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**ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION**



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**EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION**

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## EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION

### I. INTRODUCTION

#### A. Background

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

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

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

4. The Secretary-General of AALCO realizing the extreme importance of the work undertaken by the WIPO IGC for the Asian and African countries, and the possible role that AALCO could play in formulating an international instrument, proposed to the AALCO Member States through an Explanatory Note dated 27 April 2004, to include the item “Expressions of Folklore and its International Protection” on the Agenda of the Forty-Third Annual Session of AALCO held in Bali (Republic of Indonesia) from 21-25 June 2004. This proposal was in line with Article 1 (b) of the AALCO’s Statutes which provides for exchange of views and information on matters of common concern having legal implications. The AALCO Member States welcomed the proposal and the item was deliberated at the Forty-Fifth (2006) and Forty-Sixth (2007) Annual Sessions. At the Forty-Eighth Annual Session (2009), the Member States through a resolution requested the Secretary-General to monitor and report the outcome of the IGC Sessions and directed the Secretariat to follow-up the developments within the WIPO and submit a report at the next Session.<sup>2</sup>

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

<sup>2</sup> AALCO/RES/48/S 14 dated 20 August 2009.

5. As a follow-up, this report provides an overview of the work of the WIPO Intergovernmental Committee (IGC) since its inception in 2001, focusing its attention on the recently concluded Fourteenth, Fifteenth and Sixteenth Sessions of the Committee held in 2009 and 2010 and the documents circulated at the Session for the consideration of the Member States.

#### **B. Issues for Focused Consideration at the Forty-Ninth Session of AALCO**

6. It may be recalled that the Government of Indonesia proposed to include this agenda item for deliberation in the Forty-Eighth Annual Session. Due to time paucity, this agenda was not taken up for deliberation at that Session. Therefore, the Secretariat finds it appropriate to include this agenda item for deliberation at the Forty-Ninth Annual Session. The deliberations in the Annual Session shall be focused on issues such as: **i) Prevention of the misuse, misappropriation and protection of Expressions of Folklore; ii) Establishing an internationally legal binding instrument to safeguard the rights of Expressions of Folklore; and iii) on the Revised Provisions on the Protection of Expressions of Folklore/Traditional Cultural Expressions and Policy Objectives and Core Guiding Principles.**

## **II. WIPO INTERGOVERNMENTAL COMMITTEE (IGC) ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE**

### **A. Introduction**

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

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

9. While the WIPO had been attempting to protect the “expressions of folklore” through piecemeal amendments in various international instruments, no comprehensive attempt was made to draft an international instrument for its protection. In this regard,

WIPO and UNESCO met at Phuket, Thailand in April 1997 at the meeting of World Forum on the Protection of Folklore which was attended by more than 180 participants from approximately 50 countries. The major outcome of the meeting was the recognition of the need for preservation and conservation of folklore throughout the world, legal means of protection of expressions of folklore within national regimes, economic repercussions of exploitation and international protection of expressions of folklore.

10. In 1999, WIPO and UNESCO conducted four Regional Consultations on the Protection of Expressions of Folklore, each of which adopted resolutions or recommendations with proposals for future work. The consultations recommended that WIPO should increase and intensify its work in the field of folklore protection and recommended the establishment within WIPO of a separate committee on folklore and traditional knowledge to facilitate future work. Recommendations for the legal protection of folklore focused on the development of a *sui generis* form of legal protection at the international level (Asia/Pacific, Arab, Latin American Countries Recommendations) and also considered the UNESCO-WIPO Model Provisions to be an adequate starting point and relevant groundwork for future work in this direction. The African countries recommended developing, in the shortest possible time, a broad consensus among States in favor of an international regime.<sup>3</sup>

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

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

13. 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.<sup>5</sup> Subsequently, at its Thirty-Eighth (19<sup>th</sup> Ordinary) Session in 2009, the WIPO General Assembly agreed to renew the mandate of IGC to continue its work and undertake text-based negotiations with the objective of reaching agreement on a text of an international

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<sup>3</sup> See documents WIPO-UNESCO/FOLK/ASIA/99/1, page 4, paragraph 4; WIPOUNESCO/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.

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

<sup>5</sup> WO/GA/20/8, paras. 94 and 95.

legal instrument (or instruments) which will ensure the effective protection of folklore, genetic resources and traditional knowledge.<sup>6</sup>

## **B. Work of the IGC on the Protection of Expressions of Folklore from First to Thirteenth Sessions**

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

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

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

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

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

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<sup>6</sup> WIPO/GRTKF/IC/15/REF-DECISION 28 dated 1<sup>st</sup> October 2009.

<sup>7</sup> Report of Sixth Session, WIPO/GRTKF/IC/6/14, para. 66.

objectives and principles for the protection of Expressions of Folklore for consideration by the Committee at its Eighth Session.

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

20. The **Ninth and Tenth Sessions** of WIPO IGC were held in the year 2006.<sup>9</sup> As per the mandate, both meetings were accelerated to work in establishing a concrete outcome with particular focus on the international dimension on bringing out a legally binding instrument on the subject matter. The draft provisions developed by the previous IGC meetings had been taken further ahead. An important outcome of the Ninth Session was the launching of a new funding mechanism for indigenous and local communities and the purpose was to provide support for representatives of these communities to participate actively in the process of establishing international standards to prevent the misappropriation of expressions of folklore.<sup>10</sup>

21. In the **Eleventh Session** (2007), the Member States agreed to undertake a sustained discussion of a list of ten issues related to the protection of Expressions of Folklore.<sup>11</sup> Over the last several sessions the IGC had made substantial progress in exploring the web of complex issues related to the protection, preservation and promotion of TCEs/EoF. This Session had the opportunity to engage in the kind of focused discussion among the Member States to reach a consensus on the agreed list of issues before the IGC. While there was a wide divergence of views in the IGC on issues relating to Expressions of Folklore, the Member States considered the progress could be made with respect to a number of concrete proposals outlined by the IGC. The IGC decided at this Session that the WIPO Secretariat should prepare "a factual extraction, with attribution, consolidating the view points and questions of Members and Observers on the List of Issues considered during the Eleventh Session including their comments submitted in writing for the Eleventh Session, subject to review of Member States and observers and without prejudice to any position taken on these issues." It also decided

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<sup>8</sup> WIPO/GRTKF/IC/8.

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

<sup>10</sup> WIPO Press Release No. 446 dated 27 April 2006.

<sup>11</sup> WIPO/GRTKF/IC/11/4(A)

that the revised objectives and principles for TCEs/EoF protection should remain on the table.<sup>12</sup>

22. At its **Twelfth Session** (2008), the IGC undertook a detailed debate by paying close attention to the interplay between the existing international legal frameworks and called for extended or enhanced protection of TCEs/EoF. It also reviewed the progress made on its substantive agenda items at the Session, and agreed that to prepare a working document on which: (a) describe what obligations, provisions and possibilities already exist at the international level to provide protection for TCEs/EoF; (b) describe what gaps exist at the international level, illustrating those gaps, to the extent possible, with specific examples; (c) set out considerations relevant to determining whether those gaps need to be addressed; (d) describe what options exist or might be developed to address any identified gaps, including legal and other options, whether at the international, regional or national level; and (e) contain an annex with a matrix corresponding to the items mentioned in sub-paragraphs (a) to (d) above.

23. At its **Thirteenth Session** (2008), an attempt to focus and intensify work on the protection of TCEs/EoF, the IGC drew up proposals to analyze gaps in the protection available in these respective areas. The “gap” analyses were prepared through an open commentary process and reviewed in the Thirteenth Session. The gap analyses contrast the current international legal framework with specific examples of gaps in protection and consideration of how these gaps might best be addressed.<sup>13</sup> The gap analyses were expected to help prioritize issues, identify substantive areas for the Committee to focus upon, and to guide the future work of the Committee towards the expected concrete results.

### **III. CONSIDERATION OF ASPECTS OF EXPRESSIONS OF FOLKLORE AT THE FOURTEETH, FIFTEENTH AND SIXTEENTH SESSIONS OF WIPO IGC**

#### **A. Summary of the Deliberations and Decisions adopted at the Fourteenth Session of WIPO IGC (29 June -3 July 2009)**

24. The major focus of the Fourteenth Session was to renew the mandate of the IGC. The Member States despite their differences worked together for an extension of the period of IGC. Towards that end, the African Group proposed a concrete programme of action and a draft document titled "Elements for the New Mandate" which outlined a focus for the new mandate. The proposal was put up in the plenary for discussion by Member States which included: (1) a clearly defined work program and timeframe, including the holding of inter-sessional work sessions to be adopted at the Fifteenth Session, and (2) future work based on text based negotiations.

25. During the deliberations, the Delegation of **Senegal** a member State of AALCO, on behalf of the African Group, underscored the holistic approach which was to lead to

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<sup>12</sup> WIPO/GRTKF/IC/11/15 Prov. 2, p. 198.

