AUSTRALIA

The following comments were received through a communication from IP Australia

Australia welcomes the development by the Secretariat of the World Intellectual Property Organisation Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC) of an overview of draft policy objectives and core principles for the protection of traditional cultural expressions (TCEs)/expressions of folklore (EoFs). Australia believes that the development of the draft objectives and principles provides a good basis to progress constructive discussion within the WIPO IGC on these important issues.

Australia is strongly supportive of a number of draft core principles. For example, the principle of "balance and proportionality" recognises that the protection of TCEs/EoFs may affect the interests (whether economic, moral or otherwise) of a range of parties including authors, performers, Indigenous communities, users and the community as a whole. Any protection of TCEs/EoFs should appropriately balance the competing interests of these parties.

Australia also strongly supports the draft core principle of "flexibility and comprehensiveness" given the diversity of TCEs/EoFs identified and the diverse needs of the beneficiaries of protection. The Australian experience is very similar to that identified in WIPO/GRTKF/IC/7/3 (Annex II, page 8) in that there have been a range of proprietary and non-proprietary, including non-IP, tools used for the protection of TCEs/EoFs. For example, in Australia trade practices law have been used to protect Indigenous communities against false advertising, while cultural heritage laws protect against the inappropriate export of Indigenous heritage items. Australia is also considering whether to amend its Copyright Act to introduce Indigenous communal moral rights provisions. It is important that any final consensus agreed to by the WIPO IGC takes into account the range of measures that are currently used (and being considered) to protect TCEs/EoFs and allows Member States the flexibility to continue to use and develop these measures.

However, Australia has concerns about the prescriptive nature of some of the substantive principles that focus on conferring legally enforceable rights. For example, the substantive principles on criteria of protection, scope of protection and beneficiaries of protection appear to be inconsistent with the core principle of flexibility and comprehensiveness. Under that core principle, measures to protect for TCEs/EoFs should acknowledge diversity in national circumstances and legal systems, and allow flexibility for national authorities to determine the appropriate means of achieving the objectives of protection. Ideally, to avoid these possible inconsistencies, the identification and development of substantive principles should occur only after the draft policy objectives and core principles have been properly considered and agreed.

Australia also has concerns about the principle dealing with the role of customary law. While potentially useful in the context of protecting TCEs/EoFs, it should be acknowledged that customary laws may be inconsistent with other international

instruments (eg, where practices that occur according to customary law contravene human rights standards).

Principle B.5 deals with the "Scope of Protection" of TCEs/EoFs. However there is no discussion about "derivatives". Australia believes that there should be some limitation on this concept within this principle otherwise it will not be clear where TCEs/EoFs end and the public domain begins.

Principle B.6(iii) states that "limitations should not, however, permit the use of TCEs/EoFs in ways that would be offensive to the relevant community." Mention is made elsewhere regarding consistency with other international instruments and Australia notes that this principle would need to be consistent with for example, the principle of freedom of free speech in the International Covenant on Civil and Political Rights (ICCPR)

COLOMBIA

The following comments were received through a communication from the Permanent Mission of Colombia. The communication contained the following wording: "The Permanent Mission of Colombia to the United Nations and International Organizations in Geneva presents its compliments to the Secretariat of the World Intellectual Property Organization and has the honor to submit to it the comments made by Colombia (National Copyright Directorate) on the wording of the proposed "Draft Policy Objectives and Core Principles for the Protection of Expressions of Folklore", as agreed at the 7th Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore."

1. GENERAL REMARKS

The protection of traditional cultural expressions and expressions of folklore does not encompass the prospects for promotion, preservation and enjoyment of the rights which may be held by indigenous, regional or local communities. We therefore reiterate the initiative to produce an international instrument which define and protects in *sui generis* terms the subject of traditional cultural expressions and expressions of folklore.

Such a proposal is to be found, or almost, in document WIPO/GRTKF/IC/7/3 in particular, where both the policy interests inherent in protecting TCEs/EoF, and the substantive portion implying to some extent the great experience gained in the IP sphere, especially as regards copyright, are given definite form.

In section (xii) of the Policy Objectives, "preclude the grant of invalid IP rights", the following is established:

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

In our opinion, this article should be revised again; to that end, we propose the following wording: "Establish enforcement measures for the protection of acquired rights over TCEs/EoF, and the works derived therefrom". The above allows each State to establish measures to avoid the illegal use of the TCEs/EoF which are relevant, in accordance with its organization.

In turn, as regards the General Guidelines, we agree with the content and wording of the articles submitted, especially since they provide the possibility of interpreting the way in which TCEs/EoF are to be protected.

Since we consider the substantive part of document WIPO/GRTKF/IC/7/3 to be of great importance, we have submitted the relevant comments in a separate section.

2. SPECIFIC SUBSTANTIVE PRINCIPLES

As regards the specific substantive principles, we have the following observations:

1. We believe that it would be expedient to produce a glossary in order to make the terms used easier to understand and to achieve a unified understanding of the articles, as well as to review the subject of the moral rights of communities.

2.2 Article B.2, "Protection criteria", states that:

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.

In that regard, we consider that two criteria should be added:

(a) "The protection of TCEs/EoF does not require any kind of prior formality constituting rights",

(b) "The protection of TCEs/EoF will be achieved only within the traditional or customary context of creative indigenous communities",

As regards the existing sections, it is suggested that:

TCEs/EoF may be protected, whatever the mode or form of their expression, provided that they are:

(i) the products of creative activity, provided that they are collective and cumulative", and (ii) is deleted. This is the case because a heavy burden of proof would be imposed for the exercise of rights.

3. Article B.4, which relates to the subject of "Rights management", states:

(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.

We consider that this article should be deleted from the document so that it may be regulated internally by each country. In the Colombian Constitution, the indigenous territories, formed by indigenous communities, have complete autonomy to act as well as legal recognition (Articles 286 and 287 of the Political Constitution of Colombia). To that extent, the State or responsible authority cannot be more than a facilitator and in no case a player who gets involved at the time the use of a traditional cultural expression or expressions of folklore is authorized.

It is important to distinguish these functions from the beginning in order to avoid possible conflicts or confusion at a later date. As owners of their folklore, indigenous communities must be the only ones authorized to allow a third party to use such folklore. It is they who have direct contact with the folklore and, to that extent, also have the authority to recognize their historical, cultural and heritage value. It is clear that the State or competent authority could advise the indigenous communities, if they so request at a particular time, but it must always be taken into consideration that the only parties entitled to take decisions on folklore are the communities themselves.

4. Article B.5, "Scope of protection" states that:

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.*

In this regard, we consider that a distinction should be made between moral rights and economic rights as the subject matter of protection. In relation to (iii), the wording used is not very felicitous. We therefore propose the following text: "There shall be adequate measures to ensure: (iii) protection for TCEs/EoF, without prejudice to the WIPO Performances and Phonograms Treaty (WPPT)".

5. Article B.6, *"Exceptions and limitations" states:*

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.

We believe that each Member State should establish those which it considers relevant to TCEs/EoF and therefore only a small number of foundations should be established from which the relevant regulations emerge. For example, cultural interest and/or the existence or otherwise of gainful intent.

6. Article B.7, "Term of protection" states:

(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.

It is our opinion that (b) should be deleted, given that if it were adopted a void would be created in protection which would be uncertain.

7. Article B.8, "Formalities", refers to:

(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.

The following text is proposed (taken from the Andean Decision, Articles 52 and 53):

"The protection granted to TCEs/EoF and the works derived therefrom shall not be subject to any kind of formality. Consequently, the omission of recordal does not prevent the enjoyment or exercise of the rights recognized. Recordal is declaratory and does not constitute rights. Without prejudice thereto, entry in the register presumes that the facts and acts recorded therein are true, unless proven otherwise. Any entry does not affect the rights of third parties.

As regards document WIPO/GRTKF/IC/7/4, which contains specific cases of *sui generis* regulation of the protection of TCEs/EoF and their application, we note the different systems of protection that are recorded as examples of future regulations on the subject. This document allowed specific comments to be made on the text proposed in document WIPO/GRTKF/IC/7/3.

