

WIPO



WIPO/GRTKF/IC/11/4(a)

ORIGINAL: English

DATE: April 30, 2007

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

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

Eleventh Session
Geneva, July 3 to 12, 2007

THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/
EXPRESSIONS OF FOLKLORE:

COLLATION OF WRITTEN COMMENTS ON THE LIST OF ISSUES

Document prepared by the Secretariat

I. SUMMARY

1. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”) is currently considering the protection of traditional cultural expressions (“TCEs”)/ expressions of folklore (“EoF”) through two related and complementary processes:

(i) consideration of an agreed List of Issues concerning the protection of TCEs/EoF; and

(ii) consideration of a draft set of “Revised Objectives and Principles for the Protection of Traditional Cultural Expressions/Expressions of Folklore” (“Objectives and Principles”).

2. The working documents on protection of TCEs/EoF prepared for the eleventh session of the Committee, in line with the decisions taken at the tenth session, comprise:

(i) WIPO/GRTKF/IC/11/4(a): the present document, a collation of the written comments on the List of Issues which were submitted between the tenth and eleventh sessions, in line with a process agreed by the Committee at its tenth session: in particular, this document contains comments received up to April 30, 2007, and addenda will be issued in the event that further comments are received prior to the eleventh session;

(ii) WIPO/GRTKF/IC/11/4(b): a compilation of comments on the draft Objectives and Principles provided between the ninth and tenth sessions, in line with a commentary process agreed by the Committee at its ninth session and a format agreed at the tenth session;

(iii) WIPO/GRTKF/IC/11/4(c): the text of the draft Objectives and Principles, identical to the text that was circulated at the eighth, ninth and tenth sessions, but provided for ease of reference to assist in the reading of the present set of comments.

II. BACKGROUND

3. The Committee has extensively reviewed legal and policy options for the protection of TCE/EoF. This work has built on extensive international, regional and national experience with the protection of TCEs/EoF, which dates back several decades. This review has covered comprehensive analyses of existing national and regional legal mechanisms, panel presentations on diverse national experiences, common elements of protection of TCEs/EoF, case studies, ongoing surveys of the international policy and legal environment as well as key principles and objectives of the protection of TCEs/EoF that received support in the Committee's earlier sessions. Previous documents, listed in the table above, provided full information on this earlier foundational work.

4. This extensive body of work and wide background of existing law was distilled into draft Objectives and Principles for protection of TCEs/EoF, commissioned by the Committee at its sixth session, and revised and reviewed over the course of the following four sessions. The draft Objectives and Principles have also been widely consulted upon beyond the Committee, and have been used, even as a draft, as a point of reference in several national, regional and other international legislative and policymaking processes. Several of these processes are drawing directly from the draft.

5. The draft Objectives and Principles are currently circulated as the Annex to WIPO/GRTKF/IC/11/4(c), for ease of reference and in particular to assist understanding the comments contained in the present document. This contains the identical text of the second draft of the Objectives and Principles that was also annexed to WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/9/4, and WIPO/GRTKF/IC/8/4. This revised version, unchanged from the eighth to the current session, was the result of the first round of intersessional stakeholder review established by the Committee after it reviewed the first draft, WIPO/GRTKF/IC/7/3, at its seventh session. Thus the draft remains in the form in which it has been widely consulted upon and extensively reviewed in the Committee, and in many Member States and other policy processes.

6. The Committee again reviewed the draft Objectives and Principles at its ninth session, and initiated a second round of intersessional commentary and review. The written comments received between the ninth and tenth sessions in line with that process were posted on the internet and were circulated as information documents WIPO/GRTKF/IC/10/INF/2, WIPO/GRTKF/IC/10/INF/2 Add., WIPO/GRTKF/IC/10/INF/2 Add.2 and WIPO/GRTKF/IC/10/INF/2 Add.3 (English) and WIPO/GRTKF/IC/10/INF/3 (Spanish). The draft Objectives and Principles are complemented by a further document, an overview of policy options and legal mechanisms used in national laws for implementing the Objectives and Principles (WIPO/GRTKF/IC/9/INF/4 and an earlier draft WIPO/GRTKF/IC/7/4).

7. More broadly concerning outcomes of the Committee's work on TCE/EoF protection, and noting that the Committee's renewed mandate refers to the international dimension of its work and excludes no outcome, it is recalled that previous Committee discussions have identified three aspects of possible outcomes, namely: (i) content or substance; (ii) form or legal status; and (iii) consultative and other working procedures necessary to achieve any agreed outcome.

III. THE COMMITTEE'S TENTH SESSION

8. At its tenth session (November 30 to December 8, 2006), the Committee decided as follows with respect to TCEs/EoF and traditional knowledge (TK):

“(i) Discussion will commence on the Issues (attached [to document WIPO/GRTKF/IC/10/7 Prov. as Annex I] in numerical order, if possible, during the current session, and will continue on that basis at the next session.

(ii) The existing documents (WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/10/5 and WIPO/GRTKF/IC/10/6) remain on the table in their existing form and existing positions in relation to them are noted.

(iii) The discussion on the issues is complementary to and without prejudice to existing positions in relation to the existing documents.

(iv) Delegations and observers are invited to submit comments on the Issues by end of March 2007. The Secretariat will collate the comments under each of the issues and distribute them by end of April. All comments will be posted on the Internet on receipt.

(v) In relation to existing comments on documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5, the Secretariat will produce two tables (one for traditional knowledge and one for traditional cultural expressions/expressions of folklore) each containing two columns. In the first column, the titles of provisions in documents WIPO/GRTKF/IC/9/4 or WIPO/GRTKF/IC/9/5, as the case may be, will be reproduced, together with titles “general”, under the heading “Issues”. In the second column, the comments made by delegations and observers in relation to the titles in question will appear under the name of each delegation or observer.”

IV. DOCUMENTS FOR THE ELEVENTH SESSION

9. Pursuant to this decision of the Committee, the following complementary documents have been prepared for the eleventh session of the Committee:

(i) WIPO/GRTKF/IC/11/4(a): the present document, a collation of the written comments submitted between the tenth and eleventh sessions on “Traditional Cultural Expressions/Expressions of Folklore: List of Issues”, as required in paragraph (iv) of the decision just quoted;

(ii) WIPO/GRTKF/IC/11/4(b): a compilation of comments on the draft Objectives and Principles provided between the ninth and tenth sessions, in line with the commentary process agreed by the Committee at its ninth session and the format agreed at the tenth session in paragraph (v) of the decision just quoted;

(iii) WIPO/GRTKF/IC/11/4(c): which encloses, for ease of reference, the text of the draft Objectives and Principles as contained in WIPO/GRTKF/IC/9/4, being identical to the text of Objectives and Principles circulated at the eighth, ninth and tenth sessions. This is provided especially to assist in following the table of comments provided in the present document. It is recalled that the tenth session’s decision just quoted states that “The existing documents (WIPO/GRTKF/IC/10/4, WIPO/GRTKF/IC/10/5 and WIPO/GRTKF/IC/10/6) remain on the table in their existing form and existing positions in relation to them are noted” and that “The discussion on the issues is complementary to and without prejudice to existing positions in relation to the existing documents.”

10. The comments have been collated and reproduced directly as received, although, if necessary some typographical errors have been corrected to facilitate understanding of the comments. The comments appear in the order in which they were received. Some comments were of a general nature and did not respond directly to any of the issues in the List of Issues. These comments were placed in a section headed “General”. Certain comments were ostensibly addressed to the TK List of Issues, but in fact addressed TCE-related issues, or both TK and TCE issues. Such comments were generally included in this collation as well as the TK collation (WIPO/GRTKF/IC/11/5(a)), which document should also be referred to. This document contains comments received up to April 30, 2007. An addendum or addenda will be issued in the event that further comments are received prior to the eleventh session.

11. The Committee is invited to:

(i) review and discuss the comments collated in the annex in relation to the List of Issues decided upon at the tenth session of the Committee, in relation to the comments on document WIPO/GRTKF/IC/9/4 contained in WIPO/GRTKF/IC/10/4(b) and the draft provisions contained in WIPO/GRTKF/IC/11/4(c); and

(ii) call for further comments from Committee participants on the List of Issues.

[Annex follows]

ANNEX

COMMENTS RECEIVED ON
THE LIST OF ISSUES CONCERNING PROTECTION OF
TRADITIONAL CULTURAL EXPRESSIONS/ EXPRESSIONS OF FOLKLORE

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GENERAL COMMENTS

European Community

The European Community and its Member States welcome the approach chosen at the last session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to pursue the discussion in the next session on the basis of a questionnaire, as this approach allows for a focus on the substantive issues at stake. The purpose of this submission is to contribute constructively to the dialogue among the WIPO members, taking into account the interests voiced by some WIPO members to protect the spiritual and commercial value attached to traditional cultural expressions and expressions of folklore, highlighting their importance as shared heritage. The European Community and its Member States recognize the general and specific value that indigenous and local communities attach to their Traditional Cultural Expressions (TCE's) and acknowledge that these communities deserve respect.

The European Community and its Member States remain of the view that further discussion in the IGC should be based on the following general principles, as we reiterated in the tenth session of the IGC (November 30 to December 8, 2006).

General Guiding Principles:

- a) Recognizing the importance of the aspirations and expectations of indigenous communities as regards their TCE's, we however believe that enabling these communities to use the current Intellectual Property system, where appropriate, both nationally and internationally, is a practical first step. Unless part of a working legal framework, it is difficult to identify illicit acts.
- b) The very nature of Intellectual Property protection has always been based on a delicate balance of interests between the creators and those wanting to enjoy or use these creations. For uses that are considered offensive other areas of law, such as blasphemy or unfair competition rules, can be of use.
- c) We agree that the current international Intellectual Property system of rights and obligations should not be interfered with and double protection should be avoided.
- d) In view of the great variety in indigenous communities and the different attitudes and needs expressed by them during the past years of the Intergovernmental Committee, it appears that it will not be possible to develop a single system as a solution.
- e) The characteristics of TCE's set out in this section mean that protection via copyright is not satisfactory. Indeed, the notions of their evolving character, the difficulty in identifying the creator and time of creation, their lack of uniqueness and the indefinite term of protection being sought are problematic when compared to the strict criteria (regarding the identity of the creator, the originality of the work, the time and length of protection) required to qualify for copyright protection.
- f) We are in favour of continuing to discuss TCE's separately from issues under the heading of Traditional Knowledge.
- g) The work of this committee should not interfere with the internationally recognised agreements on the subject of human rights.
- h) It appears that there is a certain overlap with indications already contained in subparagraph a). In our jurisdictions, TCE's are in the public domain and therefore open for free use by everyone, including, of course, those persons belonging to the original community.

i) Whatever systems are introduced to administer rights attached to indigenous communities should not prevent those wanting to be inspired by such TCE's to create.

Hungary

Please be advised that the European Union's contributions concerning the 2 lists of issues will be Hungary's position as well.

International Publishers Association (IPA)

The International Publishers Association (IPA) welcomes the opportunity to comment on the list of Issues attached to the Initial Draft Report on the 10th meeting of GRTKF/IC, and respectfully submits its responses as attachment to this letter. Our responses do not supersede, but compliment our position with regard to the work of the WIPO/GRTKF/IC as set out in our previous submissions and interventions.

Publishers come into contact with traditional cultural expressions/expressions of folklore (TCE/EoF) or traditional knowledge (TK) in many different ways:

- Local publishers of children's books and school textbooks make reference in their works to the cultural context and environment of their readers. The retelling of folk tales or the depiction of the culture forming part of their readers' daily lives is part of the editorial content.
- Similarly, many writers of fiction are inspired by their local customs, traditions and the social environment in which they were raised. They may refer in their works to some specific experiences important to their local culture.
- Academic publishers publish works of scientists describing ethnological observations; others may publish medical research which is based on discoveries by indigenous peoples. In this area, there is a heightened awareness of the ethical implications of this kind of research and a series of codes of conduct have been established, or are being debated.

Our position is guided by the following primary concerns and goals:

- Support for the work of local and international publishers in preserving and disseminating TCEs/EoF and TK;
- Support for the role of educational publishers in their passing on of TCEs/EoF or TK;
- The importance of freedom of expression and freedom of access to information for the development of cultures;
- The value of a rich public domain for the development of society generally, including creators and publishers in particular;
- The pre-eminent value of copyright and other existing intellectual property rights for the protection of the economic and moral interests of all creators, including indigenous people;
- Respect for the principle of subsidiarity, according to which only those tasks should be performed at international level which cannot be performed effectively at a more immediate or local level;
- The need for consensus on Policy Objectives and Core Principles prior to discussing the creation of a more detailed framework for the protection of TCEs/EoF or TK at international level.

To help advance the process of consensus-building, we have chosen to reply to those of the Issues put up for consultation that affect the perspective of the publishing industry, in particular of local writers and publishers and those publishers collaborating closely with indigenous communities.

With our responses we hope that we can ultimately contribute to the development of a framework that incentivises indigenous communities as well as professional publishers to enhance the possibilities for the preservation and dissemination of indigenous content for the benefit of all.

We would be delighted to further explain our position to the WIPO Secretariat or WIPO Delegates at an appropriate time.

We wish you all the success with the work of this important committee, and look forward to participating in GRTKF/IC/11.

Kyrgyzstan

Kyrgyzpatent presents its compliments to the World Intellectual Property Organization (WIPO) and referring to the letter of February 23, 2007 (ref. C.7430/OMPI-49) would like to thank for the information provided and cooperation established with our office in the field of protection of Traditional Knowledge, Traditional Cultural Expressions (Folklore) in the Kyrgyz Republic.

Since currently the issues of protection of Traditional Knowledge, Traditional Cultural Expressions (Folklore) are most urgent and discussed in international community, our office also observes the development of Traditional Knowledge and Traditional Cultural Expressions (Folklore) protection in other countries.

At present time the Kyrgyz Republic carries out certain works to investigate these fields.

However we would like to note that the work carried out by the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (ICGR) is also very important in the said fields.

United States of America

At the Tenth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), Member States agreed to submit written comments on ten issues (List of Issues) related to the protection of Traditional Knowledge (TK) and Traditional Cultural Expressions/Expressions of Folklore (TCEs/EoF) with a view toward facilitating within the IGC a sustained discussion of the many complex substantive issues before the Committee. The United States welcomes that opportunity, and, toward that end, is pleased to submit these preliminary comments on the selected issues related to the protection, preservation and promotion of TK and TCEs/EoF. The United States also believes that reaching agreement on policy objectives and general principles on TK and TCEs/EoF will advance the work of the Committee.

The Lists of Issues for both TK and TCEs/EoF, in the view of the United States, provide a useful point of departure and a helpful framework for facilitating such a sustained discussion. Although many of these issues are not new to the Committee, to date the members of the IGC have not had the opportunity to engage in the kind of focused discussion needed to reach a consensus on these important questions. The United States also understands that these initial Lists of Issues will be further refined and elaborated by the Member States in their comments and during the course of the IGC's deliberations.

The United States notes that a number of the issues in the List of Issues are framed using words such as "protection" and "protected." Such words sometimes have been used within the IGC to refer to legal measures to address issues and concerns related to TK and TCEs/EoF, including protection under intellectual property laws. However, over the course of its deliberations, Committee participants have not placed limits on the discussion of TK and TCEs/EoF. Instead, the Committee consistently has taken a broad approach to addressing issues and concerns related to TK and TCEs/EoF, including discussion of measures to safeguard, preserve, and promote an environment of respect for TK and TCEs/EoF. Such an approach is consistent with the mandate of the Committee, which leaves no outcome excluded. Similarly, the United States believes that the terms of discussion of the List of Issues, which aims to facilitate consensus among Committee participants, must not prejudice the understanding of any particular issue or prescribe any particular outcome.

