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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION



**EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL
PROTECTION**

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EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION

I. INTRODUCTION

1. “Folklore” or “expressions of folklore”¹ is an important element of the cultural heritage of every nation. It is a means of self-expression and social identity. In most of the countries, folklore is truly a living and still developing tradition, rather than just a memory of the past. The Asian and African countries are very rich in their cultural heritage including, folk literature, folk arts and crafts, music, visual heritage, ceremonies, folk-beliefs, folk architecture associated with particular sites, as well as forms of traditional knowledge related to folk-medicines and folk-medical practices, agriculture, and conservation and sustainable use of biological diversity.²

2. However, there is widespread unfair and improper exploitation of folklore of these countries for commercial and business interests. With the development of technology, abuse of folklore has multiplied. Folklore is commercialized without due respect for the cultural and economic interests of the communities in which it originates and is often distorted or mutilated for business interests. At the same time, no share of the returns from its exploitation is conceded to the communities who have developed and maintained it. The importance of folklore will be lost in the absence of a proper legal protection mechanism at national and international levels.

3. The existing intellectual property rights protection regime, which confers exclusive rights on individuals and companies for the protection of their immaterial assets in a competitive environment, is inadequate to address all the issues involved in the protection of traditional knowledge and folklore. At present, in the era of new technology, many potential beneficiaries of intellectual property protection have been marginalized owing to a lack of an adequate protection system and the inapplicability of existing systems to the characteristics and peculiarities of the knowledge, innovations and practices of indigenous and local communities. It has been found that protection by the copyright route can be difficult or indeed impossible to achieve, and for a number of reasons, including the difficulty of identifying the copyright owners and the fact that copyright protects only original expression, not actual concepts, ideas or styles. This has the effect of leaving outside its scope certain aspects that are of great interest to the communities with which these manifestations originate, in the sense that there is nothing

¹ ‘Traditional cultural expressions’ has been used as a neutral working term because in some countries, cultures and communities the term ‘folklore’ is regarded as derogatory. However, some participants in the WIPO IGC’s Fifth Session expressed concern at the use of the term ‘traditional cultural expressions,’ and stated their preference for the term ‘expressions of folklore.’ This term ‘expressions of folklore’ has been used in earlier international Intellectual Property discussions in this area and is the term used in the Model Provisions and in many national laws. Accordingly, the terms ‘expressions of folklore’ is used in this Report.

² The Protection of Expressions of Folklore: The Attempt at International Level, *Paper prepared by the International Bureau of WIPO*, WIPO/CNR/MNL/97/12, December 1997.

to prevent unauthorized third parties from adopting or copying the styles of certain communities and exploiting them commercially.³

4. These considerations have fueled the push for effective legal protection of folklore to give traditional communities and national governments greater control over the use of folkloric works. For this purpose the Member States of World Intellectual Property Organization (WIPO) established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee” or “IGC”) with the objective of formulating a legal and policy option for the protection of expressions of folklore and a possible international legal instrument.

5. Amb. Dr. Wafik Z. Kamil, the Secretary-General of AALCO represented the Organization at the Sixth Session of the Committee which was held in Geneva, from 15-19 March 2004. Realizing the extreme importance of the work undertaken by the WIPO IGC for the Asian and African countries, and the possible role AALCO could play in formulating an international instrument, the Secretary-General proposed to the AALCO Member States through an Explanatory Note dated 27 April 2004, to include the “Expressions of Folklore and its International Protection” as an item on the Agenda of forthcoming 43rd Session of AALCO which will be held in Bali (Indonesia) from 21-25 June 2004. This proposal is in line with Article 4(d) of the AALCO’s Statutes which provides for exchange of views and information on matters of common concern having legal implications.

6. This report provides an historical overview of the attempts made at the international level for the protection of expressions of folklore and the work of the WIPO Intergovernmental Committee since its inception in 2001. The Model Provisions on Protection of Folklore and UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore is included as annexure to this Report.

³ Traditional knowledge and the need to give it adequate Intellectual property protection, *Documents prepared by the Group of Countries of Latin America and the Caribbean (GRULAC)* September 14, 2000, WO/GA/26/9.

II. INTERNATIONAL PROTECTION OF EXPRESSIONS OF FOLKLORE

7. 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. The western concept of private property rights was anathema to traditional societies.⁴ This led to widespread exploitation of folklore inside and outside the nation concerned.

8. The need for a strong legal mechanism for the protection of folklore has been a subject of discussion at the national and international level since 1960's. The two main international fora where most of the discussions were held were the WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO). While WIPO is concerned with the intellectual property protection of folklore and UNESCO is concerned with the cultural aspect of folklore. UNESCO has undertaken several initiatives at the international, regional and national levels concerning the identification, conservation, preservation and dissemination of expressions of folklore.⁵ Apart from this, regional organizations like the African Intellectual Property Organization (OAPI) reflects the collective thought of the like-minded nations for the legal protection of creations of folklore.

9. In the early 1978 when WIPO in cooperation with the UNESCO initiated its work on "expressions of folklore," it was considered as a subset 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 IPR regime for the protection of folklore, the major achievement was the adoption in 1982 of the Model Provisions on the Protection of Expressions of Folklore.

(a) Protection of Expressions of Folklore in the existing IPR Regime

10. The idea of protection of the intellectual property rights in the folklore, by applying copyright law was raised in 1967 at the Stockholm Diplomatic Conference for the revision of the Berne Convention for the Protection of Literary and Artistic Work. At the Conference the following provision were included in the Stockholm Act of the Convention, and retained in the revision adopted in Paris in 1971:

In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union (Article 15.4 (a)).

⁴ P.V. Valsala G. Kuty, National Experiences With The Protection Of Expressions Of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines, *World Intellectual Property Organization (WIPO)*, 2002.

⁵ WIPO/GRTKF/IC/5/3.

Another attempt was the adoption of the Model Law on Copyright for Developing Countries in 1976 Tunis Meeting, with a specific provision for the protection of works of national folklore.

11. Despite the success in the use of the Copyrights Law for the protection of the folklore in the national level, the application of copyright law had some fundamental limitations. First, whereas copyright requires an identifiable author, and the notion of authorship is a problematic concept in many traditional societies. Secondly, copyright has a time limit. For folkloric expressions that are important elements of people's cultural identity, it would be more appropriate to have permanent protection. Third, copyright normally requires works to be fixed, and some of the folklore are not fixed, but are passed on orally from generation to generation. These issues made it clear that protection under copyright law is not the answer to the question of how to preserve the community-owned, cultural heritage expressed as folklore.

12. "Another attempt to address the desperate need for effectively protecting the expressions of folklore has been to provide for such provisions under the laws relating to neighboring or related rights. What is envisaged under the laws governing neighboring rights is indirect protection, as in the International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (the "Rome Convention") providing for protection of rights of performers, producers of phonograms and broadcasters. In respect of performances of expressions of folklore, developing countries were advised to adhere to the Rome Convention and the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (1971) so as to protect performances and broadcasts of expressions of folklore. However, under Article 3(a) of the Rome Convention, 'performers' means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works. As expressions of folklore do not correspond to the concept of literary and artistic works proper, the definition of "performers" in the Rome Convention does not seem to extend to performers who perform expressions of folklore."⁶ The 1996 WIPO Performances and Phonograms Treaty defines 'performers' as 'actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in interpret or otherwise perform literary or artistic works or expressions of folklore.'⁷

(b) WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore, 1982

13. As the existing laws of copyright and related rights does not provide an adequate form of protection of the expressions of folklore, attention turned into the possibilities of a *sui generis* solution. In 1978 the International Bureau of WIPO prepared a first draft of

⁶ P.V. Valsala G. Kutty, National Experiences With The Protection Of Expressions Of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines, *World Intellectual Property Organization (WIPO)*, 2002.

⁷ Article 2, WIPO Performances and Phonograms Treaty 1996

sui generis model provisions for intellectual-property-type protection of folklore against certain unauthorized uses and against distortion. The Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention noted the model provisions and approved the proposal of WIPO that special effort should be made to find solutions to the intellectual property protection aspects of folklore.

14. The WIPO and UNESCO convened several joint meetings 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 Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention welcomed the development of the Model Provision as a first step in the establishment of a *sui generis* system of intellectual-property-type protection of folklore.

15. The Model Provisions has 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.

Definition of Expressions of Folklore

16. The Model Provision does not provide any definition of folklore. Section 2 for the purpose of the Model Provision defines the term "expressions of folklore" to mean:

“productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- (i) verbal expressions, such as folk tales, folk poetry and riddles;*
- (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, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes; (b) musical instruments; [(c) architectural forms].*

17. The definition adopted by the Model Provision had many limitations. The definition is limited only to folklores transmitted orally. This would render most of those parts of folklore, which have evolved through the written method, fall outside the purview of folklore.⁸ Another category of folklore that are neither oral nor written are the

⁸ For example, Indian literature has a sizeable share of folk songs, folk tales, poems, riddles and even many stories forming part of great epics, which are still essentially expressed and communicated in written form. P.V. Valsala G. Kutty, National Experiences With The Protection Of Expressions Of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippine, *World Intellectual Property Organization (WIPO)*, 2002.

