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DATE: SEPTEMBER 15, 2010**Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore****Seventeenth Session****Geneva, December 6 to 10, 2010****DRAFT ARTICLES ON THE PROTECTION OF TRADITIONAL CULTURAL
EXPRESSIONS/EXPRESSIONS OF FOLKLORE PREPARED AT IWG 1****IN SESSION VERSION****December 8, 2010, 1:00 PM***Document prepared by the Secretariat***INTRODUCTION**

1. The First Intersessional Working Group (IWG 1) met from July 19 to 23, 2010 to discuss traditional cultural expressions (TCEs). With reference to document WIPO/GRTKF/IC/17/4 Prov. ("The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles"), IWG 1 discussed the issues and articles in that document as follows: objectives and general guiding principles; subject matter of protection (Article 1); beneficiaries/management of rights (Articles 2 and 4); acts of misappropriation/exceptions and limitations/formalities (Articles 3, 5 and 7); term of protection/transitional measures (Articles 6 and 9); sanctions/remedies and exercise of rights (Article 8); relationship with IP protection and other forms of protection, preservation and promotion (Article 10); and, international and regional protection (Article 11).
2. The results of IWG 1 are reported on in the session's "Summary Report" (WIPO/GRTKF/IWG/1/2), made available at this session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) as document WIPO/GRTKF/IC/17/8. In particular, after extensive and

detailed deliberations in the plenary of IWG 1, six informal, open-ended drafting groups were established to further discuss, exchange and consolidate the various views expressed in the plenary, and to propose streamlined text, including options, on each cluster of issues. The work of the informal drafting groups was consolidated and introduced by the respective rapporteurs of the drafting groups to all the experts in the IWG 1 plenary on July 23, 2010, as the advice that IWG 1 was requested to provide to the IGC. The consolidated drafts were commented on by the experts in the IWG 1 plenary and some experts added new options. The drafting proposals, comments and additional options were noted and not adopted as such.

3. IWG 1 requested the Secretariat to prepare, for this session of the IGC, a document incorporating the draft articles prepared by the informal drafting groups, as well as the additional comments and options made by the IWG 1 plenary on July 23, 2010, as referred to above. This present document fulfils that request.

Preparation and structure of this document

4. The articles prepared at IWG 1 appear in the annex to this document. In respect of each article, there also appears: (i) the introduction made by the rapporteur(s) of the relevant drafting group; (ii) comments on the proposed articles made by the experts in the IWG 1 plenary on July 23, 2010; and, (iii) any alternative options presented by experts on the same day. Alternative options were presented in respect of articles 1, 3 and 8.

Related documents

5. The following documents also made available at this session of the IGC are directly related to the present document:

"Summary Report of the First Intersessional Working Group (IWG 1)", which includes the List of Participants of IWG 1 (WIPO/GRTKF/IC/17/8); and,

"Record of Deliberations of IWG 1" (WIPO/GRTKF/IC/17/INF/7).

6. *The Committee is invited to review and comment on the articles contained in the Annex towards developing a revised and updated version thereof.*

[Annex follows]

ANNEX

CANADA: OBJECTIVES [to be discussed at a later stage]¹

The protection of traditional cultural expressions, or expressions of folklore,² should aim to:

Recognize value

- (i) recognize that indigenous peoples and communities³ 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 communities⁴ 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 misuse⁵ of traditional cultural expressions/expressions of folklore

- (iv) provide indigenous peoples and communities⁶ 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] [adaptations]⁷ therefrom, and [control]⁸ ways in which they are used beyond the customary and traditional context and promote the equitable sharing of benefits arising from their use;

¹ Note from the Secretariat: this text is copied directly from document WIPO/GRTKF/IC/17/4, including the proposals reflected in the text and accompanying footnotes.

² Note from the Secretariat: 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

³ Delegation of Mexico

⁴ Delegation of Mexico

⁵ Delegation of Mexico

⁶ Delegation of Mexico

⁷ Delegation of the United States of America. The Delegation suggested "bracketing" all occurrences of the word "derivatives". As an alternative to deletion, it proposed replacing "derivatives" with "adaptations". The concept of "derivatives" did not exist in existing international IP texts in the same way that "adaptations" did. The right of adaptation was a well known right in Article 14 and Article 14bis of the Berne Convention, while the "derivatives" concept was established in some national laws. For consistency, "adaptations" was preferred. The Delegation of South Africa opposed the proposal

⁸ Delegation of Mexico

Empower communities

- (v) be achieved in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and communities⁹ and traditional and other cultural communities to exercise in an effective manner their¹⁰ 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 communities¹¹ and traditional and other cultural communities, and for the benefit of humanity in general;

Encourage community innovation and creativity

- (viii) reward and protect tradition-based creativity and innovation especially by indigenous peoples and communities¹² 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 communities¹³ 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 communities¹⁴ and legitimate trading activities

- (xi) where so desired by [communities] indigenous peoples and communities and traditional and other cultural communities¹⁵ 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 communities¹⁶, recognizing them as an asset of the communities that

⁹ Delegation of Mexico

¹⁰ Delegation of Mexico

¹¹ Delegation of Mexico

¹² Delegation of Mexico

¹³ Delegation of Mexico

¹⁴ Delegation of Mexico

¹⁵ Delegation of Mexico

¹⁶ Delegation of Mexico

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] [adaptations]¹⁷ thereof.

Enhance certainty, transparency and mutual confidence

(xiii) enhance certainty, transparency, mutual respect and understanding in relations between indigenous peoples and communities¹⁸ and traditional and cultural communities, on the one hand, and academic, commercial, governmental, educational and other users of TCEs/EoF, on the other.

¹⁷ Delegation of the United States of America

¹⁸ Delegation of Mexico

CANADA: GENERAL GUIDING PRINCIPLES [to be discussed at a later stage]

- (a) Responsiveness to aspirations and expectations of relevant communities
- (b) Balance
- (c) Respect for and consistency with international and regional agreements and instruments
- (d) Flexibility and comprehensiveness
- (e) Recognition of the specific nature and characteristics of cultural expression
- (f) Complementarity with protection of traditional knowledge
- (g) Respect for rights of and obligations towards indigenous peoples and [other traditional communities] communities and traditional and other cultural communities¹⁹
- (h) Respect for customary use and transmission of TCEs/EoF
- (i) Effectiveness and accessibility of measures for protection

¹⁹ Delegation of Mexico

ARTICLE 1

SUBJECT MATTER OF PROTECTION

1. "Traditional cultural expressions" and/or "expressions of folklore" are any form, tangible or intangible IRAN, ISLAMIC REPUBLIC OF: or a combination thereof, in which traditional culture and knowledge are embodied FILAIE: in an original manner and have FILAIE usually been passed on EUROPEAN UNION, ITALY: [from generation to generation], ITALY: tangible or intangible forms of creativity, as defined in Article 2, including, but not limited to:
 - (a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, RUSSIAN FEDERATION: [signs,] names, RUSSIAN FEDERATION: [and symbols];
 - (b) ITALY [musical or sound expressions, such as songs, RUSSIAN FEDERATION: [rhythms,] and instrumental music, MEXICO the sounds which are the expression of rituals;
 - (c) expressions by action, MEXICO, FILAIE, NIGERIA gestures and body movements, such as dances, plays, ceremonies, rituals, MEXICO: sacred places and peregrinations ITALY, EGYPT, UNITED STATES OF AMERICA, KENYA, TUPAJ AMARU, CANADA: [TRINIDAD-AND-TOBAGO, BARBADOS, GRTKF INTERNATIONAL, SWITZERLAND, MEXICO, NIGERIA, CISA: sports and NIGERIA: [traditional]] games, puppet performances, and other FILAIE artistic and spiritual performances, INDIA: whether fixed or unfixed;
 - (d) UNITED STATES OF AMERICA: [tangible expressions, such as] material expressions of art, RUSSIAN FEDERATION: [handicrafts,] EGYPT, NIGERIA [TRINIDAD-AND-TOBAGO, BARBADOS, CAPAJ, JAMAICA, CISA: works of Mas.] FILAIE, COLOMBIA: [architecture,] NIGERIA: [LLAMADO DE LA TIERRA: designs] and UNITED STATES OF AMERICA: tangible RUSSIAN FEDERATION, CANADA [spiritual forms], MEXICO: techniques and technologies IRAN, ISLAMIC REPUBLIC OF, CISA: and sacred place.
2. Protection JAPAN: [shall] should extend to any traditional cultural expression or expression of folklore which is the INDIA, SWITZERLAND, FILAIE, ARIPO, TULALIP TRIBES: [unique] INDIA: indicative SWITZERLAND: characteristic NIGERIA: [FILAIE: original] product of IRAN, ISLAMIC REPUBLIC OF: a people or community, including an indigenous people or local community IRAN, ISLAMIC REPUBLIC OF: and cultural communities BARBADOS, EGYPT, IRAN, ISLAMIC REPUBLIC OF, JAMAICA: or nations ITALY: as defined in Article 2, and INDIA, ARIPO: [belongs] used and developed ARIPO: is characteristic of to that people or community INDIA: [as part of their cultural or social identity or heritage]. UNITED STATES OF AMERICA, AUSTRALIA: Protected TCEs/EOF shall be:
 - (a) the products of INDIA: [creative intellectual activity,] including communal creativity;
 - (b) indicative of INDIA: [authenticity/being genuine] of the cultural and social identity and cultural heritage of indigenous peoples and communities and traditional and other cultural communities; and
 - (c) maintained, used or developed by nations, states, indigenous peoples and communities and traditional and other cultural communities, or by individuals having the right or responsibility to do so in accordance with the customary land tenure system or law customary normative systems 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".