Brazil

The following concerns should guide the discussions on the protection of TCEs/EoFs within the competences of WIPO, most of which, by and large, are touched upon by the draft international instrument under consideration on the Annex to document WIPO/GRTKF/IC/10/4:

- **Defensive protection:** Measures to curb misappropriation of TCEs/EoFs, in particular to prevent and, when applicable, revert, the granting of IPRs without the authorization of the custodians of TCEs/EoFs, irrespective of whether the TCEs/EoFs have been registered;
- **Positive protection:** Without prejudice to the decision Members may take to protect TCEs/EoFs via "sui generis" systems, the Committee should consider the adequacy of IP mechanisms to provide for the protection of TCEs/EoFs by examining, for example, (i) the extent to which rules relating to public domain should be adapted to accommodate appropriate protection of TCEs/EoFs; (ii) changes that might be necessary to accord TCEs/EoFs a term of protection commensurate to their duration in time; (iii) possible modifications in rules governing the validity of IPRs with a view to provide for deterrent mechanisms against misappropriation of TCEs/EoFs;
- **Prior informed consent:** ensure that communities enjoy rights over their TCEs/EoFs by setting out the requirement of prior informed consent as a condition for their use by third parties;

International dimension: The Committee should address ways and means to facilitate the enforcement of national legislation on the protection of TCEs/EoFs in third countries.

Japan

Japan recognizes that the issue of traditional cultural expressions (TCEs)/expressions of folklore (EoF) is important for many member States. However Japan believes that the depth of understanding among the member States on this issue is still insufficient for any kind of agreement at the international level to be formed. Therefore, as the first step to deepening our understanding of TCEs/EoF, we welcome fundamental discussions based on the Lists of Issues. In discussing the List of Issues, we believe that it is useful to discuss fundamental issues, such as the definition or the content of certain terms. We wish to point out that there are some issues that cannot be resolved because these fundamental issues are still unclear. Even before attempting to finalize the details of the wordings of certain terminology, what is more problematic is the lack of formation of common understandings or common perception as to what such words should mean. Arguing, however, that under these circumstances, it is impossible to agree on the detailed wording of definitions or that the definitions should be left to the national laws of member States is a failure in facing up to the problem squarely.

The List of Issues contains words such as “rights“ and “protection”, but at this stage, there is no consensus on establishing any new rights or forms of protection. We may use and touch on these words in the course of discussing each individual issue, but such usage is not indicative of Japan’s positions on the formulation of any new “rights” or “protection”. Of course we are aware that there are some pre-existing rights under customary laws and that they should be respected. However, even in such cases, we must point out that rights recognized by customary laws in certain states or regions are not necessarily recognized in other jurisdictions.

Japan submits the following comments on each issue. We will reserve further comments if necessary.

South Africa

South Africa’s proposal is based on the understanding that any further work of WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the “IGC”) will constitute a step towards developing an international binding instrument that aims to protect traditional knowledge, traditional cultural expressions and genetic resources. South Africa reaffirms its stance that the work of the IGC must veer towards an accelerated completion hence it does not view the responses to decisions of the 10th Session of the IGC as mainly exploratory in nature with compilation of information and wide-ranging discussions for future work of the IGC. South Africa finds it appropriate as it would like to think of being in an advantageous position of having a national Indigenous Knowledge Systems (IKS) Policy in place which duly informs our position on the various questions and draft legislation that aligns our intellectual property rights legislation as well as formalized the IKS policy.

FUTURE OF THE IGC

In order to a illuminate a positive role on the continued working of the IGC South Africa encourages working towards a comprehensive and integral legal international binding convention to promote and protect the rights and dignity of local and indigenous communities.

I. DEFINITION OF TRADITIONAL CULTURAL EXPRESSIONS (TCES) /
EXPRESSIONS OF FOLKLORE (EOF) THAT SHOULD BE PROTECTED.

European Community

Further to the above general principles, the European Community and its Member States would also like to support the endeavour of the IGC to further clarify the intended object of protection. A clear definition of the object of protection is a prerequisite to engaging further in discussions in this area.

International Publishers Association (IPA)

For publishers to be able to publish works related to TCES/EoF with economic and legal certainty, a clear and concise definition of the protected subject-matter is required, leaving no room for ambiguity. In particular, any framework for the protection of TCES should not afford protection simply to a mere idea or concept, but should be tied to a particular manifestation or expression. Otherwise, the right to freedom of expression could be infringed (see e.g. Article 19, Universal Declaration of Human Rights).

China

We think that the definition of TCES/EoF in the current draft is a feasible one but suggest that TCES/EoF and traditional knowledge (TK) should be more clearly differentiated in the following discussions of the Intergovernmental Committee of WIPO.

Kyrgyzstan

Traditional cultural expressions (folklore) to be protected – working and ritual traditional expressions (related to verbal folk arts and used in verbal form) of folklore, myths, legends, tales, heritage (sanjyra), epics, folk dramas, proverbs, by-words, riddles, expressions of folk poetry, folk and funeral songs (koshok), dance melodies, folk and professional music, folk dances, games, events, celebrations and other expressions of movement, musical expressions of national folklore and verbal expressions as well as expressions of national symbolism, ornament, pattern, contained in items reflecting the idea of semantic purpose.

Protection also cover identified as folk artistic crafts created in the material form and through the folk arts and crafts containing varieties of artistic crafts, including graphic professional pictures, paintings, subject images, shadow pictures, coinage, wooden implements, national clothes, interior decorations, habitations, horses, sculptures, ceramics, earthenware and pottery, bone, stone items, cast items made of steel and bronze, metal works (metallic processing), carved woods, mosaics, embroideries, ornamental paintings, sericulture, patterned hand weaving, felt products, laces, gobelins, pile and pileless carpet weaving representation of ornaments, patterns, jewelry, leather works, basketry, ornamental matting (chiy), clothes as expression of folk arts, musical instruments, timbering, architecture, smaller architectural form etc.

United States of America

The IGC has made considerable progress in identifying the broad contours of the subject matter of TCEs/EoF. This progress has drawn on the pioneering work of the WIPO UNESCO Model Provisions for National Laws for the Protection of Expressions Against Illicit Exploitation and Other Prejudicial Actions. It also has benefited from the excellent work of the International Bureau (IB) in compiling a wealth of materials and distilling key elements of definitions for TCEs/EoF from regional frameworks, national copyright laws, and other laws.

Nonetheless, to date, the members of the IGC have not had the opportunity to undertake a focused discussion of the subject matter of TCEs/EoF. Building on its prior work, the IGC is now in the position to examine in greater detail the subject matter of TCEs/EoF. Such a discussion should draw deeply on both national experiences (for example, under national copyright laws, sui generis laws, customary laws, and other laws) and the experiences of indigenous peoples and traditional and other cultural communities (footnote in submission: The United States uses the phrase “indigenous peoples and traditional and other cultural communities,” which appears in a number of WIPO IGC documents, but notes that the Committee has not reached agreement on the use of this phrase).

By casting its net broadly, the IGC could advance its understanding of many recurring conceptual and practical issues regarding the subject matter of TCEs/EoF. For example, the recurring issue of whether the subject matter of TCEs/EoF is limited to community-oriented artistic and literary productions requires further examination. An important related issue is delineating with greater precision, if possible, the boundaries between TCEs/EoF and traditional knowledge (TK). IGC discussion of the subject matter of TCEs/EoF should be informed by the most recent national experiences, including the approaches of WIPO Members in defining TCEs/EoF, whether for purposes of protection or exclusion.

The IGC would benefit greatly from learning more about the experiences of indigenous peoples and traditional and other cultural communities in defining the subject matter of TCEs/EoF. Such a discussion should be informed by both legal measures (such as the definition of TCEs/EoF under customary law, whether codified or not) and non-legal measures (such as the use of tribal registries and electronic databases). A focused discussion should also address the question of how to identify an association between a particular TCEs/EoF and a particular indigenous people or traditional or other cultural community.

The issue of defining TCEs/EoF also includes the difficult question of identifying TCEs/EoF, or elements thereof, that “should be protected.” As noted in our general comments, the United States understands the use of the term “protection” to include a broad range of measures (including legal and non-legal measures) to address specific issues and concerns related to TCEs/EoF and TK. It would be productive for the IGC to examine in greater detail what TCEs/EoF, or related elements, are capable of protection under existing legal and non-legal mechanisms.

Ghana

1.1 The WIPO Glossary defines folklore as works belonging to the cultural heritage of a nation created, preserved and developed in indigenous communities by unidentified persons from generation to generation.

Examples of such works are folk tales, folk songs, instrumental music or dances and the different rites of people. In the broad sense, folklore comprises all literary and artistic works mostly created by authors of unknown identity but presumed to be nationals of a given country, evolving from characteristic forms traditional with ethnic groups of the country.

1.2 The Copyright act 2005 (Act 690) defines folklore as the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana designs, where the author of the designs are not known and any work designated under the Act as works of folklore.

1.3 Definition 3: The UNESCO Bulletin Volume 32 NO. 4 defines folklore as follows:-
Folklore is a mode by which culture is expressed. Folklore encompasses all aspects of cultural heritage, including art works, songs, dances, stores, customs, traditional medical knowledge, etc.

Brazil

The subject matter should be all that consists in the elements belonging to the traditional cultural heritage, developed and maintained by a community or a people within a country or by individuals, and that reflect the traditional cultural expressions of said community or people.

The provisions defining the subject matter of the international instrument should reflect the idea that ECTs/EoFs have a dynamic and iterative (in the sense that it represents a process) nature. Accordingly, expressions that may characterize more recently established communities or identities should not be left unprotected, as they equally qualify as TCEs/EoFs.

With respect to musical expressions, musical styles in particular, the protection sought after is aimed at the particular rather than the general, i.e., there is little sense in ascribing entitlement to a musical style as a tradition that, by the very cultural dynamics of mankind, is transmitted and shared among many groups and societies.

In this context, the definition proposed in Article 1 of the Annex to document WIPO/GRTKF/IC/10/4, transcribed below, represents an adequate basis to discuss the issue:

“(a) “Traditional cultural expressions” or “expressions of folklore” are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

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

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

(iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances; whether or not reduced to a material form; and

(iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are:

- (aa) the products of creative intellectual activity, including individual and communal creativity;*
(bb) characteristic of a community's cultural and social identity and cultural heritage;
and
(cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.
(b) The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels."
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Japan

The expression "traditional cultural expressions/expression of folklore" gives us a rough idea of its general meaning, but from a legal perspective, the expression still remains very vague. Below we will point out the problems we see in current existing attempts to define TCEs/EoF. This is for the purpose of illustrating issues necessary to deepen understanding.

WIPO/GRTKF/IC/6/3 (Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options) paragraph 50 lists the common elements that appear in definitions of TCEs/EoF in national laws of member States as below:

- (i) are handed down from one generation to another, either orally or by imitation,
- (ii) reflect a community's cultural and social identity,
- (iii) consist of characteristic elements of a community's heritage,
- (iv) are made by 'authors unknown' and/or by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so,
- (v) are constantly evolving, developing and being recreated within the community.

With regard to these common elements, problems and difficulties as below have been pointed out from time to time, but the international community has never been able to come to a common understanding to this date.

- (1) The range of the meaning of certain words and the scope of public domain: It is not clear how words such as "traditional", "handed down from one generation to another", "heritage" and "characteristic" are rigidly interpreted and applied. Rather the meanings of these words cover a wide range of spectrum. There are traditional cultural expressions that are handed down only to certain individuals within a small community through strict rituals, and there are also traditional cultural expressions in a wider sense, such as those that have taken root as part of the national traditional culture of a country among its citizens in general, and are used by city dwellers and may be at times even be used commercially. Among these, the criteria that divide those that are protected from those that are not are unclear. Applying these words too loosely would bring about a fear of according intellectual property protection to traditional culture in general. Such consequence is not appropriate, as it would unfairly limit the public domain. On the other hand, if we were to rigidly interpret the meaning of these words and limit the scope of protection, we would need a justifiable explanation as to why certain types of expressions are protected while others are not.
- (2) Criteria to fall under public domain due to uses outside the community: It is understood that TCEs/EoF falls under public domain once it has lost its link with a certain community. However it is unclear what extent of uses outside the community would be

sufficient to render a TCE/EoF to be in the public domain. Geographically, it is unclear how much the use should expand outside the community for a TCEs/EoF to be in the public domain. Time-wise, it is unclear as to how long the TCEs/EoF should be used by non-community members for it to fall in the public domain. It is inappropriate to deny public domain status to TCEs/EoF that have been used outside the community for centuries in the past, as this would lead to the denial of the fruit of cultural development through cultural exchange.

- (3) Non-traditional cultural expressions: It is unclear why non-traditional cultural expressions that have fallen under the public domain should not be protected while traditional cultural expressions are. WIPO/GRTKF/IC/5/3 paragraph 42(c) lists examples such as works by Shakespeare, heritage of Greek, Egyptian and Roman cultures and poses a question “Should ‘traditional’ creations enjoy a privileged status vis-à-vis other public domain ‘non-traditional’ creations?” This question is still unanswered.
- (4) TCEs/EoF “that should be protected”: There is a view that the meaning of the expression TCEs/EoF can be made clear if requirements for protecting TCEs/EoF are clearly established, even if the meaning of the expression TCEs/EoF itself is vague. However it should be noted that no consensus about “protection” has yet been reached. The following opinions about the List of Issues are just for the purpose of discussion and this does not mean that Japan agrees to start discussing the listed issues for any other purpose than for clarifying issues.

The criteria for TCEs/EoF “that should be protected” is inextricably linked with the criteria for judging what benefits society can enjoy by the protection of TCEs/EoF. Will the TCEs/EoF be made widely available to the public (as are patents and copyrights) with the aim of enhancing technology and culture for succeeding generations? Or, will the maintenance of TCEs/EoF itself be regarded as serving the public interest? Taking into all these questions into account, discussions should focus on public interest and the return of benefits to the society. Without discussing such public interest, it will not be made clear if any protection is necessary or what should be protected.

The subject matter of protection may vary by the form/level of protection. The level of protection required to ensure that TCEs/EoF is respected can cover a substantially wide range of cultural expressions. If the level of protection is that of granting an exclusive right, the scope of the subject matter will be greatly narrowed. In addition, levels such as granting a right to remuneration or providing government subsidies for its conservation are also conceivable.

To clarify the expression “TCEs/EoF that should be protected,” the discussion about public interest, identification of existing problems, and practical needs for protection is indispensable.

- (5) Definition of “Community”: This will be discussed under the next item 2.

Norway

Traditional cultural expressions and expressions of folklore may include any artistic or traditional expressions, tangible or intangible, that are the results of individual or communal creativity, and that are characteristics of a community’s cultural and social identity and cultural

heritage, and that is maintained, used or developed by such a community. There should be considerable room for further specifics to be determined at the national level.

In our opinion the discussions in the IGC as well as the IGC documents provide an extensive basis for the understanding of what expressions should be protected.

Qatar

Traditional Knowledge (TK) is the totality of tradition – based creations of a community, expressed by a group of individuals and recognized as reflecting the Knowledge of a community in so far as they reflect its social experience. Its life practices, standard and values are transmitted orally, by imitation or other means.

Its forms among other:

- TKs and practices concerning nature and universe
 - TKs concern traditional arts and crafts
 - TKs concern agriculture, traditional medicine, culinary cosmetics and dressings etc...
 - TKs concern decorations and symbols
 - TKs concern constructing and architecture
 - Traditional Law
-

Ogiek Peoples Development Program (OPDP)

Many terms may be used in defining TCE in relation to cultural identity and solidarity in livelihoods. For instance among the Ogiek People, TCE is experience during circumcisions (rites of passage), marriage, burial and while hunting. Traditional cultural expression therefore is a source of identifying traditional way of life which human is born and brought up. Folklore has been applied in tradition informal education to provide stories, tales to the young generations so as to shapen their understanding in relation to their parents and strangers. An expression of folklore has been vital in warning young generations against of the community norms.