Folk dances, folk arts and crafts, folk paintings, sculptures, etc. They are transmitted through visual tradition, imitations, observations, through training and performances.⁹ Further, only ‘artistic’ heritage is covered by the Model Provisions. This means that many other forms of expressions of folklore shall fall outside the scope of the definition.

Acts against which expressions of folklore is protected in the Model Provision

18. Section 1 of the Model Provision provides that the Expression of Folklore shall be protected against ‘illicit exploitation’ and ‘other prejudicial actions’. A utilization of the expressions of folklore will be ‘illicit exploitation’ according to Section 3 if any utilization is made both with gainful intent and outside their traditional or customary context:

- (i) any publication, reproduction and any distribution of copies of expressions of folklore;
- (ii) any public recitation or performance, any transmission by wireless means or by wire, and any other form of communication to the public, of expressions of folklore.

This means that utilization even with a gainful intent within the traditional or customary context of the community is not subject to authorization. On the other hand, a utilization, even by members of the community where the expression has been developed and maintained, requires authorization if it is made outside such a context and with gainful intent.¹⁰ However, utilization will not be ‘illicit exploitation’ if the utilization is:

- for the purposes of education;
- utilization by way of illustration in the original work of an author or authors, provided that the extent of such utilization is compatible with fair practice;
- borrowing of expressions of folklore for creating an original work of an author or authors. (Section 4)

19. “Other prejudicial action” detrimental to interests related to the use of expressions of folklore are identified by the Model Provision, as four case of offences subject to penal sanctions (section 6)”. They are:

1. The Model provision provides for the protection of the “appellation of origin” of expressions of folklore. Section 5 require that, in all printed publications, and in connection with any communication to the public, of any identifiable expressions of folklore, its source be indicated in an appropriate manner by mentioning the community and/or geographical place from where the expression utilized has been derived. Under Section 6, non-compliance with the requirement of acknowledgement of the source is a punishable offence.

⁹ Ibid.

¹⁰ The Protection of Expressions of Folklore: The Attempt at International Level, *Paper prepared by the International Bureau of WIPO*, WIPO/CNR/MNL/97/12, December 1997

2. any authorized utilization of folklore where authorization is required constitutes an offence.
3. misleading the public by creating the impression that what is involved is an expression of folklore derived from a given community when, in fact, such is not the case (passing off).
4. it is an offence if, in the case of public uses, expressions of folklore are distorted in any direct or indirect manner prejudicial to the cultural interests of the community concerned.¹¹

20. The Model provision use the word 'competent authority' and 'community concerned' avoiding the term 'owner'. They do not deal with the question of the ownership of expressions of folklore since this may be regulated in different ways from one country to another.

21. A number of developing countries, including some AALCO Member States, having influenced by the Model Provision, had incorporated these provisions in their national legislations thereby attempted to protect their folklores. Most of these legislative attempts to protect folklore creations, however, were done within the framework of copyright laws, and also lacked uniformity in the nature and scope of protection.¹² The majority of the national laws provide for the protection of what they call "works of folklore"; some other laws (the laws of Benin, Indonesia, Kenya, Mali, Morocco, Senegal, Tunisia and Zaire) refer simply to "folklore," and two of them (the laws of Chile and China) use the term that the International Bureau of WIPO considers the most appropriate one: "expressions of folklore." Some national laws (those of Chile, Ghana, Indonesia, Madagascar, Mali and Tunisia) do not provide a substantive definition; at most, they mention that what is involved is common national heritage. The other laws provide more or less detailed definitions.¹³ The definitions, in general, only cover traditional literary and artistic creations.

22. Furthermore, the Model Provisions were not extensively implemented by Member States because the Model provisions did not provide for ownership-type rights over folklore; did not have adequate international protection of folklore; and they seemed outdated due to technological, legal, social and cultural developments.

23. Finally one must add that all the international effort for the protection of Expressions of Folklore ended with the adoption of the Model Provisions.

¹¹ Ibid.

¹² Those developing countries which made the first attempts to regulate the use of folklore creation tried to provide protection in the framework of their copyright laws are: Tunisia, 1967 and 1994; Bolivia, 1968 and 1992; Chile, 1970; China, 1990; Iran 1970; Morocco, 1970; Algeria, 1973; Senegal, 1973; Kenya, 1975 and 1989; Mali, 1977, Burundi, 1978; Cote d'Ivoire, 1978; Sri Lanka; 1979; Guinea, 1980; Barbados, 1982; Cameroon, 1982; Colombia, 1982; Congo, 1982; Madagascar, 1982; Rwanda, 1983; Benin, 1984; Burkina Faso, 1984; Central African Republic, 1985; Ghana, 1985; Dominican Republic, 1986; Zaire, 1986; Indonesia, 1987; Nigeria, 1988 and 1992; Lesotho, 1989; Malawi, 1989; Angola, 1990; Togo, 1991; Niger, 1993; Panama, 1994; Vietnam, 1994. *The Protection of Expressions of Folklore: The Attempt at International Level, Paper prepared by the International Bureau of WIPO WIPO/CNR/MNL/97/12, December 1997.*

¹³ Ibid.

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

24. 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. Acknowledging the need for further research in this field before formulating an international instrument, WIPO and UNESCO agreed on the formulation of a World Forum on the Protection of Folklore. A meeting of the group was held in Phuket, Thailand in April 1997 and was attended by 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. Pursuant to the outcome, WIPO conducted folklore-focused research activities and in 1998 and 1999 conducted nine fact-finding missions to 28 countries to better understand the needs, expectations and general situation of traditional knowledge holders.¹⁴

25. 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 in this area. 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.¹⁵

26. 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 (“the Committee” or “IGC”) in 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

¹⁴ Molly Torsen, Cultural Property Protection: International and US Current Affairs, <<http://cyber.law.harvard.edu/bold/deve103/torsentk.html>>

¹⁵ 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.

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.¹⁶

27. During the informal consultations which led to the establishment of the Committee, the Member States considered that the advanced stage of the work on expressions of folklore merits the distinct consideration of this subject matter as a separate theme. They indicated that their experiences since the adoption of the Model Provisions have shown a need for the provisions to be updated in two respects: (i) improving the protection system for tangible expressions of folklore, in particular the important issue of handicrafts, and (ii) extending the protection of expressions of folklore of a given country beyond the borders of the country concerned.

28. 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.¹⁷ The new mandate excludes no outcome of the IGC's work, including the possible development of an international instrument or instruments in this field.¹⁸

(a) Work of the Committee on folklore from first to fifth Session

29. The Committee first met on April 2001 and by the end of December 2003, the Committee had convened five sessions.¹⁹ The Committee's work programme focused on an ongoing technical analysis of the use of existing intellectual property and *sui generis* approaches for the protection of expressions of folklore. More specifically it has tackled these issues at several interlocking levels:

- Debating broader policy and legal questions, including how IP rights can operate to promote the interests of holders and custodians of Expressions of Folklore, ranging over conventional IP rights, extension and adaptation of IP rights and specific or *sui generis* legal system that have been created in a number of countries;
- Sharing practical experience by surveying, documenting and analyzing protection of Expressions of Folklore in many countries and several regions, to give practical input into the policy debate; and
- Developing practical tools and mechanisms to support custodians of Expressions of Folklore and indigenous and local communities in identifying and promoting their interests in relation to the IP system.²⁰

¹⁶ WO/GA/26/6, paragraph 13, and WO/GA/26/10

¹⁷ WO/GA/20/8, paras. 94 and 95

¹⁸ WIPO Press Release PR/2003/362, 29 September 2003

¹⁹ The Committee is open to all Member States of WIPO, and other UN Member States, international organizations and NGO's may participate as observers.

²⁰ WIPO Press Release, PR/2003/362, 29 September 2003

30. The Committee has built its work on the existing basis of consultations and earlier works done by its various bodies. An active programme of consultation and dialogues 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 IP aspects of Expressions of Folklore. The highlights of the nature of work of the Committee on folklore and its key outcome, which include a set of practical tools can be found in the documents:

- Assessing policy and legal options for IP protection systems for Expression of folklore; and
- Assessing and developing practical mechanisms for the legal protection of folklore.²¹

Also a coordinated series of case studies and presentation on national experiences provides an additional source of practical information for holder of Expressions of folklore and for policymakers alike.

31. 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 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 issue and their complexity, meant that further analysis and clarification was needed before crystallizing formal outcomes; there is a view that more work needs to be done to explore the full potential of existing IP rights and systems to protect Expressions of Folklore.

(b) Major Issues considered by the Committee for the protection of folklore

32. The Committee has already considered diverse approaches to protecting Expressions of Folklore through the intellectual property (IP) system. Some relate to the scope and operation of the IP system and the range of interest it embodies and mediates; other issues concern the interaction between the IP system as such, and a broader set of legal systems and policy interest. General concern was expressed in the Committee about the need both for the preservation and for protection of folklore, in a manner that is responsive to the community values and legal systems of the communities that create and maintain these intellectual and cultural traditions.

