

**COMMENTS AND OBSERVATIONS BY THE NATIONAL COMMISSION FOR THE DEVELOPMENT OF INDIGENOUS PEOPLES (CDI) ON THE DRAFT WORKING DOCUMENTS PREPARED BY THE SECRETARIAT OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) CONCERNING THE “GAP ANALYSIS ON THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/ EXPRESSIONS OF FOLKLORE<sup>1</sup> AND TRADITIONAL KNOWLEDGE<sup>2</sup>”.**

July 18, 2008

The CDI shares the problems described in both documents in addressing the specificities of both the traditional cultural expressions and the traditional knowledge of its indigenous peoples and communities, under Mexico’s intellectual property and copyright systems and in view of the gaps in our legal framework.

In particular, with regard to the issue of the *owner of the right*, it is useful to point out that in Mexico a few federal bodies have recognized indigenous communities as subjects of public law, which allows them to enjoy collective legal personality to carry out legal acts.<sup>3</sup> This is extremely important when the community is the owner of the right with regard to the issues with which we are dealing, as legal personality will allow them to access protection mechanisms which could be established under the legislation.

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<sup>1</sup> See the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, “Draft Gap Analysis on the Protection of Traditional Cultural Expressions/Expressions of Folklore”. Document prepared by the WIPO Secretariat on May 30, 2008. Spanish version sent by the Ministry of Foreign Affairs in a communication with reference OEM-04471, dated July 4, 2008, received officially by the CDI on July 14, 2008.

<sup>2</sup> See WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, “Draft Gap Analysis on the Protection of Traditional Knowledge”. Document prepared by the WIPO Secretariat on May 30, 2008.

<sup>3</sup> Only the States of Oaxaca, San Luis Potosí, Querétaro and Durango have recognized the legal personality under public law of the indigenous peoples and communities. The explicit recognition as an entity or subject of public law entails the legal guarantee of their full personality and capacity to assume and exercise all their rights and obligations, in accordance with the constitutional right to free determination and the exercise of autonomy. See document entitled *La Vigencia de los Derechos Indígenas en México. Análisis de las repercusiones jurídicas de la reforma constitucional federal sobre derechos y cultura indígena en la estructura del Estado* [“The validity of indigenous rights in Mexico. Analysis of the legal repercussions of the federal constitutional reform on indigenous rights and culture in the State structure”], by the CDI, Mexico, December 2007, page 42, see [http://www.cdi.gob.mx/derechos/vigencia\\_libro/vigencia\\_derechos\\_indigenas\\_diciembre\\_2007.pdf](http://www.cdi.gob.mx/derechos/vigencia_libro/vigencia_derechos_indigenas_diciembre_2007.pdf).

The CDI would like to make the following comments and observations on the documents concerned:

*Draft Gap Analysis on the Protection of Traditional Knowledge*

**Specific comments**

Original text	CDI comments and observations
<p>4. The gap analysis also proceeds on the assumption that in order to be protected through specific legal mechanisms, traditional knowledge may need to be:</p> <p>(i) generated, preserved and transmitted in a traditional and intergenerational context;</p> <p>...</p>	<p>It is suggested that the innovation aspects of traditional knowledge be taken into account.</p>
<p>5. In other words, to be eligible for protection, rather than being described in general terms as being ‘traditional knowledge,’ it may be necessary for knowledge to be intergenerational in character, to have an objective link with the community of origin, and to have a subjective association within that community, so that it forms part of the community’s own self-identity.</p>	<p>It is important to point out that knowledge also forms part of a community’s social reproduction.</p>
<p>6. The gap analysis is required to address ‘protection’ of TK. To some extent, analyzing gaps in protection naturally requires a concept of what ‘protection’ means, as this clarifies</p> <p>- the scope of relevant protection...</p>	<p>It should be emphasized that this section does not include innovations, which, although they can be protected given the context of the discussion (they are mentioned in particular in the section on the characteristics of traditional knowledge), it is recommended that reference be made to them directly.</p>
<p>34. A specific domain of traditional knowledge is governed by the Convention on Biological Diversity, which requires that a Contracting Party shall:</p> <p>...</p>	<p>In this part, in addition to Article 8(j), the following Articles of the Convention on Biological Diversity (CBD) may be considered:</p> <p>Article 10. Sustainable Use of Components of Biological Diversity.</p> <p>Each Contracting Party shall, as far as</p>