South Africa

Whilst we agree with the definition provided in Article 3 of document WIPO/GRTKF/10/5, South Africa recommends the inclusion that “Indigenous Knowledge (IK) will be passed from generation to generation and between generations.”

In addition to the current definition South Africa proposes the following:

- to include under the term “traditional knowledge” technical know-how and spirituality (Article 3.2);
- to include ‘memory’ amongst resources section under article 3; and,
- Under Article 4 (iii), to add “traditional and local”

South Africa will continue to use the term Indigenous Knowledge (IK) as opposed to the use of Traditional Knowledge (TK). The use of this terminology is in sync with our IKS policy,

proposed amendments to our IP legislations, and draft Access and Benefit regulations etc. This might support the use of IK as opposed to TK.

Russian Association of Indigenous Peoples of the North (RAIPON)

All works whose source is traditional culture, performed by folklore groups or authors from a number of indigenous peoples, including:

Works of popular creation may include:

- (1) works of oral popular creation, such as popular tales, epics, legends, fairy tales, popular poetry, proverbs and riddles;
 - (2) musical works such as popular songs and instrumental music;
 - (3) choreographic works such as popular dances;
 - (4) dramatic works such as games, performances and rituals;
 - (5) works of painting, sculpture, graphic art and other works of fine art;
 - (6) works of decorative applied art;
 - (7) works of architecture etc.
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Colombia

The definition contained in the proposed Article 1 of the substantive provisions detailed in documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/10/4 refers to the “creativity of the individual”. We consider that there is no need to refer to the creativity of an individual when speaking of a collective task. However, the problem lies not so much in the applicability of the criterion of creativity to a group but in the practical definition of the criterion as such. Furthermore, the list included in the above Article should scarcely be a list and must not be restrictive.

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

We consider that this question can be divided into two parts, the first relating to the specific definition of traditional cultural expressions, which must reflect the concept of the devising of an original creation by a group of individuals constituting a community and which has developed these indigenous creations since ancestral times, and the fact that said creations, including changes thereto, have been handed down from generation to generation, have been perpetuated in time up to the present and continue in force. The subject of the traditional cultural expression must belong to and be recognized as the work of the specific community which has devised and transmitted it.

The second issue refers to expressions of folklore that should be protected: in our opinion these must be all the original creations of the community in question and which must have as its sphere of application the whole series of creations reflected to a greater or lesser extent in the intellectual property laws in force in very different countries. We believe, however, that musical compositions, with or without words, dramatic and dramatico-musical works, including choreographs, pantomimes, and in general any artistic performance similar thereto, including theatrical works, as well as sculptures, works of painting, drawing, engraving, lithographs and graphic arts on any carrier, as well as applied or non-applied three-dimensional works, should be protected as subject matter for consideration. Indigenous craft designs and

preparation of original items, including logotypes, denominations, and specific linguistic expressions used to denominate a region or people should also be included.

Tunisia

Terminology:

Traditional knowledge includes the processes acquired by peoples through the know-how, skills and creativity which they inherit. It is the handing-down of culture, from one generation to another.

Traditional knowledge should be preserved because it contains indicators of the identity and specific nature of a nation. In Tunisia, the fields of application of such traditional knowledge are as follows :

- ✓ crafts,
 - ✓ culinary aspects,
 - ✓ the art of living,
 - ✓ the art of building,
 - ✓ agriculture and nature,
 - ✓ medicinal knowledge.
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Guatemala

Convention on the Protection and Promotion of the Diversity of Cultural Expressions, ratified by the Government of Guatemala, on August 21, 2006, published in the Journal of Central America on March 23, 2007.

Cultural expressions: these are expressions resulting from the creativity of persons, groups and societies, which possess cultural content.

Protection means the adoption of measures aimed at preserving, safeguarding and enriching the diversity of cultural expressions.

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (WIPO/GRTKF/IC/2).

Expressions of folklore: products incorporating elements characteristic of the traditional artistic heritage developed and perpetuated by a community or by individuals, which reflect the traditional artistic expectations of that community.

Protects:

Verbal expressions: popular tales, popular poetry and riddles.

Musical expressions: songs and popular instrumental music.

Physical expressions: popular stage dances and performances, and artistic forms of rituals.

Tangible expressions: other forms of popular and traditional art, drawings, paintings, sculptures, pottery, terracotta, mosaics, carpentry, foundry goods, jewelry, basket making, textile work, tapestries, dresses, musical instruments and architectural works.
Decree No. 26-97, revised by Decree No. 81-98 of the Congress of the Republic of Guatemala.
Law for the Protection of the National Cultural Heritage.

Cultural heritage: the national cultural heritage consists of the property and institutions which, in accordance with the law or by declaration of authority, are included therein and constitute movable or immovable property, both public and private, relating to palaeontology, archaeology, history, anthropology, art, science and technology, and culture in general, including the intangible heritage, which together help to strengthen the national identity.

Tangible cultural heritage: immovable cultural property: architecture and its elements, including applied decoration, groups of architectural elements and units and of vernacular architecture, historical centers and units, including areas serving as the natural environment and landscape, the urban layout of cities and villages, palaeontological and archaeological sites, historical sites, particular areas or units, man-made works or combinations thereof with the natural landscape, recognized or identified by their character or landscape of exceptional value, prehistoric and prehispanic inscriptions and representations.

Movable cultural property: property which for religious or secular reasons is of genuine importance for the country and is related to the palaeontology, archaeology, anthropology, history, literature, art, science or technology of Guatemala, which comes from the sources listed below. The collections and objects or copies which, owing to their interest and scientific importance for the country, are of value for zoology, botany, mineralogy or archaeology, planned by chance. The elements resulting from the dismantling of artistic and historical monuments and archaeological sites. Artistic and cultural property related to the country's history, special events, and illustrious personalities from social, political and intellectual life, which are of value for the Guatemalan cultural heritage.

Protects:

- (a) Original paintings, drawings and sculptures.
- (b) Photographs, engravings, silk screen paintings and lithographs.
- (c) The sacred art of unique and significant character, made of noble and permanent materials and whose creation is relevant from a historical and artistic standpoint.
- (d) Incunable manuscripts and old books, maps, documents and publications.
- (e) Archives, including photographic, cinematographic and electronic archives of any type.
- (f) Musical instruments.
- (g) Antique furniture.

Decree No. 25-2006 of the National Congress, Convention for the Safeguarding of the Intangible Cultural Heritage, states:

Intangible cultural heritage: these are the uses, representations, expressions, knowledge and technologies together with the instruments, objects, artifacts and cultural areas inherent in communities, groups and, in some cases, individuals, so that they may be recognized as an integral part of their cultural heritage.

Protects:

Show arts, social uses, rituals and festive acts, knowledge and uses relating to nature and the universe, traditional craft techniques.

Russian Federation

There is no definition of “traditional cultural expression/expression of folklore” in Russian legislation, the most commonly used notion is the “work of folk arts” used as a synonym. However, “work of folk arts” this notion is not defined in Russian legislation either.

Works of folk arts may include:

- 1) works of oral folk arts, such as sagas, legends, fairy tales, folk poetry, proverbs, riddles;
- 2) musical works, such as folk songs and instrumental music;
- 3) choreographic works, such as folk dances;
- 4) dramatic works, such as games, performances, ceremonies;
- 5) works of art, sculptures, graphics and others;
- 6) works decorative and applied arts,
- 7) architectural works, etc.

Providing the exhaustive list of objects that should be considered works of folk arts is impossible. As we can see from the above works of folk arts may and may not be expressed in a material form.

In general, taking into consideration the studies of the ethnographers expressions of folklore (works of folk arts) are characterized by the following features:

- impossibility to define the author with a sufficient level of certainty;
- regional peculiarities caused by habitation of certain people on certain territories;
- impossibility to define with a sufficient level of certainty the moment of creation of works of folk arts.

Works of folk arts can be considered as an object comprising typical elements of traditional artistic heritage created and preserved by a nationality of its individuals, which embodies traditional artistic aspiration of that nationality.

II. WHO SHOULD BENEFIT FROM ANY SUCH PROTECTION OR WHO HOLD THE RIGHTS TO PROTECTABLE TCES/EOF?

International Publishers Association (IPA)

For publishers to be able to publish works related to TCES/EoF with economic and legal certainty, a clear and concise definition of who could be potential beneficiaries is required, leaving no room for ambiguity. Only the originators or custodians of TCES should benefit from protection, and they must be clearly identifiable through the application of transparent and agreed principles.

China

We hold that beneficiaries should be limited to traditional communities in which TCES/EoF originated, or which maintain, manage or develop TCES/EoF or make TCES/EoF their unique cultural and social characteristics.

Kyrgyzstan

Owners of traditional cultural expressions (folklore) are as follows – nations, national persons and legal entities creating and preserving traditional cultural expressions (folklore).

State shall benefit from use of traditional cultural expressions (folklore), which cultural heritage covers respective traditional cultural expressions (folklore).

United States of America

The IGC has explored in very broad terms the complex issue of the beneficiaries of measures to protect TCES/EoF. This topic includes complicated issues related to the web of interests of many stakeholders, including the roles of states and their nationals, immigrant communities, governmental authorities, and the indigenous peoples and traditional and other cultural communities. The inherent problem of defining beneficiaries is made all the more difficult in a world where individuals and groups readily cross national borders and geographic boundaries.

In the deliberations to date, Committee participants have not had the opportunity to undertake a sustained discussion and reach a clear understanding of these complex issues, much less arrive at a consensus on the scope and meaning of such important terms as “indigenous peoples,” “traditional,” and “other cultural communities.” The United States believes that the IGC would benefit from further study, informed by representatives from many stakeholder groups, including indigenous groups, of existing mechanisms to protect TCES/EoF, with a view toward deepening the understanding of the Committee on the most successful strategies to identify beneficiary groups and to resolve the sometimes competing claims of beneficiaries.

Ghana

The beneficiaries of the protection of folklore may be divided into two categories viz:-

- i. Holders or Owners of the folklore viz individuals, traditional communities, casts, families, ethnic groups, nations and sub regions. For instance, in West Africa except with slight differences in species and use, kente, yam, gari, and palm fruits are widely used in the sub region.
- ii. Derived right owners such as modern researchers, innovators and extractors of folklore.

The beneficiaries of protection under the instrument must include indigenous communities, nations and sub-regions which own and maintain the folklore and secondary owners of rights such as collectors, researchers, extractors and developers.

Researchers, collectors and extractors of information regarding folklore to be given limited recognition. Shared serendipity applications of folklore (that is discoveries made by accident). Provision must be made for shared ownership of the commercial exploitation of knowledge that is developed from folklore.

Brazil

Although it is not always possible to identify one individual author, TCEs/EoFs of ethnic groups and traditional populations have an identifiable collective authorship, given that they belong to a specified group or population – a reason why it is not possible to defend the expressions belong in the public domain. Therefore, entitlement to rights should be collective and in accordance with the interests and traditions of the groups in question.

The notion of “author” is an element that attests the complexity of the issue, i.e., oftentimes there is not an identifiable author or authors within the traditional communities. Apart from that, the transmission of such heritage is normally done orally across generations; a certain work is recreated and given renewed meaning over time, which evidences the inherent dynamics of this process of intellectual creation. Other examples highlight the complexity of the issue, such as the fact that many indigenous ethnic groups are not grouped within the same territory and therefore one specific TCE might be shared by different ethnic groups.

Despite the complexity of the issue, determination of the beneficiaries of TCE/EoF protection is a critical point of an international instrument. Although specific definition of eligibility should be left for national legislations, on the international level minimum standards should be set out and, in this respect, the draft provision of Article 2 represents an adequate basis to discuss the issue:

“Measures for the protection of traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples and traditional and other cultural communities:
(i) in whom the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with their customary law and practices; and
(ii) who maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic of their cultural and social identity and cultural heritage.”

Japan

It is unclear what social prerequisites are necessary for a group to be qualified as a “community”, which will be the beneficiary of protection. Points that lack clarity are as below:

- (1) Community with regard to TCEs/EoF of indeterminable origin: There are many TCEs/EoF whose origin is indeterminable. There are cases where the community that should enforce its rights to receive benefit cannot be determined or where more than one community claim to be the origin of a traditional cultural expression.
- (2) Community with regard to “regional folklore”: It is unclear how to treat cases of “regional folklore”, where a community spreads across national borders.
- (3) Community with regard to “national folklore”: Usually, the word “community” implies a certain level of actual communal living. However, when it is interpreted that nationals of an entire country may be deemed a “community” and can claim ownership of a “national folklore”, the condition of actual communal living becomes so relaxed as to be non-existent. This is tantamount to saying that TCEs/EoF can be so broad as to include any expression related to a nation’s custom or tradition. There is a need to clarify the relationship between “community” and the conditions of “communal living” or the condition of “being handed down”.
- (4) Traditional communities that are not founded on kinship: It is not clear if the succession of TCEs/EoF over generations by such a community as a religious community, which is not founded on kinship, can be regarded as a beneficiary community. We cannot see any justifiable grounds for an organization which is firmly united to not be deemed as a beneficiary just because the organization members are not biologically related while a loosely united community such as a country (as in the case of “national folklore”) is regarded as an eligible beneficiary.
WIPO/GRTKF/IC/5/3 paragraph 42 (d) reads, “Is the creation of a sui generis IP regime for certain communities (such as indigenous or local peoples, as against all other “non-indigenous” or “non-local” persons) acceptable as a matter of policy?”. This question remains unanswered.
- (5) Contemporary communities: There are other forms of communities not founded on kinship such as Internet communities. Members of these communities do not live together. The communities have not lasted for more than one generation; the members of these communities gather together for the same purpose or because of sharing the same idea. Certainly, these communities are not traditional communities and are not considered as beneficiary communities under the traditional definition. However, why these communities should be unfairly discriminated against in comparison with traditional communities is not clear.
- (6) Communities of immigrants: The question of how to treat TCEs/EoF of immigrants (as opposed to TCEs/EoFs of the indigenous people) has been occasionally raised. However this question remains unanswered.

There are also problems with the benefit sharing mechanism such as below, and it seems difficult for the mechanism to actually work.

- (1) There would be many cases where the community cannot exercise its rights against outside parties even when it tries to do so, due to lack of a clear decision making mechanism or representative in the community. Especially in the case of “national folklore”, whose owner is the nationals of a whole country, it is unclear who holds the right for authorization.

- (2) Some have proposed that the State may exercise rights in proxy for internal communities. However some groups of indigenous peoples are opposed to this and there is no consensus. When States are allowed to act as beneficiaries in proxy for indigenous peoples, there is a problem of whether the State will act to truly represent the welfare and benefit of the indigenous peoples.
 - (3) There is no clear idea of how the benefit will be shared within the community.
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Norway

The beneficiaries should be the custodians (the bearers of the tradition) of the particular TCE/EoF; ie the collective groups – the indigenous peoples or local communities – that has maintained, used and developed the expressions and which still continue to do so. Local customs may provide guidance when identifying the appropriate custodians and their representatives.