(i) *Positive and Defensive protection of Expressions of Folklore*

33. Positive protection refers to the acquisition by the holders of folklore themselves of an IPR such as a patent or an alternative right provided in a *sui generis* system. Defensive protection refers to provisions adopted in the law or by the regulatory authorities to prevent IPR claims to a cultural expression or a product being granted to

unauthorized persons or organizations. Both strategies are typically used in conjunction, in a coordinated manner, and usually a range of positive and defensive forms of protection may be applicable to the interests of any group of holders of Expressions of Folklore.

Positive Protection of Expressions of Folklore

34. Protection of Expressions of Folklore in the work of the Committee refers to protection of material against some form of unauthorized use by third parties. It is this kind of protection, rather than preservation, that is the general function of intellectual property systems, including in the area of Expressions of Folklore. The Committee's deliberations have covered several different concepts of protection, including the need for protection against:

- unauthorized commercial exploitation of Expressions of Folklore;
- insulting, degrading or culturally offensive use of this material;
- false or misleading indications that there is a relationship with the communities in which the material has originated; and
- failure to acknowledge the source of material in an appropriate way

In each of these cases, owners and custodians of Expressions of Folklore can use specific IP rights to prevent others from undertaking these activities without authorization. Because this is based on the active assertion of rights, this was termed 'positive protection.'

35. The Committee also discussed the use of non-IP approaches for the positive protection of Expressions of Folklore: these approaches were complementary to the use of IP rights and could be used in conjunction with IP protection. This included protection by legal and technical means. Protection by legal means included other forms of legislation (e.g. laws governing the environment and access to genetic resources, and laws concerning indigenous people), as well as bilateral contracts, agreements and licenses governed by contract law, which can provide for certain undertakings and benefits in exchange for access to the Expressions of Folklore. The Committee also considered positive protection through technical means, especially information technology.²²

36. In summary, the range of positive protection measures for Expressions of Folklore considered by the Committee included:

- using IP rights (the conventional IP system or *sui generis* rights specifically created to protect Expressions of Folklore) to prevent unauthorized use, and to seek remedies when unauthorized use has occurred (especially commercial use, or offensive and abusive use);

²²

For instance, data security systems could safeguard Expressions of Folklore by restricting access and use to those who are authorized by the community.

- using the same rights as the basis for commercial, research and cultural partnerships with third parties, including for defining and sharing benefits from use of Expressions of Folklore beyond the traditional environment;
- using other non-IP legal tools to protect Expressions of Folklore, such as contracts and legislation for the protection of the environment and the interests of indigenous communities; and
- using technical tools, such as databases with security systems, to prevent third parties from gaining unauthorized access to Expressions of Folklore.

37. In the particular context of Folklore, the Committee had considered the protection of Expressions of Folklore within the context of cultural policies for the preservation of cultural heritage, the promotion of cultural diversity and the stimulation of creativity, including tradition-based creativity. In this regard, the need to clarify the contours and boundaries of the “public domain” was a key concern, as was the relationship between IP protection and these cultural policy objectives.²³

38. To summarize, the Committee’s discussions highlighted the need for balance and coordination between preservation and protection, and a clearer relationship between the exercise of positive protection and the maintenance of the public domain. Various practical initiatives suggested to address these concerns include the development of a draft toolkit and a practical guide on the protection of Expressions of Folklore.²⁴

Defensive Protection of Expressions of Folklore

39. The Committee considered defensive protection as a distinct way of defending the interests of holders of Expressions of Folklore. In contrast to positive protection, which involved the active exercise of rights over the Expressions of Folklore, defensive protection was identified as a set of strategies to ensure that third parties did not gain illegitimate or unfounded IP rights over Expressions of Folklore subject matter. The need for defensive protection arose in various scenarios discussed in the Committee; these included taking measures to preclude or to oppose:

- Trade mark rights making use of Folklore subject matter (e.g., a trade mark based on a traditional cultural symbol) or creating a misleading link with a traditional community; and
- Assertion of copyright in literary or artistic works that make illegitimate use of traditional cultural works or traditional performances (e.g., a sound recording that includes sampled performances of expressions of folklore).

40. The role and place of cultural heritage collections, databases and registers raises specific questions relevant to both defensive and positive protection of Expressions of Folklore. The Committee is addressing several questions arising when (i) cultural heritage and Expressions of Folklore are first accessed by folklorists, ethnographers,

²³ See documents WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/5/INF 3).

²⁴ See document WIPO/GRTKF/IC/3/10, para. 155.

ethnomusicologists, cultural anthropologists and other fieldworkers, and (ii) Expressions of Folklore are documented, recorded, displayed and made available to the public by museums, inventories, registries, libraries, archives and the like. The activities of collectors, fieldworkers, museums, archives etc., are important for the preservation, conservation, maintenance and transmission to future generations of intangible and tangible forms of cultural heritage. Museums also play a valuable educational role. However, the “public domain” status of cultural heritage and Expressions of Folklore that are not protected by IP challenges efforts to protect the interests of indigenous and local communities. This is particularly so in view of the growing trend of museums to digitize their cultural heritage collections and make them publicly available for both museological/curatorial as well as commercial purposes.²⁵

(ii) *Scope and definition of legal protection*

41. The terms ‘folklore’ and ‘expressions of folklore’ have been discussed for many years in international policy debate on IP questions, and are identified as an object of protection in international IP law. They are also the object of protection of many national laws, including in copyright laws and distinct *sui generis* laws for the protection of folklore. While there is no exhaustive definition of ‘folklore’ at the international level, there is a long established international and national usage of the term as the object of specific protection (whether it is folklore as such, or expressions of folklore, that is the direct object of protection).²⁶

42. One of the key issues the Committee considered was how to refer to and how to define the subject matter of protection – what terms to use, and what definitions to give them. This corresponded to a need widely identified in the Fact-Finding Missions in 1998-99. In the Committee’s subsequent discussions, this emerged as an important basis for international policy debate. Discussions frequently stressed the holistic nature of traditional cultural and knowledge systems, and the need to recognize the complex interrelations between a community’s social and cultural identity, and the specific components of its knowledge base, where traditional technical know-how, cultural expressions and traditional narrative forms, traditional ecological practices, and aspects of lifestyle and spiritual systems may all interact, so that attempts to isolate and separately define particular elements of knowledge or culture may create unease or concern.

43. Discussions have pointed to the need for some clarity and a common understanding of the subject matter of protection as the basis for international cooperation in this area: this has also led to a need to clarify the very role of definitions of protected subject matter in international IP instruments. Broadly speaking, the discussion highlighted a tension between an approach to defining Expressions of Folklore subject

²⁵ WIPO/GRTKF/IC/5/3.

²⁶ The more recently coined term ‘traditional cultural expressions’ was used in the work of the Committee as a close synonym for ‘expressions of folklore;’ for some community representatives and commentators it has the advantage of being a more direct description, and one that lacked the negative associations that ‘folklore’ has for some communities.

matter that aimed at inclusiveness and recognition of the diverse local characteristics of traditional knowledge and cultures, and an approach that saw value in establishing a common set of terms and a general understanding of their signification at the international level.

44. The surveys and studies considered by the Committee on specific national approaches to legal IP protection have disclosed a need for a clear working understanding of the interaction between a more focussed conception of traditional cultural expressions. Many countries have adopted a range of different approaches to defining this term in national laws. For instance, Ghanaian legislation defines folklore as “all literary, artistic and scientific work belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or by unidentified Ghanaian authors, and any such works designated under this Law to be works of Ghanaian folklore.” Identical definitions can be found in the laws of the Nigeria²⁷ Republic of Congo,²⁸ Burundi,²⁹ Mali,³⁰ Cameroon,³¹ Central African Republic³² and Senegal.³³

45. One of the most elaborate definition could be found in the Indigenous Peoples Rights Act of 1997 (IPRA) of the Philippines which recognizes, protects and promotes the rights of Indigenous Cultural Communities (ICCs) Indigenous Peoples (IPs), creating a National Commission on Indigenous People (NCIP), and establishing an implementing mechanism. The Act defines Folklore as:

²⁷ Nigerian law defines folklore as: a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means.

²⁸ Under the laws of Congo, folklore is defined as “all literary and artistic productions created on the national territory by authors presumed to be Congolese nationals or by Congolese ethnic communities, passed from generation to generation and constituting one of the basic elements of the national traditional cultural heritage.” Law on Copyright and Neighboring Rights (Congo) art. 15 (July 7, 1982),

²⁹ Under the laws of Burundi, folklore is defined as “all literary, artistic and scientific works created on the national territory by authors presumed to be nationals of Burundi, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.” Decree-Law Regulating the Rights of Authors and Intellectual Property (Burundi) art. 4 (May 4, 1978),

³⁰ Under the laws of Mali, folklore is defined as “any work composed on the basis of elements borrowed from the national heritage of the Republic of Mali.” Ordinance Concerning Literary and Artistic Property (Mali) art. 8 (July 1, 1977),

³¹ Under the laws of Cameroon, folklore is defined as “all literary, artistic and scientific works produced by various communities and which, passed from one generation to another.” Law No. 82-18 to Regulate Copyright (Cameroon) § 4(viii) (Nov. 26, 1982),

³² Folklore is defined under the laws of the Central African Republic as “all literary and artistic productions created by the national communities, passed on from generation to generation and constituting one of the basic elements of the traditional cultural heritage.” Ordinance No. 85-002 on Copyright (Central African Republic) art. 9 (Jan. 5, 1985),

³³ Senegalese law defines folklore as “all literary and artistic works created by authors presumed to be of Senegalese nationality, passed from generation to generation and constituting one of the basic elements of the Senegalese traditional cultural heritage.” Law on the Protection of Copyright (Senegal) art. 9 (Dec. 4, 1973),

“Indigenous Cultural Communities/Indigenous Peoples - refers to a group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organize, community on communal bounded and defined territory, and who have, under claims of ownership sine time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have through resistance to political, social and cultural inroads of colonization, non-indigenous religions and cultures, became historically differentiated from the majority of Filipinos. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains”

46. Finally, the IP protection of Expressions of Folklore raises several questions concerning the relationship between IP and the preservation of cultural heritage, the promotion of multiculturalism and cultural diversity and the stimulation of creativity and innovation as ingredients of sustainable economic development. These questions formed the backdrop for continued examination of the uses and limits of existing IP and for the review of *sui generis* options.