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

[Commentary on Article 1 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Justin Hughes introduced the work of the drafting group on Article 1. He thanked N. S. Gopalakrishnan, Weerawit Weeraworawit, Sa'ad Twaissi, Esteriano Emmanuel Mahingila, Natacha Lenaerts, in an observer capacity, as well as Benny Müller and Norman Bowman, and several experts from NGOs. The principal goal of the working group was to streamline the text as much as possible, while retaining the coverage that Member States at the IGC seemed to have intended.

The single bracket in the text "[and knowledge]" in Article 1(1) did not reflect a disagreement within the working group, but a desire by at least one expert (and agreeable to the others) to see what the coverage of any final text or instrument on traditional knowledge (TK) would be to determine that relevant TK had proper coverage through that parallel text. In other words, it did not mean that some of the group members thought knowledge had to be in, but that it was preferred to wait and see what the subject matter of protection in a TK text or instrument would state before finally removing any reference to TK in the TCE instrument.

Subparagraph (1)(a) was only slightly changed. In subparagraph (1)(b), the group deleted a reference to "tales", as it was adequately covered by "narratives and stories, epics, legends, poetry" in subparagraph (a). In subparagraph (1)(c), the group removed "folk dramas" as those fell into "plays, ceremonies or rituals". It also eliminated "sports" as it was adequately covered under "games".

The most extensive shortening and streamlining of the list occurred in subparagraph (1)(d), where the group deleted most of the enumerated elements in favor of "art" or "handicrafts". He recognized that the initial list had come from the 1982 WIPO-UNESCO Model Provisions, but the list had become inappropriately long. All of the enumerated items ("wooden carvings, sculptures, mouldings, pottery, terracotta, . . . glassware, carpets . . . toys") would fall under "art" or "handicrafts", or both. On the question of "funeral forms" and "sacred sites", both could be included in "spiritual forms". He argued that the notion of "spiritual forms" would allow a country to recognize, under domestic law, that a sacred place might constitute a TCE, despite there being no international agreement on the issue. In other words, in the case of both "sports" and "sacred sites", the informal working group recognized the substantial disagreement among the experts and sought concepts that could permit a nation to include these areas in its own implementation of TCE protection without necessarily requiring such implementation.

As to paragraph (2), the working group concluded that some of the elements duplicated requirements in the rest of Article 1, as well as in Article 2. The working group sought to streamline the concepts that the TCE must be the "product of creative intellectual activity" as well "characteristic . . . of the community", "indicative of authenticity", and "being genuine". The original qualifications were cut down in order to ensure that the protected TCEs were those that belonged to an indigenous people or local community and were unique to them, i.e., were different from the TCEs of other communities. The working group sought to encapsulate all the requirements of existing subparagraphs 1(2)(b) and (c) in the language of Article 1(2), i.e. that in order to be protected, the TCE had to be "the unique product" of a beneficiary group and "belong" to that beneficiary group.

As to paragraph (3), no changes were made at all. The working group did not embrace the suggestion that "international" be added to it.

He said that when using the phrase "indigenous people or local community", the group was cognizant of the work being done under Article 2. Although the group used "indigenous people or local community" to describe the holders of TCEs or beneficiary class (for protected TCEs), it recognized that once Article 2 would be streamlined and stabilized, the terminology for the beneficiary class would be made consistent across the articles.

Marisella Ouma added to the Rapporteur's introduction that the group had removed "whether or not reduced to material form", because it was redundant with the mention of "tangible or intangible" in paragraph (1).

COMMENTS BY EXPERTS

Ronald Barnes reserved his right to raise his concerns about the reference to national law and to "sacred places".

Elizabeth Reichel proposed adding "utensils and artifacts" to the list in subparagraph (d). She also wondered whether there was a contradiction in the fact that "spiritual forms" was mentioned under "tangible expressions".

Weerawit Weeraworawit wondered why "signs and symbols" appeared under "phonetic or verbal expressions", since, in his view, they were drawings.

Heng Gee Lim wondered if there was any specific reason for retaining "expression of folklore", in addition to "traditional cultural expressions".

Regan M. Asgarali wished to keep the reference to "works of mas".

Xilonen Luna Ruiz questioned the reference to "indigenous peoples, local communities and cultural communities", claiming there was an exception for cultural communities. She also deplored the deletion of "sacred places".

Rachel-Claire Okani wondered if "sports" and "games" were synonymous or if both terms needed to be retained.

Silke von Lewinski wondered if the formulation of paragraph (2) was intended to exclude those TCEs which were shared by several local communities. The rationale for protection was the same whether or not the TCE was unique to a certain community or shared by several ones. Marcus Goffe concurred. She also questioned the deletion of the condition that the TCEs be "maintained, used or further developed by the indigenous peoples or local communities", since that condition made sense as part of the justification for protection.

Johan Axhamn expressed some concerns about the criteria for protection in paragraph (2). He also suggested that the text read "shall/should" throughout.

José Mario Ponce suggested removing the square brackets from the word "knowledge". He also suggested adding "ceremonial chants" and supported the inclusion of "sacred places".

Emmanuel Sackey brought attention to the fact that the phrase "indigenous peoples and local communities" had not been agreed upon.

ALTERNATIVE OPTIONS BY EXPERTS

Makiese Augusto proposed alternative text for Article 1:

"CRITERIA

Protected TCEs/EOF shall be:

- (a) the products of creative intellectual activity, including communal creativity;
- (b) indicative of authenticity/being genuine of the cultural and social identity and cultural heritage of indigenous peoples and communities and traditional and other cultural communities; and
- (c) maintained, used or developed by nations, states, indigenous peoples and communities and traditional and other cultural communities, or by individuals having the right or responsibility to do so in accordance with the customary land tenure system or law customary normative systems 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".

ARTICLE 2

BENEFICIARIES

MOROCCO: Beneficiaries of the Measures for the protection of traditional cultural expressions/expressions of folklore shall CISA, BGC, NIGERIA: [/should] be MOROCCO: [for the benefit of the]:

Option 1: Indigenous Peoples, SOUTH AFRICA, BGC: communities and nations.²⁰ Local Communities and Cultural Communities TUPAJ AMARU, TULALIP TRIBES, CISA, SOUTH AFRICA, CIEM, NIGERIA [CANADA, AUSTRALIA: and individuals of those communities]

Option 2: Peoples and Communities, INDIA, MBOSCUDA, MEXICO, TRINIDAD-AND-TOBAGO: [for example] including Indigenous Peoples, IRAN, ISLAMIC REPUBLIC OF, EGYPT, ALGERIA, MOROCCO: Nations, Communities, Local Communities, Cultural Communities, MBOSCUDA, CISA: [and/or Nations], IRAN, ISLAMIC REPUBLIC OF, and individual groups and families CHINA: and minorities.

COLOMBIA: [in whom the INDIA: [custody, and] safeguarding of the traditional cultural expressions/expressions of folklore are INDIA: [entrusted NEW ZEALAND, UNITED STATES OF AMERICA, TULALIP TRIBES: [or AUSTRIA: by whom they are held] presumed to be vested] in accordance with:]

NEW ZEALAND, UNITED STATES OF AMERICA, TULALIP TRIBES: [*Option 1:* the relevant COLOMBIA: national CANADA, AUSTRALIA: laws and/or practices (consideration: to leave under domestic laws)]

Option 2: their NIGERIA: laws and/or practices (consideration: reference to UNDRIP)], MEXICO: including customary law and community protocols]

CANADA, AUSTRALIA, COLOMBIA: [INDIA: [and] or who maintain, TRINIDAD-AND-TOBAGO, CISA, BGC: control, use or develop the traditional cultural expressions/expressions of folklore as being INDIA: [characteristic or genuine] indicative expressions of their cultural and social identity and cultural heritage. INDIA: In case a traditional cultural expression/expression of folklore is specific to a nation, the authority as determined by the national law.]

