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EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION

I. INTRODUCTION

A. Background

1. Folklore has always been considered as part of the common heritage of the community without individual ownership, and there were no formal or informal laws in many developing countries, which specifically bestowed ownership rights of folklore on any community or group of persons, and prohibit its exploitation without their consent. This led to widespread exploitation of folklore inside and outside the State concerned.

2. The need for a strong legal mechanism for the protection of folklore has been a subject of discussion at the national and international levels since 1960s, and the two main international fora where most of the discussions were held, were the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). While WIPO is concerned with the intellectual property protection of folklore, UNESCO is concerned with the general protection. Apart from this, the African Intellectual Property Organization (OAPI), a regional organization reflects the collective thought of the like-minded States for the legal protection of creations of folklore.

3. The WIPO General Assembly, at its Twenty-Sixth Session, held in Geneva from September 26 to October 3, 2000, established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee” or “IGC”) in order to analyse *inter alia*, intellectual property issues that arise in the context of the protection of expressions of folklore.¹ The WIPO General Assembly extends the mandate of the WIPO IGC and the mandate requires the IGC to accelerate its work and to focus in particular on the international dimension of folklore protection.²

4. The Secretary-General of AALCO realizing the extreme importance of the work undertaken by the WIPO IGC for the Asian and African countries, and the possible role that AALCO could play in formulating an international instrument, proposed to the AALCO Member States through an Explanatory Note dated 27 April 2004, to include the item “Expressions of Folklore and its International Protection” on the Agenda of the Forty-Third Session of AALCO held in Bali (Republic of Indonesia) from 21-25 June 2004. This proposal was in line with Article 4(a) of the AALCO’s Statutes which provides for exchange of views and information on matters of common concern having legal implications. The AALCO Member States welcomed the proposal and the item was deliberated at the Forty-Third (2004) and Forty-Fourth (2005) Sessions. At these Sessions the Member States through a resolution requested the Secretary-General to monitor and report the outcome of the

¹ WO/GA/26/6, paragraph 13, and WO/GA/26/10.

² WO/GA/20/8, paras. 94 and 95.

IGC Sessions and directed the Secretariat to follow-up the developments within the WIPO and submit a report at the next Session.

5. As a follow-up, this report provides an overview of the work of the WIPO Intergovernmental Committee since its inception in 2001, focusing its attention on the recently concluded Ninth and Tenth Sessions of the Committee held in the year 2006 and the documents circulated at the Session for the consideration of the Member States. The draft Provisions on the Protection of Expressions of Folklore as revised in the Seventh Session has also been annexed.

B. General Comments of the AALCO Secretariat

6. The WIPO Intergovernmental Committee as an international forum was successful in drafting Provisions for the Protection of Expressions of folklore. Though still in the drafting stage, these Provisions present a strong framework for a future convention. It is also welcomed that WIPO General Assembly had decided to extend the mandate of the IGC for another two years, renewing their 2005 directions to the IGC to accelerate its work, particularly with a focus on the international dimension. Another important development in the protection of traditional cultural expressions was the adoption of the UNESCO “Convention for the Safeguarding of Intangible Cultural Heritage, 2003”. The adoption of this Convention is a step forward from the legal protection point of view as it, if not comprehensive, provides for the general safeguard measures for the protection of intangible cultural heritage.

7. The WIPO IGC, until its Eighth Session (6-10 June 2005) had made considerable progress in formulating flexible policy objectives and core principles for the protection of traditional cultural expressions/folklore. However, there were still many outstanding issues where the Committee was yet to evolve a consensus formula. States expressed their concerns about the relationship between protection of folklore and the existing intellectual property system. The question of international versus national approaches was another issue that was central to the meeting. It was also pointed out that the desire to create a harmonized, predictable international system could risk the creation of an inappropriate "one size fits all" approach to protection of folklore, approaches that would ignore the diversity of meanings around the "Expressions of folklore" and "protection". Another important issue was that the holders of expressions of folklore are mostly developing countries. This is one of the reasons why there is lesser enthusiasm on the part of the developed countries to provide a strong framework for the protection of folklore.

8. The Ninth and Tenth Sessions of the IGC, experienced a clear disagreement between developing countries and some developed countries. While both sides agreed to move forward on general guidelines and statements of principles for the protection of folklore, some developed countries (the US and Canada) were unwilling to continue work on drafting substantive provisions for a possible international treaty. They maintained that these articles were presented in a treaty-like format and set out extremely detailed “substantive” or “legal” standards. Most of the developing countries were of the view that the approach of the document should focus on defining the framework of an international legally binding instrument as the first priority. The launching of a new funding mechanism presented a new momentum for indigenous and local communities to participate actively in the process of establishing international standards to prevent the misappropriation of expressions of folklore.

This Session also agreed upon a new approach which adopted a separate set of issues on Traditional Cultural Expressions (TCEs), and certainly it would represent a way forward to the Member States for further discussion, as it provide a systematic approach to the fundamental policy choices to develop or enhance the protection of TCEs.

9. At this stage, it is crucial for the developing countries which are owners of the major resources to be able to agree among themselves on a best possible model. The Member States should also utilize all available options, whether inside or outside the Intellectual Property system, preventive or defensive, national or international, to seek the objective of effective protection of expressions of folklore. In this context, AALCO an intergovernmental legal Organization with representation from almost all major countries from Asia and Africa could be a suitable forum for further discussion and deliberation on the protection of folklore. This would help in consolidating the position of the Asian-African countries on the substantive aspect of the future international instrument for the protection of folklore. AALCO also feels that a joint AALCO-WIPO seminar on folklore matters, in order to find a common ground, would be pertinent at this juncture.