47. Discussion at the Committee on the policy options and the range of national experiences was wide-ranging, and the following issues were identified as a way of structuring consideration of *sui generis* approaches:

- (i) policy context and objectives;
- (ii) subject matter (scope of protection);
- (iii) criteria the subject matter must meet as a condition for its protection;
- (iv) holder of the rights;
- (v) rights conferred, including exceptions and limitations;
- (vi) procedures and formalities, if any, for the acquisition and maintenance of the rights conferred;
- (vii) responsibilities of new or existing authorities, associations and other institutions to exercise and/or manage the rights;
- (viii) sanctions and enforcement procedures;
- (ix) how rights are lost and expire;
- (x) interaction between the *sui generis* system and IP and other laws, such as cultural heritage laws, especially the extent to which they overlap or complement each other;
- (xi) incorporation and/or recognition of any relevant customary laws and protocols;
- (xii) regional and international protection, including the question of the protection of the same or similar cultural expressions from neighboring countries (so-called “regional folklore”); and

(xiii) transitional arrangements.³⁴

48. At the fifth session many Committee participants have observed that no single solution is likely to meet all the needs of indigenous and traditional communities and to protect Expressions of Folklore in a comprehensive manner. Instead, effective and comprehensive protection may be found in a ‘menu’ of options, comprising differentiated and multiple levels and forms of protection.³⁵ Accordingly the WIPO Secretariat had prepared a document invited the Committee to, amongst other things, ‘provide directions for further work ... including the possibility of the development of an annotated menu of policy options to provide practical support for protection of Expressions of Folklore and to serve as the basis for development of recommendations or guidelines.’³⁶ The Committee took no formal decision in this respect, but several States and observers supported the development of such a menu of options.³⁷

49. The options include existing intellectual property systems, adapted IP rights (*sui generis* aspects of IP systems), and new, stand-alone *sui generis* systems, as well as non-IP options, such as trade practices and labeling laws, use of contracts, customary and indigenous laws and protocols, cultural heritage preservation laws and programs, common law remedies such as unjust enrichment, rights of publicity, blasphemy, and criminal law. Not all of these potentially useful options are necessarily discussed in the same amount of detail in this document, however.

50. To clarify options and to give the discussion a practical and applied focus, four main subjects and forms of protection are considered (based closely upon the kinds of appropriations of Expression of Folklore that Committee participants and other stakeholders most often refer to). These are:

- (i) protection of traditional literary and artistic productions against unauthorized reproduction, adaptation, distribution, performance and other such acts, as well as prevention of insulting, derogatory and/or culturally and spiritually offensive uses;
- (ii) protection of handicrafts, particularly their ‘style’ (taking into account the emphasis many countries place on the protection of handicrafts);
- (iii) prevention of false and misleading claims to authenticity and origin/failure to acknowledge source; and
- (iv) defensive protection of traditional signs and symbols.

³⁴ Overview of Activities and Outcomes of the Intergovernmental Committee, *Document prepared by the Secretariat*, April 3, 2003, WIPO/GRTKF/IC/5/12

³⁵ WIPO/GRTKF/IC/6/3

³⁶ WIPO/GRTKF/IC/5/3

³⁷ European Community and its Member States, Norway, New Zealand, United States of America, Venezuela.

IV. DISCUSSIONS AT THE SIXTH SESSION OF THE WIPO INTERGOVERNMENTAL COMMITTEE ON FOLKLORE

51. The Sixth Session of the Intergovernmental Committee was held in Geneva, from 15-19 March 2004. The session was opened by Mr. Francis Gurry, Deputy Director General of WIPO, on behalf of the Dr. Idris Kamil, Director General of WIPO. At the session, Folklore was taken up for discussion as Agenda item 5.³⁸

52. The major documents concerning the Expression of folklore introduced before the Committee were: (i) Traditional Cultural Expressions/Expressions of Folklore: Policy and Legal Options³⁹ - this document provides a succinct overview of the policy and legal options for the protection of expressions of folklore. It also summarizes and draws upon past reports, working documents, studies and presentations already considered by the Committee; (ii) Defensive Protection Measures related to Industrial Property Classification Tools⁴⁰ and (iii) Legal-Technical Cooperation concerning folklore.⁴¹

53. The Delegation of Ireland, on behalf of the European Community, encouraged the Committee to keep discussions on culturally oriented issues separate from that of TK. The Delegation supported the conclusion made in document WIPO/GRTKF/IC/6/3 (para 211), that the Committee's substantive work on Expressions of Folklore should be accelerated, including the preparations of drafts of an overview of policy objectives and core principles for the protection of folklore. The Delegate looked forward to participate in the elaboration of solutions in order for each State to make decisions on the policies it wished to adopt for the particular circumstances found on its territory and within its population.

54. The Delegate of Panama reported on a draft law on local communities that was being drafted, which was intended to complement its existing law protecting the IP of indigenous peoples. He felt that the national level protection would be synchronized with the work of the Committee so it could be internationally applied.

55. The Delegate of Colombia stated that it was important to have a *sui generis* system for the protection for folklore different from existing systems. He felt that the Committee should give more emphasis to an international *sui generis* protection of collective works folklore.

56. The Delegation of Mexico supported the development of drafts of policy options and legal mechanisms for expressions of folklore. He felt that protection should be given shape on the national level before an international system was adopted. However, the Committee should work on towards combined national and international systems.

³⁸ The Report only highlights the deliberations on Expressions of Folklore at the Sixth Session of IGC.

³⁹ WIPO/GRTKF/IC/6/3

⁴⁰ WIPO/GRTKF/IC/6/3 Add.

⁴¹ WIPO/GRTKF/IC/6/7

57. The Delegation of Japan stated that Expressions of Folklore could be protected under existing IP and referred to the WIPO Performances and Phonograms Treaty, 1996 as an example. It was indispensable to make the core principles and objectives clear as a first step, and to take into account the possible impact of Expressions of Folklore protection on current IP rights. While next steps should address core principles and objectives, it would be premature to discuss options and specific legal mechanisms.

58. The Delegation of China noted that document WIPO/GRTKF/IC/6/3, together with WIPO/GRTKF/IC/5/3 and the list of options (WIPO/GRTKF/IC/5/INF/3) would play the role of piloting and assisting countries wishing to formulate legislation and conduct policy research work on the protection of expressions of folklore/TeEs. He informed that in January 2003, the Government had launched a nation-wide project, the "Project on the Protection of Ethnic Culture and Folklore in China", which covered research into folklore, nomination of successors of folklore, related training, and protection of cultural ecology. He also informed that Following several years of fact-finding and feasibility studies, including the WIPO fact-finding mission on folklore to the Yunnan Province in 2002, the Draft Law of the People's Republic of China on the Protection of Ethnic Culture and Folklore had been formulated by the Education, Science, Culture and Public Health Committee of the National People's Congress (NPC) in 2003, which had since been distributed for comments by relevant parties and was now ready for submission to the NPC Standing Committee for its consideration.

59. The Delegation of the United States of America concurred that it was timely to set out a range of objectives and core principles that would clarify and focus many of the policy issues raised by the various options as a possible basis for recommendations or guidelines. The Delegations suggested that work be done now to find answers to important questions presently before the Committee, and stated that until then the notion of discussing an international framework was premature.

60. The Delegation of the Islamic Republic of Iran referred to the diversity of expressions of folklore found in different countries, which led to diverse views. Existing IP did not fulfill the requirements for the protection of expressions of folklore. However, existing IP, *sui generis* laws and customary laws could be used. In connection with paragraph 17 of the subject document, the Delegation believed clear comprehensive and precise definitions for "Expressions of Folklore" or "Traditional Cultural Expressions" in national laws and WIPO documents to be of utmost importance. If the nature of each subject was not clear for the legislators, they could not prepare correct and comprehensive laws and regulations to provide rights owners with legitimate legal protection.

61. The Delegation of Syria stated that in some countries protection of folklore was achieved through IP but this was not the case in all countries. The Delegation supported the proposals contained in paragraph 211 of document WIPO/GRTKF/IC/6/3.