THE ISLAMIC REPUBLIC OF IRAN

The following comments were received through a communication from the Permanent Mission of the Islamic Republic of Iran. The communication contained the following wording: "The Permanent Mission of the Islamic Republic of Iran to the United Nations Office and other International Organizations in Geneva presents its compliments to the Secretariat of the World Intellectual Property Organization and with reference to the decision taken in the seventh session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore held from 1st-5th November 2004 and as indicated in paragraph 100 of document WIPO/GRTKF/IC/7/15, prov. 2, has the honour to enclose herewith the comments on document WIPO/GRTKF/IC/7/3."

1. Annex 1, page 6, Principle B9

It is proposed to add the following case in both paragraphs of this Principle a) Measures on the border lines; b) Administrative proceedings and; c) Criminal and Civil Remedies. Accordingly, we may add the phrases "*including Criminal and Civil Remedies*" after the word "… *sanctions and remedies*" in paragraph (a). Similarly, the word "administrative" should be added after "… *civil and criminal proceedings*."

2. Annex 1, page 4, Principle B1 (iv) (a) (Scope of subject matter)

It is proposed to add some Iranian handicrafts such as glassware, carving with chisels and flat weaving to the other forms of expressions. In addition, *handicrafts* have been referred to as one of the forms of expression of folklore. However, this has a general nature and includes various fields of Art and is not a specific single field like other forms indicated. Moreover, in the definitions provided in this paragraph the definitions of tangible and intangible expressions do not suffice. There are different combinations of expressions of folklore that must also be specified.

3. Annex 1, page7, Principle B12 (b)

It is hereby proposed to specifically indicate the necessity of devising a system for exploitation of the common heritage (in the field of folklore) with neighbouring countries within a regional framework. This can be included as an independent paragraph.

4. Annex 1, page 2, paragraph (x)

It should be specifically indicated that promotion and protection of artistic expressions should be with due attention to national observations.

5. Annex 1, pages 1 & 2, Policy Objectives

In defining the policy objectives, it is necessary to take the following issues into consideration: 1. National sovereignty; 2. National supervision on management of resources of folklore.

6. Annex 1, page 6, paragraph B6

The requirements of inclusion of all the limitations as permitted with respect to all IP issues should be deleleted because failure to observe such limitations would limit the authority of the States. This provision may be included as a recommendation.

7. Annex 1, page 7, paragraph B10

It is proposed to incorporate the principle of retrospective into the regulations pertaining to protection of Expressions of Folklore to be devised at the national levels.

8. It is proposed to somehow include in the present Annex that no reservations shall be incorporated in the prospective international document to be prepared in the future.

THE RUSSIAN FEDERATION

The following comments were received through a communication from the Russian Federation

The Russian Federation supports stated in document WIPO/GRTKF/IC/7/3 ("The Protection of Traditional Cultural Expressions/Expressions of Folklore: Overview of Policy Objectives and Principles") approaches to a problem of the protection of traditional cultural expressions/expressions of folklore (TCEs/EoF), policy objectives and core principles for the protection TCEs/EoF.

We consider that the document is a good basis for the further work on development of legal instruments for the protection of TCEs.

We strongly support the "Principle of flexibility and comprehensiveness" and the statement that "Protection should allow sufficient flexibility for national authorities to determine the appropriate means of achieving the objectives of protection" and also support principles "balance and proportionality", "respect for and cooperation with other international and regional instruments and processes".

The Committee's efforts should be directed towards achieving results that were balanced and proportional to the nature of the problem in this sphere. Any scheme for addressing TCEs/EoF should not conflict with or compromise existing IP rights.

"Universal international template" may not be able to achieve the objective of the comprehensive protection of TCEs/EoF in a manner that suited the national priorities, legal and cultural environment and needs of traditional communities in all countries.

- For Comprehensive protection of TCEs/EoF special laws at a national level are needed (in the Russian Federation there is a number of the laws establishing legal principles of guarantees of original social and economic and cultural development of indigenous peoples of the Russian Federation, of protection of their traditional environment, a traditional way of life, managing and crafts (for example, the Federal Law of the Russian Federation "On National Cultural autonomy" of 17.06.96 N 74-FL). The rights given by these laws, concern preservation of TCEs., but not protection of IPR. Protection may draw on a comprehensive range of options, such as cultural heritage laws, customary laws, contract law, criminal law, and so on.

Beneficiaries of protection (B.3):

Beneficiary of protection may be: communities, indigenous peoples, the state (for example, the Russian legislation determines "the authorized representatives of indigenous minority peoples" - the Federal Law of the Russian Federation "On General principles of Organization of Communities of Indigenous Minority Peoples of the North, Siberia and the Far East of the Russian Federation " of 20.07.2000 N 104-FL). But it is necessary to analyse this matter deeper because often the communities are not located on the territory of just one State because of its traditional lifestyle and because of its economic background. It should be taken into account and it should be taken into account.

Concerning principle B.7 on the “Term of Protection”:

We agree that it could be difficult to apply the same term of protection to all TCEs. The diversity and variety of expressions should be taken into account. We agree with the approach: “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” and might be considered as “a trademark-like emphasis on current use, so that once the community that the TCE identifies no longer uses the TCE or no longer exists as a defined entity protection for the TCE would lapse.” (analogous to abandonment of a trademark).

The Russian Federation supports the preparation of the Practical Guide as indicated in paragraph 28 of WIPO/GRTKF/IC/7/3, especially if the Guide is based upon the ‘Practical Steps’ (see document WIPO/GRTKF/IC/6/3).

For example, in the Russian legislation there are “Standard Regulations on Artistic Expert Council on Folk Artistic Crafts” and the Rules for registration of the samples of articles of folk artistic crafts with recognized artistic merits (the Decree of the Government of the Russian Federation of 18.01.2001 N 35).

We hope, that the Secretariat on the basis of the received comments will develop the further project of the purposes and principles for protection TCEs which will be considered by Committee at the eighth session.

The ultimate conclusion of the Committee’s work should also be flexible and comprehensive, allowing Member States to leave effective customary laws in place, while fully addressing the scope of problems.

THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

The following comments were received through a communication from the Ministry of Culture of the Republic of Macedonia. The communication reads as follows: "On the behalf of the Ministry of Culture of Republic of Macedonia I wish to express our respect and to inform you that Republic of Macedonia welcomes the activities of the World Intellectual Property Organization in the field of preparation of adequate instruments for the protection of expressions of folklore."

On the behalf of the Ministry of Culture of Republic of Macedonia I wish to express our respect and to inform you that Republic of Macedonia welcomes the activities of the World Intellectual Property Organization in the field of preparation of adequate instruments for the protection of expressions of folklore. At the same time, I wish to inform you that we accept the text of the draft Report of the seventh session of the Intergovernmental Committee for Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, which took place in Geneva, from November 1 to 5, 2004.

Allow me to give you some information about the jurisdiction of the Ministry of Culture in the field of the protection of the expressions of folklore and about the actual legislation and the system for its protection.

We think that WIPO, in cooperation with UNESCO and other specialized international nongovernmental organizations, have indisputably settled the necessity of preparing an international instrument for protection and use of the expressions of folklore from the aspect of the intellectual property and with such instrument it is possible to achieve equalization of the international practice in this field.

At the same time, we point out that at the international level it is necessary to establish legal measures for identification, documentation, production, preservation and other protection of the expressions of folklore (in material and non-material form) outside the legislation for intellectual property.

In the legal system of Republic of Macedonia, the protection of expressions of folklore is subject to few laws, mainly the protection of copyright and related rights, cultural heritage and other laws.

In our country which is very rich with traditional, folklore and other cultural heritage, at the institutional level the protection is of the responsibility of many institutions, such as "Institute for folklore 'Marko Cepenkov" - Skopje; "Institute for Macedonian language" - Skopje; "Institute for Ancient Slavic Culture" - Skopje; "Museum of Macedonia" - Skopje and other museums all over the country; "The Film Archives of Macedonia" - Skopje; "National and University Library Sv. Kliment Ohridski" - Skopje and other libraries all over the country, as well as other institutions which have collections of

publications, programs and phonograms of folk songs, dances, tales, riddles and other works and performances of folklore. Those are national institutions, which protect expressions of folklore among other things.