Qatar

- (a) Tradition community as the prime holder of rights and ownership or the group members who hold the rights of protectable TK as representative of society or people.
 - (b) The informant as transmitter of traditions.
 - (c) The collector who gathered TK and conserved it in archives in good conditions and a methodical manners.
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Ogiek Peoples Development Program (OPDP)

The beneficiaries of the TCE/EoF deserve to hold the rights of protection to their cultural values. Through cultural exhibition, the community holding TCE and practicing earns income from the tourist, researchers and who may in turn be vital to their national development. Any behaviour that promotes and respects the culture and folklore of community using it should be acknowledged. There has to be limitations for attaching to protection of TCE/EoF as they might be misused at wrong places. For instance many scientific institutions use traditional cultural symbols and practices to generate an extra ounce of confidence of certainty. As long as the community still relies on their good cultural practices, then the TCE demands for policies that promotes it for a longer period of time. This will ensure that the future generation has adapted the cultural issues.

South Africa

South Africa is of the stance that the current system of protecting IPRs is limited to private monopoly rights and therefore incompatible with the protection of IK. We proceed on the premise that IK is held as part of a community's heritage passed down from generation to generation, and should not be allowed either to be privatized or commercially exploited for individual gain; or to slip into the "public domain." Hence, our assertion is that the first beneficiary of indigenous knowledge must be the community directly connected with the knowledge accessed and to be protected.

Read conjointly with the aforesaid we propose that where there is no clear and/or identifiable beneficiary the State or its delegated authority will act as the custodian of the rights, and the products derived from the IPR/TK of the communities.

In addition to this subsection we propose the insertion of “indigenous, traditional and ‘local’ communities” as well as the insertion of word “traditional” before “knowledge holders”.

Russian Association of Indigenous Peoples of the North (RAIPON)

Authors and performers of the works performed.

Colombia

On this point it is important to distinguish the concepts of State, country and people or nation. Precisely in countries with great cultural diversity such as Colombia, where 91 indigenous peoples exist with more than 60 different languages and specific systems of organization and government, it is essential to channel benefits appropriately to these peoples or nations which even transcend national borders. In other words, although the concept of cultural community is sufficiently broad to cover even a country or a nation, it is important to establish that benefits may correspond to a nation when dealing with countries made up of a single cultural community, people or nation; or rather that there may be peoples or nations in regions, which in fact transcend territorial limits between neighboring countries.

Similarly, the concept of cultural community should be considered to include local or regional identities which do not necessarily constitute different peoples, but although such peoples share the same national language, religion and identity, they possess traditional cultural expressions/expressions of folklore which are specific to and authentic for a particular cultural community, which in turn forms part of a larger cultural community or national society within a country.

In the same way as for traditional knowledge, traditional cultural expressions and expressions of folklore generally originate and are maintained collectively, such that the rights derived therefrom should be granted mainly to communities and not to individuals. In this connection, although it is considered appropriate in conceptual terms to assign a right to a group, for practical purposes that group should be represented by a specific body, which gives rise to the question of the recognition and/or legal forum which the particular body must possess in the national legislative sphere.

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

Undoubtedly the sole beneficiary of this type of protection should be the indigenous community or ancestral people that has created an original traditional culture. Such benefit should be channeled towards direct action, through the relevant provisions, so that the maximum benefits accrue directly to the community.

Tunisia

Governments, peoples and holders of such knowledge.

Guatemala

Decree No. 25-2006 of the National Congress, Convention for the Safeguarding of the Intangible Cultural Heritage, states:

Sustainable development communities, groups and individuals.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions, ratified by the Government of Guatemala on August 21, 2006, published in the Journal of Central America on March 23, 2007.

Guidelines: principles of complementarity of the economic and cultural aspects of development. Culture is one of the main driving forces of development, the cultural aspects thereof are just as important as their economic aspects, in relation to which individuals and peoples have the fundamental right of participation and enjoyment.

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (WIPO/GRTKF/IC/2).

Native communities and peoples that are authors of their expressions of folklore.

Russian Federation

Formal interpretation of the provisions of article 3 of the Law of the Russian Federation of October 9, 1992 No. 3612-I “Basics of the legislation of the Russian Federation on culture” allows us to come to a conclusion that folklore can be attributed to cultural values, some expressions of folklore can be attributed to cultural property of the peoples of the Russian Federation and “have all-Russian importance and thus completely belong to the Russian Federation and its subjects without any possibility of transfer to other countries or unions of countries to which the Russian Federation is a participant”.

Legal intellectual property institutes with respect to granting legal protection to an object of intellectual property do not have a single approach to defining the beneficiary.

In copyright the beneficiary is the author (creator) – the person who contributed into the creation of the work, and also the successors, in particular, the heirs of the author.

The institute of related rights considers as the beneficiary the initiator, the organizer, the person that contributed into the distribution of the work.

The institutes of patent law, the so called industrial property, does not also provide for a unity in defining the beneficiary. According to the patent law exclusive rights belong to the patent holder (article 10 of the Patent Law of the Russian Federation of 23 September, 1992 No. 3517-I), who can be the author of the invention, utility model, design (individual due to who's

creative work they were created), his employer (if the object is created in connection with his professional duties) or his successors.

A common feature, uniting all the abovementioned people in copyright and patent law is the contribution, expenses into the creation of object subject to legal protection. Thus, a beneficiary can be any person who has contributed into the creation of an object of his successor.

In respect to the works of folk arts (expressions of folklore) it is impossible to define the person who made a contribution into the creation of the work, was the creator, organizer of the process. Due to this and other reasons the objects of folk arts in Russia according to the Law of the Russian Federation “On Copyright and Related Rights” are not granted legal protection.

It is not possible also to define the heirs and successors of the authors of works of folk arts, due not only to the migration of population, but also the resemblance, common features, motifs of the works of folk arts of different peoples. Resemblance of the works is caused not only by the fact that works of folk arts were in many cases arising from one source, and not only by the cultural interaction between the peoples, but also by similar climatic, historical and domestic conditions, which left an imprint on the works of folk arts of many peoples.

In copyright and patent law after the death of the author in cases the author has no heirs all the rights in the works are transferred to the Russian Federation, which can assign the management of property rights to a special body.

Since is it impossible to define the successors in respect of the works of folk arts, we will try to build an analogy with the inheritance law.

Let's assume that we can consider the state as the beneficiary.

However, the heirs of the author may live on the territories of different states, having different legal systems. As a general rule, provided for in article 1224 of the Civil Code of the Russian Federation concerning the inheritance, the relations on the inheritance are governed by the law of the country where the testator, here – the author, has last lived. Thus, in cases when the heirs of the author can not be defined, but it is clear that the author has last lived in the Russian Federation, the inheritance law of the Russian Federation is used, and thus we can be speaking of the Russian Federation as the successor similar to cases of escheat (article 1151 of the Civil Code).

However, in cases of works of folk arts the testator (the author) can not be defined, nor can be defined his last place of living, and accordingly the law of the country that should be applied to such relations. Thus, it is not clear which state may have pretensions of the rights in the works of folk arts.

The abovementioned speaks for the difficulties in defining the beneficiary, which can not be defined using the present Russian legislation.

III. WHAT OBJECTIVE IS SOUGHT TO BE ACHIEVED THROUGH ACCORDING INTELLECTUAL PROPERTY PROTECTION (ECONOMIC RIGHTS, MORAL RIGHTS)?

International Publishers Association (IPA)

IPA believes that with respect to TCEs/EoF, the primary focus should be put on the protection of moral rights. Overall, publishing TCEs/EoF is not a highly profitable business, despite the anecdotal evidence that points to the exceptional cases, rather than the typical publishing enterprise.

The focus of any policy in this area must be to incentivise more publishing, not to add costs or commercial uncertainty to an already risky publishing venture. Prescribed economic rights would add to such risks, and disincentivise publishers further from publishing in this area.

China

We think it is the objective of intellectual property protection to realize moral rights and economic rights in TCEs/EoF of the traditional communities.

Kyrgyzstan

The objective of protection of traditional cultural expressions (folklore) are as follows – protection, contribution to renaissance, use, distribution and preservation thereof since traditional cultural expressions (folklore) are a part of cultural heritage of particular nation.

United States of America

The broadest overall objective of providing intellectual property rights is to promote creativity and innovation. The WIPO Convention provides that the primary objective of WIPO is to “promote the protection of intellectual property.” The 1974 Agreement between the UN and the WIPO recognizes that WIPO is the specialized agency to “promote creative intellectual activity.” Existing systems of intellectual property protection may be used or adapted to address the actual needs of communities, including both economic and non-economic concerns, for qualifying expressions that are or are related to TCEs/EoF.

Over the last several sessions and with the strong support of the IB, the IGC has made substantial progress in identifying and articulating a wide range of specific policy objectives for TCEs/EoF—not merely their protection, but also the preservation and promotion of TCEs/EoF. To name just a few of these policy objectives, the IGC has underscored the importance of promoting an environment of respect for TCEs/EoF, contributing to the preservation and safeguarding of TCEs/EoF, and encouraging, rewarding, and protecting authentic tradition-based creativity and innovation.

The United States considers that the framing of these policy objectives is not just a useful technique for facilitating discussion within the Committee. Rather, the IGC’s work on the policy framework for the preservation, promotion and protection is an extremely useful tool for policymakers at the national, regional, and international levels. The United States notes that

many WIPO Member States, informed by the work of the IGC, already are taking steps to address specific issues and concerns related to the protection and promotion of TCEs/EoF.

Nonetheless, more work remains at the international level. In the view of the United States, the IGC should continue to make a positive contribution to the policy dimension of preserving, promoting and protecting TCEs/EoF. As noted earlier, the United States believes that the IGC can make a significant contribution by reaching agreement on policy objectives and general principles at the international level.

More specifically, the IGC may productively focus discussion on the great potential of traditional creativity and innovation to promote economic and cultural development, especially rural development. Regrettably, however, in many nations the policy framework for making decisions about the use (or non-use) of these assets is not in place or fully developed. The IGC may serve an important role in advancing the development of appropriate national policy frameworks for the use of TCEs/EoF by WIPO Member States for economic and cultural development. Consistent with WIPO's mandate, such work should focus on the IPR-related aspects of economic and cultural development, including both economic and moral rights considerations.

Ghana

1. To acknowledge ownership of folklore
2. To protect the rights of the owners.
3. To encourage collection, storage, collation, retrieval and use of folklore
4. To facilitate research extraction and development rights in folklore
5. To make same available for the benefit of mankind.
6. To guarantee adequate remuneration to the beneficiaries.

The objective for the protection of Folklore as provided in document GRTKF/9/INF/5 is too limited. It is true that some researchers, extractors and innovators who come by folklore, most often misappropriate this knowledge. The source of the information is not acknowledged and little or no financial benefit ensure to the owners or holders of the knowledge from the exploitation of the folklore. Misappropriation should not be the only basis or objective for the protection of folklore. It is necessary to expand the objectives for the protection of folklore.

Brazil

The growing demand for protection of TCEs/EoFs stems from the emergence of a market for products that are environmentally sustainable and that convey ethnic expressions. Such market appeals to a share of the international public opinion that favors projects targeted at forestalling the cultural extinction of traditional populations. A negative byproduct of the emergence of such market, nevertheless, is the increased number of cases of misappropriation of TCEs/EoFs.

In view of the preceding situation, an international instrument should, inter alia, clearly ensure communities the entitlement of collective rights, moral and economic, related to their TCEs/EoFs – by means of, for example, the requirement of prior informed consent – so as to contribute to the improvement of their life conditions.

Considering that work of the Committee is circumscribed by WIPO's mandate, one specific objective that must be addressed is the setting out of measures aimed at preventing and curbing the misappropriation of TCEs/EoFs by the granting of IPRs, irrespective of whether such expressions have been registered.

Also, since the issue is being discussed within the framework of WIPO, the Committee should examine possible "positive" measures necessary to accommodate protection of TCEs/EoFs under existing categories of intellectual property rights that respect the specific features of the former, and without prejudice to the possibility that Members may decide to accord protection to TCEs/EoFs via "sui generis" systems.

In this respect, the draft objectives proposed in document WIPO/GRTKF/IC/10/4, transcribed below, represent adequate basis to discuss the issue, in particular objective number (xii) – Preclude unauthorized IP rights – that touches more directly upon WIPO's competences:

"I. OBJECTIVES

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

Recognize value

(i) *recognize that indigenous peoples 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 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 of traditional cultural expressions/expressions of folklore

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

Empower communities

(v) *be achieved in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and traditional and other cultural communities to exercise 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 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 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 traditional and other cultural communities;*

Contribute to cultural diversity

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

Promote community development and legitimate trading activities

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

Preclude unauthorized IP rights

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

Enhance certainty, transparency and mutual confidence

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

Japan

There is an opinion that IP right protection should be extended to TCEs/EoF to acknowledge its commercial value. This opinion, however, does not clear in identifying any justifiable reasons why TCEs/EoF should be eligible for such protection. If the purpose of the IP protection of TCEs/EoF is to correct the inequities in economic development or to ensure sustainable development of certain communities by providing a new financial resource, a discussion should be conducted as to whether or not IP protection of TCEs/EoF is an appropriate way to achieve

these purposes in the first place. Also, attention should be paid to the fact that protection of TCEs/EoF is not simply a matter of economic policy and its ramifications in terms of impact on cultural development are quite large.

Currently, the main purpose of an IP protection system is to give incentive to creators by protecting their creations and to vitalize culture and society. In this context, the right for protection should be valid for only a limited period of time to encourage use by third parties for further development and to secure the balance between the interests of right holders and public interests. However it might be problematic to enable only a certain generation to enjoy the benefits derived from TCEs/EoF that has long been passed down. Moreover, there will be no financial incentive for the generations after the expiration of the IP right to maintain and pass down the TCEs/EoF. On the other hand, from the viewpoint of public interests, it is also inappropriate to grant an IP right that will stay valid forever as it unfairly limits the scope of public domain.

There is another opinion that TCEs/EoF should be protected as moral rights considering values that have long been fostered in an indigenous population or local community. If moral rights protection is made applicable to TCEs/EoF, right holders should be protected against any acts infringing their moral rights. However, what acts constitute such moral rights infringement has yet to be clearly defined. Use of TCEs/EoF that inflict mental suffering upon a community should be refrained from, as a matter of moral in general in the same way that derogatory expressions against certain race, religion or sex should be refrained from. However one should be careful in attempting to establish any system of IP rights or similar rights in order to deter such acts, as unnecessarily rigid regulation against expression could harm freedom of speech or development of culture. For serious moral right infringements, protection under the Civil Code or other general laws may be applicable even if no IP right protection is available.

Norway

In Norway's opinion the main objectives of protection in regard of TCEs/EoF are:

- to prevent misappropriation
- to preclude the granting of unauthorized IP rights

Furthermore, protection should seek to:

- ensure prior informed consent and exchanges based on mutually agreed terms
- promote equitable benefit-sharing
- promote conservation and sustainable use

By providing protection, one also secures recognition and respect of the intrinsic value of TCE/EoF.

The rationale behind Norway's view is further elaborated in document WIPO/GRTKF/IC/9/12 paragraphs 21 – 24.

Qatar

Moral, cultural and economic rights against misuse and robbery or otherwise, either national, international.

South Africa

Some, but not all, of our concerns would be met by the recommendations set out by the below mentioned objectives for IP protections. Hence we support the introduction of:

- Sustainable development;
- Preservation.
Within this context we draw attention to the fact IP protection should be distinguished from the concepts of 'preservation' and 'safeguarding.' By contrast safeguarding in the context of cultural heritage refers generally to the identification, documentation, transmission, revitalization and promotion of cultural heritage in order to ensure its maintenance or viability.
- Promotion.
South Africa views that the recognition and promotion of IP protection for contemporary creativity can in turn support such economic development.
- South Africa notes that there now appears to be wide recognition that IP protocols have the ultimate objective of enhancing social welfare. Hence the potential socio-economic benefit needs to be emphasized.
- Social cohesion.
- Prevent misappropriation / abuse
- Protect against unauthorised use of existing IPR
- South Africa endorses the comments subsumed in draft objectives WIPO document WIPO/GRTKF/IC/10/5, pages 3 to 5.