<sup>13</sup> WIPO Press Release dated 22 October 2008.



the effective protection of TCEs/EoF, and noted that the African Group had made proposals, inter alia, on the renewal of the mandate of the Committee along with a work program with a timetable for, in particular, inter-sessional meetings as a means of accelerating the work of the Committee.

26. The Delegation noted that the proposal of the Group referred to the negotiations based on texts, including documents WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5, and submitted to the Committee under the document code WIPO/GRTKF/IC/14/9. The Delegation reaffirmed that only the adoption of a legally binding international instrument could guarantee the effective protection of folklore and traditional knowledge as well as genetic resources of indigenous and local communities of Member States. It expressed the wish that its proposals would, in the context of future work of the Committee, serve to correct the imbalance inherent in intellectual property at the international level with on the one hand individual property well protected by various rights (patents, copyright, related rights, ...) and on the other community-based assets at the mercy of piracy, illicit use, misappropriations or other prejudicial actions. The Delegation expressed the wish that the Committee could put a stop to that situation.

27. On behalf of the Asian Group, the Delegation of **Sri Lanka**, which is also an AALCO Member State, hoped that the Committee would revitalize its mandate towards a tangible result, including the possible development of an international instrument for the protection of Genetic Resources (GR), Traditional Knowledge (TK) and TCEs. The Group expressed its ongoing concern for the misappropriation of TCEs, TK and GRs. The fundamental objective of the Committee's work was the protection and preservation of indigenous peoples' knowledge and resources. The sharing of benefits from GR, TK and TCEs should also be a guiding objective, and it was time for the Committee to have a more focused work program. The Group stressed the need for issuance of documents in all of WIPO's official languages. Concrete progress in the Committee was essential for the larger strategic goals of WIPO.

28. The African Group's original proposal from the Thirteenth Session had already called for a legally-binding international instrument. The vast majority of Member States supported this objective in the Fourteenth Session. However, a few Member States, namely those that did not support the United Nations Declaration of the Rights of Indigenous Peoples - Canada, Australia, USA, New Zealand - have declined to support any text seeking a legally-binding agreement, instead preferring language asking for the mandate to include wording "without prejudice to any outcomes" indicating a seeming preference for non-binding soft law outcomes, such as national and contractual arrangements, guidelines and policies, or high level political resolutions, declarations or decisions.

29. There were also many deliberations by a minority of developed nations about the inclusion of the phrase "text based negotiations" in the proposed new mandate. A few States wanted to amend that, with the USA proposing that the text read "outcome oriented deliberations". New Zealand proposed the wording "with no outcome excluded". But as Senegal on behalf of the African Group repeatedly explained, text based

negotiations was used in its ordinary UN usage, to mean negotiations based on already identified WIPO IGC texts, rather than vague, arbitrary deliberations in a vacuum.

## **B. Summary of the Deliberations and Decisions adopted at the Fifteenth Session of WIPO IGC (7 – 11 December 2009)**

30. The Fifteenth Session marked the resumption of the IGC's substantive work after a lengthy focus on procedural questions. The meeting reviewed draft provisions for the protection of TCEs/EoF and TK, and considered options for future work on intellectual property and genetic resources.

31. The new mandate of the WIPO General Assembly called for a "clearly defined work program" and made provision for four formal sessions of the IGC and three inter-sessional working group (IWG) meetings over the next two years. Discussions on IWGs and the modalities were based largely on a formal process by the African Group.<sup>14</sup> Proposals were also presented during the meeting by a group of industrialized countries (Group B) and several other delegations.<sup>15</sup>

32. Over the course of the Session, IGC delegates also engaged in text-based negotiations on substantive issues<sup>16</sup>. The Session discussed the first two articles set out in the document WIPO/GRTKF/IC/9/4 and several amendments were proposed to certain provisions contained in the document. Delegations and observers also made several comments and posed certain questions. The detailed discussions on the substantive provisions, i.e., Articles 1 and 2 are discussed below under the Sixteenth Session deliberations.

## **C. Summary of the Deliberations and Decisions adopted at the Sixteenth Session of WIPO IGC (3 – 7 May 2010)**

33. The Sixteenth Session of the WIPO IGC had witnessed agreement on the establishment of inter-sessional Working Groups (IWGs). These IWGs are meant to support and facilitate the negotiations of the IGC and to provide legal and technical advice and analysis. The Session decided to hold three IWGs which will deal on an equal footing on the matters pertaining to TCEs/EoF, TK and GR. The Delegates agreed that the first IWG would solely address TCEs/EoF issues in the month of July 2010.<sup>17</sup> Over the course of the Session, the delegates also engaged in text-based negotiations on substantive issues. The discussion was on the newly revised paper on "Objectives and Principles" for the protection of TCEs/EoF prepared by the WIPO Secretariat. It was also decided that the WIPO Secretariat should "prepare and make available for the first

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<sup>14</sup> WIPO/GRTKF/IC/15/5 dated 8 December 2009.

<sup>15</sup> WIPO/GRTKF/IC/15/6 dated 11 December 2009.

<sup>16</sup> The negotiations are based on the Working Document prepared by the WIPO Secretariat, WIPO/GRTKF/IC/9/4.

<sup>17</sup> The first IWG will discuss the issues of TCEs/EoF from 19-23 July 2010. For further details see the Doc. WIPO/GRTKF/IWG/1.

session of the Intersessional Working Group a further draft of document WIPO/GRTKF/IC/16/4.

34. The following part will consider the comments on the Policy Objectives and Core Principles and also the Substantive Provisions on the protection of TCEs/EoF, the draft prepared by the WIPO Secretariat.<sup>18</sup> The Annex of this Report reproduced the text of the Policy Objectives and Core Principles and also the Substantive Provisions.

## **1) POLICY OBJECTIVES AND CORE PRINCIPLES**

### **a. Objectives**

35. This section contains suggested policy objectives for the protection of TCEs/EoF, which draw on past submissions and statements to the Committee and relevant legal texts. Such objectives could typically form part of a preamble to a law or other instrument.

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

### **b). General Guiding Principles**

37. The substantive provisions set out in the next section are guided by and seek to give legal expression to certain general guiding principles which have underpinned much of the discussion within the Committee since its inception and in international debate and consultations before the Committee's establishment.

*(a) Principle of responsiveness to aspirations and expectations of relevant communities*

38. This principle recognizes that protection for TCEs/EoF should reflect the aspirations and expectations of indigenous peoples and traditional and other cultural communities. This means, in particular, that the protection of TCEs/EoF should recognize and apply indigenous and customary laws and protocols as far as possible, promote complementary use of positive and defensive protection measures, address both cultural and economic aspects of development, prevent insulting, derogatory and offensive acts in particular, promote cooperation among communities and not prompt competition or conflicts between them, and enable full and effective participation by these communities in the development and implementation of protection systems.

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<sup>18</sup> The details are drawn out from the WIPO Secretariat study, WIPO/GRTKF/IC/16/4 dated 22 March 2010.

Measures for the legal protection of TCEs/EoF should also be recognized as voluntary from the viewpoint of indigenous peoples and other communities who would always be entitled to rely exclusively or in addition upon their own customary and traditional forms of protection against unwanted access and use of their TCEs/EoF. It means that external legal protection against the illicit acts of third parties should not encroach upon or constrain traditional or customary laws, practices and protocols.

*(b) Principle of balance*

39. The need for balance has often been emphasized by the diverse stakeholders taking part in discussions concerning the enhanced protection of TCEs/EoF. This principle suggests that protection should reflect the need for an equitable balance between the rights and interests of those that develop, preserve and sustain TCEs/EoF, and of those who use and benefit from them; the need to reconcile diverse policy concerns; and, the need for specific protection measures to be proportionate to the objectives of protection, actual experiences and needs.

*(c) Principle of respect for and consistency with international and regional agreements and instruments*

40. TCEs/EoF should be protected in a way that is respectful of and consistent with relevant international and regional instruments, and without prejudice to specific rights and obligations already established under binding legal instruments, including human rights instruments. Protection for TCEs/EoF should not be invoked in order to infringe human rights guaranteed by international law or to limit the scope thereof.

*(d) Principle of flexibility and comprehensiveness*

41. This principle concerns a need to recognize that effective and appropriate protection may be achieved by a wide variety of legal mechanisms, and that too narrow or rigid an approach at the level of principle may constrain effective protection, conflict with existing laws to protect TCEs/EoF, and pre-empt necessary consultation with stakeholders and holders of TCEs in particular. It concerns the need to draw on a wide range of legal mechanisms to achieve the intended objectives of protection. In particular, experience with TCEs/EoF protection has shown that it is unlikely that any single “one-size-fits-all” or “universal” international template will be found to protect TCEs comprehensively in a manner that suits the national priorities, legal and cultural environment, and needs of traditional communities in all countries.

42. The draft provisions are therefore broad and inclusive, and intended, while establishing that misappropriation and misuse of TCEs/EoF would be unlawful, to give maximum flexibility to national and regional authorities and communities in relation to which precise legal mechanisms may be used to achieve or implement the provisions at the national or regional levels.