AUSTRALIA: There should be discretion at the national level to determine the best means of distributing the benefits to the owners, to be exercised in consultation with the owners.

TUPAJ AMARU: Legal protection of traditional cultural expressions/expressions of folklore shall be national and international and is designed to ensure fair benefits for indigenous communities, local communities and social groups which are holders of this cultural heritage.

- a) in whom the custody, safeguarding and protection of traditional cultural expressions/expressions of folklore are entrusted or held in accordance with customary law and practices and international law on intellectual property.
- b) who maintain, control, use and develop traditional cultural expressions/expressions of folklore as authentic and genuine expressions of their cultural and social identity and their cultural heritage.

[Commentary on Article 2 follows]

²⁰ Footnote explaining different layers of communities.

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Miranda Risang Ayu thanked Norman Bowman, Corlita Babb-Schaeffer, Vittorio Ragonesi, as an observer, Lilyclaire Bellamy, Sa'ad Twaissi, Marisella Ouma, Heng Gee Lim, Magreet Groenenboom, as an observer, Josephine Reynante, Susanna Chung and Benny Müller, as well as several experts from NGOs, including Ronald Barnes, Ana Leurinda, Elizabeth Reichel, Debra Harry and Preston Hardison.

She first commented on the second set of options put forward by the group. The phrase "the relevant law and/or practices" implied leaving the implementation to domestic law, while "their law and/or practices", was a reference to the UN Declaration on the Rights of Indigenous Peoples.

Concerning the first set of options, the group had wished to refer to "indigenous peoples", as the term had been used in many international conventions and benefited from a system of protection. "Local communities" was a term based on territorial consideration, and referred to collectivities or communities which were not bound by traditional or cultural background but by a mix of the two. As to "cultural communities", the formulation encompassed all of the concerns of the terms related to beneficiaries other than indigenous peoples, such as "nation", for example.

In the second option, which was similar, the group had used a more abstract term, "peoples and communities", followed by "for example". Consideration had been given to "such as", but one member of the group had offered "for example", which was considered more precise. Reference throughout the text would simply be made to "beneficiaries".

COMMENTS BY EXPERTS

Emmanuel Sackey wished to include a reference to "traditional communities".

Natacha Lenaerts expressed reservations with regard to the first cluster of options. As to the second cluster, she preferred the first option. Pavel Zeman concurred.

Charity Salasani preferred the term "characteristic" over "genuine", which she wished to have deleted.

Youssef Ben Brahim suggested aligning Articles 1 and 2, so that Article 1 read "...which is the unique product of the beneficiaries mentioned in Article 2".

Marcus Goffe raised the importance of having a provision that would apply in cases where the TCEs were not identifiable or attributable to any particular community; in such cases, reference could be made to "state folklore".

ARTICLE 3

SCOPE OF PROTECTION

Article A

Secret Traditional Cultural Expression

In respect of protected TCE/EoF, which is kept secret by the MBOSCUA: [IRAN, ISLAMIC REPUBLIC OF: beneficiaries] indigenous people BARBADOS, TRINIDAD-AND-TOBAGO, INDONESIA: [or] local ITALY, UNITED STATES OF AMERICA, EUROPEAN UNION, UNITED KINGDOM: or cultural community, GRTKF INTERNATIONAL, MBOSCUA: [BARBADOS, TRINIDAD-AND-TOBAGO, UNITED STATES OF AMERICA, INDONESIA, ALGERIA: or nation] that people BARBADOS, TRINIDAD-AND-TOBAGO: [or] community GRTKF INTERNATIONAL: [BARBADOS, TRINIDAD-AND-TOBAGO, INDONESIA: or nation] shall ITALY, EUROPEAN UNION, UNITED KINGDOM: /should have the means, through adequate and effective COLOMBIA: appropriate EUROPEAN UNION, UNITED KINGDOM: [legal and practical] measures, to prevent any unauthorized fixation, disclosure, use, or other exploitation.

Alternative 1

Article B

Rights Secured for Other MEXICO, COLOMBIA: [Protected] TCE

In respect of MEXICO, COLOMBIA: [protected] LLAMADA DE LA TIERRA: on the economic and moral rights emanating therefrom TCEs/EoF, there shall be adequate and effective legal and practical measures to ensure that the relevant INDIA, UNITED STATES OF AMERICA, EUROPEAN UNION, IRAN, ISLAMIC REPUBLIC OF: beneficiaries under Article 2 [IPLC] has the exclusive and inalienable INDIA, UNITED STATES OF AMERICA: collective right to authorize COLOMBIA, TUPAJ AMARU: and prohibit the following LLAMADA DE LA TIERRA: through prior informed consent CANADA: or approval and involvement:

a) INDIA: in respect of traditional cultural expressions/expressions of folklore other than words, signs, names and symbols

- fixation
- reproduction
- public performance
- translation or adaptation
- making available or communicating to the public
- FILAIE, ECUADOR, INDIA: distribution
- INDIA: and

b) in respect of traditional cultural expressions/expressions of folklore which are words, signs, names in symbols, including derivative thereof:

- i) any use for commercial purposes, other than their traditional use
- ii) acquisition or exercise of IP rights
- iii) the offering for sale or sale of articles that are falsely represented as traditional cultural expressions/expressions of folklore made by the beneficiaries as defined under Article 2
- iv) any use that disparages, offends, or falsely suggests a connection with the beneficiaries as defined under Article 2 or brings them into contempt or disrepute.

MEXICO: [In the case where the unauthorized user of a protected TCE/EoF made a SOUTH AFRICA, UNITED STATES OF AMERICA, KENYA, ECUADOR: [genuine good faith] proven effort to locate the beneficiary of these rights and did not, the beneficiary shall be entitled only to equitable remuneration or benefit-sharing, subject to the provisions of Article C UNITED STATES OF AMERICA: [INDIA: for the use already made and with authorization for the continued use].]

Article C

Attribution, Reputation, and Integrity

The IRAN, ISLAMIC REPUBLIC OF: beneficiaries indigenous people BARBADOS, TRINIDAD-AND-TOBAGO: [or] local community BARBADOS, TRINIDAD-AND-TOBAGO, ALGERIA: or nation shall have the right to be acknowledged to be the source of the protected TCE/EoF CISA, TULALIP TRIBES: [UNITED STATES OF AMERICA: expect where omission is dictated by the manner of the use] and FILAIE: [to object to] to forbid any distortion, mutilation or other modification of, or other derogatory action, NIGERIA: including any false, confusing or misleading indications which, in relation to goods or services which suggest any endorsement by or linkage with such indigenous peoples, local communities and nations, can be prevented and/or is subject to civil or criminal sanctions; in relation to, the said TCE/EoF FILAIE: [which would be prejudicial to the IRAN, ISLAMIC REPUBLIC OF: beneficiaries indigenous people BARBADOS, TRINIDAD-AND-TOBAGO: [or] local community's AUSTRALIA: [BARBADOS, TRINIDAD-AND-TOBAGO, ALGERIA: or nation's] reputation or integrity].

INDIA: [Alternative 2
Article B

The economic and moral interests of the ITALY, EUROPEAN UNION: [holders/] beneficiaries of TCE, as defined in Articles 1 and 2, BARBADOS: [should] JAPAN: [BARBADOS: shall] be safeguarded in a reasonable and balanced manner.

As regards the moral interests, the holders/beneficiaries should have the right to be acknowledged to be the source of the TCE/EoF EUROPEAN UNION, UNITED KINGDOM: unless this turns out to be impossible / CISA, TULALIP TRIBES: [UNITED STATES OF AMERICA: expect where omission is dictated by the manner of the use] and FILAIE: [to object] and prohibit to any distortion, mutilation or other modification of, FILAIE: or any attempt against or other derogatory action in relation to, the said TCE, FILAIE: [which would be prejudicial to the reputation or integrity of the TCE].]

[Commentary on Article 3 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Weerawit Weeraworawit reported on the work of the group consisting of Justin Hughes, Marisella Ouma, Meenakshi Negi, Norman Bowman, Johan Axhamn, Benny Müller, Esteriano Emmanuel Mahingila, and others, including experts from NGOs.

