

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

PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE

SUMMARY OF DRAFT POLICY OBJECTIVES AND CORE PRINCIPLES

This paper reproduces Annex I of document WIPO/GRTKF/IC/7/3. These draft materials are put forward as one input only to facilitate continuing consideration and discussion of possible approaches to the Committee's work in preparing an overview of policy objectives and core principles. These are discussed and elaborated further in the full document.

I. POLICY OBJECTIVES

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

[Recognize value]

(i) recognize the intrinsic value of traditional cultures and folklore, including their social, cultural, spiritual, economic, intellectual, commercial and educational value, and acknowledge that traditional cultures constitute diverse frameworks of ongoing innovation and creativity that benefit all humanity;

[Promote respect]

(ii) promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the 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 cultural communities, and contribute to the welfare and sustainable economic, cultural and social development of indigenous peoples and traditional and other cultural communities;

[Empower communities]

(iv) be achieved in a manner inspired by the protection provided for intellectual creations and innovations, in a manner that is balanced and equitable and that effectively empowers indigenous peoples and traditional and other cultural communities to exercise due authority over their own TCEs/EoF, including through appropriate moral and economic rights, should they wish to do so;

[Support customary practices]

(v) respect and facilitate the continuing customary use, development, exchange and transmission of TCEs/EoF by, within and between these communities;

[Contribute to safeguarding traditional cultures]

(vi) contribute to the preservation and safeguarding of TCEs/EoF and the customary means for their development, preservation and transmission, and promote the conservation,

application and wider use of TCEs/EoF, for the direct benefit of indigenous peoples and of traditional and other cultural communities, and for the benefit of humanity in general;

[Respect for and cooperation with relevant international agreements and processes]

(vii) recognize, and operate consistently with, other international and regional instruments and processes;

[Encourage community innovation and creativity]

(viii) encourage, reward and protect authentic tradition-based creativity and innovation, particularly, when so desired by them, by indigenous peoples and traditional and cultural communities and their members;

[Promote intellectual and cultural exchange]

(ix) promote, where appropriate, access to and the wider application of TCEs/EoF on terms fair and equitable to indigenous peoples and traditional and cultural communities, for the general public interest and as a means of sustainable development;

[Contribute to cultural diversity]

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

[Promote community development and legitimate trading activities]

(xi) promote the use of TCEs/EoF for community-based development, recognizing them as a collective asset of the communities that identify with them; and promote the development of and expansion of marketing opportunities for authentic TCEs/EoF, particularly traditional arts and crafts.

[Preclude invalid IP rights]

(xii) curtail the grant, exercise and enforcement of invalid intellectual property rights acquired by unauthorised parties over TCEs/EoF, and derivatives thereof;

[Enhance certainty, transparency and mutual confidence]

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

[Complement protection of traditional knowledge]

(xiv) operate consistently with protection of traditional knowledge, respecting that for many communities knowledge and expressions of culture form an indivisible part of their holistic cultural identity.

II. CORE PRINCIPLES

A. General guiding principles

[These principles should be respected to ensure that the specific principles below concerning protection are equitable, balanced, effective and consistent, and appropriately promote the objectives of protection. Each principle is followed here by a brief description of the possible effect of the principle; a more complete description is provided in Annex II of WIPO/GRTKF/IC/7/3.]

Principle of responsiveness to aspirations and expectations of relevant communities

Protection should reflect the aspirations and expectations of indigenous peoples and traditional and other cultural communities; in particular, it should recognize and apply indigenous and customary laws and protocols as far as possible, promote complementary use of positive and defensive protection, address cultural and economic aspects of development, address insulting, derogatory and offensive acts, enable full and effective participation by these communities, and recognize the inseparable quality of traditional knowledge and TCEs/EoF for many communities. 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.

Principle of balance and proportionality

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, and the maintenance of an equitable balance of interests.

Principle of respect for and cooperation with other international and regional instruments and processes

TCEs/EoF should be protected in a way that is consistent with the objectives of other relevant international and regional instruments and processes, and without prejudice to specific rights and obligations already established under binding legal instruments. These principles are not intended to pre-empt the elaboration of other instruments or the work of other processes which address the role of TCEs/EoF in other policy areas.