62. The Delegation of Canada acknowledged document WIPOIGRTKF/IC/6/3 supported the conclusion that the evaluation and choice of policy options and legal

mechanisms began with the identification of the overall policy objectives, and that this process should take into account the needs of indigenous and traditional communities as well as the relevant cultural policy issues of interest to the whole society. The Delegation wished to note a few areas of particular interest. Further work was needed to improve understanding of the implications of the relationship between customary protocols and the formal IP system.

63. The Delegation of New Zealand supported the suggested process for considering options for the protection of Expressions of Folklore which could, even in its present form, be adapted by States to form the basis for domestic policy processes. The chief aim of Expressions of Folklore protection must be to achieve the goals and aspirations of TK-holding communities and peoples. New Zealand was very supportive of the "menu of options" approach taken in the document, including the focus on non-IP as well as IP approaches. It was unlikely that any single "one-size-fits-all" solution could be found to protect Expressions of Folklore and meet the needs of their holders and communities in all countries.

64. The Delegation of Egypt stated that in its view the discussions were in a vicious circle which would not lead to constructive solutions. Up until now, no clear way forward had emerged. There were many divergences in views in the Committee, while among experts on folklore there were no divergences. Yet, it was non-experts in folklore who were intervening and who were the most influential. Specialists in folklore knew well what the purpose of protection was, who benefited and how protection was provided. The existing legal frameworks were not adequate. Accordingly, the Delegation proposed that the WIPO Secretariat should work in conjunction with folklore experts to prepare legal provisions for the protection of folklore and these should be put before the Committee's next session.

65. The Delegation of Nigeria said that the developing countries had over the years evolved a renewed faith in the IP system and had accepted higher international standards of protection in new areas, often to their own inconvenience. The outcome of the Committee would therefore be a litmus test of the flexibility and adaptability of the IP system and how it worked in practical terms when the interests and concerns of developing countries were in the front burner.

66. The Delegation of Cameroon expected the elaboration of a specific international instrument to protect against the exploitation by third persons of TK and folklore.

67. The Delegation of the Russian Federation mentioned the importance of establishing clarity on goals and the subject of protection. Further work was needed on appropriate policies and there was a need for definitions.

68. The Delegation of India stated that document WIPO/GRTKF/IC/6/3 had moved forward from the policy objectives set out in previous documents to setting out policy options. The Delegation noted specific aspects of the document under discussion, namely whether there was a need for the distinction between Expressions of folklore *stricto sensu*

and contemporary Expressions of folklore, the applicability of existing IP standards, and the special characteristics of Expressions of folklore with regard to lack of identification of the owner, availability in the public domain and the need for protection beyond the time limits recognized in copyright. There was a need to identify areas of consensus and of conflict.

69. The Delegation of Algeria congratulated the Secretariat for the document and expressed support for the submission of the African Group (document WIPO/GRTKF/IC/12). The Delegation suggested creating a committee in WIPO to address the creation of a framework in this field.

70. The Delegation of Indonesia stated that the information provided by the Committee was useful in assisting the work of Member States in dealing with the issues of GR, TK and folklore. The Delegation reiterated that natural resources, TK and Expressions of Folklore could be shared, explored and transferred from one country to another. It added that although several countries had set up their own regulations for the protection of GR, TK and Expressions of Folklore, a proper and stronger international instrument was expected to overcome existing misappropriations as well as eliminate any disputes at the earliest possible time. The Delegation stated that documents concerning disclosure of source and country of origin of biological resources and TK, evidence of prior informed consent and benefit sharing were prerequisites to support this expectation. Secondly, the Delegation stated that most of them were members of other international fora's that deal with these issues and supported the continues efforts of effective consultation between WIPO and those organizations. The Delegation concluded that with regard to document WIPO/GRTKF/IC/6/3, it supported the decision to expedite further work.

71. The Delegation of Morocco stated its strong concerns with the issue of Expressions of Folklore given that Morocco had a wealth of Expressions of Folklore. The Delegation stated that the protection of Expressions of Folklore would have social, economic and political consequences. The Delegation attached great importance to this and therefore requested WIPO to coordinate efforts amongst States in this field.

72. Amb. Dr. Wafik Z. Kamil, Secretary-General of AALCO noted that conservation, protection and sustainable utilization of Genetic Resources and associated traditional knowledge as well as expressions of folklore assumed greater significance. He said there is lack of an adequate protection system and the inapplicability of existing system to the characteristics and peculiarities of the knowledge, innovations and practices of indigenous and local communities. He said the Asian and African continents are home to a majority of the world's biological resources and a great heritage of traditional knowledge and folklore. Protection of genetic resources and traditional knowledge is of paramount importance to the countries in the Asian African region and it is no wonder that most of the Asian-African Countries are active participants in the work of the Committee.

72. He said that AALCO had been following the work of the IGC with interest and appreciation and felt that there is a need to negotiate a legally-binding international instrument or instruments, to protect folklore, genetic resources and traditional knowledge. Further, there is a need to develop a Model Law for the protection of these issues to meet the peculiar conditions of the Asian-African region. Keeping in view the benefits from the past experiences in cooperation with WIPO and the exclusively legal forum that AALCO offers for its Member States, he informed the Committee that in his capacity of Secretary General of AALCO, would propose to AALCO's Member States to include the 'International Protection of Folklore' as an item on the Agenda of AALCO's 43rd Session.

73. Generally, the Members at the IGC meeting agreed that the substantive work on the protection of folklore be carried out along two track. In the short term, the Committee will identify policy objectives and core principles for the protection of folklore, which will provide a conceptual framework for future discussions. In the medium term, the Committee will compile specific policy options and legal elements as well as a brief analysis of their practical implications. This work is expected to provide the foundations for policy-making at both the domestic and international levels, including a possible international instrument for the protection of folklore.

74. The Asian and African countries had expressed strong opinion that there is a need to restart discussion on a possible international framework for the protection of folklore. In this regard, the Arab Republic of Egypt, on behalf of the African Group had submitted in 12th March 2004, a document entitled "Objectives, principles and elements of an international instrument, or instruments on intellectual property in relation to genetic resources and on the protection of traditional knowledge and folklore" (see Annex III), which has proposed for developing a *sui generis* system of protection of folklore, there by providing of the scope of protected subject matter; nature of rights; ownership of rights; moral and economic rights of performers; acquisition, exercise, expiry and enforcement of rights; and registration and administration mechanism. The proposal was widely welcomed at the IGC meeting as a suitable framework for the Committee's work.

V. CONCLUDING REMARKS

75. It is indeed well recognized that 'expressions of folklore' forms an important component of the cultural heritage of a nation. Preservation, maintenance, and development of this heritage have been a matter of serious concern. However, there is widespread illicit and improper exploitation of expression of folklore of these countries for commercial and business interests. With the emergence modern technologies, newer forms of exploitation, especially in the fields of information technology and biotechnology, posed new challenges for the protection of folklore. Though the last two decades had witnessed great momentum in the area of legal protection of expressions of folklore at the national and international level, it is an accepted fact that there is no unified international legal protection of folklore.

76. However, there was a general consensus among the nations, especially among the developing countries, that this new global issue should be tackled together in a comprehensive manner. The option of the existing intellectual property rights protection regime as an instrument of protection for the expression of folklore was inadequate to address all the issues involved because of the multi-faceted nature of folklore. While the earlier attempt by the international level by WIPO and UNESCO culminated in the formulation of Model Provisions for national laws relating to legal protection of folklore in 1982, it is disappointing to note that the international attempt concluded with developing model legislative provisions rather than an international treaty for the protection of folklore. Even though a draft treaty for protection of folklore in line with the Model Provisions was prepared, it was not adopted. Further, the Model Provisions narrows down the scope of the concept of folklore and its elements provided.

77. Pursuant to the constant demand from the Member States, the Governing Council of the WIPO established an Intergovernmental Committee to discuss the policy, legal and international dimension of the intellectual property protection of expressions of folklore. The Committee had so far convened six substantive sessions and has achieved considerable progress in many areas of discussions. The Committee had been successful in collection of data from the Member States pertaining to folklore and in providing background for the legal and policy issues in the protection of folklore. The Committee had seen active participation from the member countries particularly of Asia, Africa and Latin America and from non-governmental actors and indigenous groups.

78. However, there are many outstanding issues were the Committee is yet to evolve a consensus formula. Also there is no international consensus on the substance of the internationally acceptable regime of protection. One of the most important problems in the Committee is that most of the holders of expressions of folklore are developing countries. This has substantially reduced the phase of the discussion in the Committee. The Secretariat is of the view that even though it would be extremely unrealistic to expect the countries to agree on the substance of the international protection on this issue overnight, it is crucial for at least the developing counties which are the owners of the resources to be able to agree among themselves on the best possible model.

79. Asian-African Legal Consultative Organization (AALCO), being an intergovernmental legal organization with representation from almost all major countries from Asia and Africa, has been following the work of the Committee with interest and appreciation. AALCO feels that there is indeed a need to negotiate a legally binding international instrument or instruments to protect folklore. The forum of AALCO could be utilized for further discussion and deliberation on the protection of folklore and could be utilized to consolidate the position of the Asian-African countries on the substantive aspect of the future international instrument for the protection of folklore. Further, there is also need to develop a Model Law for the protection of folklore, conditioned to Asian African region.