C. Issues for Focused Consideration at the Forty-Sixth Session of AALCO

- **Prevention of the misuse, misappropriation and protection of Expressions of Folklore.**
- **Establishing an internationally legal binding instrument to safeguard the rights of Expressions of Folklore.**
- **Creating awareness amongst the Member States to utilize the voluntary fund set up by the WIPO.**

II. WIPO INTERGOVERNMENTAL COMMITTEE ON TRADITIONAL KNOWLEDGE, GENETIC RESOURCES, AND FOLKLORE AND THEIR SESSIONS

A. Introduction

10. The subject “expressions of folklore,” was first initiated by WIPO in cooperation with UNESCO in early 1978. During that time, it was considered as a subject of traditional knowledge. Since then the work on expression of folklore has progressed to a more advanced stage, than the work on traditional knowledge in general. Apart from the piecemeal amendments in the existing intellectual property regime (IPR) for the protection of folklore, the major achievement was the adoption in 1982 of the Model Provisions on the Protection of Expressions of Folklore.

11. The Model Provisions were the result of several joint meetings convened by the WIPO and UNESCO to study the draft model provisions. The outcome of the meeting was submitted to the Committee of Governmental Experts, convened by the WIPO and UNESCO at Geneva in 1982, which adopted the famous “Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions (Model Provisions)”. The Model Provisions have attempted to achieve a balance between protection against abuses of expressions of folklore, on one hand and the freedom, and encouragement of folklore, on the other.

12. While the WIPO had been attempting to protect the “expressions of folklore” through piecemeal amendments in various international instruments, no comprehensive attempt was made to draft an international instrument for its protection. In this regard, WIPO and UNESCO met at Phuket, Thailand in April 1997 at the meeting of World Forum on the Protection of Folklore which was attended by more than 180 participants from approximately 50 countries. The major outcome of the meeting was the recognition of the need for preservation and conservation of folklore throughout the world, legal means of protection of expressions of folklore within national regimes, economic repercussions of exploitation and international protection of expressions of folklore.

13. In 1999, WIPO and UNESCO conducted four Regional Consultations on the Protection of Expressions of Folklore, each of which adopted resolutions or recommendations with proposals for future work. The consultations recommended that WIPO should increase and intensify its work in the field of folklore protection and recommended the establishment within WIPO of a separate committee on folklore and traditional knowledge to facilitate future work. Recommendations for the legal protection of folklore focused on the development of a *sui generis* form of legal protection at the international level (Asia/Pacific, Arab, Latin American Countries Recommendations) and also considered the UNESCO-WIPO Model Provisions to be an adequate starting point and relevant groundwork for future work

in this direction. The African countries recommended developing, in the shortest possible time, a broad consensus among States in favor of an international regime.³

14. Following the recommendations of the regional consultations on folklore, the WIPO General Assembly, at its Twenty-Sixth Session, held in Geneva from September 26 to October 3, 2000, established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore on the following general terms:

The Intergovernmental Committee would constitute a forum in which discussions could proceed among Member States on the three primary themes which they identified during the consultation: intellectual property issues that arise in the context of: (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore.⁴

15. In September 2003, the WIPO General Assembly at its Thirtieth Session decided to extend the mandate of the WIPO IGC and the mandate requires the IGC to accelerate its work and to focus in particular on the international dimension of folklore protection.⁵ The new mandate excludes no outcome of the IGC's work, including the possible development of an international instrument or instruments in this field.⁶

B. Work of the IGC on Folklore from First year to Eighth (2005) Sessions

16. The Committee's work programme focused an ongoing technical analysis of the use of existing intellectual property and *sui generis* approaches for the protection of expressions of folklore. The Committee's work has so far resulted in draft Provisions on Objectives and Principles for the Protection of the Expressions of Folklore.

17. The Committee has built its work on the existing basis of consultations and earlier work done by its various bodies. An active programme of consultation and dialogue has complemented the formal proceedings of the Committee, with emphasis on the fostering of regional dialogue, and the enhanced participation of indigenous and local communities in WIPO activities. The Committee has also provided a framework for interaction with other international processes concerned with Intellectual Property (IP) aspects of Expressions of Folklore. Also a coordinated series of case studies and presentation on national experiences provides an additional source of practical information for holders of Expressions of Folklore and for policymakers alike.

³ See documents WIPO-UNESCO/FOLK/ASIA/99/1, page 4, paragraph 4; WIPO-UNESCO/FOLK/ARAB/99/1, paragraph II(b)6; WIPO-UNESCO/FOLK/LAC/99/1, page 3). *Matters Concerning Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore*, WIPO General Assembly Twenty-Sixth (12th Extraordinary) Session Geneva, September 25 to October 3, 2000, WO/GA/26/6.

⁴ WO/GA/26/6, paragraph 13, and WO/GA/26/10.

⁵ WO/GA/20/8, paras. 94 and 95.

⁶ WIPO Press Release PR/2003/362, 29 September 2003.

18. The Committee's work has already led to a much greater understanding of the concept and issues it has addressed, and has clarified how to deal with the concerns and inadequate recognition and protection of Expressions of Folklore. The discussions highlighted the expectation of a number of countries that specific steps should be taken to strengthen protection, including the development of specific new international instruments; others pointed out that the significance of the issues and their complexity, meant that further analysis and clarification was needed before crystallizing formal outcomes; there was a view that more work needed to be done to explore the full potential of existing IP rights and systems to protect Expressions of Folklore.

19. At its Sixth Session of the IGC held in March 2004, the Committee had also decided that the WIPO Secretariat should prepare drafts of an overview of policy objectives and core principles for protection of Expressions of Folklore; and, an outline of the policy options and legal mechanisms for the protection of Expressions of Folklore subject matter, based on the full range of approaches already considered by the Committee, together with a brief analysis of the policy and practical implications of each option.⁷

20. At its Seventh Session in November 2004, the Committee took note of the detailed comments and drafting suggestions made on the draft objectives and core principles as set out in Annex I of document WIPO/GRTKF/IC/7/3; called for further comments on the draft objectives and core principles, including specific suggestions for wording, before February 25, 2005; and requested the Secretariat to produce, on the basis of that Annex and all subsequent inputs and comments from Committee participants, a further draft of objectives and principles for the protection of Expressions of Folklore for consideration by the Committee at its Eighth Session.