43. Protection may accordingly draw on a comprehensive range of options, combining proprietary, non-proprietary and non-IP measures, and using existing IP rights, *sui generis* extensions or adaptations of IP rights, and specially-created *sui generis* IP measures and systems, including both defensive and positive measures. Private property rights should complement and be carefully balanced with non-proprietary measures.

44. This is a relatively common approach in the IP field and previous documents gave examples of IP conventions which establish certain general principles and which give scope for wide variation as to implementation within the laws of the signatories. Even where international obligations create minimum substantive standards for national laws, it is accepted that the choice of legal mechanisms is a matter of national discretion. It is also an approach found in instruments concerning indigenous peoples, such as ILO Convention 169.

*(d) Principle of recognition of the specific nature and characteristics of cultural expression*

45. Protection should respond to the traditional character of TCEs/EoF, namely their collective, communal and inter-generational character; their relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values; their often being vehicles for religious and cultural expression; and their constantly evolving character within a community. Special measures for legal protection should also recognize that in practice TCEs/EoF are not always created within firmly bounded identifiable "communities".

46. TCEs/EoF are not necessarily always the expression of distinct local identities; nor are they often truly unique, but rather the products of cross-cultural exchange and influence and intra-cultural exchange, within one and the same people whose name or designation may vary on one side or another of a frontier. Culture is carried by and embodied in individuals who move and reside beyond their places of origin while continuing to practice and recreate their community's traditions and cultural expressions.

*(e) Principle of complementarity with protection of traditional knowledge*

47. This principle recognizes the often inseparable quality of the content or substance of traditional knowledge (TK) *stricto sensu* and TCEs/EoF for many communities. These draft provisions concern specific means of legal protection against misuse of this material by third parties beyond the traditional context, and do not seek to impose definitions or categories on the customary laws, protocols and practices of indigenous peoples and traditional and other communities. The Committee's established approach of considering the legal protection of TCEs/EoF and of TK *stricto sensu* in parallel but separately is, as previously discussed, compatible with and respectful of the traditional context in which TCEs/EoF and TK are often perceived as integral parts of an holistic cultural identity.

*(f) Principle of respect for rights of and obligations towards indigenous peoples and communities and traditional and other cultural communities indigenous peoples and other communities*

48. This principle suggests that any protection of TCEs/EoF should respect and take into account certain over-arching rights and obligations, particularly international human rights and systems of indigenous rights, and not prejudice the further elaboration of such rights and obligations.

*(h) Principle of respect for customary use and transmission of TCEs/EoF*

49. Protection should not hamper the use, development, exchange, transmission and dissemination of TCEs/EoF by the communities concerned in accordance with their customary laws and practices. No contemporary use of a TCE/EoF within the community which has developed and maintained it should be regarded as distorting if the community identifies itself with that use of the expression and any modification entailed by that use. Customary use, practices and norms should guide the legal protection of TCEs/EoF as far as possible.

*(g) Principle of effectiveness and accessibility of measures for protection*

50. Measures for the acquisition, management and exercise of rights and for the implementation of other forms of protection should be effective, appropriate and accessible, taking account of the cultural, social, political and economic context of indigenous peoples and traditional and other cultural communities.

### **c). Substantive Provisions**

#### **Article 1: Subject Matter of Protection**

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

52. The suggested article draws upon the WIPO-UNESCO Model Provisions for National Laws for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 (the Model Provisions, 1982) and the Pacific Islands Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002 (the Pacific Model, 2002), as well as existing national copyright laws which provide *sui generis* protection for TCEs/EoF.

### *Description of subject matter*

53. The words “or combinations thereof” in paragraph (a) are intended to demonstrate that TCEs/EoF can be both tangible and intangible and have both tangible and intangible components (“mixed expressions”), as has been suggested. Paragraph (a) also makes it clear that oral (non-fixed) expressions would also be protectable, responding to the often oral nature of traditional cultural expression. Fixation would therefore not be a requirement for protection. The protection for “architectural forms” could contribute towards the protection of sacred sites (such as sanctuaries, tombs and memorials) to the extent they are the object of misappropriation and misuse as covered by these provisions.

### *Criteria for protection*

54. In terms of the criteria set out in paragraphs (a) (aa) to (cc), the suggested provision is to the effect that protectable TCEs/EoF should:

(i) be intellectual creations and therefore “intellectual property”, including both individual and communal creativity. Differing versions, variations or adaptations of the same expression could qualify as distinct TCEs/EoF if they are sufficiently creative (much like different versions of a work can qualify as copyright works if they are each sufficiently original);

(ii) have some linkage with a community’s cultural and social identity and cultural heritage. This linkage is embodied by the term “characteristic” which is used to denote that the expressions must be generally recognized as representing a communal identity and heritage. The term “characteristic” is intended to convey notions of “authenticity” or that the protected expressions are “genuine”, “pertain to” or an “attribute of” a particular people or community. Both “community consensus” and “authenticity” are implicit in the requirement that the expressions, or elements of them, must be “characteristic”: expressions which become generally recognized as characteristic are, as a rule, authentic expressions, recognized as such by the tacit consensus of the community concerned;

(iii) still be maintained, developed or used by the community or its individual members.

55. The notion “heritage” is used to denote materials, intangible or tangible, that have been passed down from generation to generation, capturing the inter-generational quality of TCEs/EoF; an expression must be “characteristic” of such heritage to be protected. It is generally considered by experts that materials which have been maintained and passed between three, or perhaps two, generations form part of “heritage”. Expressions which may characterize more recently established communities or identities would not be covered.

### *Contemporary creativity/individual creators*

56. Many expressions of folklore are handed down from generation to generation, orally or by imitation. Over time, individual composers, singers and other creators and performers might call these expressions to mind and re-use, re-arrange and re-contextualize them in a new way. There is, therefore, a dynamic interplay between collective and individual creativity, in which an infinite number of variations of TCEs/EoF may be produced, both communally and individually.

57. The individual, therefore, plays a central role in the development and re-creation of traditional cultural expression. In recognition of this, the description of the subject matter in Article 1 includes expressions made by individuals. In order to determine what is or what is not a TCEs/EoF, it is therefore not directly relevant whether the expression was made collectively or by an individual. Even a contemporary creative expression made by an individual (such as, for example, a film or video or a contemporary interpretation of pre-existing dances and other performances) can be protected as a TCE/EoF, provided it is characteristic of a community's cultural and social identity and heritage and was made by the individual having the right or responsibility to do so in accordance with the customary law and practices of that community. In so far as the *beneficiaries of protection* are concerned, however, the primary focus of these draft provisions is on communal beneficiaries rather than on individuals. Communities are made up of individuals, and thus communal control and regulation of TCEs/EoF ultimately benefits the individuals who make up the relevant communities.

### *Choice of terms*

58. Member States and other stakeholders have called for flexibility in regard to terminology, amongst other things. Many international IP standards defer to the national level for determining such matters. Hence, to allow for appropriate national policy and legislative development, consultation and evolution, the suggested paragraph (b) recognizes that detailed decisions on terminology should be left to national and regional implementation.

59. The specific drafting amendments in the draft provision were proposed by Angola, Australia, Bolivia (Plurinational State of), Brazil, Colombia, **Arab Republic of Egypt**, El Salvador, **India**, **Indonesia**, **Islamic Republic of Iran**, Mexico, **Nepal**, **Nigeria**, the Philippines, Trinidad and Tobago, and Venezuela (Bolivarian Republic of).

### *Comments made and questions posed*

60. The comments made and questions posed were proposed by Australia, Brazil, **Cameroon**, **People's Republic of China**, Colombia, **Arab Republic of Egypt**, France, Germany, Italy, **Islamic Republic of Iran**, **Japan**, **Republic of Korea**, the Philippines, the Russian Federation, Spain, **Sudan**, Switzerland, United States of America.



### *Structure of Article 1*

61. A delegation sought to have clarification from the Secretariat on the structure of Article 1. The delegation asked whether its understanding was correct that all conditions stated in (aa) to (cc) applied to all forms of TCEs described in subparagraphs (i) to (iv). If that understanding was correct, the delegation suggested to structure the text accordingly in order to avoid ambiguities.

### *Terminology*

62. A delegation suggested that, in sub-paragraph (a)(bb), the word “heritage” in English be replaced by a word closer in meaning to the Spanish “*patrimonio*.” The English version did not reflect the idea, present in the Spanish version, that TCEs had a dynamic and interactive nature.

63. A delegation suggested that, in paragraph (a), the term “traditional” be clearly defined. It believed that the main objective for protecting TCEs was to provide protection to those TCEs containing sufficient value to be protected that would not fall under the scope of the conventional copyright protection regime. As “cultural expressions” could generally be subject for protection under the existing copyright regime, the core concept applicable to deciding the subject matter of TCE protection should be the term “traditional.” Although subparagraph (iv)(bb) could help in defining this term, using the words “cultural and social identity” and “cultural heritage,” these words too were broad concepts. “Traditional” was, therefore, not clearly defined.