The title of the article was changed to "Scope of Protection" for the sake of certainty and flexibility. The three-layer approach had been maintained. The first one concerned "Secret Traditional Cultural Expressions", as stated in Article A; the second, the "Rights Secured for Other Protected TCEs" in Article B; and the third, the "Attribution, Reputation and Integrity," in Article C.

Justin Hughes added to the Rapporteur's introduction that the group had thought that the protection of secret TCEs was the paramount concern, and for that reason, it had been moved to the beginning of the article. "Fixation" meant any fixation. Secret TCEs had to be protected against any, *any*, unauthorized exploitation.

Concerning the "rights secured for other protected TCEs", the Rapporteur stated that the group had had a very constructive discussion on the question of "registered" or "unregistered" TCEs, which had been a major point of discussion throughout the IGC. Many in the group believed that the distinction was unworkable or less desirable than a unitary system, but at the same time did not want to punish those who inadvertently used TCE or made a good faith effort to find the holder or beneficiary of TCEs and could not. That was the virtue of a registration system: to find the beneficiary of the TCE.

In Alternative 1, Article B tried to encourage registration systems but did not require them and did not require such registration for protection, but nonetheless shielded from draconian measures a good faith user of TCEs who could not find the beneficiary. When the beneficiary did come up, equitable remuneration was available. That was separate from the question of attribution, reputation and integrity, which were grouped together, both in Alternative 1, and Alternative 2.

Marisella Ouma further added that it had been very difficult to reach consensus on the content of the article. She said that the group had attempted to figure out what exactly was needed to be protected within the article, i.e., "misappropriation and misuse". One of the things that had come out clearly was that the title had to be changed to a more positive one. What was needed was to have the rights conferred, in order to make it easier to deal with the issues of exceptions and limitations. The group had tried to incorporate the various thoughts from experts and to come up with a document that would give leeway under national law. For the sake of clarity, the group had separated economic rights from moral rights, and for that reason, a separate Article C, covering attribution, reputation and integrity had been drafted.

COMMENTS BY EXPERTS

Johan Axhamn expressed concerns about the subject matter of protection in Article 1, and hence could not agree to Alternative 1.

Susanna Chung was concerned that a lot of key points were not covered in the alternatives, such as the issues of "prior informed consent", "equitable benefit sharing", "false, misleading, confusing", and "derivatives". Moreover, "genuine good faith effort to locate" and "safeguarded in a reasonable and balanced manner" were both very vague phrasings. She preferred going back to the original text which covered a lot of those concerns. Debra Harry, Carlos Serpas and Ronald Barnes agreed. Ronald Barnes also noted the deletion of the word "stop", with which he did not agree.

Heng Gee Lim recalled that the phrasing had to be consistent with Article 2. He also said that the word "other" needed to be inserted for clarity in the first sentence of Alternative 1, Article B, to be consistent with the title of said article. He also noted the poor drafting of the second paragraph, and suggested replacing "and did not" with "and could not locate them".

Debra Harry noted the deletion of the word "sacred" and reminded that "secret" and "sacred" needed to feature in the text, since indigenous peoples were interested in protecting sacred TCEs, as well as to keep them secret. She also expressed concerns with Alternative 1, Article B, which set unnecessary limits to the type remuneration or benefit-sharing beneficiaries may be entitled to. The phrase "genuine good faith effort" was vague and created an onerous burden on indigenous peoples. Article C, similarly, placed a burden on indigenous peoples to prove prejudice to their reputation or integrity caused by the misuse of their TCEs. Additionally, the words "indigenous peoples and local communities' values" had to be added to broaden the scope of misuse. Finally, the original intent of the article, to stop misappropriation, was no longer a key focus and the word "misappropriation" was no longer there.

Silke von Lewinski brought attention to the fact that a shift had occurred from a right of prior informed consent to a classical IP exclusive right to authorize uses. Ronald Barnes and José Mario Ponce agreed. Ponce also wished to include "administrative measures", in addition to "legal and practical measures".

Natacha Lenaerts expressed reservations on the whole article.

Luz Celeste Ríos de Davis commented on the title of the article and proposed that in Spanish, it be changed from "alcance de protección" to "ámbito de protección".

Robert Leslie Malezer said that reference should simply be made to "beneficiaries", without listing all possible beneficiaries. He also expressed concerns with the word "people" in the singular, where instead he preferred "peoples" in the plural. He also said that "reasonable and balanced manner" was too vague and could lead to discrimination. He also had concerns with the reference to "equitable remuneration".

ALTERNATIVE OPTIONS BY EXPERTS

Makiese Augusto proposed an alternative for Article 3:

"Adequate and effective legal and practical measures shall be provided to safeguard the exclusive rights of beneficiaries of traditional cultural expressions/expressions of folklore as defined in Article 2 of these provisions, to control, authorize or prohibit and benefit from the use of such traditional cultural expressions/expressions of folklore and derivatives and adaptation.

There shall be adequate and effective legal and practical measures to obtain prior informed consent from beneficiaries of TCEs, derivatives and adaptations to ensure the prevention of:

- the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography);
- any use which does not acknowledge in an appropriate way the indigenous peoples and communities and traditional and other cultural communities as the source of the traditional cultural expressions/expressions of folklore;
- any distortion, mutilation or other modification of, or other derogatory action that may prejudice the traditional cultural expressions, adaptation and derivatives and would damage the reputation, customary values or cultural identity or integrity of the community;
- 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, suggest any endorsement by or linkage with such indigenous peoples and communities and traditional and other cultural communities, can be prevented and/or is subject to civil or criminal sanctions; and

There shall be fair and equitable benefit sharing where the use or exploitation of the TCEs, adaptations and derivatives is for gainful intent. The terms shall be determined by the relevant communities in consultation with the designated national authority referred to in Article 4."

Alternative Proposal from Delegation of New Zealand:

Adequate and effective EUROPEAN UNION: [legal or practical] measure should be provided to:

- (a) to prevent the AUSTRALIA: [unauthorized fixation, disclosure, use or other exploitation] disclosure of secret traditional cultural expressions/expressions of folklore;
- (b) to require the INBRAP: [acknowledgement] prior informed consent CANADA: or approval and involvement of EUROPEAN UNION beneficiaries as referred in Article 2 [indigenous and local communities] BARBADOS: small island developing state as the custodians of their traditional cultural expressions/expressions of folklore EUROPEAN UNION: unless this turns out to be impossible;
- (c) protect against the offensive use of traditional cultural expressions/expressions of folklore EUROPEAN UNION: which would be prejudicial to the reputation or integrity of the beneficiaries of traditional cultural expressions/expressions of folklore LCA: to the extent the legal system permits it; and
- (d) protect against the use of the AUSTRALIA: non-authentic traditional cultural expressions/expressions of folklore in trade that suggests a connection UNITED STATES OF AMERICA: that does not exist with EUROPEAN UNION: beneficiaries as referred in Article 2 [an indigenous or local community] UNITED STATES OF AMERICA: [that does not exist]; and
- (e) EUROPEAN UNION: [where appropriate,] provide equitable remuneration to the beneficiaries for EUROPEAN UNION: [INDIA: [enable] INDIA: ensure indigenous and local communities INDIA: shall have exclusive and inalienable collective rights to authorize] the following uses of traditional cultural expressions/expressions of folklore
 - fixation
 - reproduction
 - public performance
 - translation or adaptation
 - making available or communicating to the public

TUPAJ AMARU:

PREVENT MISAPPROPRIATION

- a) The prohibition would apply to the following illicit acts:
 1. the reproduction, distribution, communicating to the public, making available, rental, including still photography of traditional cultural expressions/expressions of folklore without the prior informed consent CANADA: or approval and involvement of the holders
- b) – any use of traditional cultural expressions/expressions of folklore or adaptations to the prejudice of the interests of indigenous peoples who are the legitimate holders
- c) –any deformation, modification or acts of bad faith or its identity
- d) Any fraudulent acquisition or abuse of IP rights concerning traditional cultural expressions/expressions of folklore should be punishable.

Article 3 bis

- A) indigenous peoples or local communities shall have the rights to intellectual property in tangible and intangible works. Any modification shall be prohibited, and those pre
- B) any false, confusing or misleading, with a view to using these traditional cultural expressions/expressions of folklore without the prior informed consent CANADA: or approval and involvement shall be subject to civil and criminal sanctions.