	<p>possible and as appropriate:          ...          c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;</p> <p>Article 17. Exchange of Information.          ...          2. Such exchange of information shall include exchange of results of technical, scientific and socio-economic research, as well as information on training and surveying programmes, specialized knowledge, indigenous and traditional knowledge as such and in combination with the technologies referred to in Article 16, paragraph 1. It shall also, where feasible, include repatriation of information.</p> <p>Article 18. Technical and Scientific Cooperation.          ...          4. The Contracting Parties shall, in accordance with national legislation and policies, encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of this Convention. For this purpose, the Contracting Parties shall also promote cooperation in the training of personnel and exchange of experts.</p>
<p>(b) <u>Gaps in the objectives or policy rationales of protection:</u></p> <p>43. Gaps in the policy objectives expressed at the international level include:          ...          - Ensuring that access and use of traditional knowledge is subject to prior informed consent;</p>	<p>The CDI suggests continuing to promote the inclusion of this principle as “prior, free and informed consent”, in accordance with the <i>United Nations Declaration on the Rights of Indigenous Peoples</i></p>

*Draft Gap Analysis on the Protection of Traditional Cultural Expressions/Expressions of Folklore*

### General comments

The document shows considerable progress compared to the document on traditional knowledge, above all because it is possible to use protection instruments which are already applied in the case of cultural heritage (an analysis of which would be relevant to determine which are useful for the traditional knowledge theme).

Furthermore, the CDI thinks that the text can be improved upon by introducing the theme of the principle of *free, prior and informed consent*, contained in the United Nations Declaration on the Rights of Indigenous Peoples, which will strengthen the participation and protection of the traditional cultural expressions/expressions of folklore of indigenous and local communities.

### Specific comments

Original text	Comments and observations by the CDI
<p><i>Characteristics of TCEs</i> 8. ... Second, while traditional creativity is a dynamic interplay between collective and individual creativity, the defining characteristic of “traditional” creations is that they identify a living tradition and a community that still bears and practices it. Even where an individual has developed a tradition-based creation within his or her customary context, the creation is not “owned” by the individual but falls within a shared sense of communal responsibility, identity and custodianship. This is what marks such a creation as “traditional”. TCEs might well have had an author at some stage, but that author is now unknown or simply unlocatable.</p>	<p>It is suggested that the importance of the natural environment in this process be mentioned.</p>
<p>9. In summary, TCEs in general (i) are the products of creative intellectual activity, (ii) have been handed down from one generation to another, either orally or by imitation, (iii) reflect a community’s cultural and social identity, (iv) consist of characteristic elements of a community’s heritage, (v) are made by authors unknown and/or unlocatable and/or by communities, (vi) are often primarily created for spiritual and religious purposes, and (vii) are constantly evolving, developing and being recreated within the community.</p>	<p>It is recommended that the role of natural resources in the creation, reproduction and innovation of traditional cultural expressions/expressions of folklore be emphasized.</p>