21. At its Eighth Session in June 2005,⁸ the Committee considered the draft provisions embodying policy objectives and core principles for the protection of Traditional Cultural Expressions (TCEs)/Expressions of Folklore (EoF). The Annex to the document WIPO/GRTKF/IC/8/4 provided a revised version of the draft provisions for the Committee's further review. The draft had been revised in line with a commentary and review process established by the Committee at its Seventh Session. The draft provisions reflect the essence of the Committee's work on protection of TCEs/EoF since 2001. The provisions are based on the statements, comments and proposals made by Committee participants, and national and regional approaches to protection of TCEs/EoF described and discussed in the Committee's sessions. The latest draft is guided especially by the comments and specific suggestions made at the Committee's Seventh Session and during the commentary and review process since then.

⁷ Report of Sixth Session, WIPO/GRTKF/IC/6/14, par. 66.

⁸ WIPO/GRTKF/IC/8.

III. CONSIDERATION OF ASPECTS OF EXPRESSIONS OF FOLKLORE AT THE NINTH AND TENTH SESSIONS OF WIPO IGC

22. The Ninth and Tenth Sessions of WIPO IGC were held in the year 2006.⁹ As per the mandate, both meetings were accelerated to work in establishing a concrete outcome with a particular focus on the international dimension on bringing out a legally binding instrument on the subject matter. The draft provisions developed by the previous IGC meetings have been taken further ahead.

23. The Ninth Session stressed the need to formulate concrete measures and identify appropriate mechanisms to establish an international framework for the protection of expressions of folklore. An important outcome of the Session was the launching of a new funding mechanism for indigenous and local communities and the purpose of which was to provide support for representatives of these communities to participate actively in the process of establishing international standards to prevent the misappropriation of expressions of folklore.¹⁰

24. To avoid the repetition of the deliberations on the draft provisions on Expressions of Folklore considered at the Ninth and the Tenth Session deliberations of IGC have been reported below.

A. The Protection of Expressions of Folklore: Revised Objectives and Principles

25. The Committee at its Tenth Session had extensively reviewed legal and policy options for the protection of TCE/EoF. This work was built on extensive international, regional and national experience with the protection of TCEs/EoF, which date back to several decades. This review had covered comprehensive analyses of existing national and regional legal mechanisms, panel presentations on diverse national experiences, common elements of protection of TCEs/EoF, case studies, ongoing surveys of the international policy and legal environment, as well as key principles and objectives of the protection of TCEs/EoF that received support in the Committee's earlier Sessions.

26. The Annex¹¹ has reproduced the objectives and principles in the form provided to the Committee at its Eighth and Ninth sessions. This version was the result of the first round of stakeholder review established by the Committee after it reviewed a first draft at its Seventh Session. Thus the draft remains in the form in which it has been widely consulted upon and extensively reviewed in the Committee, in many Member States and other policy processes. The input from the second intersessional round of commentary and review, initiated by the Committee at its

⁹ Ninth Session was held from 24-28 April 2006 and Tenth Session was from 30 November to 8 December 2006.

¹⁰ WIPO Press Release No. 446 dated 27 April 2006.

¹¹ See Annexure at pages 18-25 of this document.

Ninth Session, is separately circulated as information document WIPO/GRTKF IC/10/INF/2.

27. The draft objectives and principles comprise: (i) policy objectives, which could set common general directions for protection and provide a consistent policy framework; (ii) general guiding principles, which could ensure consistency, balance and effectiveness of substantive principles; and (iii) specific substantive principles, which could define the legal essence of protection.

28. The draft provisions set out substantive standards which may provide the content of international standards for the protection of TCEs/EoF against misappropriation and misuse, without requiring the assertion of new exclusive property rights over TCEs/EoF, but accommodating this option should TCEs/EoF holders elect to take it up. The provisions focus on protection against misappropriation and misuse of TCEs/EoF as a complement to international instruments and processes which deal with the preservation, safeguarding and promotion of TCEs/EoF.

29. The draft provisions concern most directly the protection of TCEs/EoF in a legal sense, that is, protection against the kinds of illicit uses and misappropriations that Intellectual Property protection usually addresses, while taking into account the particular nature and characteristics of traditional creativity and cultural expression, including its communal quality, and the preference many have expressed to avoid new distinct property rights. “Protection” in this sense is distinguishable from the “safeguarding” or “preservation” of cultural heritage and expressions, and complements it within the broader policy and legal environment. This approach is consistent with the “protection ... against illicit exploitation and other prejudicial actions”, that was the objective of earlier norm-setting activities conducted by WIPO and UNESCO.¹²

(i) Objectives

30. As the Committee has noted several times, protection of TCEs/EoF should not be undertaken for its own sake, as an end in itself, but as a tool for achieving the goals and aspirations of relevant peoples and communities and for promoting national, regional and international policy objectives. The way in which a protection system is shaped and defined will depend to a large extent on the objectives it is intended to serve. A key initial step, therefore, of the development of any legal regime or approach for the protection of TCEs/EoF is to determine relevant policy objectives.

31. Accordingly, the draft Provision recognizes that the protection of traditional cultural expressions, or expressions of folklore, should aim to: (i) Recognize value;

¹² However, several Committee participants have expressed various concerns with the use of the term “protection”, which, according to one Member State, “leave[s] the strong impression of favoring a specific policy direction” and led to concern about “the exclusion of the important concepts of ‘preservation’ and ‘conservation’ from the definition of protection” and about “the failure to mention the concept of ‘promotion.’” Furthermore, some Committee participants, especially indigenous peoples, have argued that the approach to protection in the work of the Committee is too narrow and limited.

(ii) Promote respect; (iii) Meet the actual needs of communities; (iv) Prevent the misappropriation of traditional cultural expressions/expressions of folklore; (v) Empower communities; (vi) Support customary practices and community cooperation; (vii) Contribute to safeguarding traditional cultures; (viii) Encourage community innovation and creativity; (ix) Promote intellectual and artistic freedom, research and cultural exchange on equitable terms; (x) Contribute to cultural diversity; (xi) Promote community development and legitimate trading activities; (xii) Preclude unauthorized Intellectual Property rights; and (xiii) Enhance certainty, transparency and mutual confidence.