ARTICLE 4

INDIA: COLLECTIVE MANAGEMENT OF RIGHTS

1. The INDIA: collective management of the rights provided for in Article 3 belongs to the beneficiaries as defined in Article 2. INDIA: [. AUSTRALIA: The beneficiaries may authorize [or to] a [designated] IRAN, ISLAMIC REPUBLIC OF: national competent authority MEXICO: [(for example, regional, national, or local)] [acting at the request, and on behalf, of the beneficiaries] FILAIE: where they live most of the year IRAN, ISLAMIC REPUBLIC OF: in accordance with the national law CISA, JAMAICA: their traditional decision-making and government process JAMAICA, CAMEROON: in accordance with international law. Where AUSTRALIA: an authorization[s] is [are to be granted] given, [by] NEW ZEALAND: [the] a competent authority AUSTRALIA: may:
 - (a) AUSTRALIA: Grant licenses only after appropriate consultation and with the prior informed consent CANADA: or approval and involvement of the beneficiaries in accordance with their traditional decision-making and governance processes;
 - (b) AUSTRALIA Collect monetary or non-monetary benefits from the use of the traditional cultural expressions/expressions of folklore providing such benefits shall/should be provided directly by the competent authority to the beneficiaries concerned or utilized for their benefits
 - (c) AUSTRALIA [such authorizations shall/should be granted MEXICO to a user by the designated competent authority IRAN, ISLAMIC REPUBLIC OF: [only] after appropriate consultation and with the prior informed consent CANADA: or approval and involvement of the beneficiaries in accordance with their IRAN, ISLAMIC REPUBLIC OF, ALGERIA: national procedure INBRAPI, VENEZUELA: and their customary rights [traditional decision-making and governance processes]; and
 - (d) any monetary INDONESIA: [or] and non-monetary benefits collected by the competent authority for the use of the traditional cultural expressions/expressions of folklore shall/should be provided directly by the MEXICO: designated competent authority to the beneficiaries concerned or utilized SWITZERLAND: [for their benefits] for the direct benefit of relevant beneficiaries ALGERIA: and the preservation of traditional cultural expressions/expressions of folklore.]
2. Where so requested by and in consultation with the beneficiaries, NEW ZEALAND: [the] a competent authority NEW ZEALAND, EUROPEAN UNION [shall] NEW ZEALAND: may EUROPEAN UNION should:]
 - (a) conduct awareness-raising, education, advice and guidance functions;
 - (b) monitor uses of traditional cultural expressions/expressions of folklore for purposes of ensuring fair and appropriate use;
 - (c) establish the criteria to determine any monetary or non-monetary benefits; and,
 - (d) provide assistance in any negotiations for the use of the traditional cultural expressions/expressions of folklore.
 - (e) LCA: establish and maintain a database or registry of traditional cultural expressions/expressions of folklore, accessible only to those chosen by the beneficiaries.
3. SOUTH AFRICA: [EUROPEAN UNION: The competent authority shall report to WIPO, each year, and in a transparent way, on the distribution of benefits arising from the use of traditional cultural expressions/expressions of folklore.]

4. KEI, SOUTH AFRICA, UNITED STATES OF AMERICA: The management of the financial aspects of the rights should be subject to transparency, concerning the sources and amounts of the money collected, the expenditures if any to administer the rights, and the distribution of money to the beneficiaries.

[Commentary on Article 4 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Miranda Risang Ayu said that there were several reasons behind the group's restructuring efforts. First, the group was of the opinion that it was important to add "prior informed consent". The group also restructured the article to simplify it, and drafted a cumulative list of requirements. In that regard, the competent authority was not the original right holder, but could act as the empowerment agent or manager of rights in cases where no beneficiary could be identified. The authority could withdraw itself once the beneficiary had been found.

Second, the group saw the rights as positive, cultural rights. The government was there to assist the beneficiaries or right holders, in cases where they needed assistance, but when they could manage the rights themselves, the government had to leave them to manage that right by themselves. It was a combination of the right of self-determination and of the authority of the State or government or other competent authority. Furthermore, the group wanted to create the possibility for governmental organizations, NGOs or State auxiliaries, at the national or regional level, to ask the competent authority to manage the rights. The choice would be left to be made at the national level.

COMMENTS BY EXPERTS

Susanna Chung pointed to a possible confusion between "ownership" and "management" of rights. Users should not go directly to the communities, without the government being involved. She also suggested replacing "authorization" by "prior informed consent". Issah Mahama and Xilonen Luna Ruiz agreed with the latter point, adding that the article should be linked to Article 3. Ronald Barnes agreed. He also added that the competent authority could not be national, but international.

Heng Gee Lim suggested that "their benefits" in the last part of subparagraph 1(b) be replaced with "the benefits of the relevant beneficiaries", so as to ensure that the benefits go to the beneficiaries and not to the competent authority. Miranda Risang Ayu agreed.

Natacha Lenaerts expressed reservations on the article.

Robert Leslie Malezer suggested clearly distinguishing the rights of the beneficiaries from the function of the competent authority.

ARTICLE 5

EXCEPTIONS AND LIMITATIONS

1. Measures for the protection of TCEs/EoF should:
 - (a) Not restrict the CANADA, COLOMBIA: [normal] SWITZERLAND, MEXICO, CAPAJ: creation COLOMBIA: customary use, transmission, exchange and CANADA: [development] of TCEs/EoF within COLOMBIA, SWITZERLAND, MEXICO: and between communities COLOMBIA: [the traditional and customary context MEXICO: [by members] of the IRAN: ISLAMIC REPUBLIC OF: [IPLC]] the beneficiaries CANADA: [as determined by customary laws and practices] CANADA: consistent with domestic laws of the member states; and
 - (b) Extend only to utilization of TCEs/EoF taking place CANADA: [outside the membership of beneficiary community or] outside traditional or customary context.
2. NEW ZEALAND: [It shall be a matter of CANADA: [national] domestic legislation EUROPEAN UNION: in accordance with the Berne Convention and the WCT to provide exception and/or to permit the use of protected TCE/EoF in certain special cases, provided that such utilization does not conflict with the normal utilization of the TCE/EoF by the beneficiary and does not unreasonably prejudice the CANADA: [legitimate interests] of the beneficiaries TULALIP TRIBES: and that such uses do not violate their customary laws or community protocols.]
3. NEW ZEALAND: Parties may adopt appropriate limitations or exceptions, provided that the use of traditional cultural expressions/expressions of folklore is compatible with fair practice, acknowledges the indigenous or local community where possible, and is not offensive to the indigenous or local community.
4. UNITED STATES OF AMERICA, EUROPEAN UNION: Except for the protection of secret traditional cultural expressions/expressions of folklore against disclosure, to the extent that any act would be permitted under the national law for works protected by copyright or signs and symbols protected by trademark law, such act shall not be prohibited by the protection of traditional cultural expressions/expressions of folklore EUROPEAN UNION [provided such exceptions to the protection of traditional cultural expressions/expressions of folklore are limited to certain special cases that do not conflict with the normal utilization of the traditional cultural expressions/expressions of folklore by the beneficiaries and do not unreasonably prejudice the legitimate interest of the beneficiaries.]

Proposed addition:

5. SOUTH AFRICA, KENYA, MEXICO: [Regardless of whether such acts are already permitted under 2 or not, the following acts should be permitted INBRAP: on the basis of the prior informed consent CANADA: or approval and involvement of indigenous peoples and local communities:
 - (a) The making of recordings and other reproductions of TCE/EoF for purposes of their inclusion in an archive, inventory, dissemination for non-commercial cultural heritage safeguarding purposes; and incidental uses SIEF: for non-commercial academic research; and
 - (b) EUROPEAN UNION: the creation of An original work of authorship INDIA, INBRAP: by the beneficiaries or in association with them inspired/borrowed by TCEs/EoF.]

[Commentary on Article 5 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Weerawit Weeraworawit said that the group had tried to clean up and simplify the text. He added that some members of the group had wanted to change the title of the article, but it had, in the end, been decided to retain the original one, so as to be in keeping with other international instruments.

Paragraph (1) reflected subparagraphs 1(a) and 1(b) of the original draft. Paragraph (2) encapsulated the various specific cases mentioned in the original subparagraph 1(c). Paragraph (3) was added to reflect the views that paragraph (2) was not sufficient to cover those specific cases.

Justin Hughes added to the Rapporteur's introduction by reiterating that the use of "TCE/EoF" in the text was intended as a place holder, just like "IPLC" was used while waiting for an agreement on the right terminology to be used. He thus asked to focus on the structure, principle and norm, and not on the terminology. He also added that the article had two alternatives: either combining paragraphs (1) and (2), or (1), (2), and (3). The latter alternative was intended to capture the exceptions and limitation as reflected in the 1982 UNESCO-WIPO Model Provisions. Danny Edwards concurred.