64. Several delegations suggested adding an article or glossary setting out definitions of key terms. It was believed to be necessary to use unified terminology for the concepts as the establishment of a working definition of TCEs was one of the prerequisites of a substantive discussion. Existing relevant international terminology, including the definition of “intangible cultural heritage” of the 2003 UNESCO Convention for the safeguarding of the intangible cultural heritage, should also be taken into account by the committee.

65. A delegation noted that the Committee had not determined whether TCEs or expressions of folklore were in fact one and the same, and that the definitions remained open.

### *Meaning of “Community”*

66. Two delegations posed questions related to the concept of members of a “community” and wished to know what the definition of “traditional community” was.

67. A delegation suggested that the term “community” should be understood in the same broad and inclusive sense as the term “communities” as described in footnote 23 of the Annex of working document WIPO/GRTKF/IC/9/4. This footnote had read: “The

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

68. The issue of community in Diaspora was also raised. One delegation stated that TCEs were only alive when carried in people, when expressed through people within a political or geographic region that claimed it, or when owned by people across the world in the Diaspora. It gave the example of a Cambodian dancer located in Seattle, who might be accused of pirating Cambodian TCEs, or, similarly, of an Ethiopian group of musicians in Washington, D.C.

*Meaning of “characteristic”*

69. A delegation suggested that instead of using the word “characteristic,” which was deemed too general, some other wording could be used to make it clearer that the TCE should be “authentic and genuine.”

70. A delegation, in relation to subparagraph (a)(bb), posed the question as to who determined what was “characteristic” and at which stage that would be done.

*Definition of TCEs (Scope of Subject Matter): Open-ended / exhaustive nature*

71. Two delegations said that the definition should be left open for further additions. A delegation suggested adding at the end of the preamble paragraph “etc.”, so as to suggest that there were also other forms of TCEs.

72. A delegation was of the view that the definition was generally acceptable, however, given cultural diversity, the examples in the definition should not be considered exclusive.

73. A delegation sought greater clarification on what should be the objective and subject matter of the protection of TCEs.

74. A delegation suggested that the scope of the TCE subject matter for protection be clearly defined as it found that the classification of TCEs was too vague in the present document. More work was needed to break it down in more detail.

75. A delegation noted that it considered the establishment of a working definition of “TCEs” to be one of the prerequisites of substantial discussion. The definition of “TCEs” as contained in Article 1 constituted a good working definition. The Committee could and should revisit this definition during the course of its negotiations to amend or modify the definition if necessary. The delegation highlighted that the definition of “TCEs” should encompass all TCEs, i.e., TCEs from developing countries and developed countries.

### *Relationship with conventional copyright law*

76. A delegation noted that there was a possible overlap with copyright protection for adaptations and variations of TCEs, and asked how that conflict would be resolved. The delegation pointed to the text which read “differing versions, variations or adaptations of the same expression could qualify as distinct TCE/EoF.” It said that not only original TCEs but also variations and adaptations there from would also be protected as TCEs. The delegation said that it was its understanding that such adaptations based on original TCEs could also be protected by the conventional copyright regime. There would thus be two rights on the same subject matter and this would lead to a conflict of rights.

77. A delegation pointed to a conflict with the Berne Convention (Article 2) as far as the definitions were concerned and the relationship between the Berne Convention and the protection intended in the document. It suggested that this issue be looked into by an expert group.

### *Relationship with the public domain*

78. Two delegations suggested that the impact on the public domain to be examined. One delegation asked what criteria were used to distinguish the TCEs that were protected from those that were not. Among TCEs, some were handed down only to certain individuals within a small community, while others were handed down in a broader nation-wide cultural context, maintained and used by a wider range of public or sometimes even used commercially. This issue was important since it would have a direct impact on the boundaries of the public domain. Pending the level of protection to be applied to the subject matter, broader definition of TCEs could imply limiting the scope of public domain materials which were currently available.

## **Article 2: Beneficiaries**

79. Many stakeholders have emphasized that TCEs/EoF are generally regarded as collectively originated and held, so that any rights and interests in this material should vest in communities rather than individuals. Some laws for the protection of TCEs/EoF provide rights directly to concerned peoples and communities. On the other hand, many vest rights in a Governmental authority, often providing that proceeds from the granting of rights to use the TCEs/EoF shall be applied towards national heritage, social welfare and culture related programs. The African Group has stated that principles for the protection of TCEs/EoF should ‘Recognize the role of the State in the preservation and protection of traditional knowledge and expressions of folklore.’<sup>19</sup>

80. The suggested provision is sufficiently flexible to accommodate both approaches at the national level – while the beneficiaries of protection should directly be the concerned peoples and communities, the rights themselves could be vested either in the peoples or communities, or in an agency or office.

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<sup>19</sup> WIPO/GRTKF/IC/6/12.

81. Article 2, and the provisions as a whole, contemplate that more than one community may qualify for protection of their TCEs/EoF in line with the criteria in Article 1. Existing *sui generis* laws provide for this possibility, such as the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge of Panama, 2000 and the related Executive Decree of 2001 (“the Panama Law”)<sup>20</sup>, and the Peruvian Law of 2002 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources (“the Peru Law, 2002”).<sup>21</sup> This also touches upon the allocation of rights or distribution of benefits among communities which share the same or similar TCEs/EoF in different countries (so-called “regional folklore”). This is dealt with further in Articles 4, “Management of Rights” and 7, “Formalities”.

82. The term “cultural communities” is intended to be broad enough to include also the nationals of an entire country, a “nation”, in cases where TCEs/EoF are regarded as “national folklore” and belonging to all of the people of a particular country. This complements and accords with the practice in other policy areas.<sup>22</sup> Therefore, a national law could, for example, state that all nationals are the beneficiaries of protection.

#### *Communities/individuals*

83. As discussed in relation to Article 1, these provisions are intended primarily to benefit communities, including in cases where a TCE/EoF is created or developed by an individual member of a community. The essential characteristics of “traditional” creations are that they contain motifs, a style or other items that are characteristic of and identify a tradition and a community that still bears and practices it. Thus, even where an individual has developed a tradition-based creation within his or her customary context, it is regarded from a community perspective as the product of social and communal creative processes. The creation is, therefore, not “owned” by the individual but “controlled” by the community, according to indigenous and customary legal systems and practices.<sup>23</sup> This is what marks such a creation as “traditional”.

84. For these reasons, the benefits of the protection envisaged in these provisions accrue to communities and not individuals – this is what distinguishes this *sui generis* system from conventional IP law which remains available to the individual should he or she wish to take advantage of it. This approach accords with the view articulated by Committee participants that these provisions should aim to provide forms of protection for expressions of culture and knowledge not currently available under conventional and existing IP law.

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<sup>20</sup> Article 5, Decree.

<sup>21</sup> Article 10.

<sup>22</sup> See Glossary on Intangible Cultural Heritage, Netherlands National Commission for UNESCO, 2002 (“... a nation can be a cultural community”).

<sup>23</sup> See generally WIPO/GRTKF/IC/6/3.

85. However, communities are made up of individuals, and thus communal control and regulation of TCEs/EoF ultimately benefits the individuals who make up the relevant community. Thus, in practice, it is individuals who will benefit, in accordance with customary law and practices.

86. The specific drafting amendments reflected in the draft provision were proposed by Australia, Brazil, El Salvador, India, Mexico, Morocco, and Trinidad and Tobago.

*Comments made and questions posed*

87. The comments made and questions posed were proposed by Australia, Brazil, El Salvador, **India, Indonesia, Islamic Republic of Iran, Republic of Korea** and Morocco and, as an observer, by the Arts Law Centre of Australia.

*Terminology*

88. A delegation reiterated its comments made under Article 1 regarding the English equivalent to the Spanish “*patrimonio*.”

89. A delegation, concerning paragraph (i), said that the term “entrusted” could have certain legal ramifications in terms of requiring evidence of the custody, care and safeguarding being entrusted to a particular community. It suggested substituting the word “entrusted” with the word “existing.”

*Scope of beneficiaries*

90. A delegation suggested that other groups should also be referred to in addition to “indigenous peoples and traditional and other cultural communities.”

91. A delegation said that, concerning paragraph (i), the term “traditional communities” was much too broad and should be defined in a clearer and more precise way. The delegation said that a nation had its own folklore, “national” folklore; however there was no mention of “national” TCEs. It suggested amending paragraph (i) stating that the “national” folklore of the States also needed to be protected.

92. A delegation proposed that the definition of beneficiaries also include the following elements: (i) other than traditional/indigenous communities as parties who maintained and developed TCE/EoF, governments also needed to play a role in facilitating TCE/EoF protection in case there were other communities who had potential benefits for the utilization of TCE/EoF; (ii) in cases where the owner of TCE/EoF could not be identified, the beneficiary of TCE/EoF protection should be the government, such as the local government, and the TCE/EoF would be used for the sake of community’s interests; (iii) the owner of TCE/EoF eligible to benefit from the protection should be the TCE/EoF owner who had been identified by the local government; (iv) regarding the individual’s contribution to the development of TCE/EoF, it could be rewarded by the existing IP system; (v) a state could play a certain role in facilitating the protection of the

community and it could be extended further as a right holder only if it benefited the communities.