The state, through the Ministry of Culture, in accordance with the yearly program for financing the cultural projects of the national interest, financially supports projects for maintenance and presentation of the expressions of folklore, customs, crafts and traditional cultural values.

At the municipality level there are also activities for maintenance, presentation and use of the traditional knowledge and expressions of folklore, folklore festivals, manifestations and other activities, which are financed by the municipalities in accordance with the Law for local government.

Non-governmental organizations preserve expressions of folklore on the non-profit basis, in accordance with the Law for citizen associations and foundations, and those are mainly folklore groups, choirs, bands, etc., which are financially supported by the state, municipalities and private donors.

Legal protection of the folklore

The CONSTITUTION OF THE REPUBLIC OF MACEDONIA guarantees the freedom of artistic and other kinds of creativity and the rights concerning the scientific, artistic and other kinds of intellectual creativity. With the Constitution, in the frames of the corpus of cultural rights, it is established that ethnic communities have right to express, maintain and develop freely their identity and characteristics of their communities and to establish cultural, artistic and educational institutions as well as scientific associations, with the purpose of expressing, maintaining and developing of their identity

According to The LAW FOR COPYRIGHT AND RELATED RIGHTS ("Official Gazette" 47/96, 3/98, 98/02 and 4/05), arrangement of the work of expression of folklore which is individual and intellectual creation, is substantive copyright work. Collection of works of expression of folklore: encyclopedia, anthology, repertory, data basis, etc., is also substantive copyright work if it is provided that by the choice, purpose and contents it represents individual and intellectual work.
Works of expressions of folklore are not copyright works, but in adapted form they can be used in copyright works or through copyright works, which are the subject of direct protection of the copyright.
According to the Law, works of expressions of folklore are used freely. This regime applies to all kinds of uses of these works (reproduction, distribution, publication, renting, public performances, public transmission, public presentation, public exposure, broadcasting and re-broadcasting, adaptation).
But, if the work of folk creativity is used, it is obligatory to acknowledge the source and origin of the work. The mutilation and improper use are not allowed.

For enforcement and protection of the rights for the works of expression of folklore, in accordance with the free use of these works, responsible is Institute for folklore "Marko Cepenkov" - Skopje.
If the works of expression of folklore are used contrary of the above mentioned conditions, the Law provides for penalties and protection measures: prohibition for activity for a period between 3 mounts and 1 year and taking away the samples of copyright and subject matter of related rights.

The LAW FOR INDUSTRIAL PROPERTY ("Official Gazette" 47/02, 42/03 and 09/04) provides that expressions of folklore which are works of crafts or handicrafts in original form can not be protected through rights for industrial property, except through the right of sign for the origin of the product.
With the sign for the origin of the product the name of the product can also be protected if it is provided that by its longstanding use in trade it became well known for defining certain kind of products. The sign for the origin of the product can be used, among other things, for indication of works of crafts and handicrafts.
Certain product of craft or handicraft made in traditional folklore way can be protected through the sign of origin of the product. The State Institute for the Protection of Industrial Property is responsible for enforcement of this right.

According to the LAW FOR THE USE OF MACEDONIAN LANGUAGE ("Official Gazette" 5/98), Macedonian language is intangible heritage of special cultural and historical significance for the country, and its use, protection, promotion and enrichment are regulated with this Law. At the same time, there is no restriction of the right for free creation of dialects and for development of cultural and lingual identity of all ethnic communities in Republic of Macedonia and the right of the members of these communities to use their language and letters, in accordance with the Constitution and special laws.

The LAW FOR CULTURE ("Official Gazette" 31/98 and 66/04) as a basic law for the area of culture guarantees the right for free creativity. According to this Law, anyone can realize culture as particular, local and national interest, with profit or non-profit purpose. Anyone has a right for free creativity, independently of the age, education, religion, nationality, in professional or non-professional way.

The LAW FOR PROTECTION OF THE CULTURAL HERITAGE ("Official Gazette" 20/04), for the first time in Macedonian legislation, establishes the category intangible cultural heritage, which refers to the expressions of folklore, language and toponyms. The protection of cultural heritage, along with the making and saving the records of it, includes maintenance and regular use, in accordance with the Law and document for protection. Maintenance of the expressions of folklore, customs, old crafts and similar cultural values, as well as activities of free creativity which are expression of the identity of one people, nation or community, are not regulated with exact procedures or standards for their enforcement.
For the processes of identification, documentation, valorization, categorization, preservation and other forms of protection of the intangible cultural heritage, minister of

culture, depending of the kinds of goods, will appoint responsible institutions (the procedure is going on not finished yet) from the line of public institutions for protection or from the line of scientific institutions, for fulfilling activities related to the protection of diverse kinds of intangible cultural heritage such as language, phonograph and cinematograph goods, toponyms and etc. The entitled institutions will collect, process and keep records of intangible cultural heritage, as a public interest.
The maintenance and use of intangible cultural heritage are encouraged through special projects and programs in the area of culture, education, science and information. The Administration for protection of the cultural heritage (new agency as a part of the Ministry of Culture, with appropriate document can define special measures for maintenance and adequate use of protected intangible good and temporary can stop or prohibit improper use of protected intangible good.
Those measures are provided only for the intangible cultural heritage which acquired the status of cultural heritage of exceptional significance or of especial significance, through the procedure established with the Law.

The LAW ON THE MUSEUMS ("Official Gazette" 66/04) provides the protection and presentation of the ethnological objects, which indirectly concerns the protection and the presentation of the expressions of folklore.

The LAW ON LIBRARIES ("Official Gazette" 66/04) and The LAW ON FILM ARCHIVE OF REPUBLIC OF MACEDONIA ("Official Gazette" 20/74) also indirectly provide protection of the literary and audio-visual records of expressions of folklore.

The legislation in our country provides for some ways of reducing the taxes for the sponsors of the projects for publications and presentation of expressions of folklore, but they are not sufficient.
Unfortunately, the traditional knowledge is in the process of dying and for now there are no special programs for their support. This question needs broader level of considerations as cultural and economic policy, with the purpose of presentation of the expressions of folklore and encouragement and revitalization of traditional old crafts, especially as a form of cultural turism.

International exchange and presentation of expressions of folklore from the Republic of Macedonia abroad is done through international presentation of expressions of folklore, such as literature, folk songs and dances, according to the bilateral international agreements in the area of culture, but also with direct cooperation between domestic and foreign institutions and between domestic and foreign organizers of cultural manifestations.

In the end, we would like to emphasize once more that Republic of Macedonia acknowledges the long standing efforts of WIPO to establish international standards for the protection of the traditional cultural values and supports all activities of WIPO in this area.

UNITED STATES OF AMERICA

The following comments were received through a communication from the Government of the United States of America

Note from the Secretariat: The comments comprise both a covering note and Annex I with track changes.

INTRODUCTION

At the Seventh Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the "IGC" or the "Committee"), the members of the Committee were invited to review and submit comments by February 25, 2005 on a document prepared by the World Intellectual Property Organization ("WIPO") Secretariat entitled "The Protection of Traditional Cultural Expressions/Expressions of Folklore: Overview of Policy Objectives and Core Principles" (WIPO/GRTK/IC/7/3) ("7/3").

In particular, Committee members were invited to submit comments, including specific suggestions for wording, on the "Summary of Draft Policy Objectives and Core Principles for the Protection of Traditional Cultural Expressions/Folklore," which is attached to 7/3 as Annex I. In response to this invitation, the Government of the United States of America is pleased to submit these comments and suggestions.

GENERAL COMMENTS

The United States recognizes the significant contribution that 7/3 makes to the future work of the IGC by providing materials for review that are extremely pertinent to the complex issues under discussion and consideration by the members of the IGC, including draft materials on core principles, policy objectives, terms, and the international dimension of TCEs/EoF.

