 defines the scope of protection against misuses and misappropriations of TCEs, which complements protection mechanisms currently available under existing conventional IP law:

- In Option 1, States have maximum flexibility to determine the scope of protection.
- Option 2 is more detailed and prescriptive, and contains two different approaches. One prescribes the acts that should be regulated, but leaves flexibility on the types of measures to be implemented. The other prescribes a rights-based approach.

20. Option 2 deals with adequate and effective measures, and reflects four different elements of protection; first, protection for secret TCEs; second, acknowledgment; third, offensive use, distortion or mutilation (the IGC should agree on the exact wording); and fourth, preventing misleading use of TCEs and goods and services.

21. Subparagraph (e) lists three alternatives dealing with commercial exploitation, from the most flexible to the most prescriptive. In Alternative 1, States may provide commercial exploitation and determine its modalities. Alternative 2 deals with equitable remuneration (it could be removed if there is no support for it). Alternative 3 deals with the strongest form of protection: inalienable exclusive rights.

Article 4 – Management of Rights

22. Paragraph 1 establishes that the collective management of rights is for the beneficiaries who may authorize a competent authority to act on their behalf. The authority may grant licenses (after appropriate consultation and with the prior informed consent of the beneficiaries) and collect benefits.

23. Paragraph 2 lists further roles of the authority, such as awareness-raising and assistance in negotiations, among several others.

24. Paragraphs (3) and (4) provide language on the transparent management of the financial aspects. Paragraph 3 proposes that competent authorities report to WIPO each year, while paragraph 4 provides that the management of the financial aspects of rights should be transparent. The IGC could choose between those two options.

25. The IGC could discuss whether governments should be able to legislate or make decisions concerning the management of rights (for example through national authorities), whether to refer to "prior informed consent" or "approval and involvement," and whether there should be reporting requirements for competent authorities.

26. In my view, this Article could be shortened and simplified considerably, leaving the detail to the national level.

Article 5 – Exceptions and Limitations

27. Article 5 consists of two options:

- Option 1 allows for fewer exceptions, so when combined with Article 3, it provides greater protection overall for TCEs than Option 2.

- Option 2 allows for more exceptions, so when combined with Article 3, it provides less protection overall for TCEs than Option 1.

28. In the IGC, there seems to be wide-ranging agreement on: respect for customary use, a test for developing domestic exceptions, and an exception for cultural institutions. The areas of disagreement concern derivative works and the relevance of existing exceptions under conventional copyright and trademark law.

29. In paragraph 1, the square brackets reflect a disagreement on the relevance of customary or domestic law, i.e., whether the text needs to deal just with the customary context or also refer to national laws. The IGC could elucidate the term “national.”

30. Paragraph 3 lays out a test that Member States would apply when developing exceptions. The criteria are separated into two alternatives. Alternative 1 includes the concepts of acknowledgment, offensive use and compatibility with fair practice. Some delegations wish clarification of the term “fair practice.” Alternative 2 is based on the three-step test, but includes only two steps, while the third step still needs to be discussed.

31. Subparagraph 4 (a) deals with specific exceptions for cultural institutions, like museums. There are concerns about the thin line between commercial and non-commercial uses.

32. Option 2 includes an exception for derivative works or original works inspired by or borrowing from TCEs. This exception raises a number of significant questions because it could potentially allow TCEs to be used by contemporary creators to create original works and claim copyright over those works. There are differing views on this question. The IGC could discuss what is meant by “inspired by” to help gauge the scope of the exception.

33. Paragraph 5 contains an exception regarding trademark and copyright law, but there are different views on it.

Article 6 – Term of Protection

34. Article 6 contains two options. The first provides a term of protection related to the eligibility criteria in Article 1 and provides an indefinite term for moral rights. It also provides for the protection of disclosed secret TCEs. The second option is only concerned with the duration of economic rights, which is limited in time.

35. The IGC could consider if Options 1 and 2 could be merged and whether time limits should be imposed on the period of protection for moral and economic rights.

Article 7 – Formalities

36. The general principle concerning formalities is established in Article 7. There seems to be consensus that protection would not be subject to any formality.

Article 8 – Sanctions, Remedies and Exercise of Rights

37. The article consists of two options, as well as of Article 8*bis* on alternative dispute resolution. One main point of disagreement is whether the text should prescribe sanctions or provide States with the flexibility to determine appropriate sanctions based on domestic law. The IGC could try to merge the two options.

38. The IGC could consider the provision on trans-boundary cooperation in Option 2.

39. There is no consensus on the question of whether an article on dispute resolution should be added. The proposal contained in Article 8*bis* is open for consideration.

Article 9 – Transitional Measures

40. Article 9 first states that the instrument would apply to the TCEs, which, at the moment of entry into force, fulfill the criteria of protection. Thereafter, it contains two options. One protects the existing rights of third parties, while the other provides for continuing uses by third parties to be brought into conformity with the provisions.

41. An outstanding policy issue is the reference to the repatriation of TCEs in paragraph 3, in Option 2. The IGC could consider whether the text could clarify the distinction between recovering the TCEs themselves (as objects of cultural property) and the recovering of rights in the TCE, to avoid potential conflict with other international instruments, notably the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970.

Article 10 – Relationship with Intellectual Property Protection and Other Forms of Protection, Preservation and Promotion

42. This article deals with the relationship that the new instrument would have with the existing IP system, as well as with cultural heritage laws, among others. It is made up of two options. The first option envisages a complementary relationship whereas the second one indicates clearly that international IP law would supersede.

43. There has been some discussion about whether the text added to Option 1, which provides that TCEs should be protected without time limit for the safeguarding of the cultural heritage of indigenous peoples, should remain in Article 10. One possibility would be to move it to Article 6 on the term of protection. If the focus of the text is not about the term of protection, but about safeguarding cultural heritage, then the question is whether this matter belongs in an IP instrument. This issue should be considered by the IGC.

Article 11 – National Treatment

44. This article does not seem to be controversial. The IGC could reflect on the question of “eligible foreign beneficiaries.”

[End of Annex and of document]