93. A delegation believed that the right holders should be individual groups, families, local communities, tribes and nations. However, the rights of holders were considered in the framework of the rights of society. In this regard, national legislation was important and could not be ignored. The rights of local communities who were real owners and their consent should particularly be observed.

94. A delegation stated that the provision did not fully address the issue of legitimate beneficiaries of TCE protection. Different communities could share the same or similar forms of TCEs or their TCEs could have similar features, which could make it difficult for potential users to find the legitimate beneficiaries or rights holders of the TCEs they wished to use. In addition, without a clear scope of beneficiaries, the TCE registration offices, as referred to in Article 7(b)(iv), would be highly burdened when resolving disputes.

#### *Customary law*

95. A delegation said that there would be difficulties to prove the relevant customary law for indigenous communities, and suggested that “or” should replace “and” in paragraph (i).

### **Article 3: Acts of Misappropriation and Misuse (Scope of Protection)**

96. This draft article addresses a central element of protection, that is, the misappropriations of TCEs/EoF covered by the provisions and the rights and other measures that would apply in each case.

97. The article aims to provide forms of protection for expressions of culture and knowledge not currently available under conventional and existing IP law. These provisions are without prejudice to protection for TCEs/EoF already available under current IP law. Conventional IP protection remains available.

98. The suggested provision seeks to address the kinds of IP-related uses and appropriations of TCEs/EoF which most often cause concern to indigenous and local communities and other custodians and holders of TCEs/EoF, as identified by them in earlier fact-finding and consultations. It draws from a wide range of approaches and legal mechanisms embodied in various national and regional laws.

#### *Summary of draft provision*

99. In brief, the draft provision suggests three “layers” of protection, intended to provide flexible protection that is tailored to different forms of cultural expression and the various objectives associated with their protection, reflecting a combination of exclusive and equitable remuneration rights and a mix of legal and practical measures:

(a) for TCEs/EoF of particular cultural or spiritual value to a community, a right of “free, prior and informed consent” (PIC), akin to an exclusive right in IP terms, is suggested, in terms of which the kinds of acts usually covered by IP laws, especially copyright, related rights, trademarks and designs, would be subject to the PIC of the relevant community.

(i) This layer of protection would be subject to prior notification or registration in a public register as provided for under Article 7. Registration or notification is optional only and for decision by relevant communities. There would be no need to register or notify secret TCEs/EoF because secret TCEs/EoF is separately protected under Article 3 (c). This registration option is applicable only in cases where communities wish to obtain strict, prior informed consent protection for TCEs/EoF which is already known and publicly available.

(ii) The right of PIC would grant a community the right either to prevent or authorize, on agreed terms including on benefit-sharing, the use of the TCEs/EoF. As such, PIC is akin to an exclusive IP right which may be, but need not be, licensed. These rights could be used positively or, which is more likely perhaps, defensively.

(iii) Specific tailored forms of protection are suggested for words, names, symbols and other designations, drawing on trademark law and special measures already established in this regard in the Andean Community, New Zealand and the United States of America.

(iv) In respect of performances which qualify as TCEs/EoF, these may also be registered or notified and so be protected strongly, as suggested. The moral and economic rights proposed include rights modeled on the kinds of rights already provided to other performers, including by in particular the WIPO Performances and Phonograms Treaty, 1996 (WPPT, 1996). This form of protection is without prejudice to the protection available under the WPPT. If such performances were not so registered or notified, they could be protected under (b) or (c) below, depending on the circumstances and the community’s wishes.

(b) For TCEs/EoF not so registered or notified, their use would not be subject to prior authorization but protection would concern *how* the TCEs/EoF were used. This TCEs/EoF could be used, as a source of creative inspiration for example, without the need for prior consent or authorization, in furtherance of creativity and artistic freedom, a key objective as many have stated. However, how the TCEs/EoF are so used would be regulated, drawing mainly upon moral rights and unfair competition principles, with civil and criminal remedies proposed, as well as the payment of an equitable remuneration or equitable benefit-sharing, to be determined by a competent authority. This authority could be the same Agency as referred to in Article 4 “Management of Rights”. This approach is akin perhaps to a compulsory license or equitable remuneration approach,

found in national *sui generis* laws concerning TCEs/EoF<sup>24</sup>, as well as in conventional copyright law concerning musical works already fixed in sound recordings.<sup>25</sup>

(c) Finally, for secret, confidential or undisclosed TCEs/EoF, the suggested provision seeks to clarify that existing protection for confidential or undisclosed information covers TCE-related subject matter, building also upon case-law to this effect.<sup>26</sup> The Mataatua Declaration, 1993 recognizes, amongst other things, that indigenous peoples have the right to “protect and control dissemination” of [their] knowledge.<sup>27</sup>

#### *Flexibility as to legal mechanisms for implementation*

100. The provisions are broad and inclusive, and intended to give flexibility to national and regional authorities and communities in relation to which precise legal mechanisms may be selected at the national or regional levels to implement them.

101. To illustrate this point with a practical example – the suggested principle which states that there ought to be protection against false or misleading indications in trade as to the endorsement by or linkage with a community of tradition-based creations (a typical example is a handicraft sold as ‘authentic’ or ‘Indian’ when it is not) could be implemented in practice at the national level through *one or more* of the following: (i) the registration and use of certification trademarks by concerned communities; (ii) civil and/or criminal remedies available under general trade practices and labeling laws; (iii) enactment of legislation specifically to provide this form of protection for TCEs/EoF; (iv) the registration and use of geographical indications; and/or (v) common law remedies for “passing off” and laws for the suppression of unfair competition.

#### *Derivative works*

102. Some key policy and legal questions pivot on the adaptation right, the right to make derivative works and on the setting of appropriate exceptions and limitations in this regard.

103. The suggested provision suggests an adaptation right in respect of TCEs/EoF of particular cultural or spiritual value, subject to prior registration or notification. In respect of other TCEs/EoF, there would be no adaptation right as such, nor prevention of the obtaining of IP rights in the derivative work by its creator. Nor would, in either case, mere “inspiration” be prevented, as is also the case in copyright law, in line with the idea/expression dichotomy.<sup>28</sup> However, it is suggested there be regulation of how derivative works may be exploited, following the general approach of the Pacific Model Law, 2002.

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<sup>24</sup> Such as the Bangui Accord, OAPI, as revised in 1999.

<sup>25</sup> Article 13, Berne Convention, 1971.

<sup>26</sup> *Foster v. Mountford* (1976) 29 FLR 233.

<sup>27</sup> Article 2.1.

<sup>28</sup> Discussed in WIPO/GRTKF/IC/6/3.



*Comments made during the intersessional written commenting process*

104. The comments made were proposed by **People’s Republic of China**.

*Enforcement of rights*

105. A delegation suggested that minimum criteria be specified for the enforcement of rights. For example, the following two conditions should be met, as a matter of principle and regardless of the nature of rights, when TCEs were to be used: (i) in regard to moral rights, TCEs should be protected against distortion and mutilation and the source of a TCE should be indicated; and (ii) in regard to property rights, appropriate economic compensations should be ensured.

**Article 4: Management of Rights**

106. This provision deals with how and to whom authorizations to use TCEs/EoF are applied for and related questions. The matters dealt with in this provision should apply regardless of whether communities or State-appointed bodies are the rights holders.

107. The provisions as a whole envisage the exercise of rights by the relevant communities themselves. However, in cases where the relevant communities are not able or do not wish to exercise the rights directly, this draft article suggests a role for an “Agency”, acting at all times at the request of and on behalf of relevant communities. A role for such an “Agency” is entirely optional, and only necessary and appropriate if the relevant communities so wish.

108. An agency fulfilling these kinds of roles is provided for in the Model Provisions, 1982, the Indigenous Peoples Rights Act of 1997 of the Philippines (the Philippines Law, 1997), the Pacific Model Law, 2002 and in many national laws providing *sui generis* protection for TCEs/EoF. Several Member States have expressed support for an ‘authority’ in such cases.

109. An agency such as that suggested could be an existing office, authority or society, and also a regional organization or office. The African Regional Intellectual Property Organization (ARIPO) and *l’Organisation africaine de la propriete intellectuelle (OAPI)* have, for example, noted the possible role of regional organizations in relation to the protection of TCEs/EoF and TK. Copyright collecting societies could also play a role.

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

## Article 5: Exceptions and Limitations

111. Many stakeholders have stressed that any IP-type protection of TCEs should be subject to certain limitations so as not to protect them too rigidly. It has been suggested that overly strict protection may stifle creativity, artistic freedom and cultural exchanges, as well as be impracticable in its implementation, monitoring and enforcement.