80. Keeping this in view and taking into account the benefits from the past experience of cooperation with WIPO, the Secretary-General of AALCO, proposed to the AALCO Member States to include the “Expressions of Folklore and its International Protection” as an item on the Agenda of forthcoming 43rd Session of AALCO which will be held from 21-25 June 2004.

81. The deliberations at the AALCO’s 43rd Session on the folklore issue could pave the way to hold a joint seminar of experts with WIPO on folklore matters. Participation in the Expert Meeting could be from the jurists and representatives of Member States of AALCO and WIPO, and the Organization could also request the spokesmen from different geographical groups to attend, in order to have high level expert discussions on all the Folklore aspects. The joint Expert Meeting could also start discussing a draft of an International Instrument to Protect Expressions of Folklore, which could be prepared by the International Bureau of WIPO.

82. The outcome of the deliberations during the 43rd Session and the Expert Meeting could be reported at the Committee’s Seventh Session in November 2004 with the hope that this exercise could be considered as a concrete step forward in the work of Committee in general and for the benefit of Asian and African Member States in particular, for the drafting of an International Instrument for the Protection of Expressions of Folklore.

ANNEX I

MODEL PROVISIONS FOR NATIONAL LAWS ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS

UNESCO & WIPO, 1985

[Considering that folklore represents an important part of the living cultural heritage of the nation, developed and maintained by the communities within the nation, or by individuals reflecting the expectations of those communities;

Considering that the dissemination of various expressions of folklore may lead to improper exploitation of the cultural heritage of the nation;

Considering that any abuse of commercial or other nature or any distortion of expressions of folklore is prejudicial to the cultural and economic interests of the nation;

Considering that expressions of folklore constituting manifestations of intellectual creativity deserve to be protected in a manner inspired by the protection provided for intellectual productions:

Considering that such a protection of expressions of folklore has become indispensable as a means of promoting further development, maintenance and dissemination of those expressions, both within and outside the country, without prejudice to related legitimate interests:

The following provisions shall be given effect:]

Section 1: Principle of Protection

Expressions of folklore developed and maintained in [insert the name of the country] shall be protected by this [law] against illicit exploitation and other prejudicial actions as defined in this [law].

Section 2: Protected Expressions of Folklore

For the purposes of this [law], "expressions of folklore" means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- (i) verbal expressions, such as folk tales, folk poetry and riddles;
- (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, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes; (b) musical instruments; [(c) architectural forms].

Section 3: Utilizations Subject to Authorization

Subject to the provisions of Section 4, the following utilizations of the expressions of folklore are subject to authorisation by the [competent authority mentioned in Section 9, paragraph 1,][community concerned] when they are made both with gainful intent and outside their traditional or customary context:

- (i) any publication, reproduction and any distribution of copies of expressions of folklore;
- (ii) any public recitation or performance, any transmission by wireless means or by wire, and any other form of communication to the public, of expressions of folklore.

Section 4: Exceptions

1. The provisions of Section 3 shall not apply in the following cases:

- (i) utilization for purposes of education;
- (ii) utilization by way of illustration in the original work of an author or authors, provided that the extent of such utilisation is compatible with fair practice;
- (iii) borrowing of expressions of folklore for creating an original work of an author or authors.

2. The provisions of Section 3 shall not apply also where the utilization of the expressions of folklore is incidental. Incidental utilization includes, in particular:

- (i) utilization of any expression of folklore that can be seen or heard in the course of a current event for the purposes of reporting on that current event by means of photography, broadcasting or sound or visual recording, provided that the extent of such utilization is justified by the informatory purpose;
- (ii) utilization of objects containing the expressions of folklore which are permanently located in a place where they can be viewed by the public, if the utilization consists in including their image in a photograph, in a film or in a television broadcast.

Section 5: Acknowledgement of Source

1. In all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate

manner, by mentioning the community and/or geographic place from where the expression utilized has been derived.

2. The provisions of paragraph 1 shall not apply to utilizations referred to in Section 4, paragraphs 1(iii) and 2.

Section 6: Offences

1. Any person who wilfully (or negligently) does not comply with the provisions of Section 5, paragraph 1, shall be liable to ...

2. Any person who, without the authorization of the [competent authority referred to in Section 9, paragraph 1] [community concerned] wilfully [or negligently] utilizes an expression of folklore in violation of the provisions of Section 3, shall be liable to ...

3. Any person wilfully deceiving others in respect of the source of artefacts or subject matters of performance or recitations made available to the public by him in any direct or indirect manner, presenting such artefacts or subject matters as expressions of folklore of a certain community, from where, in fact, they have not be derived, shall be punishable by ...

4. Any persons who publicly uses, in any direct or indirect manner, expressions of folklore wilfully distorting the same in a way prejudicial to the cultural interests of the community concerned, shall be punishable by ...

Section 7: Seizure or Other Actions

Any object which was made in violation of this [law] and any receipts of the person violating it and corresponding to such violations, shall be subject to [seizure] [applicable actions and remedies].

Section 8: Civil Remedies

The sanctions provided for in [Section 6] [Sections 6 and 7] shall be applied without prejudice to damages or other civil remedies as the case may be.

Section 9: Authorities

[1.] For the purpose of this [law], the expression "competent authority" means ...

[2. For the purpose of this [law], the expression "supervisory authority" means ...]

Section 10: Authorisation

1. Applications for individual or blanket authorisation of any utilisation of expressions of folklore subject to authorisation under this [law] shall be made [in writing] to the [competent authority][community concerned].

2. Where the [competent authority][community concerned] grants authorization, it may fix the amount of and collect fees [corresponding to a tariff [established][approved] by the supervisory authority.] The fees collected shall be used for the purpose of promoting or safeguarding national [culture] [folklore].

[3. Appeals against the decisions of the competent authority may be made by the person applying for the authorisation and/or the representative of the interested community.]

Section 11: Jurisdiction

[1. Appeals against the decisions of the [competent authority] [supervisory authority] are admissible to the Court of ...]

[2.] In case of any offence under Section 6, the Court of ... has jurisdiction.

Section 12: Relation to Other Forms of Protection

This [law] shall in no way limit or prejudice any protection applicable to expressions of folklore under the copyright law, the law protecting performers, producers of phonograms and broadcasting organisations, the laws protecting industrial property, or any other law or international treaty to which the country is party; nor shall it in any way prejudice other forms of protection provided for the safeguard and preservation of folklore.

Section 13: Interpretation

The protection granted under this [law] shall in no way be interpreted in a manner which could hinder the normal use and development of expressions of folklore.

Section 14: Protection of Expression of Folklore of Foreign Countries

Expressions of folklore developed and maintained in a foreign country are protected under this [law]

- (i) subject to reciprocity, or
- (ii) on the basis of international treaties or other agreements.

ANNEX II

UNESCO RECOMMENDATION ON THE SAFEGUARDING OF TRADITIONAL CULTURE AND FOLKLORE

*Adopted by the General Conference at its twenty-fifth session
Paris, 15 November 1989*

The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 17 October to 16 November at its twenty-fifth session,

Considering that folklore forms part of the universal heritage of humanity and that it is a powerful means of bringing together different peoples and social groups and of asserting their cultural identity,

Noting its social, economic, cultural and political importance, its role in the history of the people, and its place in contemporary culture,

Underlining the specific nature and importance of folklore as an integral part of cultural heritage and living culture,

Recognizing the extreme fragility of the traditional forms of folklore, particularly those aspects relating to oral tradition and the risk that they might be lost,

Stressing the need in all countries for recognition of the role of folklore and the danger it faces from multiple factors,

Judging that the governments should play a decisive role in the safeguarding of folklore and that they should act as quickly as possible,

Having decided, at its twenty-fourth session, that the safeguarding of folklore should be the subject of a recommendation to Member States within the meaning of Article IV, paragraph 4, of the Constitution,

Adopts the present Recommendation this fifteenth day of November 1989:

The General Conference recommends that Member States should apply the following provisions concerning the safeguarding of folklore by taking whatever legislative measures or other steps may be required in conformity with the constitutional practice of each State to give effect within their territories to the principles and measures defined in this Recommendation.

The General Conference recommends that Member States bring this Recommendation to the attention of the authorities, departments or bodies responsible for matters relating to the safeguarding of folklore and to the attention of the various organizations or

institutions concerned with folklore, and encourage their contacts with appropriate international organizations dealing with the safeguarding of folklore.

The General Conference recommends that Member States should, at such times and in such manner as it shall determine, submit to the Organization reports on the action they have taken to give effect to this Recommendation.

A. Definition of Folklore

For purposes of this Recommendation:

Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.

B. Identification of Folklore

Folklore, as a form of cultural expression, must be safeguarded by and for the group (familial, occupational, national, regional, religious, ethnic, etc.) whose identity it expresses. To this end, Member States should encourage appropriate survey research on national, regional and international levels with the aim to:

- a) develop a national inventory of institutions concerned with folklore with a view to its inclusion in regional and global registers of folklore institutions;
- b) create identification and recording systems (collection, cataloguing, transcription) or develop those that already exist by handbooks, collecting guides, model catalogues, etc., in view of the need to coordinate the classification systems used by different institutions;
- c) stimulate the creation of a standard typology of folklore by way of: i) a general outline of folklore for global use; ii) a comprehensive register of folklore; and iii) regional classifications of folklore, especially field-work pilot projects.