Moreover, the WIPO Secretariat has taken an important step in advancing the work of the Committee by providing these draft materials for its consideration and possible use in developing any further draft "Summary of Policy Objectives and Core Principles" on TCEs/EoF. In some cases, however, the draft materials seem to be too narrowly focused on a particular norm-setting approach to addressing issues and concerns related to TCEs/EoF. In other cases, the draft materials could be made more useful to the Committee by adding materials on important non-legal approaches to addressing issues and concerns related to TCEs/EoF.

The United States extends its appreciation to the WIPO Secretariat for its efforts at collecting and distilling draft materials from the work of the Committee, and especially in its efforts to do so in a manner that strives to be careful "not to place limits on the parameters of the debate concerning TCEs/EoF," and not "to prescribe any particular

outcomes or solutions." With these goals in mind, and in the spirit of advancing the future work of the IGC, the United States has identified a number of instances where the specific wording of 7/3 might be changed to ensure that these objectives are reached.

Core Principles

The United States fully agrees with the view that the "elaboration and discussion of core principles" is an important way to facilitate the future work of the IGC. The United States also believes that it is important to state clearly the purpose of such a summary of policy objectives and core principles, which the United States believes is to inform the discussions of the IGC, rather than to "provide a foundation for the development of a consensus" around any particular measure or approach to addressing issues and concerns related to TCEs/EoF.

The United States wants to emphasize its support of the view set forth in 7/3 that it is very important to provide IGC members with a set of balanced, neutral principles because, in our view, this is the best way to provide a basis for a "shared understanding" among Member States. In particular, the United States fully agrees that searching for a "one-size-fits-all" or "universal international template" is not a productive way for the work of the Committee to proceed.

Guiding and Substantive Principles

The United States notes that 7/3 makes a distinction between "general guiding principles" and "specific substantive principles." As the United States understands this distinction, "general guiding principles" are aimed at providing IGC members with information to "ensure consistency, balance, and effectiveness of substantive principles." "Specific substantive principles," in turn, are intended to define the "legal essence of protection" for the Committee.

Although the distinction may just be a way of organizing extensive draft materials, the United States is concerned that the term "substantive principles," which focuses only on legal mechanisms for addressing issues and concerns related to TCEs/EoF, may have the unintended consequence of overstating the importance of this approach. Therefore, the United States recommends that the Committee return to the use of the original terms, "policy objectives" and "core principles" in future drafts.

Consistent with this concern, the United States also recommends that the term "substantive principles" be used within the Committee only in connection with "specific substantive issues and concerns" related TCEs/EoF that Member States may wish to consider addressing through specific measures and approaches. In this way, with discussions within the IGC more sharply focused, Committee members may play an even more useful role by recommending particular measures and approaches that relate to specific substantive issues and concerns related to TCEs/EoF.

Policy Options And Legal Mechanisms

The United States agrees with the view providing information on a "multi-faceted approach," one that spans a wide range of distinct national legal mechanisms, including intellectual property law, unfair competition law, contract law, and customary laws, to name only a few of the national legal mechanisms, is a productive way for Member States to consider addressing specific issues and concerns related to TCEs/EoF.

The Use Of Certain Terms

The United States generally agrees with the use of the terms "traditional cultural expressions" and "expressions of folklore" in 7/3. Nonetheless, the United States expresses its concern that the repeated use of terms such as "protection," "legal protection," and the use of such terms as "criteria for protection," "term," "exceptions and limitations," which are associated with norm-based systems of protection, leave the strong impression of favoring a specific policy direction.

The United States is also concerned about the exclusion of the important concepts of "preservation" and "conservation" from the definition of protection, and by the failure to mention the concept of "promotion." To address these important concerns, the United States makes a number of recommendations for specific changes in wording, which are discussed below and reflected in the attached, redline version of the Policy Objectives and Core Principles Summary.

ANNEX I

Title of Annex I

To ensure the continued consideration of all approaches and measures related to TCEs/EoF within the Committee and by Member States, the United States recommends revising the title of Annex I from "Summary of Draft Policy Objectives and Core Principles for the Protection of Traditional Cultural Expressions/Folklore " to as follows: "Summary of Draft Policy Objectives and Core Principles on Traditional Cultural Expressions/Folklore."

POLICY OBJECTIVES

Chapeau to Policy Objectives

The United States recommends revising the chapeau by striking "The Protection of TCEs or EoF should aim to" and replacing it with "Member States may wish to consider addressing issues and concerns related to traditional cultural expressions (TCEs) and expressions of folklore (EoF) with a view toward:" This change ensures neutral treatment and continued consideration of all approaches and measures related to TCEs/EoF within the Committee. This recommendation also reinforces the important concepts of "freedom

of choice" and flexibility for Member States addressing these issues and concerns, which was discussed in the main body of this document.

Recognizing value

The United States supports policy objective I (i). However, the United States recommends a number of minor changes in wording, including the use of the gerund, rather than the verb's infinitive, to introduce each policy objective. For example, policy objective I(i) is introduced by the gerund "recognizing" instead of the infinitive "to recognize," and so on throughout the section. These changes are intended to capture the dual aspirational and directional nature of the policy objectives set forth in this section.

Promoting respect

The United States supports policy objective I (ii), as amended.

Meeting the actual needs of communities

The United States supports policy objective I (iii), as amended.

Empowering communities

The United States supports policy objective I (iv), as amended. In particular, the United States recommends deleting the phrase "be achieved in a manner inspired by the protection provided for intellectual property creations and innovations" to provide for greater flexibility in the various approaches an guard against any appearance of favoring one approach among others in addressing issues and concerns related to TCEs/EoF.

Supporting customary practices

The United States supports policy objective I (v), as amended.

Contributing to safeguarding traditional cultures

The United States supports policy objective I (vi), as amended.

Respecting and cooperating with relevant international agreements and processes

The United States supports policy objective I (vii), as amended. However, the United States believes that the WIPO Secretariat should assist the Committee members by clarifying the vague term "processes".

Encouraging community innovation and creativity

The United States supports policy objective I (viii), as amended. The United States notes that the word "authentic" is vague, with some commentators noting that the word has multiple and contested meanings. Therefore, the WIPO Secretariat may wish to consider adding a footnote to clarify these concerns and/or suggesting alternate words.

Promoting intellectual and cultural exchange

The United States supports policy objective I (ix), as amended.

Contributing to cultural diversity

The United States supports policy objective I (x), as amended.

Promoting community development and legitimate trading activities

The United States supports policy objective I (xi), as amended. However, the United States questions the need to single out a particular type of cultural asset for community development and trading activities. Therefore, the United States recommends bracketing the phrase, "particularly traditional arts and crafts." In this way, the WIPO Secretariat could direct the attention of the Committee to the possible need for further consideration and discussion of this issue.

Precluding invalid IP rights

The United States supports policy objective I (xii), as amended.

Enhancing certainty, transparency, and mutual confidence

The United States supports policy objective I (xiii), as amended.

Complementing protection of traditional knowledge

The United States supports policy objective I (xiv), as amended.

CORE PRINCIPLES

<u>General Guiding Principles</u>

The term "protection" is used in various ways throughout the section on general guiding principles. For the reasons set forth below, the United States recommends using more precise terms or phrases wherever possible. Such a change will assist Committee members by focusing attention on identifying specific measures and approaches to address specific issues and concerns related TCEs/EoF.

Chapeau

The United States recommends deleting the phrase "concerning protection" in the first sentence of the chapeau and replacing it with the phrase "addressing issues and concerns related to TCEs/EoF." This change is aimed at ensuring that the chapeau is broad enough to permit Committee members to discuss and consider all measures and approaches to address issues and concerns related to TCEs/EoF.

Principle of responsiveness to aspirations and expectations of relevant communities.

The United States supports this principle, as amended.

Principle of balance and proportionality

The United States fully supports this principle, as amended.

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

The United States supports this principle, as amended.

Principle of flexibility and comprehensiveness

The United States supports this principle, as amended.

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

The United States supports this principle, as amended.

Respect for customary use and transmissions of TCEs/EoF

The United States supports this principle, as amended.