The range of the overall protection of the social and cultural communities from which the IK emerges recognising IK as a knowledge system, the rights of the holders of such knowledge must be guaranteed - e.g. against appropriation from outside the community, and to issues of fairness and justice in benefit sharing. South Africa asserts that for IP protection to transpire it should be compatible with and supportive of a wide range of policy objectives related to the protection and conservations of IK, including:

- a. the establishment of legal certainty regarding rights in IK,
 - b. the survival of indigenous cultures - which translates into matter of survival as an Indigenous people and as a community,
 - c. the recognition of customary law and practices governing IK,
 - d. the recognition of customary laws and protocols that govern the creation, transmission, reproduction and utilisation of IK,
 - e. the repatriation of cultural heritage, and
 - f. the recording, maintenance, protection and promotion of oral traditions
-

Russian Association of Indigenous Peoples of the North (RAIPON)

Economic rights and moral rights.

Colombia

We consider that the fundamental issue is that of informed consent prior to use or exploitation and reward through benefits for the community. Similarly, we believe that the right of paternity should be recognized in favor of the community. This is in accordance with the objectives contained in documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/10/4, which are applicable irrespective of whether this is in accordance with the intellectual property system or a *sui generis* instrument, for which reason we support them.

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIÉ)

The proposed objective should include both economic and moral rights. We favor the legal formula of rights of remuneration relating to public communication, fixation, reproduction, etc., collectively managed either through the community itself, as the sole holder of the rights, or through effective collective rights administration organizations.

Tunisia

Traditional knowledge in Tunisia is the subject of sustained political attention and undergoes change in the approach applied to its development.

Today traditional knowledge is perceived as an element with rich potential for human and economic resources that must be exploited as part of an overall approach.

The Ministry of Culture and Heritage Protection in Tunisia is the reference partner in this policy of enhancing ancestral knowledge.

The objectives of the action undertaken to protect intellectual property are as follows:

- A. The safeguarding of the memory of a nation and its identity.
 - B. The creation of employment at reduced cost.
 - C. Promotion and enhancement.
 - D. The preservation and protection of traditional knowledge in order to prevent its exploitation and unlawful commercial and non-commercial use.
 - E. The enhancement of regional and local resources.
 - F. The sustainable development of such knowledge as an indicator of the specific nature of a nation in the process of globalization.
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Guatemala

Decree No. 25-2006 of the National Congress, Convention for the Safeguarding of the Intangible Cultural Heritage, states:

Respect for the intangible cultural heritage of communities, groups and individuals concerning the awareness at the local, national and international level of the importance of the intangible cultural heritage and its reciprocal recognition.

Safeguarding means the measures designed to guarantee the viability of the intangible cultural heritage, including identification, documentation, research, preservation, protection, promotion, enhancement, transmission, basically through formal and informal education, and the revitalization of the various aspects of the heritage.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions, ratified by the Government of Guatemala on August 21, 2006, published in the Journal of Central America on March 23, 2007.

Article 6(g). Measures designed to support artists and other persons participating in the creation of cultural expressions.

Article 7. Measures to promote cultural expressions: (a) create, produce, disseminate and distribute their own cultural expressions, and have access thereto, paying due attention to the special circumstances and needs of women and different social groups, including persons belonging to minorities and indigenous peoples. The important contribution made by artists, all the people participating in the creative process, cultural communities and organizations supporting them in their work, as well as the fundamental role they play in supplying the diversity of cultural expressions, also needs to be recognized.

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (WIPO/GRTKF/IC/2).

Expressions of folklore constitute manifestations of intellectual creativity, which merit protection based on that granted to intellectual productions, for the development and continuation of those expressions, both in the country and abroad, without harming the legitimate interests concerned.

Russian Federation

We can mark out several components of the protection granted at present by the intellectual property institutes: the so called “positive” protection and the “prohibitive” protection.

For example, in copyright, the aim of granting the so called “positive” protection: promoting by the state the interest in creating the works (encouraging creative activities of the author, remuneration for the expenses of the author for the creation of the work, remuneration for the work); the proprietary rights given to the author are designed to reach this goal. The author may as use the work himself, as grant these rights to a third party for remuneration.

Let’s assume that the aim of granting protection to the works of folk arts is also the encouragement of creativity. However, this aim is not fully applicable to works of folk arts. If the work of literature or art is created at present as a result of a creative activity it is granted the copyright protection in the Russian Federation. And when we speak of the compensation of the expenses made in the past, the question of the person who has born the expenses arises, because it is impossible to define such a person.

The aim of granting the so called “prohibitory” protection is: impossibility of unauthorized use, prohibition of certain actions, which may lead to unfavorable consequences for the author.

However, the institutes of intellectual property create such a prohibition for a certain period of time, after the lapse of which the proprietary right are terminated and the object (e.g. the work) falls into public domain (in particular, p.1 article 28 of the Law of the Russian federation of July 9, 1993 No. 5351-I “On Copyright and Related Rights”), and the works in the public domain can be used freely (p. 2 article 28 of the Copyright law).

Attention should also be paid to the personal non-proprietary rights: the right to be recognized as the author, the rights for the name, the protection of the work from any distortion or any other acts that could harm honor and dignity of the author.

Did the initial author want to be identified, show his attribution to a certain community, because the works of folk arts (expressions of folklore) expressed in a material form a marking could be made: names, symbols, stigmas, signs.

Or did the creator initially aim to remain anonymous to show that the work created is an aspiration of a whole nationality and the aim of the work is not the profit (material or not): fame or remuneration, but possibly another aim was followed: domestic, educational, informational, etc, because the work of folk arts as a folks wisdom may often contain the rules of conduction, moral norms.

The above said proves that the aim of the legal regulation of relations connected with the use of works of folk arts is the preservation and development of the originality of the peoples, protection of honor and dignity of the representatives of peoples, creative labor of which led to the creation of works of folk arts. Legal regulation of relations on the exploitation of works of folk arts can not be conducted by creating norm providing for exclusive rights, because they are aimed at creating monopoly for the rightholder of the works. Intellectual property institutes are tightly connected with the personality of the creator of the work. Only the rightholder can define how his work should be used. Intellectual property institutes, in particular copyright law, is aimed at the promotion of creativity though encouragement of the creators of work and do not deal with issues of preservation and development of works, thus, this institutes are aimed to solve social and economic problems, which are different from the protection of works of folk arts.

Thus, in respect of works of folk arts the moral (non-proprietary) rights seem to be important, including the protection of works from any distortion or other acts capable of harming the honor or dignity.

IV. WHAT FORMS OF BEHAVIOR IN RELATION TO THE PROTECTABLE
TCES/EOF SHOULD BE CONSIDERED UNACCEPTABLE/ILLEGAL?

International Publishers Association (IPA)

IPA is concerned by the introduction of the notion of “unacceptability” in the ongoing discussions. “Unacceptability” is not a legal term and means different things to different people. IPA recommends the use of clear and unambiguous terms throughout the ongoing discussions.

IPA could envisage a requirement that the publication or other use of TCES/EoF should be done only with appropriate acknowledgement of the source.

China

We think the following forms of behavior are unacceptable/illegal: (1) unauthorized reproduction, adaptation, broadcasting, public performance, distribution, rental, or communication to the public, of TCES/EoF or their derivative forms; (2) use of TCES/EoF or their derivative forms without indicating their source; and (3) distortion, mutilation or other modification of, or other derogatory action in relation to, TCES/EoF.

Kyrgyzstan

Illegal appropriation, falsification and other actions damaging traditional cultural expressions (folklore) shall be considered illegal actions.

United States of America

Over the last several years, the IGC has made considerable progress in identifying specific forms of behavior regarded as unacceptable or illegal by indigenous peoples and traditional and other cultural communities. The work of the IB in conducting regional consultations and in sponsoring research has been particularly helpful in facilitating this aspect of the work of the IGC. The members of the IGC also have benefited greatly from hearing directly from representatives of indigenous peoples and traditional and other cultural communities on forms of behavior that are considered unacceptable or illegal.

Despite the wealth of materials that have been generated, it remains difficult to generalize regarding specific behaviors that are regarded as unacceptable or illegal, sometimes broadly called “misappropriation.” Part of the explanation is that views on forms of behavior that may be regarded as unacceptable or illegal vary widely depending on local social, cultural, and economic circumstances. Another part of the explanation is that acts of misappropriation cover a wide range of behaviors. In this regard, the IGC has distilled a broad range of behaviors regarded indigenous peoples and traditional and other cultural communities as unacceptable or illegal, including:

- (a) unauthorized reproduction, adaptation and subsequent commercialization of TCES/EoF, with no sharing of economic benefits;

- (b) use of TCEs/EoF in ways that are insulting, degrading and/or culturally and spiritually offensive;
- (c) unauthorized access to and disclosure and use of sacred/secret materials;
- (d) appropriation of traditional languages;
- (e) unauthorized fixation of live performances of TCEs/EoF and subsequent acts in relation to those fixations;
- (f) appropriation of the reputation or distinctive character of TCEs/EoF in ways that evoke an authentic traditional product, by use of misleading or false indications as to authenticity or origin, or adoption of their methods of manufacture and 'style';
- (g) failure to acknowledge the traditional source of a tradition-based creation or innovation;
- (h) granting of erroneous industrial property rights over TCEs/EoF and derivatives thereof (footnote in submission: Paragraph 53, Document 7/3.)

Building on this foundation, the IGC should deepen its understanding of these concerns by examining and discussing in detail the existing mechanisms, including legal (both IPR and non-IPR) and non-legal measures, that are available to address these specific issues or concerns. The IGC would then be able identify gaps, if any, in existing mechanisms at the domestic and/or international levels to address the specific issues or concerns.

Ghana

- a. Unauthorized collection of folklore from the right owners.
- b. Non acknowledge of the rights of the owners or holders of the folklore
- c. Exploitation of the protected folklore without the consent or authorization of the owner of folklore.
- d. Publishing the protected information without the authorization nor observance of the moral right in the folklore
- e. Unreasonable withholding of information on folklore by the holders from researchers.

Brazil

An international instrument for the protection of TCEs/EoFs negotiated in an IP forum such as WIPO should not overlook the need to provide for measures aimed at curbing acts of misappropriation, specifically those acts that take place via the use of IP mechanisms. Among these measures, the requirement for prior informed consent should apply to all TCEs/EoFs, registered or not. Registration should not be a condition for the enforcement of rights by the communities in question.

Furthermore, one important criterium to assess whether an act constitutes misappropriation is the existence of prior informed consent by the community in question. The requirement for prior informed consent should figure as an important tenet in a system of protection of TCEs/EoFs.

With the preceding provisos in mind, the draft provision put forward in document WIPO/GRTKF/IC/10/4, Article 3, represents adequate basis to discuss the issue:

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

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

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

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

any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore; and

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

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

Other traditional cultural expressions/expressions of folklore

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

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

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

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

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

Secret traditional cultural expressions/expressions of folklore

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

Japan

Unacceptable/illegal acts may vary depending on the form of protection for TCEs/EoF. As mentioned in the above item 3, there is no clear justifiable reason why TCEs/EoF is eligible for IP right protection. Japan is greatly concerned about extending IP right protection to TCEs/EoF. Use of TCEs/EoF that inflict mental suffering upon a community should be refrained from, as a matter of moral in general in the same way that derogatory expressions against certain race, religion or sex should be refrained from. However one should be careful in attempting to establish any system of IP rights or similar rights in order to deter such acts, as unnecessarily rigid regulation against expression could harm freedom of speech or development of culture. Moreover, when defining unacceptable/illegal acts, a fact finding survey should be conducted to find out what damage is incurred by what acts.

Norway

A common understanding on what constitutes misappropriation is essential to obtain an adequate and effective protection against such misappropriation and unfair use.

Unacceptable behavior includes at least all:

- unauthorized exploitation for economic gain
- exploitation that does not acknowledge the source of the TCE/EoF
- offensive use

A common, core understanding of at least these three elements are necessary.

Qatar

Misuse, robbery, unethical infringement, illicit exploitation, prejudicial actions and misappropriation.

South Africa

- *Misappropriation*

South Africa is of the view that any acquisition or appropriation of indigenous knowledge, traditional cultural expressions and genetic resources by unfair or illicit means constitutes an

act of misappropriation. We further propose that any commercial benefit derived from the use of indigenous knowledge, traditional cultural expressions and genetic resources contrary to any honest practice that gains inequitable monetary advantage constitutes misappropriation. This is also applicable to person/s accessing the knowledge that knows or is negligent in failing to know. Regarding document WIPO/GRTKF/IC/10/4 we query protection against the misappropriation of indigenous knowledge. Our particular concern regards:

- What is fair use and what is misappropriation?
- Is the public domain legitimate?

- *Distortion*

South Africa is concerned at the rampant manipulation and distortion of indigenous knowledge, traditional cultural expressions and genetic resources. Given the nature of indigenous knowledge, traditional cultural expressions and genetic resources the presentation of indigenous cultural material in a manner of promoting integrity requires careful consideration.

- *Contrary to Constitution/ domestic legislation/ international instruments/ human rights*

South Africa has a bundle of legislation that seeks to protect indigenous knowledge, traditional cultural expressions and genetic resources hence we are the view that any violation of these pieces of legislation will constitute behaviour which is unacceptable.

- *Disrespect/denigration*
-

In concert with South Africa's proposal on access and benefit sharing regulations we support the inclusion of the following text to this sub-section, "Failure to obtain prior informed consent- unauthorised usage."

We are steadfast in our stance that any person without the prior informed consent of the community uses knowledge, an innovation or a practice in a manner inconsistent with our proposed (draft) access and benefit sharing regulations commits an illegal act.

Russian Association of Indigenous Peoples of the North (RAIPON)

The unlawful or commercial use of copies of and tunes from works without the consent of the authors and performers.

Colombia

Article 3 of the substantive provisions contained in documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/10/4 considers the protection of expressions of folklore that are registered separately from those expressions that are not registered, even though in relation to copyright registration is declaratory and does not constitute rights. Protection is derived solely from creation and therefore the Government of Colombia does not agree to consider registration and notification as a condition for the exercise of the right to prior informed consent. The moral and economic rights protected should be the same and have the same enforcement measures (civil, criminal and administrative).

As regards the TCEs/EoF of cultural and spiritual value, it is important to consider that some indigenous peoples have expressed the view that, where different levels and types of knowledge exist, those should be dealt with differently, but precisely those which are in the spiritual dimension should be seen from a defensive perspective, since in principle economic interests do not exist in between, but expectations of a transcendental and spiritual nature. Consequently, strict protection must exist and mechanisms distinct from registration or notification be established in order to regulate and make the right to prior informed consent effective.

A *sui generis* system of protection must establish a limit on those TCEs/EoF which, owing to their spiritual and sacred nature, cannot be commercialized. Peoples and communities have their own authorities which must protect and keep custody of such knowledge with their specific legal and justice systems, and the competent national authority shall be responsible for protecting this right and strengthening the authorities and organizations of peoples and communities so that they may exercise the right.

Similarly, the existence of scientific evidence of collective ownership of TCEs/EoF must be sufficient proof to enjoy the right to prior informed consent, even where registration or notification does not exist in the competent government bodies for the protection of intellectual property rights. Scientific evidence includes ethnographical studies, monographs, scientific compilations and publications, produced both by social and natural scientists, and by members of the communities which carry out specific research as a strategy to recover and revitalize TCEs/EoF.