C. Conservation of Folklore

Conservation is concerned with documentation regarding folk traditions and its object is, in the event of the non-utilization or evolution of such traditions, to give researchers and tradition-bearers access to data enabling them to understand the process through which traditions change. While living folklore, owing to its evolving character, cannot always be directly protected, folklore that has to be fixed in a tangible form should be effectively protected.

To this end, Member States should:

- a) establish national archives where collected folklore can be properly stored and made available;
- b) establish a central national archive function for service purposes (central cataloguing, dissemination of information on folklore materials and standards of folklore work including the aspect of safeguarding);
- c) create museums or folklore sections at existing museums where traditional and popular culture can be exhibited;
- d) give precedence to ways of presenting traditional and popular cultures that emphasize the living or past aspects of those cultures (showing their surroundings, ways of life and the works, skills and techniques they have produced);
- e) harmonize collecting and archiving methods;
- f) train collectors, archivists, documentalists and other specialists in the conservation of folklore, from physical conservation to analytic work;
- g) provide means for making security and working copies of all folklore materials, and copies for regional institutions, thus securing the cultural community and access to the materials.

D. Preservation of Folklore

Preservation is concerned with protection of folk traditions and those who are the transmitters, having regard to the fact that each people has a right to its own culture and that its adherence to that culture is often eroded by the impact of the industrialized culture purveyed by the mass media. Measures must be taken to guarantee the status of and economic support for folk traditions both in the communities which produce them and beyond. To this end, Member States should:

- a) design and introduce into both formal and out-of-school curricula the teaching and study of folklore in an appropriate manner, laying particular emphasis on respect for folklore in the widest sense of the term, taking into account not only village and other rural cultures but also those created in urban areas by diverse social groups, professions, institutions, etc., and thus promoting a better understanding of cultural diversity and different world views, especially those not reflected in dominant cultures;
- b) guarantee the right of access of various cultural communities to their own folklore by supporting their work in the fields of documentation, archiving, research, etc., as well as in the practice of traditions;
- c) set up on an interdisciplinary basis a National Folklore Council or similar coordination body in which various interest groups will also be represented;
- d) provide moral and economic support for individuals and institutions studying, making known, cultivating or holding items of folklore;
- e) promote scientific research relevant to the presentation of folklore.

E. Dissemination of Folklore

The attention of people should be drawn to the importance of folklore as an ingredient of cultural identity. It is essential for the items that make up this cultural heritage to be widely disseminated so that the value of folklore and the need to preserve it can be recognized. However, distortion during dissemination should be avoided so that the integrity of the traditions can be safeguarded. To promote a fair dissemination, Member States should:

- a) encourage the organization of national, regional and international events such as fairs, festivals, films, exhibitions, seminars, symposia, workshops, training courses, congresses, etc., and support the dissemination and publication of their materials, papers and other results;
- b) encourage a broader coverage of folklore material in national and regional press, publishing, television, radio and other media, for instance through grants, by creating jobs for folklorists in these units, by ensuring the proper archiving and dissemination of these folklore materials collected by the mass media, and by the establishment of departments of folklore within those organizations;
- c) encourage regions, municipalities, associations and other groups working in folklore to establish full-time jobs for folklorists to stimulate and coordinate folklore activities in the region;
- d) support existing units and the creation of new units for the production of educational materials, as for example video films based on recent field-work, and encourage their use in schools, folklore museums, national and international folklore festivals and exhibitions;
- e) ensure the availability of adequate information on folklore through documentation centers, libraries, museums, archives, as well as through special folklore bulletins and periodicals;
- f) facilitate meetings on exchanges between individuals, groups and institutions concerned with folklore, both nationally and internationally, taking into account bilateral cultural agreements;
- g) encourage the international scientific community to adopt a code of ethics ensuring a proper approach to and respect for traditional cultures.

F. Protection of Folklore

In so far as folklore constitutes manifestations of intellectual creativity whether it be individual or collective, it deserves to be protected in a manner inspired by the protection provided for intellectual productions. Such protection of folklore has become indispensable as a means of promoting further development, maintenance and dissemination of those expressions, both within and outside the country, without prejudice to related legitimate interests.

Leaving aside the "intellectual property" aspects of the protection of expressions of folklore, there are various categories of right which are already protected and should

continue to enjoy protection in the future in folklore documentation centers and archives. To this end, Member States should:

a) regarding the "intellectual property" aspects:

Call the attention of relevant authorities to the important work of UNESCO and WIPO in relation to intellectual property, while recognizing that this work relates to only one aspect of folklore protection and that the need for separate action in a range of areas to safeguard folklore is urgent;

b) regarding the other rights involved:

- i) protect the informant as the transmitter of tradition (protection of privacy and confidentiality);
- ii) protect the interest of the collector by ensuring that the materials gathered are conserved in archives in good condition and in a methodical manner;
- iii) adopt the necessary measures to safeguard the materials gathered against misuse, whether intentional or otherwise;
- iv) recognize the responsibility of archives to monitor the use made of the materials gathered.

G. International Cooperation

In view of the need to intensify cultural cooperation and exchanges, in particular through the pooling of human and material resources, in order to carry out folklore development and revitalization programs as well as research made by specialists who are the nationals of one Member State on the territory of another Member State, Member States should:

a) cooperate with international and regional associations, institutions and organizations concerned with folklore;

b) cooperate in the field of knowledge, dissemination and protection of folklore, in particular through:

- i) exchanges of information of every kind, exchanges of scientific and technical publications;
- ii) training of specialists, awarding of travel grants, sending of scientific and technical personnel and equipment;
- iii) the promotion of bilateral or multilateral projects in the field of the documentation of contemporary folklore;
- iv) the organization of meetings between specialists, of study courses and of the working groups on particular subjects, especially on the classifying and cataloguing of

folklore data and expression and on modern methods and techniques in research;

- c) cooperate closely so as to ensure internationally that the various interested parties (communities or natural or legal persons) enjoy the economic, moral and so-called neighboring rights resulting from the investigation, creation, composition, performance, recording and/or dissemination of folklore;
- d) guarantee the Member State on whose territory research has been carried out the right to obtain from the Member State concerned, copies of all documents, recording, video-films, films and other material;
- e) refrain from acts likely to damage folklore materials or to diminish their value or impede their dissemination or use, whether these materials are to be found on their own territory or on the territory of another State;
- f) take necessary measures to safeguard folklore against all human and natural dangers to which it is exposed, including the risks deriving from armed conflicts, occupation of territories or public disorders of other kinds.

ANNEX III

OBJECTIVES, PRINCIPLES AND ELEMENTS OF AN INTERNATIONAL INSTRUMENT, OR INSTRUMENTS, ON INTELLECTUAL PROPERTY IN RELATION TO GENETIC RESOURCES AND ON THE PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE

Submitted by the African Group at the Sixth Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

Objectives

1. Prevent the misappropriation of genetic resources, traditional knowledge and expressions of folklore
2. Ensure prior informed consent and equitable sharing of the benefits arising from the use of genetic resources, traditional knowledge and expressions folklore
3. Ensure that these benefits are harnessed for the benefit of traditional knowledge holders and custodians, in particular local and indigenous communities
4. Ensure the conservation and sustainable use of bio-diversity
5. Protect and reward innovations and creative works derived from traditional knowledge and expressions of folklore

Principles

1. Reaffirm the principle of national sovereignty over genetic resources
2. Recognize the role of the State in the preservation and protection of traditional knowledge and expressions of folklore
3. Recognize the economic rights of traditional knowledge holders and custodians as well as their moral rights against the culturally offensive use of their traditional knowledge and expressions of folklore
4. Recognize the role of customary law and protocols in the protection of traditional knowledge and expressions of folklore
5. Recognize the complementary nature of defensive and positive measures relating to the protection of genetic resources, traditional knowledge and expressions of folklore

General Elements

- National Treatment/ Mutual recognition of national legislation
- Definitions.