Principle of flexibility and comprehensiveness

Protection should respect the diversity of TCEs/EoF and the wide range of needs of the beneficiaries of protection, should acknowledge diversity in national circumstances and legal systems, and should allow sufficient flexibility for national authorities to determine the appropriate means of achieving the objectives of protection. 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 and non-IP measures.

Principle of recognition of the specific nature, characteristics and traditional forms of cultural expression

Protection should respond to the traditional character of TCEs/EoF; their collective or communal context and the inter-generational character of their development, preservation and transmission; 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' that can be treated as legal persons or unified actors. 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.

Principle of respect for customary use and transmission of TCEs/EoF

Protection should promote 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, on such questions as ownership of rights, management of rights and communal decision-making, equitable sharing of benefits, exceptions and limitations to rights and remedies.

Principle of effectiveness and accessibility of protection

Measures for the acquisition, management and enforcement 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.

B. Specific substantive principles

B.1 Scope of subject matter

(a) ‘Traditional cultural expressions’ or ‘expressions of folklore’ may be understood as including productions consisting of characteristic elements of the traditional cultural heritage developed and maintained by a community, or by individuals reflecting the traditional artistic expectations of such a community. Such productions may include, for example, the following forms of expressions, or combinations thereof:

- (i) verbal expressions, such as folk tales, folk poetry and riddles; aspects of language such as words, signs, names, symbols and other indications;
- (ii) musical expressions, such as folk songs and instrumental music;
- (iii) expressions by action, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and
- (iv) tangible expressions, such as:
 - (a) productions of folk art, in particular, drawings, designs, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, handicrafts, needlework, textiles, carpets, costumes;
 - (b) musical instruments;
 - (c) architectural forms.

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

B.2 Criteria for protection

TCEs/EoF are protectable, whatever the mode or form of their expression, provided they are:

- (i) the products of creative intellectual activity, including collective and cumulative creativity; and
- (ii) characteristic of a community’s distinctive cultural identity and traditional heritage developed and maintained by it.

B.3 Beneficiaries

Measures for the protection of TCEs/EoF should be for the benefit of the indigenous peoples and traditional and other cultural communities:

- (i) in whom the custody and protection of the TCEs/EoF are entrusted in accordance with the customary law and practices of that community; and
- (ii) who maintain and use the TCEs/EoF as being characteristic of their traditional cultural heritage.

B.4 Management of rights

(a) To ensure the effectiveness of protection of TCEs/EoF, a responsible authority, which may be an existing office or agency, should be tasked with awareness-raising, education, advice and guidance, monitoring, dispute resolution and other functions.

(b) Authorizations required to exploit TCEs/EoF should be obtained either directly from the community concerned or the authority acting on behalf of and in the interests of the community. Where authorizations are granted by the authority:

- (i) such authorizations should be granted only after appropriate consultations with the relevant indigenous people/s or traditional or other community/ies, in accordance with their traditional decision-making and governance processes;
- (ii) such authorizations should comply with the scope of protection provided for the TCEs/EoF concerned and should in particular provide for the equitable sharing of benefits from their use;
- (iii) uncertainties or disputes as to which communities are concerned should be resolved as far as possible with reference to customary laws and practices;
- (iv) any monetary or non-monetary benefits collected by the authority for the use of the TCEs/EoF should be provided directly by the authority to the indigenous people or traditional or other community concerned;
- (v) enabling legislation, regulations or administrative measures should provide guidance on matters such as procedures for applications for authorization; fees, if any, that the authority may charge for its services; public notification procedures; the resolution of disputes; and the terms and conditions upon which authorizations may be granted by the authority.

