

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

Twenty-Second Sessions, July 9 to 13, 2012

Traditional Cultural Expressions

Tupaj Amaru submits the following consolidated proposals, substantive contributions and amendments relevant to the draft Articles on Traditional Cultural Expressions (TCE) or cultural expressions of folklore

Article 1: Subject matters of protection

The present International instrument shall have the purpose of protecting the traditional cultural expressions and expressions of the folklore in all their tangible and intangible forms. This includes all forms of expressions and different places where they themselves express appear and/or are evident in the cultural heritage. They are transmitted from generation to generation in time and space.

The Legal protection of TCEs from (against) any illicit use, as stipulated in the present article, shall be applied in particular to:

- a) Phonetic or verbal expressions, such as stories, popular stories, epics, popular legends, poetry, riddles and other narratives; as well as the words, signs, oral expression, names and sacred symbols;
- b) The musical or (aural) sound expressions, such as songs, the rhythms, and indigenous instrumental music;
- c) The corporal expressions by actions, such as dances, scenic representations, the ritual ceremonies in sacred places, the traditional games, and other interpretations or executions , theatre and dramatic works based on popular traditions;
- d) The tangible expressions, such as works of art, in particular drawings, designs, paintings, sculptures, pottery, terracotta, mosaics, woodwork and jewellery, architectural and funerary spiritual works.

2. - Protection and safeguarding will be applied to all TCEs /EF which are the fruit of a collective and intellectual activity and constitute the living memory of indigenous peoples and local community and belong to this people or community as an intrinsic part of their cultural, social and historic identity or heritage.

Article 2) Beneficiaries of protection

For the purposes of the present instrument, it shall be understood by beneficiaries the collective entitlement of the creators, possessors, guardians, and holders of traditional cultural expressions or expressions of folklore, which are the indigenous peoples, local communities and their descendants.

a) Who have been entrusted with the custody, care and the safeguarding, protection and preservation of the TCEs, in accordance with the laws and customary practices of indigenous peoples, according to current international norms on intellectual property;

b) And who, in the collective and traditional context, according to customary laws and traditional practices, maintain, preserve, develop and use and control TCEs as authentic and genuine elements of their cultural and social identity and their cultural heritage.

Comment: *when speaking about beneficiaries, one had to speak about the rights of the creators. Indigenous peoples, creators and holders had for centuries deprived by the colonizers of their traditions knowledge and TCEs and had their natural resources stolen from them. We have not agreed with the inclusion of "individuals" States or "families", since TCEs were collective by definition. The IGC had to agree on the terms which would apply at all times: indigenous peoples and local communities.*

We recalled that the discussions related to an international instrument which contained mechanisms for sanctions in the event of violation of the rights of indigenous peoples.

Article 3) Scope of protection

For the purposes of the present instrument, protection of the rights of the owners or holders, hereinafter referred to as beneficiaries, and in accordance with Article 2, shall apply to the following illicit acts and practices of appropriation, as stipulated in this article:

a) Reproduction, publication, adaptation, interpretation or execution in the public, communication to the public, distribution, renting, making available at the public domain, including fixed (static) photography of TCEs without the free prior and informed consent of the owners;

b) any use of TCEs or adaptation of such TCEs for commercial purposes running counter to the collective interests of the indigenous peoples or local communities which are the legitimate owners of that cultural heritage;

c) any deformation, modification, falsification or mutilation of TCEs or acts of bad faith, (with intention of damaging, offending or causing damage and prejudice) intending to damage, offend, or prejudice the reputation and the identity and cultural integrity of indigenous peoples or local communities, whatever region they may inhabit;

d) Any acquisition by a fraudulent means or violent actions or usurpation of the intellectual property rights over TCEs shall not be tolerated (and will attract civil and criminal sanctions);

e) Any indication or false or improper or misleading use of TCEs for the trade in goods and services without the free prior and informed consent of the holders shall be subject to both civil and criminal sanctions (punishments).

2.- Persons responsible for the distortion, mutilation; any indication or false, confused or deceitful assertion with intention or premeditation of using the TCE as a reference to the commerce of goods and services, without free prior and informed consent of the owners will be judged and attract legal sanctions or punishment.

Comment: Regarding the issue of beneficiaries, it's regrettable that the facilitator had not taken into account the contributions of indigenous peoples and specific proposals made by Tupaj Amaru on specific articles and provisions based on other international instruments. We stated that indigenous peoples had excluded from the negotiations process and it urgent need to define the status of indigenous peoples in this forum.