Effectiveness and accessibility of protection

The United States supports this principle as amended.

<u>Specific Substantive Principles</u>

Title

The United States recommends amending the caption of II. B to read as follows: "Specific measures and approaches." This change is aimed at ensuring that Committee members have the latitude to discuss and consider all measures and approaches addressing issues and concerns related to TCEs/EoF. As noted earlier, the United States believes that such a change will assist Committee members by focusing attention on

identifying specific measures and approaches to address specific issues and concerns related TCEs/EoF.

Scope of subject matter

The United States recommends deleting in the first sentence the phrase "may be understood as including" and substituting the word "are." In the second sentence, the United States recommends deleting the words "may include, for example" and replacing them with the words "consist of." These changes are aimed at providing lawmakers and policymakers at the national level with precise and workable (rather than open-ended) boundaries for the subject matter at issue.

The United States believes that the examples of "verbal expressions" set forth in B.1 (a)(i) could result in possible inconsistencies or conflicts with the regime for the international protection of trademarks and geographical indications. The United States, therefore, recommends deleting the phrase "aspects of language such as words, signs, names, symbols, and other indications" and replacing it with the phrase "traditional speech." The United States also believes that the word "protected" in B.1(b) should be deleted and replaced with the word "identified" to provide flexibility for lawmakers at the national level.

Criteria for protection

The United States recommends deleting the word "protection" in the caption of B.2 and replacing it with the word "identification" and the deleting the word "protectible" in the first sentence and replacing it with the word "identifiable." This change will help to ensure that the Committee continues to consider and discuss the full range of approaches to addressing issues and concerns related to TCEs/EoF.

Beneficiaries

The recommended changes in wording with respect to B.3 are offered to clarify the point that "indigenous peoples and traditional and other cultures" are the intended beneficiaries of measures and approaches related to TCEs/EoF.

Management of rights

The United States recommends amending B.4 in a way that would permit the Committee to consider and discuss all approaches in its possible future work in drafting a statement of policy objectives and core principles.

Scope of protection

The United States supports the general approach of identifying a broad range of measures and approaches that are available to Member States to address specific issues and concerns related to TCEs/EoF. To introduce and frame this approach, the United States

recommends adding a separate chapeau to this section. The United States also suggests a few changes in the wording of the third element of B.5(iv) to avoid any possible inconsistencies or conflicts with existing legal regimes and to state the issues with greater precision. Finally, the United States recommends adding a short statement on non-legal approaches.

Exceptions and limitations

The United States supports this provision, as amended.

Term of protection

The United States believes that the formula used to define the term of protection of TCEs/EoF in B.7(a) and B.7(b) is too vague. The United States, therefore, believes that the WIPO Secretariat should encourage the Committee to continue its discussion of these matters.

Formalities

The United States believes that the "no formalities" norm set forth in B.8, which appears to be borrowed from copyright law, may not be appropriate for all measures or approaches to address issues and concerns related to TCEs/EoF. For example, such a rule would not be appropriate for a Member State considering the use of certification marks to address issues and concerns related to TCEs/EoF. The United States, therefore, recommends deleting B.8(a). The United States also recommends a few changes in the wording of B.8(b) to ensure that all such measures are transparent, to eliminate vagueness, and in the interest of conciseness.

Sanctions, remedies and enforcement

Recognizing the need for the enforcement of measures addressing issues and concerns related to TCEs/EoF, the United States recommends a few changes in the wording of B.9 to more closely track recent statements of enforcement standards, including examples of appropriate remedies, while avoiding making specific suggestions for enforcement mechanisms, which should be left up to Member States.

Application in time

The United States believes that the WIPO should encourage the Committee to continue to discuss and consider the important issues addressed in this section, with a view toward providing clearer guidance on these extremely complex issues.

Relationship with intellectual property protection

The United States believes that any statement of policy objectives and core principles on TCEs/EoF must include a strong non-derogation principle. The recommended changes in wording for B.11 are aimed at achieving that objective.

International and Regional Protection

The United States supports this provision, as amended.

FURTHER DRAFT STUDY

The United States requests that the WIPO Secretariat prepare a further draft Summary of Policy Objectives and Core Principles for the protection of Traditional Cultural Expressions/Folklore (TCEs/EoF) based on the foregoing comments and the comments of other members of the Committee.

EXPERT OR WORKING LEVEL CONSULTATIVE PROCESS

The United States recommends that the WIPO Secretariat use an informal, expert or working-level consultative process to review and examine such further draft objectives and principles before the Committee's eighth session, provided that participants in such a process are limited to members of the IGC.

SUMMARY OF DRAFT POLICY OBJECTIVES AND CORE PRINCIPLES ON TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE

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This Annex provides the text of the suggested draft materials that are introduced in the main body of the document. These are discussed and elaborated further in Annex II. These draft materials are put forward as one input only to facilitate continuing consideration and discussion of possible approaches to the Committeeís work in preparing an overview of policy objectives and core principles.

I. POLICY OBJECTIVES

Member States may wish to consider addressing specific issues and concerns related to traditional cultural expressions (TCEs) and expressions of folklore (EoF) with a view toward:

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[Recognizing value]

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(i) recognizing 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;

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[Promoting respect]

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(ii) promoting 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;

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[Meeting the actual needs of communities]

(iii) by taking into account the aspirations and expectations expressed directly by indigenous peoples and by traditional and cultural communities, and by contributing to the welfare and sustainable economic, cultural and social development of indigenous peoples and traditional and other cultural communities;

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[Empowering communities]

(iv) by taking measures or approaches that areis balanced and equitable and 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;

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[Supporting customary practices]

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

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[Contributing to safeguarding traditional cultures]

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(vi) by preservingand safeguarding TCEs/EoF and the customary means for their development, preservation and transmission, and by promoting 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;

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

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

[Encouraging community innovation and creativity]

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

[Promoting intellectual and cultural exchange]

(ix) by providing for, 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;

[Contributing to cultural diversity]

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

[Promoting 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;

[Enhancing certainty, transparency and mutual confidence]

(xiii) by fostering 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

[Complementing respect and support forof traditional knowledge]

(xiv) by ensuring that any measure or approach to address specific issues and concerns operates consistently with measures or approaches related to traditional knowledge, recognizing that for many communities knowledge and expressions of culture form an indivisible part of their holistic cultural identity.

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II. CORE PRINCIPLES

A. General guiding principles

[These principles should be respected to ensure that the specific principles below addressing specific issues and concerns related to TCEs/EoF are equitable, balanced, effective and consistent, and appropriately promote the policy objectives of Member States. 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.]

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Principle of responsiveness to aspirations and expectations of relevant communities

Member States should address specific issues and concerns related to TCEs/EoF in a way that reflects the aspirations and expectations of indigenous peoples and traditional and other cultural communities; in particular, any measure or approach should recognize and apply indigenous and customary laws and protocols as far as possible, promote complementary use of positive and defensive protection, if appropriate, 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 or approaches that address specific issues and concerns related to 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.

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Principle of balance and proportionality

In addressing specific issues and concerns related to TCEs/EoF, Member States should reflect the need for maintaining the 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 measures or approaches to be proportionate to the policy objectives, actual experiences and needs, and the maintenance of an equitable balance of interests.

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

In addressing specific issues and concerns related to TCEs/EoF Member States should fully respect and cooperate with relevant international and regional instruments [and processes], and any measures or approaches should be 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.

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Principle of flexibility and comprehensiveness

In addressing specific issues and concerns related to TCEs/EoF, Member States should respect the diversity of TCEs/EoF and the wide range of needs of indigenous peoples and traditional and other cultural communities, should be flexible in determining the

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appropriate measure or approach to address such specific needs, should acknowledge diversity in national circumstances and legal systems, and should allow sufficient flexibility for national authorities to determine the appropriate means of achieving these objectives. To achieve their policy objectives, Member States should draw on a comprehensive range of options, including proprietary, non-proprietary and non-IP measures, and combinations thereof, 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.

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

In addressing specific issues and concerns related to TCEs/EoF, Member States 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. Member States 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.