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

113. This suggested provision puts forward certain exceptions and limitations for consideration:

(a) paragraph (a)(i) implements objectives and general guiding principles associated with non-interference in and support for the continued use and development of TCEs/EoF by communities, while (a)(ii) affirms that these provisions would apply only to ‘*ex situ*’ uses of TCEs/EoF, namely uses outside the customary or traditional context, whether for commercial purposes or not;

(b) paragraph (a)(iii) sets out exceptions drawn from the Model Provisions, 1982, the Pacific Islands Model Law, 2002 and copyright laws in general. Certain more specific comments include:

(i) Limitations and exceptions for teaching purposes are common in copyright laws. While these are sometimes limited to “face-to-face” teaching (as also in the Pacific Model, 2002), special limitations and exceptions to copyright and related rights for distance learning have also been raised for discussion.<sup>29</sup> The term “teaching and learning” is used for present purposes.

(ii) National copyright laws in some cases allow public archives, libraries and the like to make, for non-commercial safeguarding purposes only, reproductions of works and expressions of folklore and keep them available for the public<sup>30</sup>, and this is envisaged. In this respect, appropriate contracts, IP check-lists and other guidelines and codes of conduct for museums, archives and inventories of cultural heritage are under development by WIPO. Specific limitations for libraries and archives in copyright law in general have also been raised for discussion.

(iii) Not all typical copyright exceptions may be appropriate, however, as they might undermine community interests and customary rights – for example, incidental use exceptions which allow a sculpture or work of artistic craftsmanship

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<sup>29</sup> See Proposal by Chile (SCCR/12/3) on the Subject “Exceptions and limitations to copyright and related rights”, discussed at the 12<sup>th</sup> session of the WIPO Standing Committee on Copyright and Related Rights (SCCR), November 2004.

<sup>30</sup> An example is the United Kingdom’s Copyright, Designs and Patents Act, 1988, Schedule 2, par. 14.1.

permanently displayed in a public place to be reproduced in photographs, drawings and in other ways without permission. Thus, exceptions which would be offensive are excluded.

#### **Article 6: Term of Protection**

114. Many indigenous peoples and traditional communities desire indefinite protection for at least some aspects of expressions of their traditional cultures. Calls for indefinite protection are closely linked to calls for retroactive protection. On the other hand, it is generally seen as integral to the balance within the IP system that the term of protection not be indefinite, so that works ultimately enter the 'public domain'.

115. The suggested provision embodies a trademark-like emphasis on current use, so that once the community that the TCE is characteristic of no longer uses the TCE or no longer exists as a distinct entity (analogous to abandonment of a trademark, or a trademark becoming generic), protection for the TCE would lapse. Such an approach draws upon the very essence of the subject matter of protection, it being recalled that at the heart of TCEs/EoF is that they are characteristic of and identify a community. When a TCE ceases to do so, it ceases by definition to be a TCE and it follows that protection should lapse.

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

#### **Article 7: Formalities**

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

118. A key choice is whether or not to provide for automatic protection or for some kind of registration:

(a) a first option is to require some form of registration, possibly subject to formal or substantive examination. A registration system may merely have declaratory effect, in which case proof of registration would be used to substantiate a claim of ownership, or it may constitute rights. Some form of registration may provide useful precision, transparency and certainty on which TCEs are protected and for whose benefit;

(b) a second option would be to require automatic protection without formalities, so that protection would be available as of the moment a TCE is created, similar to copyright.

119. The suggested provision combines these two approaches.

First, paragraph (a) suggests as a general principle that TCEs/EoF should be protected without formality, following copyright principles and in an endeavor to make protection as easily available as possible.

Second, some form of registration or notification is, however, proposed for those TCEs/EoF for which, under Article 3 (a), would receive the strongest protection:

(i) registration or notification is optional only and a matter for decision by relevant communities. Registration or notification is not an obligation; protection remains available under Article 3 (b) for unregistered TCEs/EoF. There would be no need to register or notify secret TCEs/EoF because secret TCEs/EoF are separately protected under Article 3 (c). This registration option is applicable only in cases where communities wish to obtain strict, prior informed consent protection for TCEs/EoF which are already known and publicly available;

(ii) the provision draws broadly from existing copyright registration systems, the Database of Native American Insignia in the United States of America, the Panama Law, 2000, the Andean Decision 351, and the Peru Law, 2002;

(iii) a regional organization could conceivably administer such a registration or notification system. ARIPO and OAPI have, for example, noted the role of regional organizations in this area. While these provisions may have initial application at the national level, thus implying national registers or other notification systems, eventually some form of regional and international register could form part of possible eventual regional and international systems of protection. Such an international system of notification/registration could perhaps draw from existing systems such as Article 6*ter* of the Paris Convention or the registration system provided for in Article 5 of the Lisbon Agreement for the International Registration of Appellations of Origin, 1958;

(iv) it is suggested that the office or organization at which such registrations or notifications may be made, and which would seek to resolve disputes, should not be the same as the Agency referred to in Article 4;

(v) it is made clear that it is only a community which claims protection of a particular TCEs/EoF that can register or notify the TCEs/EoF, or, in cases where the community is not able to do so, the Agency referred to in Article 4, acting at the request and in the interests of the community;

(vi) in resolving disputes between communities, including communities from more than one country, the draft article suggests that the registration office or organization use customary laws and processes and alternative dispute resolution (ADR) as far as possible. These are suggested in order to achieve as far as possible objectives and principles relating to customary law and non-conflict between communities. In so far as taking existing cultural resources into account, the office or organization could refer

also to cultural heritage inventories, lists and collections such as those established under the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003. There may, more broadly, be some opportunities for developing synergies between inventories established or being established for cultural heritage preservation purposes (such as States Parties are obliged to do under the UNESCO Convention referred to) and the kind of registers or notification systems suggested here. Indeed, measures could be developed to ensure that cultural heritage inventories, lists and collections could reinforce, support and facilitate the implementation of *sui generis* provisions for the protection of TCEs/EoF (and TK).<sup>31</sup>

#### *Recording, fixation and documentation of TCEs/EoF*

120. The role of documentation, recording and fixation of TCEs/EoF and its relationship with IP protection has been discussed at length in previous documents and publications.<sup>32</sup> In brief, previous discussions have identified certain IP-related concerns with documentation initiatives. For example, copyright and related rights in the documentation, recordings and fixations would almost always vest not in the communities themselves but in those who undertake the documentation, recording or fixation. Second, documentation and record of TCEs/EoF, particularly if made available in digitized form, make the TCEs/EoF more accessible and available and may undermine the efforts of communities to protect them. For these reasons, the proposed article provides that any IP rights in recordings made specifically for registration purposes should vest in the relevant communities. Indeed, fixing in material form TCEs/EoF which would not otherwise be protectable, establishes new IP rights in the fixation and these IP rights could be used indirectly to protect the TCEs/EoF themselves (this strategy has been used for example to protect ancient rock art).<sup>33</sup> It is furthermore clear that the recording and documentation of TCEs/EoF is a valuable if not essential component of cultural heritage safeguarding programs.

#### *Comments made during the intersessional written commenting process*

121. The comments made were proposed by the **Republic of Korea** and Mexico.

#### *Relationship with “characteristics” of TCEs*

122. A delegation believed that formalities should be put in place, particularly, when considering the characteristics of TCEs. For instance, difficulties could arise when determining the time of original creation of a TCE and when specifying the time in which the TCE was recognized or authorized as a TCE. A gap could exist between these two time points, leading to the issue of retroactive protection of TCEs. For that reason, protecting a TCE from the time of its original creation without any formalities could cause confusion to both rights holders and users of TCEs.

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<sup>31</sup> See UNESCO Expert Meeting on Inventorying Intangible Cultural Heritage, March 17 and 18, 2005.

<sup>32</sup> See WIPO/GRTKF/IC/5/3, WIPO/GRTKF/IC/6/3 and WIPO/GRTKF/IC/7/3, for example.

<sup>33</sup> See, for example, Janke, ‘Unauthorized Reproduction of Rock Art’ in *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, WIPO, 2003.

*“Normative systems”*

123. A delegation explained that “normative systems” comprised knowledge developed and preserved within specific groups of indigenous peoples and communities, and passed on from generation to generation, in oral form. Indigenous normative systems were therefore part of the same cultural matrix as traditional medicine, art and handicrafts, myths of creation, and relationship of exchange, which existed between the communities and with nature. To that extent, internal normative systems constituted TK of indigenous peoples and indigenous peoples should have the right to use their normative systems to resolve any internal disputes that would arise.

**Article 8: Sanctions, Remedies and Exercise of Rights**

124. This provision concerns which civil and criminal sanctions and remedies may be made available for breaches of the rights provided.

125. Communities and others have pointed out that the remedies available under current law may not be appropriate to deter infringing use of the works of an indigenous copyright holder, or may not provide for damages equivalent to the degree of cultural and non-economic damage caused by the infringing use. References have also been made to the desirability of alternative dispute resolution (ADR) in this area.