32. Several changes have been made to the original draft objectives annexed to WIPO/ GRTKF/IC/7/3, in the light of interventions made at the seventh session of the Committee and the written comments received from the Member States.

33. Some of the previous objectives are in the nature of general guiding principles rather than objectives as such, and have been transferred to that section. These include the objectives relating to respect for and cooperation with relevant international agreements, and complementarity with the protection afforded to Traditional Knowledge (TK) *stricto sensu*. Some new objectives have been added, such as an objective relating to preventing the misappropriation of TCEs/EoF, as suggested by more than one Committee participant. Two Committee participants in particular suggested that a distinction be made, between those objectives more directly related to the protection of TCEs/EoF at the Intellectual Property interface, and other objectives relating to other policy areas that the provisions should take into account and not run counter to. While such objectives may not have been formally set apart in the draft, certain objectives have been rephrased to take these comments into account.

(ii) General Guiding Principles

34. The general guiding principles seek to give legal expression to certain general guiding principles, which have underpinned much of the discussion, within the Committee since its inception and in international debate and consultations before the Committee's establishment. The general guiding principles identified within the Committee include:

(a) Responsiveness to aspirations and expectations of relevant communities; (b) Balance; (c) Respect for and consistency with international and regional agreements and instruments; (d) Flexibility and comprehensiveness; (e) Recognition of the specific nature and characteristics of cultural expression; (f) Complementarity with protection of traditional knowledge; (g) Respect for rights of and obligations towards indigenous peoples and other traditional communities; (h) Respect for customary use and transmission of TCEs/EoF; and (i) Effectiveness and accessibility of measures for protection.

(iii) Substantive Principles

1. Subject Matter of Protection

35. Article 1 defines "traditional cultural expressions" or "expressions of folklore" as any forms, whether tangible and intangible, in which traditional culture and

knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof: Verbal expressions; musical expressions; expressions by action; and tangible expressions.

36. The suggested article describes the subject matter covered by the provisions. Paragraph (a) sets out both a description of the subject matter itself (“traditional cultural expressions” or “expressions of folklore”), as well as the substantive criteria which specify more precisely which of those expressions would be protectable. The Committee’s discussions have clarified the distinction between description of the subject matter in general, and the more precise delimitation of those TCEs/EoF that are eligible for protection under a specific legal measure. As has been pointed out, not every expression of folklore or of traditional cultures and knowledge could conceivably be the subject of protection within an IP framework.

2. Beneficiaries

37. Article 2 states that measures for the protection of traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples and traditional and other cultural communities in whom custody, care or safeguarding of the folklore are entrusted and who maintain, use and develop the folklore.

38. On one hand, many stakeholders have emphasized that TCEs/EoF are generally regarded as collectively originated and held, so that any rights and interests in this material should vest in communities rather than individuals. Some laws for the protection of TCEs/EoF provide rights directly to concerned peoples and communities. On the other hand, many vest rights in a Governmental authority, often providing that proceeds from the granting of rights to use the TCEs/EoF shall be applied towards national heritage, social welfare and culture related programs. The African Group has stated that principles for the protection of TCEs/EoF should ‘Recognize the role of the State in the preservation and protection of traditional knowledge and expressions of folklore. The suggested provision is sufficiently flexible to accommodate both approaches at the national level – while the beneficiaries of protection should directly be the concerned peoples and communities, the rights themselves could be vested either in the peoples or communities, or in an agency or office (see also Article 4 “Management of Rights”).

39. Article 2, and the provisions as a whole, contemplate that more than one community may qualify for protection of their TCEs/EoF in line with the criteria enumerated in Article 1. The term “cultural communities” is intended to be broad enough to include also the nationals of an entire country, a “nation”, in cases where TCEs/EoF are regarded as “national folklore” and belonging to all of the people of a particular country. This complements and accords with the practice in other policy areas. Therefore, a national law could, for example, state that all nationals are the beneficiaries of protection.

3. Acts of Misappropriation (Scope of Protection)

40. This draft article addresses a central element of protection, i.e., the misappropriations of TCEs/EoF covered by the provisions and the rights and other measures that would apply in each case. As Committee participants have stressed should be the case, the article aims to provide forms of protection for expressions of culture and knowledge not currently available under conventional and existing IP law. These provisions are without prejudice to protection for TCEs/EoF already available under current IP law. Conventional IP protection remains available. The suggested provision seeks to address the kinds of IP-related uses and appropriations of TCEs/EoF, which most often cause concern to indigenous and local communities, and other custodians and holders of TCEs/EoF, as identified by them in earlier fact-finding and consultations. It draws from a wide range of approaches and legal mechanisms embodied in various national and regional laws.

41. In brief, the draft provision suggests three “layers” of protection, intended to provide supplementary protection, i.e., tailored to different forms of cultural expression and the various objectives associated with their protection, reflecting a combination of exclusive and equitable remuneration rights and a mix of legal and practical measures. The provisions are broad and inclusive, and intended to give flexibility to national and regional authorities and communities in relation to which precise legal mechanisms may be selected at the national or regional levels to implement them.

4. Management of Rights

42. This provision deals with how and to whom authorizations to use expressions of folklore are applied for and related questions. It provides that “prior authorizations to use traditional cultural expressions/expressions of folklore..., should be obtained either directly from the community concerned where the community so wishes, or from an agency acting at the request, and on behalf, of the community”. The matters dealt with in this provision should apply regardless of whether communities or State-appointed bodies are the rights holders.

43. The provision as a whole envisages the exercise of rights by the relevant communities themselves. However, in cases where the relevant communities are not able or do not wish to exercise the rights directly, this draft article suggests a role for an “Agency”. A role for such an “Agency” is entirely optional, and only necessary and appropriate if the relevant communities so wish.

44. This provision seeks to identify only certain core principles that could apply. Clearly the elaboration of such measures will depend greatly on national and community factors. Options for more detailed provisions could be further developed at the national and community levels. Existing laws and models have detailed provisions that could be drawn from.