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

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In addressing specific issues and concerns related to TCEs/EoF, Member States 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.

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Principle of effectiveness and accessibility

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Any measure or approach used by a Member States to address issues and concerns related to TCEs/EoF 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.

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B. Specific measures and approaches

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B.1 Scope of subject matter

(a) 'Traditional cultural expressions' or 'expressions of folklore' are 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, riddles, and traditional speech; ;

(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 identified subject matter should be determined at the national and regional levels.

B.2 Criteria for identification

TCEs/EoF are identifiable, 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 addressing specific issues and concerns related to TCEs/EoF should be for the benefit of the indigenous peoples and traditional and other cultural communities. Such beneficiaries are those communites or individuals:

(i) in whom the custody, care and safeguarding 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 measures and approaches addressing specific issues and concerns related to 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.

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(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 measures and approaches addressing specific issues and concerns related to the TCEs/EoF concerned and should in particular provide for the equitable sharing of benefits from their use;

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(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 measures and approaches

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To advance national, or, where appropriate, regional policy objectives, Member States should consider adopting reasonable measures and approaches that address specific issues and concerns related to TCEs/EoF that are most appropriate to their national or regional needs drawing from the following list of measures and approaches:

(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 misleading indications or allegations in the course of trade and contrary to honest business practices, as to the origin, the nature, the manufacturing

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process, the characteristics, the suitability for their purpose, the quantity, endorsement by or linkage with the community 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.

(v) non-legal approaches for the custody, care, safekeeping, conservation and preservation of TCEs/EoF, including museum, library, and archival approaches

B.6 Exceptions and limitations

Measures and approaches addressing specific issues and concerns related to 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)

(iv) 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) Measures and approaches addressing specific issues and concerns related to 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 and approaches addressing specific issues and concerns related to 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

(b) In the interests of transparency and certainty, measures and approaches addressing specific issues and concerns related to TCEs/EoF may require notifications to the competent authority responsible for the TCEs/EoF at issue, including notifications with respect to 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."

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B.9 Enforcement

Member States should consider providing for the appropriate enforcement of measures addressing issues and concerns related to TCEs/EoF, which should include fair and equitable procedures and appropriate remedies (such as damages and injunctions).

[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

Nothing in these policy objectives or core principles shall in any way affect or derogate from the rights and obligations of Member States under existing international agreements, including international intellectual property agreements.

B.12 International and regional protection

(a) In addressing specific issues and concerns related to TCEs/EoF, Member States should consider the need for egal and administrative mechanisms to provide effective protection in national systems for the TCEs/EoF of foreign rightsholders. Such mechanisms should facilitate as far as possible the acquisition, management and enforcement of measures 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.

February 25, 2005
Washington, D.C.

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Deleted: (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.¶

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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.

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THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

The following comments were received through a communication from the European Community and its Member States

At the Seventh session of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, the Committee called for "further comments on the draft objectives and core principles, including specific suggestions for wording before 25 February, 2005".

The European Community and its Member States would like to confirm their support for the work of this Committee and thank the WIPO secretariat for providing this opportunity for further constructive collaboration. Support is also given to the flexible approach being used and the understanding that the decision to apply measures concerning the protection of traditional cultural expressions lies with the individual contracting parties.

The European Community and its Member States would like to reiterate that it would seem important that assistance be given on a national basis to those countries so wishing, to set up and use as much as possible legal instruments, including those relating to intellectual property, that are already in place and recognised by the international community. In this respect, the European Community and its Member States would refer members of the Intergovernmental Committee to its submission made to the 3rd meeting of the Committee (WIPO/GRTKF/IC/3/11). Attempts to protect traditional cultural expressions should not undermine current international obligations nor interfere with the current rights and obligations found in copyright. The European Community and its Member States consider the document containing the draft Policy Objectives and Core Principles constitutes a possible basis for guidelines to be used by national authorities.

Moreover, it appears that to have an effective national system for the protection of traditional cultural expressions is a prerequisite for any extension or reciprocity of this protection to third countries.

The European Community and its Member States would like to make the following comments on the text.

GENERAL

International protection should not be presupposed at this stage and a certain confusion in this direction could be interpreted in the document. There is an underlying suggestion that what is being proposed in the text is equivalent to the protection of copyright works despite fundamental differences which expose basic problems such as the definition of rightholder, the term of protection and the definition and originality of the subject matter to be protected. It is important that the principles do not conflict with copyright protection.

CORE PRINCIPLE – RECOGNITION OF THE SPECIFIC NATURE, CHARACTERISTICS AND TRADITIONAL FORMS OF CULTURAL EXPRESSION

There are fundamental difficulties laid out in this core principle such as the "constantly evolving character" and the non-uniqueness of the origin of a traditional cultural expression and the lack of identifiability of the community involved.

B1 Scope of subject matter
It is submitted that the definition of the scope of subject matter is too wide and not specific enough to be able to achieve the level of legal certainty required.

B2 Criteria for protection
The criteria should be more precise in order to be more predictable and transparent.

B3 Beneficiaries
A clearer definition of who the beneficiaries should be is necessary, especially in relation to local communities, territoriality and cross-border jurisdiction.

B4 Management of rights
The EC and its Member States support the setting up of public or private national authorities, who represent the rightholders, for the management of their rights. However, rightholders should not be obliged to have recourse to these authorities for the management of his or her rights if they choose not to do so. Moreover, it should be ensured that the original beneficiaries should be the recipients of the remuneration collected on their behalf by these authorities.

The legal meaning of "authorisation" and forms of protection requires further discussion.

B5 Scope of protection
There is concern about the potential abuse and extended protection related to the situation of rights of third parties and secret forms of TCEs. It is imperative that this should not interfere with the current intellectual property system. The notion of benefit sharing requires further discussion.

B6 Exceptions and limitations
It would appear that there is a close correlation between certain elements of B5 and B6 which require further analysis**.**

B7 Term of protection
Point a) would appear to be too vague. Copyright is characterised by the limitation in time of the author's exclusive right to exploit the work in question. Most expressions of folklore undoubtedly go back much further in time than the term of legal protection granted by the Berne Convention or most national or regional laws. Assimilating any protection of Traditional Cultural Expressions via copyright law would not be compatible with this lack of defined term of protection. A defined term of protection is inherent to the balance of rights accepted for copyright.

B8 Formalities
It is suggested that certain formalities would indeed be required for the protection of traditional cultural expressions in order to ensure legal certainty.

B9 Sanctions, remedies and enforcement

Any national authority set up for the handling of Traditional Cultural Expressions should not be the same as the national authority for settling disputes.

B 10 Application in time

It is feared that any retroactive effect may lead to inequitable circumstances concerning third parties. Moreover, the text as it stands would be in conflict with rules on copyright and rules which apply to works which have already fallen into the public domain.

B11 Relationship with IP protection

It is important that nothing in the present principles should be interpreted to derogate from existing obligations under current international agreements on intellectual property. Double protection should be avoided.

B12 International and regional protection

It would appear premature to be considering any international protection when coherent national systems have not yet been set up and considered to be providing insufficient protection.

International Trademark Association
Representing the Trademark Community since 1878

COMMENTS ON THE

SUMMARY OF DRAFT POLICY OBJECITIVES

&

CORE PRINCIPLES

of the

WIPO INTERGOVERNMENTAL COMMMITTEE ON

INTELECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDG AND FOLKLORE

Submitted by the

Emerging Issues Committee

25 February 2005

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The International Trademark Association[1] (INTA) appreciates the opportunity to submit comments to the WIPO Secretariat on the Draft Policy Objectives and Core Principles for the Protection of Traditional Cultural Expressions/Expressions of Folklore as set out in Annex 1 or Document WIPO/GRTKF/IC/7/3.

INTA represents the interests of trademark owners worldwide. Although its membership is geographically diverse, INTA has found its members united in support of the basic principles we believe essential to maintenance of the important role trademarks play in promoting effective commerce, protecting consumer interests, and encouraging free and fair competition. The INTA Emerging Issues Committee's comments below reflect those principles and are limited to those provisions of the Draft that affect the interests of trademark owners.