126. Member States have pointed out the necessity of appropriate guidance and practical experiences with sanctions, remedies and enforcement.

**Article 9: Transitional Measures**

127. This provision concerns whether protection should operate retroactively or prospectively, and in particular how to deal with utilizations of TCEs/EoF that are continuing when the provisions enter into force and which had lawfully commenced before then.

128. As many Committee participants have pointed out, this question touches directly upon the notion of the “public domain”. Previous documents have pointed out that a “clearer understanding of the role, contours and boundaries of the public domain is vital in the development of an appropriate policy framework for the IP protection of TCEs.”<sup>34</sup> Committee participants have stated that the public domain was not a concept recognized by indigenous peoples and/or that as expressions of folklore *stricto sensu* had never been protected under IP they could not be said to have entered a “public domain.”

129. Several options are apparent in existing laws:

(i) retroactivity of the law, which means that all previous, ongoing and new utilizations of TCEs would become subject to authorization under the new law or

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<sup>34</sup> See for example WIPO/GRTKF/IC/5/3 and subsequent documents.

regulation;

(ii) non-retroactivity, which means that only those new utilizations would come under the law or regulation that had not been commenced before their entry into force; and

(iii) an intermediate solution, in terms of which utilizations which become subject to authorization under the law or regulation but were commenced without authorization before the entry into force, should be brought to an end before the expiry of a certain period (if no relevant authorization is obtained by the user in the meantime, as required).

130. Existing *sui generis* systems and models either do not deal with the question, or provide only for prospective operation. However, the Pacific Regional Model, 2002 follows in general the intermediate solution described above.

131. This intermediate solution is the approach of the draft provision. It draws particularly from the Pacific Regional Model, 2002 as well as wording found in article 18 of the Berne Convention for the Protection of Literary and Artistic Works, 1971.

## **Article 10: Relationship with Intellectual Property Protection and Other Forms of Protection, Preservation and Promotion**

### *Relationship with IP laws*

132. These provisions are intended to provide forms of protection for TCEs/EoF not currently available under conventional and existing IP laws.

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

(a) copyright and industrial designs laws can protect contemporary adaptations and interpretations of pre-existing materials, even if made within a traditional context;

(b) copyright law may protect unpublished works of which the author is unknown;

(c) the *droit de suite* (the resale right) in copyright allows authors of works of art to benefit economically from successive sales of their works;

(d) performances of “expressions of folklore” may be protected under the WIPO Performances and Phonograms Treaty (WPPT), 1996;

(e) traditional signs, symbols and other marks can be registered as trademarks;

(f) traditional geographical names and appellations of origin can be registered as geographical indications; and

(g) the distinctiveness and reputation associated with traditional goods and services can be protected against “passing off” under unfair competition laws and/or the use of certification and collective trade marks.

### *Relationship with non-IP measures*

134. It has also been discussed widely that comprehensive protection may require a range of proprietary and non-proprietary, including non-IP, tools. Non-IP approaches that may be relevant and useful include trade practices and marketing laws; laws of privacy and rights of publicity; law of defamation; contracts and licenses; cultural heritage registers, inventories and databases; customary and indigenous laws and protocols; cultural heritage preservation and promotion laws and programs; and handicrafts promotion and development programs. In particular, as some Committee participants have suggested, opportunities for synergies between the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003 and these provisions could be further explored.

135. The suggested provisions are not intended to replace the need for such non-IP measures and programs. IP and non-IP approaches and measures are not mutually-exclusive options, and each may, working together, have a role to play in a comprehensive approach to protection.

136. The provisions are intended to complement and work together with laws and measures for the preservation and safeguarding of intangible cultural heritage. In some cases, existing cultural heritage measures, institutions and programs could be made use of in support of these principles, thus avoiding a duplication of effort and resources. Which modalities and approaches are adopted will also depend upon the nature of the TCEs to be protected, and the policy objectives that protection aims to advance.

### **Article 11: International and Regional Protection**

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

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

139. Instead of national treatment, or supplementing it, other international legal mechanisms have been used to recognize the IP rights of foreign nationals. Under “reciprocity” (or reciprocal recognition), whether a country grants protection to nationals



of a foreign country depends on whether that country in turn extends protection to nationals of the first country; the duration or nature of protection may also be determined by the same principle. Under a “mutual recognition” approach, a right recognized in one country would be recognized in a foreign country by virtue of an agreement between the two countries. Another related mechanism for affording access to a national system is “assimilation” to an eligible nationality by virtue of residence.

140. Also of potential application to the recognition of rights of foreign rights holders, is the “most-favoured-nation” principle. The TRIPS Agreement provides (subject to exceptions) that: “[w]ith regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a [WTO] Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.”

141. The protection of foreign holders of rights in TCEs/EoF is, however, a complex question as Committee participants have pointed out. The Delegation of **Arab Republic of Egypt**, for example, stated at the seventh session: “. . . TCEs/EoF were often part of the shared cultural heritage of countries. Their regional and international protection was therefore a complex issue and it was necessary to be very careful. Countries would have to consult with each other before adopting any legal measures in this regard.”<sup>35</sup> In view of this complexity, Committee discussions have thus far provided little specific guidance on this technical question and existing TCE *sui generis* national laws either do not protect foreign rights holders at all or show a mix of approaches.

142. For present purposes, therefore, a provision based generally upon national treatment as is found in Article 5 of the Berne Convention, is proposed for further consideration and analysis.

143. Further drafts of these provisions could, depending on the Committee’s wishes, explore more deeply the kinds of technical provisions found in international instruments, such as provisions dealing with points of attachment, assimilation, protection in the country of origin and independent protection. They could also address further the question of “regional folklore” and the practical relationship between the international dimension and the suggested registration/notification of TCEs/EoF. As stated in the commentary to those articles, they currently refer to national registers, but there could eventually be envisaged some form of regional and/or international registers, drawing from, for example, Article 6*ter* of the Paris Convention or the registration system provided for in Article 5 of the Lisbon Agreement for the International Registration of Appellations of Origin, 1958.

#### **D. Date and Venue of the Seventeenth Session of IGC**

144. The Seventeenth Session of the IGC will be held from 6-10 December 2010 at Geneva, Switzerland.

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<sup>35</sup> WIPO/GRTKF/IC/7/15 Prov. Par. 69.

#### **IV. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT**

145. For every country, folklore is the root of the nation's cultural tradition; for mankind, it is the rich and varied but non-regenerative resources as well as the incomparably valuable heritage of human society. The Asian-African countries which are the owners of major resources are still to find a best possible model to protect the Expressions of Folklore (EoF) both at national, regional and international level. In the asymmetrical situation prevailing at present between the developing and the developed countries, the Member States should utilize all available options, whether inside or outside the Intellectual Property system, preventive or defensive, national or international, to seek the objective of effective protection of expressions of folklore.

146. The WIPO Intergovernmental Committee as an international forum was successful in drafting Provisions for the Protection of Expressions of folklore. Although these provisions are in the draft stage, they present a comprehensive framework for a future Convention. It is a welcoming trend that WIPO General Assembly had decided to renew its mandate by extending the period of IGC in October 2009, to start with text based negotiations aimed at creating a legal mechanism to protect the Expressions of Folklore. Under the new mandate, the IGC is to submit the texts of the international legal instrument to the WIPO General Assembly in September 2011. The Assembly would then decide on convening a Diplomatic Conference.

147. In the previous Sessions of the IGC, most of the developing countries were of the view that the approach of the document should focus on defining the framework of an international legally binding instrument as the first priority. Further, it was pointed out that the developed countries, had taken a more methodical approach to internationalizing the issue of intellectual property which is a special concern to developing countries.

148. The Policy Objectives and Core principles and the Draft Substantive Provisions have been considered by the IGC at its Fourteenth, Fifteenth and Sixteenth Sessions. The Member States have expressed divergent views and comments on the acceptability and commitment to protect the TCEs/EoF during those Sessions. The draft gap analysis document prepared by the WIPO Secretariat gives each Member State a rough description of some of the gaps related to the intellectual property protection of Expressions of Folklore.

149. As the IGC is moving forward towards the text based negotiations to protect the expressions of folklore (EoF), the issues would be discussed by the Inter-sessional Working Groups (IWGs) established for that purpose. It was decided that the three subjects, Expressions of Folklore, Traditional Knowledge and Genetic Resources will be treated on an equal footing and the each subject would be allocated an equal amount of time for discussion. The first IWG meeting would solely focus on EoF matters and which is scheduled in July 2010. In this regard, the AALCO Secretariat urges the Member States to utilize fully the first IWG meeting on EoF, in order to bring out an effective legal instrument to protect the EoF in the Asian and African region.

150. AALCO an intergovernmental legal Organization with representation from almost all major countries from Asia and Africa could be a suitable forum for further discussion and deliberation on the protection of expressions of folklore. This would help in consolidating the position of the Asian-African countries on the substantive aspect of the future international instrument for the protection of expressions of folklore. AALCO also feels that a joint seminar/expert meeting or to undertake a special study on folklore matters jointly with Member States or with any other relevant intergovernmental Organization, in order to find a common ground to protect the expressions of folklore both at national and international level, would be useful.