5. Exceptions and Limitations

45. This provision puts forward certain exceptions and limitations for consideration. Many stakeholders have stressed that any IP-type protection of TCEs should be subject to certain limitations so as not to protect them too rigidly. It has been suggested that overly strict protection may stifle creativity, artistic freedom and

cultural exchanges, as well as be impracticable in its implementation, monitoring and enforcement. In addition, the protection of TCEs/EoF should not prevent communities themselves from using, exchanging and transmitting amongst themselves expressions of their cultural heritage in traditional and customary ways and in developing them by continuous recreation and imitation, as has been emphasized.

6. Term of Protection

46. This provision explains the term of protection. On one hand, many indigenous peoples and traditional communities desire indefinite protection for at least some aspects of expressions of their traditional cultures. Calls for indefinite protection are closely linked to calls for retroactive protection. On the other hand, it is generally seen as integral to the balance within the IP system that the term of protection should not be indefinite, so that works ultimately enter the 'public domain'. The suggested provision embodies a trademark-like emphasis on current use, so that once the community that the TCE is characteristic of no longer uses the TCE or no longer exists as a distinct entity, protection for the TCE would lapse.

47. In addition to this general principle, specific provision is made for the term of protection of two categories, namely those TCEs/EoF which are registered or notified and those that are secret, undisclosed or confidential.

7. Formalities

48. This provision is intended to reduce administrative burdens in the acquisition and maintenance of protection of expressions of folklore. It has been suggested that the acquisition and maintenance of protection should be practically feasible, especially from the point of view of traditional communities, and not create excessive administrative burdens for right holders or administrators alike. Equally important, is the need, expressed by several stakeholders such as external researchers and other users of TCEs/EoF, for certainty and transparency in their relations with communities.

8. Sanctions, Remedies and Exercise of Rights

49. This provision concerns with civil and criminal sanctions and remedies that may be made available for breaches of the rights provided. Communities and others have pointed out that the remedies available under current law may not be appropriate to deter infringing use of the works of an indigenous copyright holder, or may not provide for damages equivalent to the degree of cultural and non-economic damage caused by the infringing use. References have also been made to the desirability of alternative dispute resolution (ADR) in this area. Member States have pointed out the necessity of appropriate guidance and practical experiences with sanctions, remedies and enforcement.

9. Transitional Measures

50. This provision enumerates protection should operate retroactively or prospectively, and in particular how to deal with utilizations of TCEs/EoF that are continuing when the provisions enter into force and which had lawfully commenced before then. As many Committee participants have pointed out, this question touches

directly upon the notion of the “ public domain”. Previous documents have pointed out that a “clearer understanding of the role, contours and boundaries of the public domain is vital in the development of an appropriate policy framework for the IP protection of TCEs. Committee participants have stated that the public domain was not a concept recognized by indigenous peoples and/or that as expressions of folklore *stricto sensu* had never been protected under IP they could not be said to have entered a “public domain”.

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

51. These provisions are intended to provide forms of protection for TCEs/EoF not currently available under conventional and existing IP laws. It has been previously discussed that any special protection for TCEs/EoF should be concurrent with the acquisition of IP protection that might also be available under IP laws. Earlier discussions had recalled that some, if not many, of the needs and concerns of indigenous peoples and traditional and other cultural communities and their members may be met by solutions existing already within current IP systems, including through appropriate extensions or adaptations of those systems.

11. International and Regional Protection

52. This provision deals with the technical question of how rights and interests of foreign holders of rights in TCEs/EoF would be recognized in national laws. In other words, on what conditions and in what circumstances foreign rights holders would have access to national protection systems, and what level of protection would be available to the benefit of foreign right holders. This question is more widely discussed in companion document WIPO/GRTKF/IC/8/6. For present purposes, and simply as a starting point for discussion, a provision based generally upon national treatment as is found in Article 5 of the Berne Convention for the Protection of Literary and Artistic Works, 1886 (as amended in 1979) is included as a basis for further consideration and analysis.

53. Broadly, but by no means exclusively, the question of how rights and interests of foreign holders of rights in TCEs/EoF would be recognized in national laws has been resolved in IP by reference to the principle of “national treatment”, although this principle can be subject to some important exceptions and limitations. National treatment can be defined in terms of granting the same protection to foreign rights holders as are granted to domestic nationals, or *at least* the same form of protection.

B. Summary of the Deliberations at the Ninth Session of WIPO IGC (24-28 April 2006)

54. The Agenda Item Traditional Cultural Expressions/Expressions of Folklore was taken up as item no. 8 at the Ninth Session. After the introduction of the document for deliberations by the WIPO Secretariat,¹³ many States, including AALCO Member States, viz., Japan, Republic of Indonesia, Peoples Republic of China, Islamic Republic of Iran, India, Singapore, Nigeria, Arab Republic of Egypt,

¹³ Secretariat Document: WIPO/GRTKF/IC/9/4.

Pakistan, South Africa took the floor. The subject deliberated was the draft Provisions on the Protection of Expressions of Folklore.¹⁴

55. Almost all the Delegations thanked the Secretariat for its efficient and constructive work, and supported the document WIPO/GRTKF/IC/9/4 as a basis for further deliberation.

56. One Delegation stated that it was satisfied that the entirety of proceedings and that the document was being considered was a positive step towards reaching the target of a legally-binding instrument. The delegation suggested that the discussion of objectives and principles must be composite and followed by discussion of the substantive principles, as well as definitional issues. The objectives and principles related to specific subject matter, TCEs as described in Article 1, and this needed discussion. Further, it added that the expression “cultural expressions” should include combinations of cultural traditions particularly in countries with a varied and diverse cultural heritage. In its context, the term “indigenous peoples” might not be appropriate. With regard to article 5, the exceptions and limitations should allow legitimate and non-commercial academic research and legitimate publication of such research through normal commercial publishing channels.