B.5 Scope of protection

There shall be adequate measures to ensure:

- (i) the prevention of: the reproduction, adaptation, public communication and other such forms of exploitation of; any distortion, mutilation or other modification of, or other derogatory action in relation to; and the acquisition by third parties of IP rights over, TCEs/EoF of particular cultural or spiritual value or significance (such as sacred TCEs/EoF), and derivatives thereof;
- (ii) the prevention of the unauthorized disclosure and subsequent use of and acquisition by third parties of IP rights over secret TCEs/EoF;
- (iii) in respect of performances of TCEs/EoF, the protection of moral and economic rights as required by the WIPO Performances and Phonograms Treaty, 1996; and
- (iv) that, in the case of the use and exploitation of other TCEs/EoF:
 - the relevant indigenous, traditional or other cultural communities are identified as the source of any work derived from or inspired by the TCEs/EoF;
 - any distortion, mutilation or other modification of, or other derogatory action in relation to a TCE/EoF, which would offend against or be prejudicial to the reputation, customary values or cultural identity or integrity of the community, can be prevented and/or is subject to civil or criminal sanctions;
 - any false, confusing or misleading indications or allegations in the course of trade and contrary to honest business practices, as to the origin, the nature, the manufacturing process, the characteristics, the suitability for their purpose, the quantity, endorsement by or linkage with the community of goods or services that refer to, draw upon or evoke TCEs/EoF can be prevented and/or is subject to civil or criminal sanctions; and
 - where the exploitation is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by a competent authority and the relevant community.

B.6 Exceptions and limitations

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 outside the traditional or customary context, whether or not for commercial gain;
- (iii) be subject to the same kind of limitations as are permitted with respect to the protection of literary and artistic works, designs, trademarks and other IP, as relevant and as the case may be. Such limitations should not, however, permit the use of TCEs/EoF in ways that would be offensive to the relevant community.

B.7 Term of protection

- (a) Protection of any TCE/EoF should endure for as long as the TCE/EoF continues to be maintained and used by, and is characteristic of, the cultural identity and traditional heritage of the relevant indigenous people or traditional or cultural community.
- (b) Measures for the protection of TCEs/EoF could specify circumstances in which an expression will be deemed no longer to be characteristic of a relevant people or community.

B.8 Formalities

- (a) The protection of TCEs/EoF should not be subject to any formalities.
- (b) In the interests of transparency and certainty, measures for the protection of TCEs/EoF may require that certain categories of TCEs/EoF for which protection is sought should be notified to a competent authority, including TCEs/EoF of particular cultural or spiritual value or significance such as sacred TCEs/EoF. Such notification would have a declaratory function, would not in itself constitute rights, and could contribute towards 'positive' and/or 'defensive' forms of protection. It should not involve or require the documentation, recordal or public disclosure of the TCEs/EoF.

B.9 Sanctions, remedies and enforcement

- (a) Accessible and appropriate enforcement and dispute-resolution mechanisms, sanctions and remedies should be available in cases of breach of the protection for TCEs/EoF.
- (b) An authority should be tasked with, among other things, advising and assisting communities with regard to the enforcement of rights and with instituting civil and criminal proceedings on their behalf when appropriate and requested by them.

B.10 Application in time

Continuing uses of TCEs/EoF that had commenced prior to the introduction of new measures that protect such TCEs/EoF should be brought into conformity with those measures within a reasonable period of time after the measures enter into force, subject to equitable treatment of rights and interests acquired by third parties through prior use in good faith. Long-standing prior use in good faith may be permitted to continue, but the user should be encouraged to acknowledge the source of the TCEs/EoF concerned and to share benefits with the original community. Other uses should cease at the end of a reasonable transition period.

B.11 Relationship with intellectual property protection

Special protection for TCEs/EoF should not replace and is complementary to any protection applicable to TCEs/EoF and derivatives thereof under other intellectual property laws.

B.12 International and regional protection

(a) Legal and administrative mechanisms should be established to provide effective protection in national systems for the TCEs/EoF of foreign rightsholders. Measures should be established to facilitate as far as possible the acquisition, management and enforcement of such protection for the benefit of indigenous peoples and traditional and other cultural communities in foreign countries.

(b) Existing or new regional organizations should be tasked with resolving competing claims to TCEs/EoF by communities within distinct countries, using customary laws, local information resources, alternative dispute resolution (ADR) and other such practical arrangements as necessary.