Furthermore, in complex geopolitical contexts, the major expectation of cultural communities relates to guaranteeing their physical and cultural continuity, owing to the different kinds of pressure which they face. In these contexts, the protection of TCEs/EoF moves on to another level but, for a different reason, such expressions cease to be legal subjects and therefore requirements must not be established which in certain cases are unachievable for communities. In other words, the rights of the most vulnerable peoples and communities must be guaranteed as a matter of priority and without condition in contexts of conflict and displacement.

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

In general, any form of appropriation, in the broad sense of this concept, which can be reflected in specific civil, administrative or criminal provisions.

In general, the looting to which peoples and communities are subject by third parties must be avoided, which logically implies intellectual property protection and knowledge thereof, with relevant registrations designed to produce an inventory/register in relation to third parties.

Tunisia

- ✓ Piracy, unauthorized use of such knowledge.
 - ✓ Copying (counterfeiting).
-

Guatemala

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (WIPO/GRTKF/IC/2).

Commercialization on a global scale without due respect for the cultural and economic interests of the communities in which they originated and without the peoples that are authors of their expressions of folklore receiving any share of the benefits of such exploitation.

Russian Federation

Taking into consideration the provisions cited in point 3, the unacceptable forms of behavior should be:

- illegal appropriation of authorship;
 - acts of use of works of folk arts harming the dignity of the representatives of peoples the works of folk arts of which are used.
-

V. SHOULD THERE BE ANY EXCEPTIONS OR LIMITATIONS TO RIGHTS
ATTACHING TO PROTECTABLE TCEs/EOF?

International Publishers Association (IPA)

IPA opposes a hasty and premature protection of TCEs/EoF through an IP related framework and therefore does not at this stage want to comment on limitations and exceptions to balance a possible framework of TCE protection.

China

We think that, first, the protection of TCEs/EoF should not affect the use of TCEs/EoF by members of the communities according to their customary laws or norms; second, the use of TCEs/EoF without permission should be allowed, provided that the source is indicated, in the following cases: (1) use for scientific research or education purpose; (2) use for personal study, research or appreciation; (3) use for reporting news or current events; (4) use by governmental organs for carrying out their duties; (5) use for archive or inventory purpose; (6) use for national security; third, non-voluntary licences may be applied to the use of TCEs/EoF in the form of adaptation or broadcast.

Kyrgyzstan

Exceptions and limitations shall be provided in respect of use of traditional cultural expressions (folklore).

United States of America

The United States believes that it is premature for the IGC to undertake a focused discussion of “exceptions and limitations attaching to rights to protectable TCEs/EoF.” First, as currently framed, the issue may tilt in a particular policy direction that is not warranted at this stage of the Committee’s deliberations. Second, such a discussion may have the unintended consequence of polarizing the discussion, thereby impeding rather than advancing the work of the IGC.

As a general matter, and consistent with comments in response to Issue 7, the IGC should continue its work in identifying the extent of existing mechanisms to address specific issues and concerns that have been raised in the Committee and identifying any perceived gaps, including appropriate and applicable exceptions and limitations.

Ghana

This instrument shall not affect the following

- i) Traditional systems of access, use or exchange of folklore knowledge.
- ii) Access, use and exchange of knowledge and technologies by and between local communities.

The sharing of benefits based upon customary practices of the concerned local communities, provided that the exception shall not be taken to apply to any person or persons not living in the traditional and customary way of life relevant to the conservation and sustainable use of folklore

- iii) the continued availability of traditional knowledge for the customary practice, exchange, use and transmission of folklore by traditional knowledge holders
 - iv) the use of traditional medicine for household purposes; use in government hospitals, especially by traditional knowledge holders attached to such hospitals; or use for other public health purposes
 - v) Regime of storage categorization of traditional medical practices
 - vi) Any use of the traditional knowledge or TCE for the benefit of the public.
-

Brazil

A provision on exceptions and limitations is welcome as long as it is based on the need to allow uses of public interest. The draft provision of Article 5 of document WIPO/GRTKF/IC/10/4, transcribed below, represents an adequate basis to discuss the issue:

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

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

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

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

- by way of illustration for teaching and learning;

- non-commercial research or private study;

- criticism or review;

- reporting news or current events;

- use in the course of legal proceedings;

- the making of recordings and other reproductions of TCEs/EoF for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes; and

- incidental uses, provided in each case that such uses are compatible with fair practice, the relevant community is acknowledged as the source of the TCEs/EoF where practicable and possible, and such uses would not be offensive to the relevant community.

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

Japan

As mentioned in the above item 3, any justifiable reasons for IP right protection to be extended to TCEs/EoF are not clearly identified and sufficiently explained. In this respect, Japan has a serious concern. Japan is not in a position to enter into discussion based on right or protection, but in discussing exceptions and limitations, consideration should be given to the balance

between the interests of right holders and public interests although such balance may vary by the form of protection and the scope of illegal acts.

Norway

Taking inspiration from traditional intellectual property law, limitations on the protection of TCEs/EoF should be examined. In particular the possibility of non-commercial and respectful use including use in education and research, should be considered. Measures aiming to safeguard the protection and preservation of cultural and traditional heritage should also be developed. Any such public interest measures should ensure that the TCE/EoF in question are treated with respect.

Qatar

For cultural, educational, research and information purposes and otherwise.

South Africa

South Africa has not yet developed a detailed proposal dealing with issues to these provisions, but we would be happy to provide such a proposal to the Committee when completed.

Russian Association of Indigenous Peoples of the North (RAIPON)

The right of priority to use traditional knowledge for commercial purposes, granted by representatives of indigenous peoples and encouragement of persons related to indigenous peoples, to make commercial use of traditional knowledge through the provision of essential capital and conditions for such use by persons and organizations of indigenous peoples.

Documentation by specialists of traditional knowledge (including their whole range as listed above) of persons and communities related to indigenous peoples, which they wish to use for commercial purposes, or in cases of the unauthorized use of such knowledge by persons not related to indigenous peoples.

Colombia

We agree to the existence of exceptions or limitations to rights attaching to protectable traditional knowledge, provided that the measures for the protection of TCEs/EoF cannot restrict the use of such knowledge in the habitual and traditional community context. In general, we support the contents of the proposed Article 5 of the substantive provisions contained in documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/10/4.

In general, we consider that exceptions must be formulated openly, provided that minimum conditions are satisfied. This corresponds to the three steps rule in copyright and that of Article 30 of the TRIPS Agreement on patents.

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

Yes, in this area consideration should be given to physical handicaps which may affect persons and at times make access to traditional culture impossible; everything related to teaching and education should also be envisaged and, in general, those limitations contained in current international treaties and national legislation relating to copyright, performers and producers, are included in the aforementioned provisions.

Tunisia

The rights attaching to protectable traditional knowledge should not be subject either to exceptions or to limitations (an inventory list should be drawn up).

Tunisia is now equipped with a body within the Ministry of Culture and Heritage Protection, responsible for producing a list of and devising technical specifications for references in this area.

Guatemala

Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98.

Article 37 – Reproduction of cultural property. Cultural property may be reproduced by all the available technical means. Where this involves direct contact between the object to be reproduced and the means that will be used to reproduce it, the authorization of the Directorate General of the Cultural and Natural Heritage shall be required, subject to the owner or holder's authorization. Any method of reproduction causing harm to or a change in the original cultural property shall be prohibited for use. Any copy or reproduction shall have a visible sign engraved or printed on it and identifying it as such.

Convention on the Protection and Promotion of the Diversity of Cultural Expressions, ratified by the Government of Guatemala on August 21, 2006, published in the Journal of Central America on March 23, 2007.

Article 8: Measures to protect cultural expressions:

(a) Determining whether there are special situations in which cultural expressions in their territory run the risk of lapse, or are the subject of a serious threat, or require any kind of urgent safeguard measure.

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (WIPO/GRTKF/IC/2).

Use for pedagogical activity purposes.

Use for the purposes of illustrating an author's original work, provided that the scope of such use is compatible with good use.

Taking of expressions of folklore for the purposes of creating an original work of one or more authors.

The provisions of Article 3 will not apply either where the use of expressions of folklore is fortuitous, including *inter alia* the use of any expression of folklore that can be seen or heard in the course of an event for information purposes concerning said event by means of photography, broadcasting, sound or visual recording, provided that the scope of said use is justified for information purposes.

Use of objects incorporating the expressions of folklore which are permanently located in a place in which they can be seen by the public, if the use consists in including their image in a photograph, film or television program.

Russian Federation

Taking into consideration points 3 and 4, any exceptions or limitations would not be expedient.

In cases of granting protection different from the one provided for in p. 3 and 4, the protection should not limit the cultural rights of the people, aimed at the preservation and development of cultural originality of peoples and cultural exchange, education, studies, etc.

VI. FOR HOW LONG SHOULD PROTECTION BE ACCORDED?

International Publishers Association (IPA)

IPA supports the limitation in time of copyright in literary and artistic works. Any term of protection, with the exception of very important core moral rights, must be limited in time so as to ensure that works can re-enter the creative cycle after a certain period. Otherwise, the public domain as a source of inspiration would be unduly restricted. The same principle should apply to any framework for the protection of TCEs/EoF.

China

We think that there should be no limit to the protection period of TCEs/EoF.

Kyrgyzstan

The period of traditional cultural expressions (folklore) protection shall not be limited.

United States of America

For the reasons set forth in our response to Issue five, the United States believes that it is premature for the IGC to undertake a focused discussion of the duration of possible rights with respect to TCEs/EoF. This question also appears to presume a particular outcome, which is not helpful in advancing the work of the Committee. There are many mechanisms available for the protection, preservation and promotion of TCEs/EoF. Some mechanisms that may preserve and maintain TCEs/EoF may be indefinite in length of time. On the other hand, many existing forms of intellectual property protection are time-limited such as copyright.

Ghana

Folklore is to be protected in perpetuity.

However derivatives and extractions from the knowledge or secondary / related rights are to be protected in line with the term of protection of intellectual property rights such as patents copyright, etc.

Brazil

Due to their specific characteristics, such as the difficulty to identify a specific author, TCEs/EoFs should deserve protection for as long as the symbolic features that originated the expression in question remain in the tradition of the community that holds it.

In this respect, the term of protection should only be related to the criteria for protection. Once a TCE/EoF meets these criteria, protection should be accorded without need for any further requirement – such as previous registration.

With these provisos in mind, the draft provision laid down in Article 6 of the Annex to document WIPO/GRTKF/IC/10/4, transcribed below, represents adequate basis to discuss the issue:

*“Protection of traditional cultural expressions/expressions of folklore should endure for as long as the traditional cultural expressions/expressions of folklore continue to meet the criteria for protection under Article 1 of these provisions, and
(i) in so far as TCEs/EoF referred to in Article 3 (a) are concerned, their protection under that sub-article shall endure for so long as they remain registered or notified as referred to in Article 7; and
(ii) in so far as secret TCEs/EoF are concerned, their protection as such shall endure for so long as they remain secret.”*

Japan

As mentioned in the above item 3, any justifiable reasons why IP right protection should be extended to TCEs/EoF are not clearly explained. In this respect, Japan has a serious concern. Japan is not in a position to enter into discussion on term of protection, but when discussing the term of protection of an IP right, consideration should be given to the balance between the interests of right holders and public interests although such balance may vary by the form of protection and the scope of illegal acts.

Norway

Protection should be provided for as long as the criteria for protection are fulfilled, and thus not necessarily be limited in time.

Qatar

To be discussed in the light of that the TK archive which holding the materials acting as the competent authority and could take the responsibility of granting proper use of TKs.

South Africa

South Africa supports the notion that indigenous knowledge, traditional cultural expressions and genetic resources be protected in perpetuity. The need to protect IK is quite obvious that they mean ‘protection’ in the sense of safeguarding the continued existence and development of IK. As repeatedly pointed out by South Africa, this necessarily implies protecting the whole social, economic, cultural and spiritual context of that knowledge, something which simply is not possible to achieve within a confined period of time. Hence, we are proposing for an instrument that protects the holistic, inalienable, collective, and perpetual nature of Indigenous Knowledge Systems for purposes far more expansive than economic benefits.

Russian Association of Indigenous Peoples of the North (RAIPON)

These rules should not be limited in time. Only a creative group or author, which has created a traditional cultural expression and performed it to the public, may limit the term of protection.

Colombia

Limiting the length of the term of protection to the existence of registration or notification limits the scope of the instrument, contradicts the established objectives and principles, and makes more difficult the defense of rights which, owing to their nature, must not be subject to prescription, particularly in the case of indigenous peoples whose law of origin or specific right is one, whole and permanent.

It is not acceptable to limit the right to protection for TCEs/EoF in terms of time, given the specific characteristics of such expressions. It should also be recalled that expressions of folklore must be protected for as long as they are expressed, appear or are manifested by the community, without distinguishing between registered or unregistered and secret expressions of folklore.

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

Protection must be granted for an indefinite period owing to the specific nature of the traditional cultural expression which has been created and/or modified through successive generations. This successive generational path cannot be interrupted since it would affect the very essence of traditional culture, and any provision covering the public domain of traditional cultural expressions, albeit through an underlying payment, should be rejected.

Tunisia

The term of protection must be unlimited.

Guatemala

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (WIPO/GRTKF/IC/2).

In no case may protection be interpreted so as to obstruct the normal use and development of expressions of folklore.

Russian Federation

It seems that the period of protection in respect of the works of folk arts can not be defined.

VII. TO WHAT EXTENT DO EXISTING IPRS ALREADY AFFORD PROTECTION?
WHAT GAPS NEED TO BE FILLED?

European Community

As far as the question to what extent existing IPRs already afford protection, the European Community and its Member States would like to quote the remarks included in our previous submission WIPO/GRTKF/IC/3/11:

“Some, albeit limited, protection can be offered already by existing intellectual property rules. However, it should be clear that when talking about protecting expressions of folklore by intellectual property, the latter is, and in fact can only be usefully applied with respect to the economic and not the purely ethnic or religious aspects of folklore. Indeed, endeavouring to protect ethnic or religious issues by intellectual property would stretch intellectual property beyond its recognized objectives of fostering creativity and investments.

To some extent, *trademark law* can be used to protect certain expressions of folklore, such as designs or symbols. The advantage of this protection is that it makes no novelty requirement and that it can be renewed without limitation, but protection relates only to actual or intended use for certain categories of products or services.

The laws on *industrial designs* provide protection for certain expressions of folklore such as graphical marks on any surface and three-dimensional plastic forms. However, the novelty and originality criteria, ownership and the limited duration of protection are difficult to reconcile with the nature of expressions of folklore.

The laws on *geographical indications* could be applied to certain tangible folklore products (such as carpets, textiles or figures) as protection can be assigned to a territory rather than a natural or legal person. However, this protection does not grant exclusive rights as regards the actual good or service itself and will only prevent others from using the indicator: the same folklore could still be reproduced or performed under a different name. The concepts of *unfair competition or unfair trade practice* may provide, where they exist, protection against wrongful commercial use and their scope could be used against industries, which profit from folklore but disregard its traditional nature.

Moreover, some intellectual property protection is already offered to performers of expressions of folklore via Article 2(a) of the WIPO Performances and Phonograms Treaty of 1996. This same Treaty extends moral rights, economic rights in their unfixed performances, a right of reproduction, of distribution, of rental and a right of making available to the same performers. The fact that expressions of folklore are included in the WPPT confirms the fact that expressions of folklore are not works however, and protection is given to performers of expressions of folklore under the concept of neighbouring rights.”

International Publishers Association (IPA)

Copyright and trademarks and the protections for designs provide ample protection of economic rights. Moreover, other areas of law may equally afford protection (geographic indications; confidentiality/trade secrets). IPA is not aware of any acute gaps in the area of publishing of TCEs/EoF.