Genetic Resources

- Recognition of the right of States to take measures to ban the patenting of life forms
- Compliance with access and benefit sharing laws of the country of origin of genetic resources to ensure implementation of prior informed consent and equitable benefit sharing

- Introducing a disclosure requirement in patent laws as well as evidence of compliance with national access and benefit sharing laws of the country of origin of genetic resources (disclosure of the source and country of origin of the genetic resource in claimed inventions and of the associated traditional knowledge used in the invention)
- Contractual arrangements

Traditional Knowledge

Developing a *sui generis* system of protection

- Establish scope of protected subject matter
- Establish nature of rights,
- Address ownership of rights, moral and economic rights, acquisition, exercise, expiry and enforcement of rights
- Establish registration mechanisms

Expressions of Folklore

Developing a *sui generis* system of protection

- Establish scope of protected subject matter
- Establish nature of rights,
- Establish ownership of rights, moral and economic rights of performers, acquisition, exercise, expiry and enforcement of rights
- Establish registration and administration mechanisms

Institutional Mechanism

- Capacity building and technical assistance
- Sensitization and Awareness building
- Networking and exchange of information
- Promotion of documentation and codification of traditional knowledge and expressions of folklore
- Institutional mechanism for fostering the transfer of technology
- Establishment of national focal points of implementation
- Establishment of a follow up body

Enforcement

Dispute Settlement

MODEL PROVISIONS FOR NATIONAL LAWS ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS

UNESCO & WIPO, 1985

[Considering that folklore represents an important part of the living cultural heritage of the nation, developed and maintained by the communities within the nation, or by individuals reflecting the expectations of those communities;

Considering that the dissemination of various expressions of folklore may lead to improper exploitation of the cultural heritage of the nation;

Considering that any abuse of commercial or other nature or any distortion of expressions of folklore is prejudicial to the cultural and economic interests of the nation;

Considering that expressions of folklore constituting manifestations of intellectual creativity deserve to be protected in a manner inspired by the protection provided for intellectual productions:

Considering that such a protection of expressions of folklore has become indispensable as a means of promoting further development, maintenance and dissemination of those expressions, both within and outside the country, without prejudice to related legitimate interests:

The following provisions shall be given effect:]

Section 1: Principle of Protection

Expressions of folklore developed and maintained in [insert the name of the country] shall be protected by this [law] against illicit exploitation and other prejudicial actions as defined in this [law].

Section 2: Protected Expressions of Folklore

For the purposes of this [law], "expressions of folklore" means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- (i) verbal expressions, such as folk tales, folk poetry and riddles;
- (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, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes; (b) musical instruments; [(c) architectural forms].

Section 3: Utilizations Subject to Authorization

Subject to the provisions of Section 4, the following utilizations of the expressions of folklore are subject to authorisation by the [competent authority mentioned in Section 9, paragraph 1,][community concerned] when they are made both with gainful intent and outside their traditional or customary context:

(i) any publication, reproduction and any distribution of copies of expressions of folklore;

(ii) any public recitation or performance, any transmission by wireless means or by wire, and any other form of communication to the public, of expressions of folklore.

Section 4: Exceptions

1. The provisions of Section 3 shall not apply in the following cases:

(i) utilization for purposes of education;

(ii) utilization by way of illustration in the original work of an author or authors, provided that the extent of such utilisation is compatible with fair practice;

(iii) borrowing of expressions of folklore for creating an original work of an author or authors.

2. The provisions of Section 3 shall not apply also where the utilization of the expressions of folklore is incidental. Incidental utilization includes, in particular:

(i) utilization of any expression of folklore that can be seen or heard in the course of a current event for the purposes of reporting on that current event by means of photography, broadcasting or sound or visual recording, provided that the extent of such utilization is justified by the informatory purpose;

(ii) utilization of objects containing the expressions of folklore which are permanently located in a place where they can be viewed by the public, if the utilization consists in including their image in a photograph, in a film or in a television broadcast.

Section 5: Acknowledgement of Source

1. In all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, by mentioning the community and/or geographic place from where the expression utilized has been derived.

2. The provisions of paragraph 1 shall not apply to utilizations referred to in Section 4, paragraphs 1(iii) and 2.

Section 6: Offences

1. Any person who wilfully (or negligently) does not comply with the provisions of Section 5, paragraph 1, shall be liable to ...

2. Any person who, without the authorization of the [competent authority referred to in Section 9, paragraph 1] [community concerned] wilfully [or negligently] utilizes an expression of folklore in violation of the provisions of Section 3, shall be liable to ...

3. Any person wilfully deceiving others in respect of the source of artefacts or subject matters of performance or recitations made available to the public by him in any direct or indirect manner, presenting such artefacts or subject matters as expressions of folklore of a certain community, from where, in fact, they have not be derived, shall be punishable by ...

4. Any persons who publicly uses, in any direct or indirect manner, expressions of folklore wilfully distorting the same in a way prejudicial to the cultural interests of the community concerned, shall be punishable by ...

Section 7: Seizure or Other Actions

Any object which was made in violation of this [law] and any receipts of the person violating it and corresponding to such violations, shall be subject to [seizure] [applicable actions and remedies].

Section 8: Civil Remedies

The sanctions provided for in [Section 6] [Sections 6 and 7] shall be applied without prejudice to damages or other civil remedies as the case may be.

Section 9: Authorities

[1.] For the purpose of this [law], the expression "competent authority" means ...

[2. For the purpose of this [law], the expression "supervisory authority" means ...]

Section 10: Authorisation

1. Applications for individual or blanket authorisation of any utilisation of expressions of folklore subject to authorisation under this [law] shall be made [in writing] to the [competent authority][community concerned].

2. Where the [competent authority][community concerned] grants authorization, it may fix the amount of and collect fees [corresponding to a tariff [established][approved] by the supervisory authority.] The fees collected shall be used for the purpose of promoting or safeguarding national [culture] [folklore].

[3. Appeals against the decisions of the competent authority may be made by the person applying for the authorisation and/or the representative of the interested community.]

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[1. Appeals against the decisions of the [competent authority] [supervisory authority] are admissible to the Court of ...]

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The protection granted under this [law] shall in no way be interpreted in a manner which could hinder the normal use and development of expressions of folklore.

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Conservation is concerned with documentation regarding folk traditions and its object is, in the event of the non-utilization or evolution of such traditions, to give researchers and tradition-bearers access to data enabling them to understand the process through which traditions change. While living folklore, owing to its evolving character, cannot always be directly protected, folklore that has to be fixed in a tangible form should be effectively protected.

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- d) provide moral and economic support for individuals and institutions

- studying, making known, cultivating or holding items of folklore;
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- iii) the promotion of bilateral or multilateral projects in the field of the documentation of contemporary folklore;

iv) the organization of meetings between specialists, of study courses and of the working groups on particular subjects, especially on the classifying and cataloguing of folklore data and expression and on modern methods and techniques in research;

c) cooperate closely so as to ensure internationally that the various interested parties (communities or natural or legal persons) enjoy the economic, moral and so-called neighboring rights resulting from the investigation, creation, composition, performance, recording and/or dissemination of folklore;

d) guarantee the Member State on whose territory research has been carried out the right to obtain from the Member State concerned, copies of all documents, recording, video-films, films and other material;

e) refrain from acts likely to damage folklore materials or to diminish their value or impede their dissemination or use, whether these materials are to be found on their own territory or on the territory of another State;

f) take necessary measures to safeguard folklore against all human and natural dangers to which it is exposed, including the risks deriving from armed conflicts, occupation of territories or public disorders of other kinds.

ANNEX III

OBJECTIVES, PRINCIPLES AND ELEMENTS OF AN INTERNATIONAL INSTRUMENT, OR INSTRUMENTS, ON INTELLECTUAL PROPERTY IN RELATION TO GENETIC RESOURCES AND ON THE PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE

Submitted by the African Group at the Sixth Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

Objectives

1. Prevent the misappropriation of genetic resources, traditional knowledge and expressions of folklore
2. Ensure prior informed consent and equitable sharing of the benefits arising from the use of genetic resources, traditional knowledge and expressions folklore
3. Ensure that these benefits are harnessed for the benefit of traditional knowledge holders and custodians, in particular local and indigenous communities
4. Ensure the conservation and sustainable use of bio-diversity
5. Protect and reward innovations and creative works derived from traditional knowledge and expressions of folklore

Principles

1. Reaffirm the principle of national sovereignty over genetic resources
2. Recognize the role of the State in the preservation and protection of traditional knowledge and expressions of folklore
3. Recognize the economic rights of traditional knowledge holders and custodians as well as their moral rights against the culturally offensive use of their traditional knowledge and expressions of folklore
4. Recognize the role of customary law and protocols in the protection of traditional knowledge and expressions of folklore
5. Recognize the complementary nature of defensive and positive measures relating to the protection of genetic resources, traditional knowledge and expressions of folklore

General Elements

- National Treatment/ Mutual recognition of national legislation
- Definitions.

Genetic Resources

- Recognition of the right of States to take measures to ban the patenting of life forms
- Compliance with access and benefit sharing laws of the country of origin of genetic resources to ensure implementation of prior informed consent and equitable benefit sharing
- Introducing a disclosure requirement in patent laws as well as evidence of compliance with national access and benefit sharing laws of the country of origin of genetic resources (disclosure of the source and country of origin of the genetic resource in claimed inventions and of the associated traditional knowledge used in the invention)
- Contractual arrangements

Traditional Knowledge

Developing a *sui generis* system of protection

- Establish scope of protected subject matter
- Establish nature of rights,
- Address ownership of rights, moral and economic rights, acquisition, exercise, expiry and enforcement of rights
- Establish registration mechanisms

Expressions of Folklore

Developing a *sui generis* system of protection

- Establish scope of protected subject matter
- Establish nature of rights,
- Establish ownership of rights, moral and economic rights of performers, acquisition, exercise, expiry and enforcement of rights
- Establish registration and administration mechanisms

Institutional Mechanism

- Capacity building and technical assistance
- Sensitization and Awareness building
- Networking and exchange of information

- Promotion of documentation and codification of traditional knowledge and expressions of folklore
- Institutional mechanism for fostering the transfer of technology
- Establishment of national focal points of implementation
- Establishment of a follow up body

Enforcement

Dispute Settlement

[End of Annex and of document]