57. The other Delegation wished to follow the cluster-by-cluster approach as proposed by the Delegation of Canada. The Delegation’s first comment on the Annex to WIPO/GRTKF/IC/9/4 concerned the wording in the chapeau of the draft Objectives. With regard to the terms “traditional cultural expressions” and “expressions of folklore”, the Delegation wished to reconfirm that at this point there existed no clear definition or a common understanding among the participating countries on what these terms meant. The terms “traditional cultural expressions” or “expressions of folklore” did not at this point presume or preclude any definite meaning, and they were open to future discussion.

58. Another Delegation shared the concern of the African Group that the application of classical IP thinking and terms in the field of folklore might easily distort the picture and at best confuse issues. For instance, while it was admitted that EoF might have been publicly available – and this was understandably so given, the character of the subject matter, and particularly its mode of transmission – did not mean that such materials had fallen into the “public domain”, a term of art which suggested an expiration of protection. One was dealing with subject matter that had never enjoyed formal protection. Most communities had their traditional mechanisms for the protection of their EoF. The Delegation found great practical wisdom in dealing with the international dimension of these issues, in an integral manner as had been suggested by many delegations. It was agreed that there was need for further deliberation, and cross-fertilization of ideas on the options available for addressing the many questions that had been raised by various delegations. However, the Delegation was satisfied that the present revised drafts were a fair distillation of the work undertaken so far and should form a credible basis for future work in this area. On the draft objectives in the Annex to WIPO/GRTKF/IC/9/4, the Delegation accepted in

¹⁴ The above stated details are drawn from the Secretariat Doc. WIPO/GRTKF/IC/9/14 Prov 2.

principle the list of objectives elaborated as representing the general basis of the work of the Committee.

59. One Delegation believed that in the policy objectives, prevention of misappropriation should be set as a core objective for discussion of folklore protection at national and international levels, and proposed that the term “misappropriation” should be clearly defined in the substantive provisions. The Delegation added the following specific comments and questions: (1) the term “misappropriation” should be specifically defined. Was it also necessary to add the term “misuse” (in the parts concerning objectives and substantive principles)?; (2) in the substantive principles, Article 3 concerning “Scope of Protection”, how was “(folklore) of particular cultural or spiritual value or significance” to be measured?. In the substantive principles also the delegation submitted its comments.

60. One Delegation commenting on draft objective believed that all peoples and all communities, in particular indigenous peoples and traditional cultural communities, cherished and valued cultural heritage and wanted to preserve and protect expressions of their traditional cultures and folklore. The Delegation was particularly concerned about the possibilities for a wide and diverse range of interpretations of the term “misappropriation”. Although the word “misuse” was welcomed in the text, the entire issue should be subject to further consultations and discussions before final agreement on the text could be reached on this very complex point.

61. Another Delegation was of the view that the general guiding principles could be improved to refer to a principle of respect for national law because national laws were key in implementing the objectives and principles. A reference to national laws also reflected the flexibility principle. Draft objective (iii) referred to national law, as did some of the substantive provisions, which made it clear that the objectives and principles were subject to national laws. In the absence of a definition of indigenous peoples, for example, the draft article 2 on beneficiaries allowed States to use other terms in their national laws.

C. Decisions Adopted by the Tenth Session of the WIPO IGC (30 November-8 December 2006)

62. At the Tenth Session of the WIPO’s IGC, the members were unable to agree on proposals that could form the basis of an international agreement on traditional knowledge and folklore. There was a clear disagreement between the developed and the developing countries over the move to creating a legally binding international instrument. After intensive consultations, Members agreed to collect comments on the draft texts of the Secretariat. Developing countries were firm on their position for a legally binding instrument. The Secretariat prepared a separate draft for the protection of expressions of folklore in the form of 10 issues.¹⁵ They are:

1. Definition of traditional cultural expressions (TCEs)/expressions of folklore (EoF) that should be protected.

¹⁵ WIPO/GRTKF/IC/10/4.

2. Who should benefit from any such protection or who holds the rights to protectable TCEs/EoF?
3. What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?
4. What forms of behavior in relation to the protectable TCEs/EoF should be considered unacceptable/illegal?
5. Should there be any exceptions or limitations to rights attaching to protectable TCEs/EoF?
6. For how long should protection be accorded?
7. To what extent do existing IPRs already afford protection? What gaps need to be filled?
8. What sanctions or penalties should apply to behavior or acts considered to be unacceptable/illegal?
9. Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?
10. How should foreign rights holders/beneficiaries be treated?

63. The WIPO Secretariat made a table for comments regarding the texts. The comments on the issues may be submitted within 31 March 2007 and the next meeting of the IGC will be held from 3 to 12 July 2007 and this will be the final working session of the IGC before it reports to the WIPO General Assembly meeting in 2007.¹⁶

¹⁶ WIPO *Press Release No. 470* dated 12 December 2006.

IV. CONSIDERATION OF THE DELIBERATIONS AT THE FORTY-FIFTH SESSION OF AALCO HELD IN NEW DELHI, INDIA, 3-8 APRIL 2006

64. During the Forty-Fifth Golden Jubilee Session of AALCO, the Agenda Item “Expressions of Folklore and its International Protection” was placed for consideration and the Member States deliberated on it. It may be recalled that at the Sixth Session of the WIPO IGC which was held in Geneva, March 2004, Amb. Dr. Wafik Z. Kamil, the Secretary-General of AALCO had proposed to the AALCO Member States in his statement and through an Explanatory Note dated 27 April 2004, to include the “Expressions of Folklore and its International Protection” as an item on the Agenda in the Forty-Third Session of AALCO which held in Bali (Republic of Indonesia) from 21-25 June 2004. Accordingly, the item was included on the agenda of AALCO at the Forty-Third Session and deliberated its successive Sessions.