China

We think that the current intellectual property system only provides partial protection to TCEs/EoF. In addition to the intellectual property law, the thorough protection of TCEs/EoF requires the protection provided by other laws, e.g. sui generis, the administrative law, and even the criminal law.

Kyrgyzstan

There is no appropriate normative and legal base directly traditional cultural expressions (folklore) protection – this is a gap in the legislation of the Kyrgyz Republic. At the same time it should be noted that we have elaborated the draft law “On the Preservation and Legal Protection of Traditional Cultural Expressions”, which is currently reviewed by stakeholder Ministries of the Kyrgyz Republic.

United States of America

Consistent with the mandate of the WIPO to “promote the protection of intellectual property rights,” thereby stimulating innovation and creativity, the IGC has made considerable progress in identifying the role of existing IPRs in addressing specific issues and concerns related to TCEs/EoF, including the role of national copyright, trademark, and trade secret laws, among other laws.

Many provisions of existing IPRs already are available for the protection of TCEs/EoF. For example, an original work of visual art created by an individual community artist inspired by or interpreting a traditional design would be eligible for copyright protection. Other principles and doctrines from existing IPRs could be adapted to address specific issues and concerns of indigenous and local communities. For instance, moral rights, which are provided for under the Berne Convention, could be adapted to address specific non-economic issues and concerns related to TCE/EoF. Existing IPR principles and doctrines also may be integrated with customary law.

The IGC should build on the national experiences of WIPO member states as well as experiences of indigenous peoples in using or adapting existing IPRs to address issues and concerns related to TCEs/EoF. The Secretariat should provide an update on recent efforts to use existing IPRs to address TCEs/EoF. With a new factual baseline, the IGC may wish to consider activities and programs (including regional programs and tool kits) designed to facilitate the exchange of best practices on the use of existing IPRs to address specific local, national or regional issues and concerns related to TCEs/EoF.

The IGC should not stop with canvassing the use of existing IPRs to address TCEs/EoF issues. The United States believes that discussion of selected principles and doctrines of unfair competition, contract, cultural heritage, and customary law, where well-suited to address specific issues or concerns, are fully within the mandate of the IGC. For example, the IGC may wish to consider more closely examining the use of unfair competition law by WIPO Member States to address specific issues related to TCEs/EoF. The exchange of information on current national legal and policy developments and identification of successful national practices would advance the work of the IGC.

Some Members may raise concerns or specific examples where intellectual property systems are perceived or considered not to be sufficient to preserve, protect or promote TCEs/EoF in a particular context. Such an exchange would help the IGC to identify gaps, if any, in the existing international framework. These perceived gaps could then be considered and addressed.

Ghana

Ghana currently protects the literary, scientific and artistic aspects of Traditional Cultural Expressions, Adinkra and Kente designs, i.e. traditional motifs are protected under the Copyright Act 2005, Act 690.

The gaps that needed to be filled are the remaining aspects of folklore such as modes and methods of preparation of traditional foods, medicine.

Brazil

Without prejudice to the decision Members may take to protect TCEs/EoFs via “sui generis” systems, the Committee should consider the adequacy of IP mechanisms to provide for the protection of TCEs/EoFs by examining, for example, (i) the extent to which rules relating to public domain should be adapted to accommodate appropriate protection of TCEs/EoFs; (ii) changes that might be necessary to accord TCEs/EoFs a term of protection commensurate to their duration in time; (iii) possible modifications in rules governing the validity of IPRs with a view to provide for deterrent mechanisms against misappropriation of TCEs/EoFs.

Japan

To date, there has been no IP system around the world which extends direct protection to TCEs/EoF. In certain limited cases, however, TCEs/EoF can be protected under such existing systems as copyright law, trademark law, or unfair competition prevention law systems. Still, the following problems will remain.

Protection under copyright law

In order to be protected by copyright, a certain level of originality is necessary. Also, the holder of right is basically presumed to be an individual, and although there are systems of joint ownership of copyright or copyright owned by legal entities, it is not presumed that the a community directly becomes a copyright holder. Performance of TCEs/EoF can be subject to protection by neighboring rights, even if the performed TCEs/EoF itself does not qualify as a copyrighted work. Term of protection is limited both for copyright and neighboring rights.

Protection under trademark law

A trademark right is aimed at protecting signs used for goods and services by entrepreneur but not cultural expressions such as TCEs/EoF. Indirect protection of protection of TCEs/EoF under a trademark right might be possible. More specifically, if a trademark right might be able to be granted to a mark of group to which the TCEs/EoF belongs, a brand can be established using the mark of the group.

In addition, with regard to protection of moral rights, copyright law can provide moral rights protection where the TCEs/EoF qualifies as copyrighted work, and civil code or other general laws may also provide protection in cases of serious moral right infringements.

In conclusion, a fair balance has been kept between the protection of TCEs/EoF and the protection of public domain under the IP system and other laws. At this stage there is no perceivable gap between the current system and the necessary forms/level of protection.

Norway

Existing IPRs (as i.e. regulated in treaties under the auspices of WIPO) already provides varying degrees of protection, depending on the circumstances. For instance the 1996 WPPT protects performers of expressions of folklore.

However, the traditional IPRs are not targeted to protect TCE/EoF. Therefore, the specific characteristics and needs are not necessarily appropriately addressed. Furthermore, the protection accorded is fragmented, varies between different jurisdictions and types of TCE/EoF and does not necessarily recognize TCE/EoF as eligible for protection.

Qatar

Existing IPRs are not sufficient according to the nature of TK, It's better to have a sui-generic system for the protection of TK.

South Africa

South Africa believes IPR applications that include or are based on IK should be specifically excluded from existing IPR protection. In IP terms for example patent claims would fail to meet the test of innovation, novelty or inventiveness. But more importantly for local and indigenous communities, such patent claims should be automatically denied because IK is in the community domain; that is, it is already under the jurisdiction of customary practice systems, which protect the IK in perpetuity as the inherent and inalienable cultural property of local and indigenous communities. Given this cross generation, communal nature of IK an international instrument is thus most likely to adequately protect – but will have to include elements that goes beyond traditional IPR.

We support the inclusion of “*Protection to individuals*” under this sub-section. It is possible for an owner who is an individual to pass on knowledge, etc. to his own group (i.e., family, village, community).

In perusing the literature on indigenous knowledge we observe that provisions acknowledge an individual can own knowledge, not merely as trustee on behalf of others, but outright. By extension this would apply to innovations and practices.

- *Already written and recorded information* – does not recognise origin (Community). Under the current provision there are no obligations to the source community, such as obligations to acknowledge the origin of their inspiration, share benefits or respect the cultural and

spiritual values and meanings associated with the underlying expression of folklore. The South African Legal Deposit Act, 1997, provides for the protection of the national documentary heritage of the country. As IKS becomes more available in written form and as it stored in electronic databases, provision should be made for the National Library of South Africa and other places of legal deposit to receive copies of such documents *when published commercially*. Provision should also be made for places of legal deposit to gain access to the relevant information stored in such databases (being mindful of the protection of intellectual property rights). The designated places of legal deposit would help preserve published IKS documents and would promote access to heritage information. IKS should therefore be provided for in the Legal Deposit Act, 1997, which is now being amended. This holds true for other countries with legal deposit legislation.

- *Community rights*: - Definition of novelty and obviousness (patents) are not recognized: We note the difficulty in meeting these requirements such as novelty or originality, and inventive step or non-obviousness (this may be due at least in part to the fact that IK often dates back prior to the time periods associated with conventional IP systems, or are developed in a more diffuse, cumulative and in a collective manner, making invention or authorship difficult to establish at a fixed time);
- We draw attention to the fact that issue of *oral history/orature* is conspicuously omitted. We propose that any provision must include oral history which is generally unwritten, and is based on oral traditions tracing back to the customs, habits, and usages of local and indigenous communities from generation to generation.

Russian Association of Indigenous Peoples of the North (RAIPON)

No response.

Colombia

Intellectual property legislation does not envisage any type of protection for traditional cultural expressions.

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

International treaties contain virtually zero protection for traditional cultural expressions and such protection is omitted from national legislation, apart from specific provisions which are to be found in Panamanian, Tunisian, Moroccan, etc. legislation.

A reference to folklore exists only in the international WIPO Performances and Phonograms Treaty (WPPT) of December 20, 1996, where a performer is defined as the person who acts, sings, declaims, etc. literary or artistic works or expressions of folklore.

In order to resolve this extremely important question, it appears appropriate to draw up an international treaty which contains minimal but effective protection and for said treaty, after its entry into force, to be applied to the nations that sign up to it.

Tunisia

Traditional knowledge is considered to be a nebulous concept which cannot be protected with a single system of laws, in this case those relating to intellectual property.

The intellectual property system cannot recognize the collective ownership of practices and knowledge handed down from generation to generation.

It may, however, be considered that if intellectual property can help in one way or the other to protect traditional knowledge and to lead to the recognition of its lawful owners, it will already have the merit of recognizing their collective creativity.

Protection must not prevent the sharing and transmission of traditional knowledge, and geographical indications represent an important element in the same way as territorial specificity.

Guatemala

Decree No. 33-98 and reforms thereto, Decree No. 56-2000 and the Law on Copyright and Related Rights, establish protection for literary, scientific and artistic works, whatever their mode or form of expression.

The Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98, establishes rules for the protection, defense, research, conservation and recovery of the property included in the National Cultural Heritage.

Among the existing legal gaps mention can be made of the absence of a relevant treaty or agreement, promoted by the World Intellectual Property Organization.

Russian Federation

In Russian at present the legal protection of the works of folk arts (expressions of folklore) within the IP system is not granted: not in copyright, not in patent law, not in any sui generis law.

A position has been expressed in scientific literature that there is a possibility of special payments for the use of works of folk arts with a reference to p.3 of article 28 of the Copyright law. According to this article the Government of the Russian Federation can define the cases when special payments must be made for the use on the territory of the Russian Federation of the works in the public domain. Such payments go to the professional funds of authors and the organizations dealing with collective management of authors' rights, and can no exceed one percent of the profit from the use of such works. This article only deals with works that have fallen into public domain.

We should also note that relations in the area of artistic crafts are governed by the Federal Law of January 1, 1999 "On the Public Artistic Crafts".

According to the mentioned law the federal executive bodies should provide economic, social and other conditions for the preservation, renaissance and development of organizations of

public artistic crafts, the list of which is approved by the Government of the Russian Federation.

In particular, according to the Tax Code of the Russian Federation of July 31, 1998 No. 146-FL tax privileges are provided for the organizations of public artistic crafts. Besides, such organizations are subject for subsidies approved by the Decree of the Ministry of Industry and Energy of April 21, 2006 No. 90.

However, works of folk arts can be not only the creations of public artistic crafts. The notion “creation of public artistic craft” which is an artistic article of utilitarian or decorative designation created according to the traditions of such craft covers the articles of decorative and applied arts, such as carvings, embroidery, braided and weaved articles, clothing, ornaments (the list of the types of production and groups of articles of crafts, according to which the articles are attributed to articles of public artistic crafts is approved by the decree of the Ministry of Economic Development and Trade of the Russian Federation of December 28, 1999 No. 555) and does not cover the works of oral creativity, such as national sagas, legends, fairy tales, folk poetry, proverbs, riddles; musical works, such as folk songs and instrumental music; choreographic works, such as folk dances; dramatic works, such as games, performances, ceremonies and other works of folk arts.

VIII. WHAT SANCTIONS OR PENALTIES SHOULD APPLY TO BEHAVIOR OR ACTS
CONSIDERED TO UNACCEPTABLE/ILLEGAL?

International Publishers Association (IPA)

IPA is concerned by the introduction of the notion of “unacceptability” in the ongoing discussions. “Unacceptability” is not a legal term and means different things to different people. IPA recommends the use of clear and unambiguous terms throughout the ongoing discussions.

IPA opposes a hasty protection of TCEs/EoF and therefore does not at this stage want to comment on the question of sanctions or penalties.

China

We think that civil, administrative and even criminal sanctions or penalties should apply to behavior or acts considered to be unacceptable/illegal.

Kyrgyzstan

There are no sanctions or penalties in the legislation of the Kyrgyz Republic for violation of use of traditional cultural expressions (folklore).

United States of America

For the reasons set forth in our response to Issue five, the United States believes that a discussion of “sanctions and penalties” will not advance the work of the IGC at this time. As noted in the same response, however, the United States believes that the IGC should undertake a focused discussion of specific behaviors and acts regarded as unacceptable or illegal by indigenous peoples and traditional and other cultural communities. Once the IGC reaches a more informed understanding of the specific harms at issue, the IGC will be a better position to canvas remedies under existing law (including copyright, trademark, patent, unfair competition, trade secret, criminal, and customary law) to determine whether there are gaps in the existing remedial schemes of WIPO Member States.

Ghana

We suggest that the following provisions in the African Union model law be considered.

1) Without prejudice to the existing agencies and authorities, the state shall establish appropriate agencies with the power to ensure compliance with the provisions of the instrument.

2) Without prejudice to the exercise of civil and penal actions which may arise from violations of the provisions of the instrument and subsequent regulation, sanctions and penalties to be provided may include:

- i) written warning

- ii) fines
- iii) automatic cancellation / revocation of the permission for access
- iv) confiscation of collected biological specimens recorded information and equipment
- v) permanent ban from access to folklore / traditional knowledge such as biological resources / community knowledge and technologies in the country.

3) The violation committed shall be publicized in the national and international media and shall be reported by the national competent authority to the secretariats of relevant international conventions and regional bodies.

4) When the collector innovator conducts his / her operation outside of national jurisdiction, any alleged violations by such a collector may be prosecuted through the co-operation of the government under whose jurisdiction the collector operates based on the guarantee that the latter has provided.

Brazil

As a general rule, sanctions foreseen in IP rules should apply in the cases of misappropriation. The draft provision of Article 8 (a) in the Annex of document WIPO/GRTKF/IC/10/4, transcribed below, represents adequate basis to discuss the issue:

“(a) 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.”

Japan

Sanctions/penalties against unacceptable/illegal acts may vary depending on the level of protection for TCEs/EoF and the level of illegality. As mentioned in the above item 3, there is no clear justifiable reason why TCEs/EoF is eligible for IP right protection. Japan is greatly concerned about extending IP right protection to TCEs/EoF. A fair balance has been kept between the protection of TCEs/EoF and the protection of public domain under the IP systems and other laws. Japan is not convinced that there is a need to introduce any other sanctions/penalties than those that have been already adopted under the existing systems. Japan does not believe that such a discussion is unnecessary, but when discussing what sanctions/penalties should be introduced, consideration should be given to the form of protection for TCEs/EoF and the scope of illegal acts. Discussion based on factual information about what damage has been caused by what illegal acts is essential.

Norway

Appropriate and effective sanctions should be provided for in national law depending upon the infringement in question. Part III of the TRIPS Agreement provides guidance in this respect.

Qatar

It is accepted to benefit from the existing IPRs norms in this matter.

South Africa

- Internationally legally binding instrument
- Bilateral / MOU's / Cooperation agreements
- Domestic law within which the transgression took place
- Article on sanctions
- Conciliation, Mediation and arbitration – by independent 3rd parties

South Africa is of the view that penalties could be set in order to recognise the particular gravity of the breach, as well as the financial means of the party involved. Civil procedures would be followed, including use of the civil standard of proof. A suitable appeal mechanism would need to be available to review the exercise of the regulator's or issuing officer's discretion. Following evaluation document WIPO/GRTKF/IC/10/4, it could potentially be extended to other areas of environmental regulation and other regulatory agencies. Our proposed regulations on access and benefit could be used to benchmark standards.