COMMENTS BY EXPERTS

Susanna Chung warned against falling back into the listing exercise. She was satisfied with paragraphs (1) and (2). She had concerns with the concepts of "inspired/borrowed", which she found too vague and with the absence of reference to "prior informed consent". She thus suggested that the paragraph not be included. Preston Hardison, Debra Harry, Issah Mahama, Xilonen Luna Ruiz and Heng Gee Lim agreed.

Rachel-Claire Okani raised concerns with the word "outside". She also wondered what "certain special cases" meant. Debra Harry agreed, qualifying the expression as "vague".

Paul Kuruk proposed adding:

"For each use of TCE that qualifies as a permitted use, the user must ensure that such use respects the rights of the relevant indigenous peoples or owners and holders of TCEs

- (1) through an appropriate acknowledgement of the relevant indigenous peoples or owners and holders on the TCEs where practicable and possible; and
- (2) by not subjecting a TCE to derogatory treatment prohibited in Article 2."

Paul Kuruk also had issues with subparagraph (3)(b), which had the effect of allowing the acquisition of IP rights in TCEs, which was not the intended purpose of the article. Preston Hardison and Issah Mahama agreed.

Ronald Barnes reiterated his point about the international nature of the competent authority. He also expressed reservations with regard to subparagraph (3)(a).

Preston Hardison questioned the introduction of paragraph (2), which was introducing equivocal terms. He also noted the deletion of the conditions under which exceptions and limitations could take place, which featured in the original text.

Heng Gee Lim expressed concerns about the absence of a safeguard for secret TCEs under subparagraph (3)(a). Justin Hughes agreed and wished to point out that that point had been discussed. Weerawit Weeraworawit also agreed.

Amadou Tankonao said that subparagraph 1(b) ran counter to the objective of the articles and would favor piracy.

Anne Le Morvan suggested that exceptions and limitations be linked to the rights conferred, despite that those had not been clearly defined yet. She also suggested bearing in mind the work of the WIPO Standing Committee on Copyright and Related Rights, which was also working on exceptions and limitations. Raúl Rodríguez Porras agreed.

Xilonen Luna Ruiz suggested aligning the language with that of Article 4, especially when dealing with customary law. She also had concerns with the notion of "membership".

Debra Harry said that paragraph (2) was giving national governments sole authority to grant permissions for use of TCEs. The article needed to reflect the decision-making and right of free prior and informed consent by beneficiaries themselves to determine any use. She did not agree with subparagraphs 3(a) and (b), which would facilitate misappropriation and ignored the principle of free, prior and informed consent. The article gave broad exception for non-commercial or academic use, which had led to misappropriation in the past.

Weerawit Weeraworawit agreed with paragraph (2), assuming that national laws would be drafted based on good governance and with the participation of interested parties.

ARTICLE 6

TERM OF PROTECTION

INDIA, AUSTRALIA, UNITED STATES OF AMERICA: [Option 1:

As in WIPO/GRTKF/17/4/Prov.

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,

- (a) in so far as TCEs/EoF referred to in Article 3(1) 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]²¹
- (b) in so far as secret TCEs/EoF are concerned, their protection as such shall endure for so long as they remain secret; and²²
- (c) 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.²³

Option 2:

- 1. 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,
- 2. 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 BGC: [community,] BGC: Indigenous Peoples and CAPAJ: their communities or MBOSCUDA: [region] land to which they belong, shall last indefinitely.
- 3. INDIA, AUSTRALIA, UNITED STATES OF AMERICA: Secret traditional cultural expressions/expressions of folklore shall NIGERIA: continue to enjoy the protection given to CISA: [disclosed] traditional cultural expressions/expressions of folklore as long as they continue to meet the criteria for protection under Article 1.
- 4. CISA: [MEXICO: Insofar as secret traditional cultural expressions/expressions of folklore the protection as such shall endure for so long as they remain secret.]

Option 3:

- 1. 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,
- 2. At least as regards the economic aspects of TCEs/EoF EUROPEAN UNION: [are concerned], their protection should be limited in time.

²¹ Delegation of Mexico

²² Delegation of Mexico

²³ Delegation of Mexico

TUPAJ AMARU:

The protection granted by this instrument to traditional cultural expressions/expressions of folklore shall endure for the duration of the lives of the indigenous peoples and local communities as described in Article 1.

- A) The protection of traditional cultural expressions/expressions of folklore should endure throughout the lives of their holders and for as long as this cultural heritage has not been made available to the public domain.
- B) The protection granted for traditional cultural expressions/expressions of folklore described as secret, spiritual and sacred, shall endure for as long as it remains the history and heritage of indigenous peoples.
- C) The protection granted for traditional cultural expressions/expressions of folklore against any distortion, mutilation, or other infringement, with the aim of causing harm to the memory, history, or image of indigenous peoples and local communities shall last indefinitely.

Question 1:

Should the term of protection consider the purpose for which the TCE/EoF is being protected (i.e. economic, social, moral rights)?

Question 2:

How might provisions impact upon different stakeholder groups?

Question 3:

How might retroactive and perpetual or unlimited protection vis-à-vis the adequate and effective protection of TCEs EoF be balanced with demands for freedom of expression and creativity?

Question 4:

Should the concept of public domain as a western construct be considered?

Question 5:

Should the scope of protection affect the time of protection?

Question 6:

Should secret TCEs be explicitly mentioned?

Question 7:

Should economics be a priority in the limitation of the term of protection of TCE/EoF?

Question 8:

Should the length of the term of protection consider collectively vs. individually held TCEs/EoF?

[Commentary on Article 6 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Arjun Vinodrai said that the discussion had been very lively and harmonious despite the various points of views. He said the group had developed a number of options as well as associated questions. The group was made up of Natacha Lenaerts, Rachel-Claire Okani, Arjun Vinodrai, Jens Stühmer, Xilonen Luna Ruiz, Shafiu Adamu Yauri, Amadou Tonkaoua, as well as Ana Leurinda, Greg Younging, Tim Roberts and Paul Kuruk.

Three options had been developed. The first option was to retain the original text of document WIPO/GRTKF/IC/17/4 PROV., because it was important to explicitly cover registered and non-registered (i.e., secret) TCEs. The second option was similar to the first one, but simplified. It did not explicitly mention the distinction between registered and non-registered (i.e., secret) TCEs. The third option introduced consideration of whether the protection of TCEs should consider economic issues. Finally, the group had identified areas of policy debate behind the three options through a list of questions.

COMMENTS BY EXPERTS

Anne Le Morvan reiterated her concern that the term of protection should be limited. Her preferred option was the third one. Danny Edwards concurred. She also wondered about the status of the questions in the text. Carlos Serpas wondered who would be answering the questions and what the status of the current document would be.

Susanna Chung suggested that the term be indefinite. Weerawit Weeraworawit, Ronald Barnes and Marisella Ouma agreed. She said the questions went beyond the scope of the article. Preston Hardison and Miranda Risang Ayu agreed and preferred Option 2.

Silke von Lewinski suggested linking the article to Article 1 and the criteria for protection. Likewise, Luz Celeste Rios de Davis said that she wanted protection to be indefinite, provided that the protection criteria continue to be met.

Heng Gee Lim warned about the practical application of Option 3, because the provision could conflict with the inter-generational nature of TCEs. Miranda Risang Ayu agreed. Amadou Tankaoua also agreed and added that because the rights were collective, it would pose problems to have a limited term of protection. José Mario Ponce, Lázaro Pary and Issah Mahama agreed.

Youssef Ben Brahim suggested deleting the reference to "done with the aim of causing harm" because that placed an unnecessary burden on the beneficiaries to prove the deliberate intention.

Greg Younging preferred Option 2 and said it was not clear what "economic aspects" meant.

Xilonen Luna Ruiz preferred Option 1. She also said the objectives had to be kept in mind.

Lázaro Pary suggested adding: "The protection granted for TCEs/EoF against any form of distortion, mutilation or other infringement with the aim of totally or partially destroying the memory, the history and the image of the indigenous communities and of peoples over time and where they live or elsewhere shall be indefinite".

ARTICLE 7

FORMALITIES

As a general principle, the protection of TCE/EoF shall not be subject to any formality. INDIA, INDONESIA: [National authorities] Beneficiaries under Article 2 may maintain SWITZERLAND, INDONESIA: declaratory [registers] INDONESIA: registrations or other records of TCE/EoF, COLOMBIA: confidential, if required INBRAPI, TULALIP TRIBES, SWITZERLAND, TUPAJ AMARU: on the basis of the prior informed consent CANADA: or approval and involvement of indigenous peoples and local communities, rights holders of traditional cultural expressions/expressions of folklore.