<p>11. ... Previous materials have identified and discussed actual examples of the appropriation and misappropriation of TCEs. These examples have referred to the exploitation of traditional music and songs, visual art (notably painting), traditional musical instruments, designs and “styles” embodied in handicrafts and other creative arts, performances of TCEs, sacred and secret TCEs, recordings and documentation of TCEs, and indigenous words, names and symbols.</p>	<p>It is suggested that handicrafts as a whole be considered, and not just the mere aspect of the design, given that in the case of Mexico, there has been recurrent piracy of this type of traditional cultural expression/expression of folklore.</p>
<p>25. IGC participants have cited various economic and non-economic objectives in relation to IP and TCEs, such as: ... (ii) IP protection to prevent unwanted use by others: some communities may wish to exercise IP rights in TCEs in order to prevent the use and commercialization of their TCEs by others, including culturally offensive or demeaning use; and,</p>	<p>It should not be forgotten that there are also communities which do not use intellectual property as a tool to prevent the use of their traditional cultural expressions/expressions of folklore, because they do not agree with this form of protection. However, they have established their own means of protecting such expressions.</p>
<p>26. The ways in which different forms of TCEs are exploited around the world are varied. Previous Committee documents set out examples of the kinds of appropriations of cultural expressions that indigenous communities draw attention to.</p>	<p>It is suggested that the concept of “exploit” be changed to “use”, “make use of”, “employ”.</p>
<p>29. In respect of defensive protection of TCEs, it is proposed to focus specifically on calls for the protection against (i) the exercise of copyright in works derived from TCEs, and (ii) the acquisition of trade mark protection in respect of indigenous and traditional names, words and symbols... .</p>	<p>It should be clarified whether or not there are mechanisms for <i>defensive protection</i> against unauthorized use and reproduction by those who protect, safeguard, create, reproduce and innovate traditional cultural expressions/expressions of folklore.</p>
<p>33. The desired forms of protection have been identified above. The following have been suggested as specific, technical limitations of the IP systems most relevant to TCEs: ... (b) <i>Ownership</i>: copyright and industrial designs protection requires the identification of a known individual creator or creators. It is difficult, if not impossible, to identify the</p>	<p>The CDI considers it important, for the future work of the IGC on this matter, to clarify what is understood by ownership, given that in the case of indigenous peoples, this</p>

<p>creators of TCEs because TCEs are communally created and held and/or because the creators are simply unknown and/or unlocatable;</p> <p>(c) <i>Fixation</i>: ... Even certain “fixed” expressions may not meet the fixation requirement, such as face painting, body painting and sand carvings... .</p> <p>...</p> <p>(e) <i>Formalities</i>: while there are no formalities in copyright and related rights, there are registration and renewal requirements attached to industrial designs and trade marks protection. Such requirements have been suggested to be obstacles to the use of these IP systems by indigenous and traditional communities;</p>	<p>concept can create confusion in the analysis, as stated in paragraph 34 of the same document.</p> <p>Even indigenous tales, legends and myths could be considered.</p> <p>Generally, the expression “indigenous and local communities” is used, as in paragraph 36 of the document in question. The language used should therefore be standardized, which also means amending paragraph 79, in which reference is made only to “traditional communities”.</p>
<p><u>B. Gaps which exist at the international level, and an illustration of those gaps with examples to the extent possible</u> <i>Literary and artistic productions</i></p> <p>55. The following gaps may be identified:</p> <p>(a) <i>The “originality” requirement</i>: TCEs which are mere imitations or recreations of pre-existing TCEs are unlikely to meet the “originality” requirement and, therefore, to be protected as conventional copyright works. This means that they are unlikely to be vested with economic rights (it should be noted that moral rights can also apply to works in the “public domain”, including perhaps pre-existing TCEs). ... This may trouble indigenous and traditional communities who may wish to deny or at least restrict the ability of persons not from the relevant cultural community from enjoying copyright in creations derived from that cultural community...</p>	<p>Even cases in which a member of the community decides to obtain the copyright in a traditional cultural expression/expression of folklore belonging to the community can be presented.</p>
<p>80. It is always an option for States to enact a special, stand-alone law to provide protection for TCEs that addresses the identified gaps under conventional IP law. A number of countries and regional organizations have</p>	

<p>enacted such laws. ... They provide, for example, for communal rights which are protected indefinitely. Whether to enact such a law is a political and policy decision for Member States, taking into account policy, operational and technical considerations such as those suggested above.</p>	
<p>Communal moral rights</p> <p>83. Moral rights (the rights to attribution, integrity and publication) respond to many needs in relation to TCEs and are potentially indefinite in duration (see above). ...</p>	<p>To avoid confusion, it should be clarified what this term refers to.</p>
<p>91. At least one jurisdiction, Canada, has already implemented legislation that creates a compulsory licensing scheme allowing for the use of published works to be issued by the national copyright authority on behalf of unlocatable copyright owners.</p>	
<p>98. On the other hand, while denying copyright to authors of such derivative works who are not community members might discourage creativity and establish inequities between authors from within communities and those not, an option could be to oblige, through legislation, external authors to acknowledge the community whose traditions were used as a source of inspiration, to share benefits from exploitation of the copyright, and/or to respect some form of moral rights in the underlying traditions used. This is the approach adopted in the Pacific Model of 2002 and in the Draft Provisions on TCEs before the Committee.</p>	