65. At the Forty-Fifth Session (2006), several AALCO Member States expressed their view on the item. The delegates highlighted that folklore manifested civilization of human society and embodies diversity of world culture. They also expressed serious concern over the vast changes to their original cultural environment and its challenges due to the accelerating trend of globalization and modernization. They appreciated the UNESCO and WIPO’s contribution in the area of folklore protection, by adopting the UN Convention of Intangible Heritage Protection (2003) and drafting Joint Model Provisions of protection policy subjects and core principles for the protection of expressions of folklore. They also suggested that within this forum Member States could reach a consensus to support and encourage the IGC to create an international legally binding instrument and take into the account the requirements of the disclosure of origin. Further, it was recommended by a Member State that AALCO should make an in depth study on the exploitation of the intangible expansion of folklore and carry out consultations with regard to the development of IPR’s protection system of the expressions of folklore, genetic resources and traditional knowledge. To this effect, **a resolution was adopted at the Forty-Fifth Golden Jubilee Session (RES/45/S 15) which *inter alia*, directed the Secretary-General to follow up the developments within the WIPO IGC on ‘expressions of folklore’, to present the views of the AALCO Member States during the Ninth Session of the IGC, and submit a report to the Forty-Sixth Session of AALCO.**

ANNEXURE

REVISED PROVISIONS FOR THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE: POLICY OBJECTIVES AND CORE PRINCIPLES*

I. OBJECTIVES

The protection of traditional cultural expressions, or expressions of folklore,¹⁷ should aim to:

Recognize value

(i) recognize that indigenous peoples and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity;

Promote respect

(ii) promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore;

Meet the actual needs of communities

(iii) be guided by the aspirations and expectations expressed directly by indigenous peoples and by traditional and other cultural communities, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such peoples and communities;

Prevent the misappropriation of traditional cultural expressions/ expressions of folklore

(iv) provide indigenous peoples and traditional and other cultural communities with the legal and practical means, including effective enforcement measures, to prevent the misappropriation of their cultural expressions and derivatives therefrom, control ways in which they are used beyond the customary and traditional context and promote the equitable sharing of benefits arising from their use;

Empower communities

¹⁷ In these provisions, the terms “traditional cultural expressions” and “expressions of folklore” are used as interchangeable synonyms, and may be referred to simply as “TCEs/EoF”. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.

(v) be achieved in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and traditional and other cultural communities to exercise rights and authority over their own traditional cultural expressions/expressions of folklore;

Support customary practices and community cooperation

(vi) respect the continuing customary use, development, exchange and transmission of traditional cultural expressions/expressions of folklore by, within and between communities;

Contribute to safeguarding traditional cultures

(vii) contribute to the preservation and safeguarding of the environment in which traditional cultural expressions/expressions of folklore are generated and maintained, for the direct benefit of indigenous peoples and traditional and other cultural communities, and for the benefit of humanity in general;

Encourage community innovation and creativity

(viii) reward and protect tradition-based creativity and innovation especially by indigenous peoples and traditional and other cultural communities;

Promote intellectual and artistic freedom, research and cultural exchange on equitable terms

(ix) promote intellectual and artistic freedom, research practices and cultural exchange on terms which are equitable to indigenous peoples and traditional and other cultural communities;

Contribute to cultural diversity

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

Promote community development and legitimate trading activities

(xi) where so desired by communities and their members, promote the use of traditional cultural expressions/expressions of folklore for community-based development, recognizing them as an asset of the communities that identify with them, such as through the development and expansion of marketing opportunities for tradition-based creations and innovations;

Preclude unauthorized IP rights

(xi) preclude the grant, exercise and enforcement of intellectual property rights acquired by unauthorized parties over traditional cultural expressions/expressions of folklore and derivatives thereof;

Enhance certainty, transparency and mutual confidence

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

II. GENERAL GUIDING PRINCIPLES

- (a) Principle of responsiveness to aspirations and expectations of relevant communities
- (b) Principle of balance
- (c) Principle of respect for and consistency with international and regional agreements and instruments
- (d) Principle of flexibility and comprehensiveness
- (e) Principle of recognition of the specific nature and characteristics of cultural expression
- (f) Principle of complementarity with protection of traditional knowledge
- (g) Principle of respect for rights of and obligations towards indigenous peoples and other traditional communities
- (h) Principle of respect for customary use and transmission of TCEs/EoF
- (i) Principle of effectiveness and accessibility of measures for protection

III. SUBSTANTIVE PROVISIONS

ARTICLE 1: SUBJECT MATTER OF PROTECTION

(a) “Traditional cultural expressions” or “expressions of folklore” are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

- (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
- (ii) musical expressions, such as songs and instrumental music;
- (iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and,
- (iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are:
 - (aa) the products of creative intellectual activity, including individual and communal creativity;
 - (bb) characteristic of a community’s cultural and social identity and cultural heritage; and
 - (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

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

ARTICLE 2: BENEFICIARIES

Measures for the protection of traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples and traditional and other cultural communities:¹⁸

- (i) in whom the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with their customary law and practices; and
- (ii) who maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic of their cultural and social identity and cultural heritage.

ARTICLE 3: ACTS OF MISAPPROPRIATION (SCOPE OF PROTECTION)

Traditional cultural expressions/expressions of folklore of particular value or significance

(a) In respect of traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance to a community, and which have been registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that the relevant community can prevent the following acts taking place without its free, prior and informed consent:

(i) in respect of such traditional cultural expressions/expressions of folklore other than words, signs, names and symbols:

- the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography) of the traditional cultural expressions/expressions of folklore or derivatives thereof;
- any use of the traditional cultural expressions/expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the community as the source of the traditional cultural expressions/expressions of folklore;
- any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore; and
- the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof;

(i) in respect of words, signs, names and symbols which are such traditional cultural expressions/expressions of folklore, any use of the traditional cultural expressions/expressions of folklore or derivatives thereof, or the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or derivatives thereof, which disparages, offends or falsely suggests a connection with the community concerned, or brings the community into contempt or disrepute;

¹⁸ The broad and inclusive term “indigenous peoples and traditional and other cultural communities”, or simply “communities” in short, is used at this stage in these draft provisions. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.

