

## **Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore**

### **Nineteenth Session**

**Geneva, July 18 to 22, 2011**

#### **LIKE-MINDED COUNTRIES CONTRIBUTION TO THE DRAFT ARTICLES ON THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS**

*Document submitted by the Delegation of Indonesia*

#### **INTRODUCTION**

1. On July 18, 2011, the International Bureau of the World Intellectual Property Organization (WIPO) received a Note Verbale from the Permanent Mission of the Republic Indonesia to the United Nations, the World Trade Organization and other International Organizations in Geneva, transmitting an "advanced text" on traditional cultural expressions "as contribution from cross-regional group of like-minded developing countries to the text-based negotiations" in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).
2. Further, the International Bureau was requested to make available the said text as a working document for the nineteenth session of the IGC. The text is, accordingly, contained in the Annex to this document.
3. *The Committee is invited to take note of this document and the Annex to it.*

[Annex follows]

LIKE-MINDED COUNTRIES  
CONTRIBUTION TO THE DRAFT ARTICLES ON THE PROTECTION OF  
TRADITIONAL CULTURAL EXPRESSIONS

ARTICLE 1  
SUBJECT MATTER OF PROTECTION

1. "Traditional cultural expressions" are any form of expressions, tangible or intangible, or a combination thereof, which are indicative of traditional culture and knowledge and have been passed on from generation to generation, including, but not limited to:
  - (a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
  - (b) musical or sound expressions, such as songs, rhythms, and instrumental music, the sounds which are the expression of rituals;
  - (c) expressions by action, such as dances, plays, ceremonies, rituals, rituals in sacred places and peregrinations, sports and games, puppet performances, and other performances, whether fixed or unfixed;
  - (d) tangible expressions, such as material expressions of art, handicrafts, architecture, and tangible spiritual forms, and sacred places.
2. Protection shall extend to any traditional cultural expression that is associated with the cultural and social identity of the beneficiaries as defined in Article 2, and is used, maintained or developed by them that people, community, locality, regions, or nations as part of their cultural or social identity or heritage in accordance with the national law and customary practices.
3. The specific choice of terms to denote the protected subject matter should be determined by national legislation.

ARTICLE 2  
BENEFICIARIES

1. Beneficiaries of protection of traditional cultural expressions as defined in Article 1 shall be indigenous and local communities or, where traditional cultural expressions is not specifically attributable to or confined to an indigenous and local community or it is not possible to identify the community that generated it, any national entity determined by domestic law.
2. For the purposes of this Article, the term "local communities" shall include any classification of social and cultural identity of a member state as defined by domestic law.

ARTICLE 3  
SCOPE OF PROTECTION

1. In respect of traditional cultural expressions, adequate and effective legal and practical measures should be provided to:
  - (a) prevent the disclosure of secret traditional cultural expressions;
  - (b) acknowledge the beneficiaries to be the source of the traditional cultural expression;
  - (c) protect against the offensive use of traditional cultural expressions and any distortion, mutilation or other modification of, or other derogatory action, including any false, confusing or misleading indications which, in relation to goods or services, suggest any endorsement by or linkage with the beneficiaries in relation to the said traditional cultural expression which would be prejudicial to the beneficiaries reputation or integrity.
  
2. Member states shall ensure that the relevant beneficiaries have the exclusive and inalienable collective right to authorize and prohibit the following:
  - (a) in respect of traditional cultural expressions other than words, signs, names and symbols:
    - (i) fixation;
    - (ii) reproduction;
    - (iii) public performance;
    - (iv) translation or adaptation;
    - (v) making available or communicating to the public;
    - (vi) distribution
  
  - and
  
  - (b) in respect of traditional cultural expressions which are words, signs, names and symbols:
    - (i) any use for commercial purposes, other than their traditional use;
    - (ii) acquisition or exercise of intellectual property rights;
    - (iii) the offering for sale or sale of articles that are falsely represented as traditional cultural expressions made by the beneficiaries as defined under Article 2;
    - (iv) any use that disparages, offends, or falsely suggests a connection with the beneficiaries as defined under Article 2 or brings them into contempt or disrepute.

ARTICLE 4  
ADMINISTRATION OF RIGHTS

1. The management of the rights provided for in Article 3 belongs to the beneficiaries as defined in Article 2. The beneficiaries may authorize designated national competent authority acting at the request, and/or on behalf, of the beneficiaries, in accordance with the national law or their traditional decision-making and international law.

