

ARTICLE 1:

SUBJECT MATTER OF PROTECTION

(a) "Traditional cultural expressions" or [VENEZUELA: and/or] "expressions of folklore" are any forms, whether tangible and intangible, [INDIA, AUSTRALIA: whether tangible or intangible] [ISLAMIC REPUBLIC OF IRAN: tangible, intangible or a combination thereof] in which traditional culture and knowledge are expressed, appear or are manifested, [PHILIPPINES, similar comment by VENEZUELA, EGYPT, ISLAMIC REPUBLIC OF IRAN, COLOMBIA: such as, but not limited to, and comprise] and comprise the following forms of expressions or combinations thereof:

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

(ii) musical expressions, such as songs and instrumental music;

(iii) expressions by action, such as dances, plays, ceremonies, rituals [TRINIDAD AND TOBAGO, PLURINATIONAL STATE OF BOLIVIA: sports and traditional games] and other performances,

whether or not reduced to a material form; and,

(iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, [INDIA: mouldings] pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes, [TRINIDAD AND TOBAGO: works of mas]; handicrafts; musical instruments; and architectural forms;

which are:

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

(bb) characteristic [BRAZIL: reference to authentic/genuine] of a community's cultural and social identity and cultural heritage [BRAZIL: replace "heritage" with a word meaning "patrimonio" in Spanish]; and

– (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law [MEXICO, EL SALVADOR: law normative systems] and [AUSTRALIA: and or] [ANGOLA: traditional/ancestral] practices of that community.

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

* To be checked against the tapes for purposes of the official report of the session

COMMENTS and QUESTIONS

SUDAN, RUSSIAN FEDERATION, SPAIN, COLOMBIA, CAMEROON, CHINA: add an article setting out definitions of key terms/develop a glossary of key terms

UNITED STATES OF AMERICA, AUSTRALIA: who determines who is part of a "community"? How to deal with the issue of diaspora?

FRANCE: who determines what is "characteristic" and at which stage?

REPUBLIC OF KOREA: there is a possible overlap with copyright protection for adaptations and variations of TCEs, how will this conflict be resolved?

ITALY, MEXICO: conflict with the Berne Convention definitions should be considered

JAPAN, AUSTRALIA: the impact on the public domain should be examined

SUGGESTIONS BY OBSERVERS

FILAIE: in relation to (a), add after "or are manifested", "in original form"; delete "and knowledge"; review reference to "architectural forms"; in relation to (aa), add "which was created by former generations".

SAAMI COUNCIL, in relation to (cc), replace with: "affiliated with an indigenous people or community due to its cultural significance to that indigenous people or community"

ARTICLE 2:

BENEFICIARIES

Measures for the protection of [MOROCCO: national] traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples and traditional and other cultural communities [MOROCCO: or the nation].¹

(i) *in whom the custody, care and safeguarding of the TCEs/EoF are entrusted [INDIA: ~~entrusted~~ existing] in accordance with their customary law and [AUSTRALIA: ~~and~~ or] practices; and*

(ii) *who maintain, [TRINIDAD AND TOBAGO: control] use or develop the traditional cultural expressions/expressions of folklore as being characteristic [BRAZIL: reference to authentic/genuine] of their cultural and social identity and cultural heritage [BRAZIL: replace "heritage" with a word meaning "patrimonio" in Spanish].*

COMMENTS and QUESTIONS

AUSTRALIA: difficulties to prove the relevant customary law for Australia's Indigenous communities which is why "or" practices is preferred

EL SALVADOR: other groups should also be referred to in addition to "indigenous peoples and traditional and other cultural communities"

SUGGESTION BY OBSERVER

ARTS LAW CENTRE OF AUSTRALIA: in relation with 2(i), the requirement that communities prove that they have been entrusted with the custody, care and safeguarding of the TCEs/EoF in accordance with their customary law and practices should be deleted and a presumption should apply in favor of the Indigenous community claiming to have been entrusted with the custody, care and safeguarding of the TCEs/EoF. 2(i) ought to read: "in whom the custody, care and safeguarding of the TCEs/EoF are entrusted." The end of the sentence should be deleted, and a new clause should be added at the end of the provision, reading: "The Indigenous peoples and traditional and other cultural communities claiming the benefit of the measures for the protection of traditional cultural expressions/expressions of folklore are presumed to have been entrusted with the custody, care and safeguarding of those traditional cultural expressions/expressions of folklore." Alternatively, and as a minimum, the same change as proposed by the delegate of Australia should be made and 2(i) should read: "in whom the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with their customary law or practices." On a general note, in Australia, Indigenous peoples consider it disrespectful to use the term indigenous otherwise than with a capital I. Therefore, the word "indigenous" could be with a capital I throughout the text. This spelling is consistent with the one used in the Declaration on the Rights of Indigenous peoples.

¹ 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.