[Commentary on Article 7 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Weerawit Weeraworawit said that there was complete agreement within the group that there should be no formalities.

COMMENTS BY EXPERTS

Danny Edwards said that it would be interesting to see the experiences of some countries which have already created registers.

Robert Leslie Malezer said that the second sentence posed problem. Youssef Ben Brahim agreed. It would be better addressed under Article 4. Preston Hardison and Miranda Risang Ayu agreed. Debra Harry also agreed and added that secret TCEs should never be subject to any formality, so there had to be a specific mention that secret or sacred TCEs were excluded. She explained that registration created an undue burden on the beneficiaries and thus should not be a requirement for protection.

Emmanuel Sackey proposed adding "regional" authorities, to account for the mechanism under the ARIPO protocol.

Youssef Ben Brahim called for administrative measures as a back-up to legal protection.

ARTICLE 8

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

[Option 1 – consistency with other instruments]

1. Contracting Parties undertake to adopt, CANADA, NEW ZEALAND: as appropriate and in accordance with their legal systems, the measures CANADA, NEW ZEALAND: [necessary] to ensure the application of this instrument.

EUROPEAN UNION, UNITED STATES OF AMERICA: 2. Contracting parties will take measures against the willful or negligent infringement of the economic and/or moral interests of the beneficiaries UNITED STATES OF AMERICA: sufficient to constitute a deterrent to further infringements.

[Option 2 – more prescriptive but limits on criminal remedies]

1. In case of misappropriation under Article 3, FAIRA: [accessible, appropriate and adequate enforcement measures] just and fair procedures should be available, including dispute-resolution mechanisms, civil remedies, border-measures, sanctions and, at least in cases of willful misappropriation on a commercial scale, criminal penalties.

[Option 3 – notes Parties may wish to provide criminal and civil remedies as they consider appropriate]

1. Accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies including criminal and civil remedies, should be available in cases of breach of the protection for traditional cultural expressions/expressions of folklore. INBRAP: Ensure the inversion of the burden of proof in favor of the indigenous peoples and local communities.
2. If a [designated competent authority] is appointed under Article 4, it may additionally be tasked with advising and assisting the beneficiaries referred to in Article 2 with regard to the enforcement of rights and with instituting remedies provided under this article when appropriate and requested by the beneficiaries.
3. The means of redress for safeguarding the protection granted by this instrument should be governed by the CISA, ASSEMBLY OF AMERICAN OF WESTERN ARMENIA: [legislation of the country] beneficiaries where the protection is claimed.
4. SOUTH AFRICA, NIGERIA: Where TCEs/EoF are shared by different countries or by indigenous peoples and communities in several jurisdictions, Contracting parties should provide cooperation and assistance to facilitate the implementation of enforcement measures provided under this instrument, SOUTH AFRICA, NIGERIA: [particularly where TCEs/EoF are located in the territories of neighboring countries or TCEs/EoF are shared by different countries or by indigenous peoples and communities in several jurisdictions].

ARIPO: As separate article on Transboundary Cooperation:

SOUTH AFRICA: Where TCEs/EoF are shared by different countries or by indigenous peoples and communities in several jurisdictions, Contracting parties should provide cooperation and assistance to facilitate the implementation of enforcement measures provided under this instrument, SOUTH AFRICA: [particularly where TCEs/EoF are located in the territories of neighboring countries or TCEs/EoF are shared by different countries or by indigenous peoples and communities in several jurisdictions].

EUROPEAN UNION:

Article 8 bisAlternative Dispute Resolution

Where a dispute arises between beneficiaries or between beneficiaries and users of a TCE, each party shall be entitled to refer the issue to an independent and recognized alternative dispute resolution mechanism, recognized by international and/or national law.²⁴

TUPAJ AMARU

Contracting parties undertake to adopt in accordance with their respective legal systems and consistent with international instruments the measures necessary to ensure the application of the instrument.

1. In case of misappropriation of traditional cultural expressions/expressions of folklore which are threatened by the loss and under Article 3, contracting parties undertake to establish appropriate mechanism for dispute resolution appropriate civil and criminal remedies and sanctions.
2. 2. In accordance with Article 3, a competent body should be established after prior consultation with the indigenous peoples to provide advice and assistance to the beneficiaries mentioned in Article 2 to ensure enforcement of the rights and the application the sanctions as covered in the present article.
3. Restitution and remuneration for the cultural heritage which has been used in violation of the rights that have been granted by the present instrument shall be governed by the legislation of the country in which the protection in question is being sought.
4. The contracting parties shall provide cooperation and assistance with the same of facilitating the application of the mechanism and measures for compliance, international territory and in border areas with neighboring countries as covered by this Article.

[Commentary on Article 8 follows]

²⁴ Such as the WIPO Arbitration and Mediation Center

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Vladia Borissova introduced the group as consisting of Norman Bowman, Anne Le Morvan, Larisa Simonova, Dariusz Urbanski, Issah Mahama and other experts. Regarding paragraph (1), the drafting group had proposed three options. Option 1 stressed the need for consistency with other instruments and recognized the views of several experts that remedies needed to take into account many factors, including the practices of the indigenous and local people and particularly their systems. Option 2 was more prescriptive but put a limit on criminal remedies. She said that the proposed text took into account the comment made by Justin Hughes regarding TRIPS regulation on criminal penalty. Option 3 noted the views of experts that parties wished to provide criminal and civil remedies as they considered appropriate in case of violation of protection of TCEs/EoF. Regarding paragraph (2), the group had put forward cleaned up text based on the discussion in the plenary session.

COMMENTS BY EXPERTS

Heng Gee Lim preferred Option 3. He also suggested deleting paragraph (2), because it overlapped with Article 4. However, he suggested that the last part of the paragraph "instituting remedies provided under this article when appropriate and requested by the beneficiaries" be moved to Article 4(2), as a new subparagraph (e).

Mara Rozenblate supported Option 1.

Paul Kuruk wished to see some language on cooperation between states on enforcement, service and process.

Preston Hardison supported Option 3 with some reservations. Susanna Chung agreed. She added that paragraph (3) was not clear and sought clarification on "where the protection is claimed" from the drafting group. She wished to keep paragraph (4) under Article 11.

Ronald Barnes said that the competent authority should be an international one.

ALTERNATIVE OPTIONS BY EXPERTS

Issah Mahama proposed the following alternative text as a new Article 12, as a replacement for Article 8(4):

"TRANSBOUNDARY COOPERATION

In instances where TCEs/EoF are located in the territories of neighboring countries, those countries shall, as appropriate, cooperate, support the implementation of this instrument by ensuring that measures taken are supportive of and do not run counter to its objectives.

Where the same TCEs/EoF are shared by different countries or by indigenous and local communities in several jurisdictions, those countries shall cooperate, in close consultation and involvement with indigenous and local communities, if any, in the exercise of implementing the objectives of this instrument."

ARTICLE 9

TRANSITIONAL MEASURES

Option 1:

1. 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.
2. 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 through prior use in good faith.

Option 2:

1. 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.
2. The state should ensure the necessary measures to secure the rights, acknowledged by national law, already acquired by third parties.

Option 3:

1. 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.
2. 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 qualified by paragraph 3.
3. With respect to TCEs/EoF that have special significance for INBRAP: [the relevant] indigenous peoples and local communities having rights thereto and which TCEs/EoF have been taken outside control of such communities, the communities shall have the right to recover such TCEs/EoF.

Question 1:

Are institutions currently working in good faith?

Question 2:

Have third party rights been legitimately acquired?

Question 3:

How might issues that arise from a new sui generis system affect other legal systems?

Question 4:

Should communities pay compensation to parties of TCEs/EoF in order to recover such TCEs/EoF from parties in possession of them?

Question 5:

Should the state ensure measures to secure the rights already acquired by third parties on behalf of the TCEs/EoF stakeholders?

[Commentary on Article 9 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Arjun Vinodrai said that the drafting group for Article 9 was the same as the one for Article 6. The group had identified a number of options where there was not necessarily any agreement, but which captured the issues of debate.

The first option was similar to the text of WIPO/GRTKF/IC/17/4 PROV. but introduced a provision that rights acquired by third parties should be through prior use in good faith. The second option added a provision that the state should ensure the necessary measures to secure the rights acknowledged by national law already acquired by third parties. The final option added a provision which gave communities the right to recover TCEs that had special significance and that had been taken out of their control. The questions reflected areas of debate that required further discussion.