Where an authorization is given, the competent authority may:

- (a) grant licenses only after appropriate consultation and with the prior informed consent or approval and involvement of the beneficiaries in accordance with their traditional decision-making and governance processes;
  - (b) collect monetary or non-monetary benefits from the use of the traditional cultural expressions providing such benefits shall/should be provided directly by the competent authority to the beneficiaries concerned or utilized for their benefits;
  - (c) engage in appropriate consultation in order to ensure the prior informed consent or approval and involvement of the beneficiaries in accordance with their national procedure and their customary rights practices;
  - (d) ensure that any such monetary or non-monetary benefits collected by the competent authority be provided directly to the beneficiaries concerned or utilized for the direct benefit of relevant beneficiaries and the preservation of traditional cultural expressions; and
  - (e) provide equitable remuneration to the beneficiaries.
2. Where so requested by and in consultation with the beneficiaries, a competent authority may:
    - (a) conduct awareness-raising, education, advice and guidance functions;
    - (b) monitor uses of traditional cultural expressions for purposes of ensuring fair and appropriate use;
    - (c) establish the criteria to determine any monetary or non-monetary benefits; and,
    - (d) provide assistance in any negotiations for the use of the traditional cultural expressions.
  3. If determined by national/domestic law, the authority may, with the consultation and approval of the beneficiary where possible, administer the rights of a traditional cultural expression that fulfills the criteria under Article 1, and is not specifically attributable to or confined to a community,

## ARTICLE 5 EXCEPTIONS AND LIMITATIONS

1. Measures for the protection of traditional cultural expressions should not restrict the creation, customary use, transmission, exchange and development of traditional cultural expressions within and among communities in the traditional and customary context by the beneficiaries as determined by customary laws and practices consistent with national laws of the member states.
2. Limitations on protection should extend only to utilization of traditional cultural expressions taking place outside the membership of the beneficiary community or outside traditional or customary context.
3. Member States may adopt appropriate limitations or exceptions under national law, provided that the use of traditional cultural expressions does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries and does not unreasonably prejudice the legitimate interests of the beneficiaries
4. Regardless of whether such acts are already permitted under paragraph 3 or not, the making of recordings and other reproductions of traditional cultural expressions for their inclusion in archives and inventories for non-commercial culture heritage safeguarding purposes should be permitted.

## ARTICLE 6 TERM OF PROTECTION

1. Protection of traditional cultural expressions should endure for as long as the traditional cultural expressions continue to meet the criteria for protection under Article 1 of these provisions; and,
2. The protection granted to traditional cultural expressions against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the community, indigenous and local communities or region to which they belong, shall last indefinitely.

## ARTICLE 7 FORMALITIES

As a general principle, the protection of traditional cultural expressions shall not be subject to any formality.

ARTICLE 8  
SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

1. Accessible 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.
2. If a designated competent authority is appointed under Article 4, it may additionally be tasked with advising and assisting the beneficiaries referred to in Article 2 with regard to the enforcement of rights and with instituting remedies provided under this article when appropriate and requested by the beneficiaries.
3. Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional cultural expression, each contracting party concerned may be entitled to refer the issue to an independent alternative dispute resolution mechanism which is most convenient to the beneficiaries of the traditional cultural expressions, recognized by national and/or regional and/or international law.

ARTICLE 9  
TRANSITIONAL MEASURES

1. These provisions apply to all traditional cultural expressions which, at the moment of the provisions coming into force, fulfill the criteria set out in Article 1.
2. Continuing acts in respect of traditional cultural expressions that had commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, should be brought into conformity with the provisions within a reasonable period of time, preferably 3 to 5 years, after they enter into force, subject to respect for rights previously acquired by third parties qualified by paragraph 3.
3. With respect to traditional cultural expressions that have special significance for the relevant communities having rights thereto and which traditional cultural expressions have been taken outside control of such communities, the communities shall have the right to recover such traditional cultural expressions.

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

Protection for a traditional cultural expression in accordance with this instrument is complementary to protection and measures that apply to that expression and derivatives/adaptations thereof in relevant legal instruments, plans of action, international intellectual property instruments, and international law for the safeguarding, preservation, promotion of cultural heritage and the diversity of cultural expressions.

ARTICLE 11  
NATIONAL TREATMENT

The rights and benefits arising from the protection of traditional cultural expressions under national measures or laws that give effect to this treaty should be available to all eligible beneficiaries who are nationals or residents of a prescribed country as defined by international obligations or undertakings.

ARTICLE 12  
TRANS-BOUNDARY COOPERATION

Where traditional cultural expressions are shared by different countries or by indigenous and local communities in several jurisdictions, contracting parties should provide cooperation and assistance to facilitate the implementation of enforcement measures provided under this instrument.

[End of Annex and of Document]