Other traditional cultural expressions/expressions of folklore

(b) In respect of the use and exploitation of other traditional cultural expressions/expressions of folklore not registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that:

(i) the relevant community is identified as the source of any work or other production adapted from the traditional cultural expression/expression of folklore;

(ii) any distortion, mutilation or other modification of, or other derogatory action in relation to, a traditional cultural expression/expression of folklore can be prevented and/or is subject to civil or criminal sanctions;

(iii) any false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the traditional cultural expression/expression of folklore of a community, suggest any endorsement by or linkage with that community, can be prevented and/or is subject to civil or criminal sanctions; and

(iv) where the use or exploitation is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by the Agency referred to in Article 4 in consultation with the relevant community; and

Secret traditional cultural expressions/expressions of folklore

(c) There shall be adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret traditional cultural expressions/expressions of folklore.

ARTICLE 4: MANAGEMENT OF RIGHTS

(a) Prior authorizations to use traditional cultural expressions/expressions of folklore, when required in these provisions, should be obtained either directly from the community concerned where the community so wishes, or from an agency acting at the request, and on behalf, of the community (from now on referred to as “the Agency”). Where authorizations are granted by the Agency:

(i) such authorizations should be granted only in appropriate consultation with the relevant community, in accordance with their traditional decision-making and governance processes;

(ii) any monetary or non-monetary benefits collected by the Agency for the use of the traditional cultural expressions/expressions of folklore should be provided directly by it to the community concerned.

(b) The Agency should generally be tasked with awareness-raising, education, advice and guidance functions. The Agency should also:

(i) where so requested by a community, monitor uses of traditional cultural expressions/expressions of folklore for purposes of ensuring fair and appropriate use as provided for in Article 3 (b); and,

(ii) establish the equitable remuneration referred to in Article 3 (b) in consultation with the relevant community.

ARTICLE 5: EXCEPTIONS AND LIMITATIONS

(a) 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 taking place outside the traditional or customary context, whether or not for commercial gain; and,

(iii) not apply to utilizations of TCEs/EoF in the following cases:

- by way of illustration for teaching and learning;
- non-commercial research or private study;
- criticism or review;
- reporting news or current events;
- use in the course of legal proceedings;
- the making of recordings and other reproductions of TCEs/EoF for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes; and incidental uses, provided in each case that such uses are compatible with fair practice, the relevant community is acknowledged as the source of the TCEs/EoF where practicable and possible, and such uses would not be offensive to the relevant community.

(b) Measures for the protection of TCEs/EoF could allow, in accordance with custom and traditional practice, unrestricted use of the TCEs/EoF, or certain of them so specified, by all members of a community, including all nationals of a country.

ARTICLE 6: TERM OF PROTECTION

Protection of traditional cultural expressions/expressions of folklore should endure for as long as the traditional cultural expressions/expressions of folklore continue to meet the criteria for protection under Article 1 of these provisions, and,

(i) in so far as TCEs/EoF referred to in Article 3 (a) are concerned, their protection under that sub-article shall endure for so long as they remain registered or notified as referred to in Article 7; and,

(ii) in so far as secret TCEs/EoF are concerned, their protection as such shall endure for so long as they remain secret.

ARTICLE 7: FORMALITIES

(a) As a general principle, the protection of traditional cultural expressions/expressions of folklore should not be subject to any formality. Traditional cultural expressions/expressions of folklore as referred to in Article 1 are protected from the moment of their creation.

(b) Measures for the protection of specific traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance and for which a level of protection is sought as provided for in Article 3(a) should require that such traditional cultural expressions/expressions of folklore be notified to or registered with a competent office or organization by the relevant community or by the Agency referred to in Article 4 acting at the request of and on behalf of the community.

(i) To the extent that such registration or notification may involve the recording or other fixation of the traditional cultural expressions/expressions of folklore concerned, any intellectual property rights in such recording or fixation should vest in or be assigned to the relevant community.

(ii) Information on and representations of the traditional cultural expressions/expressions of folklore which have been so registered or notified should be made publicly accessible at least to the extent necessary to provide transparency and certainty to third parties as to which traditional cultural expressions/expressions of folklore are so protected and for whose benefit.

(iii) Such registration or notification is declaratory and does not constitute rights. Without prejudice thereto, entry in the register presumes that the facts recorded therein are true, unless proven otherwise. Any entry as such does not affect the rights of third parties.

(iv) The office or organization receiving such registrations or notifications should resolve any uncertainties or disputes as to which communities, including those in more than one country, should be entitled to registration or notification or should be the beneficiaries of protection as referred to in Article 2, using customary laws and processes, alternative dispute resolution (ADR) and existing cultural resources, such as cultural heritage inventories, as far as possible.

ARTICLE 8: SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

(a) Accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies, including criminal and civil remedies, should be available in cases of breach of the protection for traditional cultural expressions/expressions of folklore.

(b) The Agency referred to in Article 4 should be tasked with, among other things, advising and assisting communities with regard to the enforcement of rights and with instituting civil, criminal and administrative proceedings on their behalf when appropriate and requested by them.

ARTICLE 9: TRANSITIONAL MEASURES

(a) These provisions apply to all traditional cultural expressions/expressions of folklore which, at the moment of the provisions coming into force, fulfill the criteria set out in Article 1.

(b) Continuing acts in respect of traditional cultural expressions/expressions of folklore that had commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, should be brought into conformity with the provisions within a reasonable period of time after they enter into force, subject to respect for rights previously acquired by third parties.

ARTICLE 10: RELATIONSHIP WITH INTELLECTUAL PROPERTY PROTECTION AND OTHER FORMS OF PROTECTION, PRESERVATION AND PROMOTION

Protection for traditional cultural expressions/expressions of folklore in accordance with these provisions does not replace and is complementary to protection applicable to traditional cultural expressions/expressions of folklore and derivatives thereof under other

intellectual property laws, laws and programs for the safeguarding, preservation and promotion of cultural heritage, and other legal and non-legal measures available for the protection and preservation of traditional cultural expressions/expressions of folklore.

ARTICLE 11: INTERNATIONAL AND REGIONAL PROTECTION

The rights and benefits arising from the protection of traditional cultural expressions/expressions of folklore under national measures or laws that give effect to these international provisions should be available to all eligible beneficiaries who are nationals or habitual residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country of protection, as well as the rights and benefits specifically granted by these international provisions.