COMMENTS BY EXPERTS

Heng Gee Lim preferred Option 1. He made a general reservation regarding the three options: there was no provision regarding the treatment of offensive or derogatory works.

Raúl Rodríguez Porras supported Option 2.

Susanna Chung supported Option 1. She said that Question 4 should not be a question at that stage. Miranda Risang Ayu and José Mario Ponce concurred, so did Preston Hardison, who also mentioned the right of indigenous peoples to recover their TCEs because of the severe harm suffered. Debra Harry concurred.

Debra Harry had some concerns regarding Option 1, paragraph (2) and misappropriated TCEs. She said the idea of "good faith" was very subjective, just like "special significance". She suggested the following language change: "subject to respect for rights previously acquired by third parties, legally and with the prior informed consent of the indigenous peoples and local communities". The reference to the right to recover misappropriated TCEs was important and needed to be preserved. Ronald Barnes and José Mario Ponce concurred.

Shafiu Adamu Yauri was concerned with the phrase "rights acquired by third parties", because it all depended on how those rights were acquired. Emmanuel Sackey agreed and preferred Option 1. He also made reference to Article 1 and the criteria for protection. Amadou Tankanoua, Assiah Mahama and Rachel-Claire Okani concurred.

Greg Younging supported Option 1. He said the proposed article did not reflect all of the drafting group's discussions and sought clarification on the status of observers in the drafting exercise. Ronald Barnes concurred.

Justin Hughes expressed one concern regarding Option 1, paragraph (3), which addressed the return or repatriation of tangible objects, which was outside the realm of WIPO activities and was already covered by a range of UNESCO instruments.

Paul Kuruk supported Option 3, especially paragraph (3), because the UNESCO instruments did not cover situations within national boundaries and did not apply to objects stolen prior to the entry into force of the convention.

ARTICLE 10

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

[Option 1 – emphasizes complementary protection of relevant international legal instruments]

Protection for a traditional cultural expression/expression of folklore in accordance with MOROCCO, MBOSCUDA: [these provisions] this instrument IRAN, ISLAMIC REPUBLIC OF: [does not replace and] is complementary to protection and measures that apply to that expression and derivatives/adaptations thereof IRAN, ISLAMIC REPUBLIC OF: in accordance with international law under international intellectual property instruments as well as ETHIOPIA: other relevant legal instruments and ETHIOPIA: [programs] plans of action for the safeguarding, preservation, promotion of cultural heritage and the diversity of cultural expressions.

LLAMADA DE LA TIERRA, VENEZUELA: Despite what is stipulated in this option, traditional cultural expressions/expressions of folklore should be protect without time limit for the safeguard of the tangible and intangible cultural heritage of indigenous peoples.

[Option 2 – follows precedent after WPPT/emphasizes the continuity of IPRs]

Protection under this instrument should leave intact and should ASSEMBLY OF ARMENIANS OF WESTERN ARMENIA: [in no way] affect the protection EUROPEAN UNION, ICC: [of] provided for in international legal instruments on intellectual property rights. Consequently, no provision of this instrument may be interpreted as prejudicing such protection.

[Option 3 – emphasizes indefinite term of protection of TCEs continues]

Where TCEs/EoF are currently protected by IP laws with limited terms of protection, the protection under this instrument shall take precedence.

[Commentary on Article 10 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Norman Bowman spoke on behalf of the group of experts and observers who had provided the options for Article 10. Article 10 dealt with the relationship with IP protection and other forms of protection, preservation and promotion. It was an uncontroversial provision. Article 10 dealt with two main issues: the relationship of protection for TCEs with IP law and with non IP measures. In relation to the connection with IP laws, the commentary on the original document made clear that the purpose of providing protection for TCEs was to cover gaps in protection provided to such expressions under current IP laws. It was therefore clear that it was the intention that any form of new protection be complementary to existing protection. Secondly, the commentary also made clear the intention that other forms of legal protection and other measures that applied to TCEs to achieve other public objectives should continue. The first option was closely based on the text of the original text. Further options reflected the views of experts, expressed in the plenary session. Option 1 meant to emphasize the complementary protection of relevant international legal instruments. Option 2 intended to emphasize the continuity of IP rights. The wording of Option 3 was intended to emphasize the importance of the indefinite term of protection that might be provided for TCEs under the instrument.

COMMENTS BY EXPERTS

Susanna Chung preferred Option 1, because the other two options interfered with existing IP rights. Miranda Risang Ayu concurred.

Rachel-Claire Okani warned against juxtaposing IP and the *sui generis* system being built. Ronald Barnes agreed. She suggested that Article 10 be swapped with Article 11 and be entitled as "Final Provisions" and simply read: "Protection through this instrument must not exclude the use of other measures of legal protection".

Pavel Zeman expressed a strong preference for Option 2.

Heng Gee Lim preferred Option 3, provided there be a proper clarification of the term "takes precedence". Options 1 and 2 seemed to suffer from one defect: TCEs would be protected, but at the same time, they would have to respect whatever IP rights had been granted to specific individuals, for example, a sign or symbol that was part of a TCE or a musical work. If that musical work was protected by copyright, or if that sign was registered as a trademark, did it mean that the owner of that registered trademark could prevent use of that sign or symbol by the beneficiary for all its TCEs? In Option 3, the word "precedence" covered two possibilities: first, duration, in other words, once the IP right was over, the duration or protection for TCEs remained; second, precedence over the exercise of the exclusive rights, in other words, one could read that as long as the IP rights existed, the IP right owner could prevent use of TCEs by the indigenous people. That was not specifically covered.

Xilonen Luna Ruiz said that the three options were complementary and could all be kept, subject to being properly redrafted. Justin Hughes and Lázaro Pary agreed. She supported Options 1 and 3.

Justin Hughes said that Option 3 created a difference between the TCEs in relationship to copyright, which had a limited term of protection, and the TCEs in relationship to trademark, which did not. That created disequilibrium between the three forms of IP, since trademark was not a form of IP with a limited term of protection.

Debra Harry said that Options 1 and 2 seemed to give priority of IP over customary law, essentially facilitating copyright over TCEs. The purpose was to protect subject matter not covered by IP. She supported Option 3, which emphasized an indefinite term of protection.

ARTICLE 11

NATIONAL TREATMENT

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 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.

[Commentary on Article 11 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Ndeye Siby said that the group had worked with the support of Saoudata Walet Aboubacrine and of Rachel-Claire Okani, among others. The group had changed the title, because the objective of the provision was to ensure legal protection to the communities, which were nationals of a State party and who resided in another State party. When TCEs were used in a State party, but the original beneficiaries came from a State which was not party, she wondered how that was to be settled in a *sui generis* protection framework. She said the group had looked into all the existing international instruments: the Berne Convention, the TRIPS Agreement and the 1996 Treaties. Everything concerned "national treatment" and "most favored nation". As far as trans-boundary protection was concerned, there were two criteria. International protection was important in national laws. Because of the wish to have a *sui generis* protection system, the group had wondered whether, at a regional level, protection should be taken into account or if in each part of a regional system, the conditions for appropriate legislation should be created. The group had maintained the article as it was. The group had discussed the cases in which a community lived in one State, but was not made up of citizens of that State. In such cases, there would be a clause for reciprocity to provide national treatment and to be sure that there was reciprocity in the original country of the community.

Eduardo Tempone said that the group had been guided by other international instruments and the principle of non-discrimination. If a State granted its nationals rights to have entitlements prevail, then these legal measures also had to be available to foreigners without any discrimination whatsoever. The principle of national treatment was based on nationality and on permanent residency, and took into account the case, for example, of communities which were in more than one territory or that were nomadic.

COMMENTS BY EXPERTS

Gyta Berasnevičiūtė sought clarifications on the meaning of "national" and "resident". She also said that the application of that article would depend on the nature of the final instrument.

Makiese Augusto referred to the proposal for a new Article 12 mentioned under Article 8. Shafiu Adamu Yauri agreed. He also wondered about intra-border measures.

Heng Gee Lim wondered if the last part of the article "as well as the rights and benefits specifically granted by this international provisions" was correct. He asked the following question: "if one was trying to obtain protection from country A, which did not offer protection as required by this instrument, did it mean that the foreign applicant who was seeking rights in country A could insist that country A provide him with this additional rights which were actually not available to citizens of country A?" He wondered if the article should not be labeled "National Treatments Plus".

[End of Annex and of Document]