Article 4: Exercise of collective rights (to suppress or eliminate management manipulation)

The Contracting Parties of the present instrument shall establish, in consultation with the owners or holders of traditional cultural expressions and with its free prior and informed consent, a competent authority or national or regional authorities with the following attributes:

a) To adopt measures to guarantee the safe-conduct of the traditional cultural expressions or expressions of folklore;

b) To spread information and to encourage practices, studies and investigation for the conservation of the traditional cultural expressions or expressions of folklore, as requested by the holders;

- c) To offer advice to the holders in the exercise of its rights to be authorized based on free prior and informed consent and assistance in the resolution of the controversies between beneficiaries and users;
- d) To maintain the public information or of the threats against the traditional cultural expressions;
- e) To supervise if the user has obtained the free prior and informed consent of the holders of the above mentioned cultural expressions;
- f) To verify and to control the just and equitable sharing of the benefits derived from the use of the above mentioned traditional cultural expressions.

3. The composition of the competent authority or national or regional authorities composed with the consent, and the participation of indigenous peoples shall be communicate to the World Organization of the Intellectual property (WIPO).

Article 5: Exceptions and limitations

The State Parties with the arrangement of its national legislations and in conformity of the instruments of the intellectual property shall establish limitations and exceptions to authorize the use of protected traditional cultural expressions.

The authorization or authorizations of which may be inconsistent or contrary to the collective use within a traditional context and shall obtain the free prior and informed consent of the owners or holders of traditional cultural expressions or expressions of folklore;

By their intrinsic nature, secret, sacred and spiritual knowledge will not be subject to any exceptions and limitations.

Article 6) Duration of the protection

The duration of the protection granted by the present instrument to the Traditional Cultural Expression (ECT) or expressions of the folklore will continue in perpetuity, to the life of indigenous peoples or traditional communities, stipulated in the article 1:

- a) The protection of the traditional cultural expressions or expressions of folklore will be for the duration period of the lifetime of its holders or holders and, while the above mentioned cultural heritage has not put itself at the disposal of the public domain;
- b). The protection granted to the ECT or cultural expressions that binds the secret, spiritual and sacred values will last while it keeps on personifying the life, the history,

the living memory and the cultural heritage of indigenous peoples who have been transmitted from generation to generation;

c) The protection granted to the ECT or expressions of the folklore from any distortion, mutilation or another infraction perpetrated with the intention of injuring or of destroying whole or partially the memory, the history and the image of the peoples and indigenous communities in the place in which they live, will last indefinitely.

Article 8) Exercise of rights, recourse and sanctions

The Contracting parties promise to adopt, with arrangement of its respective juridical procedures and in conformity with the international instruments, the mechanisms adopted to ensure the application of the present instrument.

a) In the cases in which the unlawful conversion of the traditional cultural expressions or expressions of folklore would contain the danger of its extinction, the Contracting parties, according to the arrangement in article 3, shall commit themselves to establish mechanisms appropriate for the resolution of controversies, administrative recourses before the courts and punishment in the penal and civil ambience.

b) In conformity and as established in article 4, a competent Organ will be established, in free prior and informed consent of the indigenous peoples to give advice and assistance to the beneficiaries mentioned in article 2, in order to guarantee the observance of its rights and the application of procedures and punishment that are stipulated in the present article.

c) The Contracting parties shall compromise to provide cooperation and assistance with the purpose of facilitating the application of the mechanisms and appropriate measurements of observance in the national territory and in the frontier areas with the neighboring countries contemplated in the present article.

New article) restitution and reparation

The indigenous peoples shall have the right to a just indemnification, compensation, restitution and reparation of its cultural and intellectual heritage. This includes their traditional knowledge and cultural, artistic and spiritual heritage, the mortal remains of its ancestors (taken from them) deprived without their free prior and informed consent and, in violations of their customary laws and traditional practices.

Indigenous peoples reserve the right to a just compensation for the material and moral damages and injuries caused by national and international piracy.

Article 9: Transitory clauses

a) The dispositions stipulated in the present article shall apply to all traditional cultural expressions occurred and for which, prior to the entry into force of this international instrument, endure unlawful acts and which had been acquired and used by third parties in bad faith.

b) The States Parties shall compromise to adopt appropriate measures that prevent or intend to put a term to the acts of unlawful conversion or undue use that they still last or have been perpetrated before the coming into effect of the present instrument.

c) State Parties shall apply and extend the provisions of protection to all traditional cultural expressions / expressions of folklore in a reasonable period of time after the entry into force of the present instruments after the coming into effect of the present.

Article 11: National Treatment

By virtue of the dispositions of the present instrument, the protection of the traditional cultural expressions shall be applied to all the beneficiaries who complied with the criteria contained in article 2.

Article: New provision: Ratification, acceptance and approval

The present international instrument and any additional Protocol shall be subject to ratification, acceptance and approval of the Member states of the WIPO, in accordance with its respective constitutional procedures.

Article: New provision: Final dispositions

Nothing of the stipulated in the present instrument shall be interpreted to the effect that it awards the State, group or persons, any right to take part in one or several directed activities to reduce or to suppress the protection rights that the indigenous peoples enjoy at present or that could be acquired in the future.

(end of document)