Russian Association of Indigenous Peoples of the North (RAIPON)

The unlawful use, without the voluntary and conscious consent of authors, of traditional cultural expressions for commercial purposes shall be punishable by the complete removal of profit and circulation of such expressions for the benefit of authors.

Colombia

Dispute resolution mechanisms, civil and criminal sanctions, both economic (compensation for damage, fines) and also those which deprive offenders of their freedom.

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

In general, criminal protection should be granted against infringers and appropriators of traditional cultural expressions, although reserved for the most serious cases.

We consider that administrative measures and border control, with the imposition of heavy fines for offenders, could give excellent results where infringements affect important elements of different nationalities.

Tunisia

The same sanctions adopted in the field of archeological heritage (the looting of sites) and the sanctions relating to copyright (piracy).

Guatemala

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (WIPO/GRTKF/IC/2).

Confiscation.

Prohibition of storage, import and export.

Guatemalan Penal Code

Establishes offenses against the public faith and national heritage, as well as the looting of that heritage.

Article 332A, added by Article 23 of Decree No. 33-96, which reads: theft and robbery of national treasures. A prison sentence of two to 10 years shall be imposed in the case of Article 246 and a sentence of four to 15 years in the cases of Article 251, where appropriation of the following is undertaken:

- (1) collections and rare specimens of fauna, flora or minerals, or items of palaeontological interest;
- (2) property of scientific, cultural, historical or religious value;
- (3) antiques more than 100 years old, inscriptions, coins, engravings, tax or postal stamps of philatelic value;
- (4) objects of ethnological interest;
- (5) manuscripts, books, documents and old publications with historical or artistic value;
- (6) original artifacts, pictures, paintings and drawings, engravings and lithographs with historical or cultural value;
- (7) sound, photographic or cinematographic archives with historical or cultural value;
- (8) articles and objects of furnishing more than 200 years old and old musical instruments with historical or cultural value.

The penalty will be raised by one third where an offense is committed by public servants or officials or persons who, owing to their position or function, are responsible for guarding and keeping custody of the property protected by this Article.

Article 332B, added by Article 24 of Decree 33-96, reads as follows: theft and robbery of archaeological property. A prison sentence of two to 10 years shall be imposed in the case of Article 246 and a prison sentence of four to 15 years in the case of Article 251, where appropriation of the following is undertaken:

1. products of lawful or unlawful archaeological excavations, or of archaeological discoveries;
2. ornaments or parts of archaeological monuments;
3. items or objects of archaeological interest, although they are scattered or located in abandoned areas.

The penalty will be raised by one third where an offense is committed by public servants or officials or by persons who, owing to their position or function, are responsible for guarding and keeping custody of protected property.

Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98.

Article 45. Unlawful export of cultural property. Any person unlawfully exporting property which is part of the National Cultural Heritage shall be sanctioned with a prison sentence of six to 15 years, plus a fine equivalent to twice the value of the cultural property which shall be confiscated. The monetary value of the cultural property shall be determined by the Directorate General of the Cultural and Natural Heritage.

Russian Federation

It seems worthwhile to provide for a possibility of administrative liability for acts mentioned in point 4, namely:

- warning (administrative measure, expressed in an official reproof of an individual or a legal entity. The warning is usually given in a written form);
 - administrative fine (monetary punishment).
-

IX. WHICH ISSUES SHOULD BE DEALT WITH INTERNATIONALLY AND WHICH NATIONALLY, OR WHAT DIVISION SHOULD BE MADE BETWEEN INTERNATIONAL REGULATION AND NATIONAL REGULATION?

International Publishers Association (IPA)

The principle of subsidiarity requires that only those tasks should be performed at international level which cannot be performed effectively at a more immediate or local level. Respect for the same principle also requires that international harmonisation should be the conclusion, not the precursor of the development of national regulation.

China

We think that at the international level the cross-border protection of TCEs/EoF should be coordinated.

Kyrgyzstan

Problems: imperfection of the national legislation in this field, lack of traditional cultural expressions (folklore) protection system as such etc.

It is presumed that at international level there will be unified approach in solution of common tasks in order to protect traditional cultural expressions (folklore).

United States of America

The United States believes that a focused discussion of the preservation, promotion and protection of TCEs/EoF requires a careful consideration of both the national and international aspects of the complex issues before the Committee, without excluding any outcome. At this time, the Committee should concentrate its efforts on engaging in sustained, robust discussions of the substantive issues before it. Further, it should be recognized that all issues raised in the IGC are being dealt with internationally even if the result of the international deliberations would be for agreed actions to be taken at the national level.

Ghana

Every issue concerning folklore should be dealt with at both the national and international levels especially where, the issue involves two or more different nationals or nations.

Brazil

One critical function of an international instrument for the protection of TCEs/EoFs should be to facilitate the enforcement of national legislation in third countries. Accordingly, minimum rules should be set out on an international level, such as: (i) the requirement that use of TCEs/EoFs be conditioned upon compliance with prior informed consent; (ii)

reference of cases that may represent acts of misappropriation; (iii) recognition of rights over TCEs/EoFs to the communities they relate to; (iv) ways and means to protect such rights.

Apart from the decision to decide the underlying features of the system of protection – IP-related or “sui generis” -, national legislations should be entitled to provide for, inter alia: (i) specific definition of the beneficiaries of protection; (ii) rules on benefit-sharing; (iii) management of rights relating to TCEs/EoFs; (iv) specific sanctions applying in cases of misappropriation.

Japan

As mentioned in the above item 3, any justifiable reasons for IP right protection to be extended to TCEs/EoF have not been clearly identified and sufficiently explained. Japan has a serious concern about establishing a new type of intellectual property right or a sui-generis right for protection of TCEs/EoF as well as about creating a legally binding international instrument that obligates member States to establish such regime.

Before discussing ways of internationally addressing this issue, discussions must be conducted on what domestic solutions exist and where their limits lie, and the extent to which contracts, etc. are incapable of addressing this issue. Discussion based on factual information about what damage has been caused by what illegal acts is essential.

Norway

The core elements should be dealt with internationally, thus providing a minimum standard of protection. However, the need for flexibility should also be recognized. One system of protection does not necessarily fit all and different concerns locally or related to the specific subject matter should also be taken into account.

Qatar

- (a) Creating an agreement about the norms of what could be considered as misappropriation, misuse, etc... of TK.
 - (b) The difficulties of defining the subject matter, the strength and weakness of existing categories of protection.
 - (c) The issue of enforcement of norms relating to TK.
-

Ogiek Peoples Development Program (OPDP):

The issues to be dealt both nationally and internationally should be based on identification and promotion of good traditional practices and prohibits harmful behaviours that may expose these practices to danger. The policy development internationally should be regulated/ domesticated nationally, hence foreign right holders have to adhere within different jurisdictions.

South Africa

As mentioned in earlier our submission, our starting point is that there needs to be coordination and clarification of linkages with the other elements of other international protocols and conventions. We propose that mechanisms for enabling or facilitating notification or registration as the basis for recognising an IP right under national law and regional policy be taken into consideration. Hence we are of the view that the OAU Model law be tabled as a possible mechanism. We propose that the model law could be harmonised with the provisions in the IGC, so as to provide a more integrated scheme for recognition and protection of Indigenous and local communities' intellectual property. If a system for community decision-making and financial returns is devised, it could also pave the way for greater economic, as well as cultural self reliance for these communities.

Russian Association of Indigenous Peoples of the North (RAIPON)

At international level general principles should be examined (see paragraph 5) and at national level – protection mechanisms.

Colombia

We support what is stated on this subject in the proposed Article 11 of the substantive provisions contained in documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/10/4.

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

We consider that in order to focus appropriately on the protection under consideration, there is no more effective formula than the drawing-up of an international treaty to which the majority of Member States could sign up. Once this international treaty has been prepared, it would be necessary to complement or establish original legal protection for traditional cultural expressions.

Since there is virtually no national rule on the subject, it is difficult to determine it at the national level.

Tunisia

Currently no legal framework exists for the protection of traditional knowledge at the national level.

The protection of traditional knowledge at the national level is essential, and the Code of Protection for the Archeological, Historical and Traditional Arts Heritage, enacted under Law No. 94-35 of February 24, 1994, and which relates essentially to sites and monuments, can be broadened to extend to traditional knowledge.

Agreements and charters between international organizations and States can be produced for the protection of traditional knowledge, similar to what is applied in the field of the built heritage or the environment.

Guatemala

Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98, WIPO/GRTKF/IC/2.

Article 18: temporary exhibitions. In order to hold temporary exhibitions of archaeological, ethnological and artistic objects outside the national territory, the exhibitor or manager shall submit its application to the Ministry of Culture and Sport, which shall contain the following:

- (a) name and general description of the activity;
- (b) duration of the activity, date of inauguration and of closure;
- (c) country, department, state or province in which the exhibition will be held;
- (d) institution, type of building, type of exhibitors, planned security measures, in which the exhibition will be held;
- (e) supervision: in order to guarantee the security of the objects included in the exhibition, these objects shall travel with at least one representative for each of the institutions responsible for the event, and where only one institution is involved they shall travel with a minimum of two persons who shall accompany the cultural property from the city or place of origin to the city where the activity will be held, as well as any change in headquarters. The setting-up and dismantling of the exhibition shall be supervised. The number of persons may vary if the institutions responsible consider it necessary, taking into account the value and size of the exhibits. Transportation costs, travel, accommodation and subsistence expenses resulting from what is covered by this section, shall be borne by the applicant;
- (f) The name of the person or institutions responsible for the exhibition;
- (g) The agreement to obtain, before the cultural property is packaged, insurance against any possible risk in accordance with the valuation made by the dispatching institution.

Article 19. Guarantee agreement. Once an application has been received, a list with the description of the objects, their valuation and physical condition shall be drawn up. A copy of the technical sheet and the corresponding photograph of each object shall be attached, after being issued by the Registry of Cultural Property. Said document shall serve as a basis for the issue of the corresponding State guarantee agreement or insurance policy. The cultural property included in an exhibition may not be confiscated and the receiving country shall guarantee its protection and return.

Article 20. Acceptance. Following acceptance by the applicant institution and with the State agreement and/or insurance policy covering the designated value of the piece or collection, the general state of the museographical exhibits shall be specified, detailing any existing deterioration. The State or legal person concerned with the exhibition shall conclude an agreement with the Ministry of Culture and Sport of Guatemala, which shall regulate the procedures and conditions.

According to the case, the insurance policy or State guarantee agreement shall be received by the Ministry of Culture and Sport which, at the time the exhibits are delivered and received, shall make an official record that, where necessary, the corresponding claims shall be made. When the exhibition of the museographical exhibits ends, before the exhibits are packaged, a detailed record shall be produced of the state of each of the objects included in the exhibition, followed by their packaging and sealing prior to return.

Article 21. Exhibitions. In the case of traveling exhibitions these shall be governed by the same principles of this Law, with responsibility being placed on the country where the exhibits are temporarily displayed. The responsibility of the country and/or institution in which the display of the exhibits is concluded shall end when the country and/or institution in which it is held subsequently receives the exhibits officially.

Article 22. Final selection. Notwithstanding the request made by the country to the institution concerned, the Ministry of Culture and Sport shall have the right of final selection of the items which shall leave the country for the exhibition.

Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98.

Article 11. Exports. The permanent export of cultural property shall be prohibited. However, temporary export, up to a maximum period of three years, may be authorized in the following cases:

- (a) where exhibits will be displayed outside the national territory;
- (b) where they are the subject of scientific research or conservation and restoration duly supervised by the Directorate General of the Cultural and Natural Heritage.

Russian Federation

The issues of preservation and dissemination of folklore should be dealt with at a national level, and the issues concerning cultural exchange may be treated at the international level.

X. HOW SHOULD FOREIGN RIGHTS HOLDERS/BENEFICIARIES BE TREATED?

International Publishers Association (IPA)

All beneficiaries should be treated equally.

China

We hold that the principles of national treatment and reciprocity should be applied.

Kyrgyzstan

It is presumed that rights of foreign holders of traditional cultural expressions (folklore) would be provided pursuant to legislation of respective country.

United States of America

For the reasons set forth in our response to Issue five, the United States believes that it is premature for the IGC to undertake a focused discussion of the treatment of foreign rights holders/beneficiaries. However, the United States notes that one of the guiding principles extensively discussed within the IGC is respect for relevant international agreements. The United States understands this principle to include the fundamental principle of national treatment, or nondiscrimination with respect to foreign rights holders. In the view of the United States, this bedrock principle of international intellectual property rights should continue to inform the spirit of discussions within the IGC.

Ghana

Nothing in this convention may be interpreted as altering the status or diminishing the level of protection under any convention affecting the rights and obligations of states parties deriving from international instruments relating to intellectual property rights or to the use of biological and ecological resources to which they are parties. Foreign right holders / beneficiaries should be given equal treatment.

Brazil

Foreigners should be afforded the same treatment as nationals or treatment not less favorable. The draft provision of Article 11 in the Annex to document WIPO/GRTKF/IC/10/4, transcribed below, represents adequate basis to discuss the issue:

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

and benefits as enjoyed by beneficiaries who are nationals of the country of protection, as well as the rights and benefits specifically granted by these international provisions.”

Japan

As mentioned in the above item 3, any justifiable reasons why IP right protection should be extended to folklore have not been clearly identified and sufficiently explained. Japan has a serious concern about establishing a new type of intellectual property right or a sui-generis right for protection of TCEs/EoF, as well as about creating a legally binding international instrument that obligates member States to establish such a regime. Treatment of foreign rights holders and beneficiaries would depend on the type of protection TCEs/EoF would be granted and the corresponding international regulations.

Norway

With regard to the custodian's economic and moral rights, as provided for in accordance with the proposed recommendation set out in document WIPO/GRTKF/IC/9/12 paragraph 38 national treatment and MFN should be granted, with the possibility for reciprocity provisions.

Qatar

The same treatment of native beneficiaries.

South Africa

At the international level there is significant level of support for opposing the granting of patents on non-original inventions. For example, more than a dozen organizations from around the world got together to oppose the EPO Neem patent and the entire process took five years. However, South Africa takes note that the current process of opposition is, however, extremely expensive and time consuming. A recent suggestion by the USPTO provides a rational approach to solve these problems.

International instrumentations should take into consideration past abuse as well as the vulnerability of the communities and should seek to elevate the rights of communities over the rights of multinational consortiums.

Russian Association of Indigenous Peoples of the North (RAIPON)

No response.

Colombia

We support what is stated on this subject in the proposed Article 11 of the substantive provisions contained in documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/10/4.

Federación Ibero-Latinoamericana de Artistas, Intérpretes y Ejecutantes (FILAIE)

In exactly the same way as nationals, with the establishment of appropriate systems of reciprocity. In other words, the principle of national treatment should apply.

Tunisia

The right of ownership of traditional knowledge is linked to the community and the nation, and territoriality is therefore an important element.

Foreign nationals cannot be owners or beneficiaries of rights.

Guatemala

Law for the Protection of the National Cultural Heritage, Decree No. 26-97, revised by Decree No. 81-98.

Article 65. Conclusion of agreements. The Government of Guatemala shall conclude with the foreign governments it deems appropriate bilateral and regional agreements in order to avoid the unlawful trafficking of the cultural property of the contracting countries.

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO/GRTKF/IC/2.

Protection of expressions of foreign folklore. The expressions of folklore developed and perpetuated in a foreign country shall be protected:

- (h) subject to the reservation of reciprocity, or
 - (i) on the basis of treaties and other agreements.
-

Russian Federation

Taking into consideration the provisions of points 3 and 4, foreign rightholders/beneficiaries should be accorded similar treatment as own national, i.e. national treatment.

[End of Annex and of document]