## Annex-I

### REVISED PROVISIONS FOR THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE POLICY OBJECTIVES AND CORE PRINCIPLES<sup>36</sup>

#### I. OBJECTIVES

The protection of traditional cultural expressions, or expressions of folklore<sup>37</sup>, should aim to:

##### *Recognize value*

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

##### *Promote respect*

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

##### *Meet the actual needs of communities*

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

##### *Prevent the misappropriation and misuse of traditional cultural expressions/expressions of folklore*

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

##### *Empower communities*

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

##### *Support customary practices and community cooperation*

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

##### *Contribute to safeguarding traditional cultures*

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

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<sup>36</sup> Reproduced as per the Draft Document Prepared by the WIPO Secretariat, See WIPO/GRTKF/IC/16/4.

<sup>37</sup> In these provisions, the terms “traditional cultural expressions” and “expressions of folklore” are used as interchangeable synonyms, and may be referred to simply as “TCEs/EoF”. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.

*Encourage community innovation and creativity*

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

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

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

*Contribute to cultural diversity*

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

*Promote the community development of indigenous peoples and communities and traditional and other cultural communities; and legitimate trading activities*

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

*Preclude unauthorized IP rights*

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

*Enhance certainty, transparency and mutual confidence*

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

## **II. GENERAL GUIDING PRINCIPLES**

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

## **III. SUBSTANTIVE PROVISIONS**

### **ARTICLE 1: SUBJECT MATTER OF PROTECTION**

(a) (A) “Traditional cultural expressions” and/or “expressions of folklore” are any forms, whether tangible or and intangible // are any forms, whether tangible, intangible or a combination thereof // are any forms,

tangible and intangible // and any forms, tangible and/or intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and are passed on from generation to generation, including: // such as but not limited to and comprise the following forms of expressions or combinations thereof:

(i) phonetic or verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols, etc.;

(ii) musical or sound expressions, such as songs, rhythms, and instrumental music and popular tales;

(iii) expressions by action, such as dances, plays, ceremonies, rituals, sports and traditional games and other performances, theater, including, among others, puppet performance and folk drama, whether or not reduced to a material form; and,

(iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), wooden carvings, sculptures, mouldings, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, food and drink, needlework, textiles, glassware, carpets, costumes, works of mas, toys, gifts and ; handicrafts; musical instruments; stonework, metalwork, spinning, and architectural and/or funeral forms;

which are:

(aa) the products of creative intellectual activity, including individual and communal creativity;

(bb) characteristic indicative of authenticity/being genuine of a community's the cultural and social identity and cultural heritage of indigenous peoples and communities and traditional and other cultural communities; and

(cc) maintained, used or developed by indigenous peoples and communities and traditional and other cultural communities such community, or by individuals having the right or responsibility to do so in accordance with the customary land tenure system or law // customary law normative systems and or traditional/ancestral practices of those indigenous peoples and communities and traditional and other cultural communities, or has an affiliation with an indigenous/traditional community that community.

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

## ARTICLE 2: BENEFICIARIES

Measures for the protection of national traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples and communities, individual groups, families, tribes, nations and traditional and other cultural communities or the nation//or the countries, to which a traditional cultural expression/expression of folklore is specific:

(i) in whom the custody, care and safeguarding of the TCEs/EoF are entrusted existing in accordance with their customary law and or practices; and

(ii) who maintain, control, use or develop the traditional cultural expressions/expressions of folklore as being characteristic authentic and genuine of their cultural and social identity and cultural heritage.

## ARTICLE 3: ACTS OF MISAPPROPRIATION AND MISUSE (SCOPE OF PROTECTION)

*Traditional cultural expressions/expressions of folklore registered or notified of particular value or significance*

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

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

- the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography) of the traditional cultural expressions/expressions of folklore or derivatives thereof;

- any use of the traditional cultural expressions/expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the indigenous peoples and communities and traditional and other cultural communities community as the source of the traditional cultural expressions/expressions of folklore;

- any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore, done in order to cause harm thereto or to the reputation or image of the community, indigenous peoples and communities or region to which they belong; and

- the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof;

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

(iii) any fixation, representation, publication, communication or use in any form of the traditional cultural expressions/expressions of folklore which make no mention of the community, indigenous peoples or communities or region to which they belong.

*Other traditional cultural expressions/expressions of folklore*

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

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

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

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

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

*Secret traditional cultural expressions/expressions of folklore*

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

**ARTICLE 4: MANAGEMENT OF RIGHTS**

(a) Prior authorizations to use traditional cultural expressions/expressions of folklore, when required in these provisions, should be obtained either directly from the indigenous peoples and communities and each

of the groups, families, tribes, nations, traditional and other cultural communities or countries community concerned where the community so wishes, or from a designated national authority an agency acting at the request, and on behalf, of the indigenous people and community or the traditional and other cultural communities community (from now on referred to as “the Agency”). Where authorizations are granted by the authority Agency:

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

(ii) any monetary or non-monetary benefits collected by the designated national authority Agency for the use of the traditional cultural expressions/expressions of folklore should be provided directly by it to the indigenous people and community and the traditional and other cultural communities concerned.

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

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

(ii) establish the equitable remuneration referred to in Article 3 (b) in consultation with the relevant indigenous peoples and communities and traditional and other cultural communities community.

#### **ARTICLE 5: EXCEPTIONS AND LIMITATIONS**

(a) Measures for the protection of TCEs/EoF should:

(i) not restrict or hinder the normal use, transmission, exchange and development of TCEs/EoF within the traditional and customary context by members of the indigenous peoples and communities and traditional and other cultural communities ~~relevant community~~ as determined by customary laws and practices;

(ii) extend only to utilizations of TCEs/EoF taking place outside the traditional or customary context, whether or not for commercial gain; and,

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

- by way of illustration for teaching and learning;
  - non-commercial research or private study;
  - criticism or review;
  - reporting news or current events;
  - use in the course of legal proceedings;
  - the making of recordings and other reproductions of TCEs/EoF for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes;
- and
- incidental uses,

provided in each case that such uses are compatible with fair practice, the relevant indigenous peoples and communities and traditional and other cultural communities ~~community~~ is acknowledged as the source of the TCEs/EoF where practicable and possible, and such uses would not be offensive to such indigenous peoples and communities and traditional and other cultural communities, as long as the traditional cultural expressions/expressions of folklore are not distorted, mutilated or modified so as to cause harm thereto or to the reputation of the community, indigenous peoples and communities or region to which they belong ~~the relevant community~~.



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

#### **ARTICLE 6: TERM OF PROTECTION**

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

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

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

(iii) the protection granted to TCEs/EoF against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the community, indigenous peoples and communities or region to which they belong, shall last indefinitely.

#### **ARTICLE 7: FORMALITIES**

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

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

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

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

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

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

#### **ARTICLE 8: SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS**

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

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

#### **ARTICLE 9: TRANSITIONAL MEASURES**

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

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

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

Protection for traditional cultural expressions/expressions of folklore in accordance with these provisions does not replace and is complementary to protection applicable to traditional cultural expressions/expressions of folklore and derivatives thereof under other intellectual property laws, laws and programs for the safeguarding, preservation and promotion of cultural heritage, and other legal and non-legal measures available for the protection and preservation of traditional cultural expressions/expressions of folklore.

#### **ARTICLE 11: INTERNATIONAL AND REGIONAL PROTECTION**

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

**EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION**  
*(Deliberated)*

*The Asian-African Legal Consultative Organization at its Forty-Ninth Session,*

**Having Considered** the Secretariat Document No. AALCO/49/DAR ES SALAAM/2010/S 14;

**Having heard** with appreciation the introductory statement of the Deputy Secretary-General;

**Recognizing** the importance of national and international protection of the 'Expressions of Folklore' for the Asian-African countries;

**Welcoming** the World Intellectual Property Organization (WIPO) General Assembly initiative in establishing an Intergovernmental Committee (IGC) to discuss the legal, policy and international framework for the protection of Expressions of Folklore (EoF);

**Also welcoming** the renewal of the mandate of the IGC by WIPO General Assembly in October 2009;

1. **Expresses** the hope that the WIPO IGC would be able to adopt an international legal and policy framework for the protection of Expressions of Folklore;

2. **Requests** the Secretary-General to organize an Expert Meeting in cooperation with WIPO or with any other Member State (s), to facilitate the exchange of views by Member States on the issues of international protection of Expressions of Folklore including the Draft Agreement for the Protection of Expressions of Folklore prepared by the International Bureau of WIPO;

3. **Encourages** Member States to actively participate in the future work of the agenda item at all the WIPO meetings;

4. **Directs** the Secretary-General to follow up the developments within the WIPO IGC on 'Expressions of Folklore', and to present the views of the AALCO Member States to the IGC; and

5. **Decides** to place the item on the provisional agenda of the Fiftieth Session.