INTA General Position

INTA notes that in developing policy objectives and core principles for the protection of traditional cultural expressions (TCE's)/expressions of folklore (EoF) minimum substantive standards for national laws are sought to be imposed by international obligations, with the choice of legal mechanisms likely being a matter of national discretion.

While INTA supports the recognition of TCE's and EoF's, it strongly believes that any protection to be afforded to these must not prejudice other existing intellectual property rights, including trademarks. Further INTA strongly opposes any proposal that would seek to grant special trademark status to TCE's and/or EoF's. INTA takes this position with respect to all such international initiatives. INTA historically has advocated on an individual country basis against any "special interest" trademark legislation that provides specific groups exclusive trademark rights without proof of likelihood of confusion or dilution.

Our specific comments on those provisions of the Draft that affect the interests of trademark owners follow.

Policy Objectives

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

INTA is concerned that any system introduced primarily to protect TCEs/EoF and/or to enable their coexistence with other intellectual property rights, including trademarks, should be consistent with the well established intellectual property principles of territoriality, exclusivity, priority and where applicable, notice. INTA has concluded that the mere elaboration of such rights alone, without taking into consideration these principles, could

[1] INTA is a 127-year old not-for-profit membership organization dedicated to the support and advancement of trademarks and related intellectual property concepts as essential elements of trade and commerce. INTA counts over 4500 members in 190 countries. INTA has been an official non-governmental observer to the World Intellectual Property Organization (WIPO) since 1979, and actively participates in all WIPO trademark-related proposals. INTA has contributed WIPO trademark initiatives, such as the Trademark Law Treaty, and is active in other international arenas including the Asia Pacific Economic Co-operation Forum (APEC), the Association of Southeast Asian Nations (ASEAN), the European Union and the World Trade Organization (WTO).

result in an unfavourable outcome, possibly including complete loss of or diminution of value in rights previously held and enjoyed by trademark owners, consumer confusion as to source, and/or impairment of trade.

Core Principles

B. Specific Substantive Principles

(2). B.1. Scope of Subject Matter (a) (i)

INTA is concerned by the inclusion of the terminology "other indications" as a broad catch all provision. Without further specificity or elaboration, inclusion of this language would render it difficult to determine the nature of rights that could be included within this terminology and the impact such rights would have on trademark owners. However, as a practical matter, this would make it extremely difficult for trademark owners to determine the scope of subject matter included as a TCE/EoF. Failure to define precisely (or at least more precisely) what should be included as "other indications" with respect to a TCE/EoF puts an unfair burden of conjecture upon the trademark owner seeking good faith adoption of a sign to use as a trademark. Failure to define what constitutes a TCE/EoF with any real specificity also makes it difficult to establish a mechanism to prevent potential abuse.

(3). B.5. Scope of Protection (i)

INTA is concerned that use of the word "derogatory" implies a subjective assessment. This renders the section uncertain in terms of its real-world application, as it will be impossible for third party rights holders, including trademark owners, to know with any reasonable degree of certainty whether their use of a particular mark will be deemed "derogatory" until after the adoption and commercial exploitation of the mark.

INTA also believes there is an appropriate mechanism to identify those TCE's/EoF of particular cultural or spiritual significance, including sacred TCE's/EoF, so third parties including trademark owners are put on notice of any claimed rights in a TCE/EoF. INTA strongly advocates a transparent system that provides public notice to third party rights holders, including trademark owners, of any claimed right that may affect their good faith adoption and claim to an intellectual property right including a trademark. INTA is very concerned that failure to disclose such claimed TCE or EoF rights, especially those to be granted in secret, puts an unfair, unnecessary and unworkable burden on intellectual property rights holders and undermines the role that trademarks play in fostering fair and robust competition.

The inclusion of the phrase "and derivatives thereof", like the use of "other indications" in B(1)(a)(i), is also overly broad in scope and seeks to expand rights exponentially beyond the TCE's/EoF without any objective criteria for how the "derivative" is derived or used, the result being a system lacking transparency and notice to third party rights holders, including trademark owners.

Further, INTA strongly opposes any proposal which seeks to prevent the acquisition by third parties of IP rights without proof that such third party rights are likely to cause confusion with another pre-existing right in the form of TCE's/EoF.

(4). B.5. Scope of Protection (ii) (Exceptions and Limitations)

INTA is very concerned that exclusive rights can be granted with respect to non-disclosed subject matter, i.e., "secret TCE's/EoF". In order to claim exclusivity of right, it is a logical precursor that the claim to such a right be made public. This is necessary to ensure that claimed proprietary rights and interests are available for public confirmation (usually presumed through utilization of a clearly defined and transparent objection mechanism) and that those rights are clearly defined as against potential encroachment. A system of granting protection of rights without public disclosure is unworkable and unfair.

(5). B.5.Scope of Protection (iv)

INTA reiterates its concerns that use of the word "derogatory" implies a subjective assessment. As with Section B5(i) the use of the word "derogatory" renders the section uncertain in terms of its real-world application, as it will be impossible for third party rights holders, including trademark owners, to know with any reasonable degree of certainty whether their use of a particular mark will be deemed "derogatory" until after the adoption and commercial exploitation of the mark. The lack of transparency and notice in this section is of particular concern, as third party rights holders, including trademark owners, who adopt a mark in good faith, may be subject to civil and criminal penalties for any violation. The imposition of such strong sanctions against an innocent adopter is inequitable.

(6). B.7. Term of Protection (a)

The scope and term of protection is nebulous. Lack of minimum criteria for determining whether and how a TCE/EoF continues to be maintained and used makes for an indefinite and unduly burdensome system. Similarly, there are no criteria to determine how a TCE/EoF could function as a "characteristic of, the cultural identify and traditional heritage of the relevant indigenous people," which compounds the issue further. INTA is of the view that trademark owners require, as far as possible, some degree of certainty in selecting and adopting in good faith signs for use as trademarks, including knowledge of rights in a claimed TCE/EoF and when those rights have been terminated or otherwise extinguished.

(7). B.8 Formalities (a) & (b)

INTA is concerned that the failure of formalities and/or lack of requirement to at least publicly disclose a TCE/EoF is contrary to the stated interests of transparency and certainty and can only lead to burdensome and unnecessary conflict and confusion, particularly in those jurisdictions in which trademark rights are based on priority of registration with a competent authority rather than priority of use.

(8). B.10 Application in Time

The sentiment of this policy in recognition of conflicting claims and intellectual property rights is noted. However the terminology is somewhat convoluted and tautological and has the potential to detract from what appears to be a statement of support for the principle of "first in time, first in right". The section also fails to address the issue of third party concurrent use in good faith.

(9). B.11 Relationship with Intellectual Property Protection

In promoting the special protection of TCE's/EoF via use of complementary protection mechanisms INTA opposes any proposal which would seek to grant special trademark status to TCE's/EoF.

(10). B.12 International & Regional Protection

INTA has gained experience through a number of education sessions on geographical indications. Geographical Indications (GI's) differ from TCE's/EoF because TRIPS Article 1(2) recognises GI's as a type of Intellectual Property. However INTA believes that its experience with many member States who are in the middle of implementing the provisions of the TRIPS Agreement on GI's and are starting to become familiar with GI's and their protection can be extrapolated as to how members may grapple with the introduction of concepts and systems for the protection of TCE's/EoF. Problems and conflicts resulting from the introduction of IP protection for GI's are appearing only now. INTA recommends those problems and experiences should be carefully analysed before introducing a system to facilitate the protection of TCE's/EoF's.

* * * * * * * *

The Emerging Issues Committee, on behalf of INTA, appreciates this opportunity to address these important issues raised by the draft. Should any of our comments be unclear or require elaboration, please contact Bruce MacPherson, Director of External Relations, at bmacpherson@inta.org .

SAAMI COUNCIL

The following comments were received through a communication from the Saami Council.

Note from the Secretariat: The Saami Council's comments comprise a series of changes and comments made directly in Annex I to WIPO document WIPO/GRTKF/IC/7/3. Therefore, the Annex is reproduced below with the Saami Council's changes and comments, which are highlighted as received from the Saami Council.

[This informal 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, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural and social development of indigenous peoples and traditional and other cultural communities;

Note: *The paragraph, as currently drafted, states that any policy should be guided by the aspirations and expectations expressed by TCE holders. Indigenous peoples are the holders of a substantial part of the world's collected TCEs. In more or less any discussion on protection of TCEs, indigenous peoples have underlined that any TCE protection system must respect their rights as holders and custodians of TCEs, including their human rights. Since the paragraph addresses the expectations of TCE holders, this should be explicitly stated in the paragraph. As a UN system organization, WIPO is bound by the UN Charter to respect human rights, as is its member states.*

[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 but yet effectively empowers indigenous peoples and traditional and other cultural communities to exercise

Deleted: and that

due rights and authority over their own TCEs/EoF, including through appropriate moral and economic rights, should they wish to do so;

Note: *The paragraph has been amended to signify "rights" precedent over other interests.*

[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, including human rights law;

Deleted: processes;

Note: *Again, under e.g. the UN Charter, any policy on protection of TCEs must comply with human rights standards. Since this is also the main concern of the majority of TCE holders, human rights law have been mentioned explicitly in the provision.*

[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) provided consent by the TCEs/EoF holders, promote 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;

Deleted: promote, where appropriate,

Note: *Access to TCEs should only be promoted provided agreement of relevant TCE holders.*

[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) if it is so desired by the holders of TCEs/EoF, 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.

Note: *It is far from always indigenous peoples want to commercialize their TCEs.*

[Preclude invalid IP rights]

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

Note: *The amendment is not intended to change the content of the provision.*

[Repress unfair and inequitable uses]
(xii *bis*) repress the misappropriation of TCEs/EoF and other unfair activities;

Note: *The provision is copy of the corresponding provision in the TK Policy.*

[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, government and other users of TCEs/EoF on the other; and

Note: *The provision has been clarified to highlight that many governments are substantial users of TCEs/EoF.*

[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 recognition of rights

The rights of traditional knowledge holders to the effective protection of their knowledge against misuse and misappropriation should be recognized and respected.

Note: *The inserted provision is modeled after the corresponding provision in the TK Policy, slightly amended.*

Principle of balance and proportionality

Protection should respect the right of indigenous peoples and other holders of TCEs/EoF to consent or not consent to access to their TCEs/EoF, and should, provided that free, prior and informed consent has been obtained, 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.

Note: *This paragraph needs to be reformulated so that it adequately distinguishes between different rights and interests. As currently drafted, the paragraph appears to presume that there is always a right to access that only needs to be balanced against other rights. As mentioned above, such is obviously not the case. If for example indigenous peoples hold property rights, other human rights etc. to TCEs or if the TCE falls within the scope of indigenous peoples' right to self-determination, there can be no sharing unless the relevant indigenous people so agrees, and only on that people's terms and conditions. There is then no room for any balancing. In other words, "those that use TCEs" have no rights to those particular TCEs, and there can thus be no balancing between the users interest and the rights of the holders.*

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 codified in or established under binding legal instruments and international customary law. 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.

Note: *Not all relevant international law has necessarily been codified in instruments. In line therewith, not all provisions contained in international instruments establish obligations. Equally often, they merely underline already binding principles.*

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, subject to international law. 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.

Deleted: protection.

Note: *Means of protection must certainly be adapted depending on the local context. In order to safeguard against regimes that violates the rights of indigenous peoples, it is necessary to underline, however, that whatever measures taken must be in compliance with international law, including human rights.*

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

If it is so desired by the holders 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.

Deleted: Protection

Note: *Indigenous peoples etc. might not always want to promote exchange or transmission of their TCEs.*

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. National authorities should make available appropriate enforcement procedures that permit effective action against misappropriation of traditional knowledge and violation of the principle of prior informed consent.

Deleted: communities.¶

Note: *The addition is picked from the corresponding provision in the TK Draft Policy.*

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, subject to international law.

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 Recognition of the customary context

The application, interpretation and enforcement of protection against misappropriation of TCEs/EoF, including determination of equitable sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the customary practices, norms, laws and understandings of indigenous peoples and traditional and local communities,

Deleted: ***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:¶
<#>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;¶

including the spiritual, sacred or ceremonial characteristics of the traditional origin of the TCEs/EoF.

Note: *The provision is modeled after the corresponding provision in the TK Policy.*

B5: Principle of Prior Informed Consent

1. The principle of prior informed consent should govern any direct access or acquisition of TCEs/EoF from indigenous peoples or other traditional holders, subject to these principles.

2. Legal systems or mechanisms for obtaining prior informed consent should ensure legal certainty and clarity; should not create burdens for traditional holders and legitimate users of TCEs/EoF; should ensure that restrictions on access to TCEs/EoF are transparent and based on legal grounds; and should provide for mutually agreed terms for the equitable sharing of benefits arising from the use of TCEs/EoF.

3. The holders of TCEs/EoF shall be entitled to grant prior informed consent for access to TCEs/EoF, or to approve the grant of such consent by an appropriate national authority.

4. As a general rule, the principle of prior informed consent applies also to TCEs/EoF which is already readily available to the general public, but due consideration should be given to the interest of third parties that have acquired TCEs/EoF in good faith. Use of TCEs/EoF already available to the general public in a manner that is fair and equitable given the interests of those from which the TCEs/EoF originates, might be excluded from the principle of free, prior and informed consent, provided that users of that TCEs/EoF provide equitable compensation to the originators. 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, with due consideration given to interests of third parties that have used the TCEs/EoF in good faith. With regard to use of TCEs/EoF already available to the general public, 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

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Deleted: such authorizations should comply with the scope of protection provided for the TCEs/EoF concerned and should in particular provide

Deleted: from their use;

Deleted: <#>uncertainties or disputes as to which communities are concerned should be resolved as far as possible with reference to customary laws and practices;¶ <#>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;¶ <#>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¶ ¶

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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

Note: *These provisions address the fundamental issue of public domain, and are modeled after the corresponding provisions in the TK Policy, with certain modifications. Again, rendering the principle of FPIC subject to national legislation and to the whim of national authorities would in effect make the provision meaningless. The Saami Council further reiterates that there appears to be little point in crafting an international policy if national legislation is to govern the most central issues that the policy addresses regardless. Indigenous representatives have repeatedly stressed that the notion of public domain, as understood by conventional IPR law, is perhaps the most problematic issue when it comes to achieving a more adequate protection for TCEs/EoF. The Saami Council understands that it might not be practically feasible, or perhaps even beneficial, suddenly to prohibit all use of TCEs/EoF currently regarded to be in the public domain. On the other hand, as the provision is currently drafted, it offers more or less no protection at all for TCEs/EoF in the public domain. It is necessary to strike a better balance. The amendment strives to achieve that end.*

Deleted: 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.

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B.6 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 directly from the indigenous people or community concerned.

(i) such authorizations should be granted only after the relevant indigenous people/s or traditional or other community/ies have given their free, prior and informed consent, in accordance with their traditional decision-making and governance processes;

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(ii) such authorizations should comply with the scope of protection provided for the TCEs/EoF concerned and should, when applicable, 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 should be paid directly 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; public notification procedures; and the resolution of disputes.

Note: *There is no reason why an authority should act on behalf of indigenous peoples. Indigenous peoples are self determining entities, capable of administering there own affairs. If they need assistance administering these kinds of affairs, they can arrange with that themselves. The provision, as currently drafted, opens up for misuse.*

B.7 Exceptions and limitations

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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;

Note: *There issues dealt with in subparagraph (iii) have been addressed above.*

B.8 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, subject to international law.

B.9 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, subject to the consent of the relevant indigenous people or local community, 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.10 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.

Note: *Certain elements of this provision have been incorporated into B4. The rest of the provision has been deleted, since the issue has already been covered in B8.*

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

Deleted: 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.

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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.

laws, local information resources, alternative dispute resolution (ADR) and other such practical arrangements as necessary.