

**DRAFT POLICY OBJECTIVES AND CORE PRINCIPLES:  
BACKGROUND INFORMATION AND DISCUSSION**

1. This Annex provides background to the suggested draft policy objectives and core principles, and illustrates the origins of these materials within the work of Committee and related discussions. This is intended to illustrate that the draft policy objectives and core principles are well-established both in national laws and in international discussion. They draw on a diverse set of policy and legal approaches to protecting traditional cultural expressions/expressions of folklore (TCEs/EoF) that have already been employed in a number of countries.

2. If the Committee so chooses, these draft materials may be used as a starting point to address the international dimension of rules, disciplines, guidelines or best practices governing the protection of TCEs/EoF. They can form a basis to develop a concrete product for protection of TCEs/EoF, in the form of an international instrument, or instruments, intended to be accepted as binding or influential but non-binding international law. These principles accordingly address only the substance, not the form, of TCEs/EoF protection at the international level. The legal status which that substantive content may take in the future will require subsequent discussion and may be promoted by consensus on substance.

#### I. POLICY OBJECTIVES

3. Protection of TCEs/EoF should not be undertaken for its own sake, as an end in itself, but as a tool for achieving the goals and aspirations of relevant peoples and communities and for promoting national and international policy objectives. The way in which a protection system is shaped and defined will depend to a large extent on the objectives it is intended to serve. A key initial step, therefore, of the development of any legal regime or approach for the protection of TCEs/EoF is to determine relevant policy objectives.

4. The Committee has decided on the formulation of such objectives as a specific output. The following suggested objectives draw on past submissions and statements to the Committee and relevant legal texts.<sup>1</sup>

The protection of traditional cultural expressions or expressions of folklore should aim to:
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<i>[Recognize value]</i>
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<sup>1</sup> Egypt (WIPO/GRTKF/IC/1/13, para. 34), Romania (WIPO/GRTKF/IC/2/16, para. 176), Brazil (WIPO/GRTKF/IC/6/14, para. 69), India (WIPO/GRTKF/IC/6/14, para. 48), USA (WIPO/GRTKF/IC/6/14, para. 76), Tunis Model Law, 1976; Model Provisions, 1982; Pacific Regional Framework, 2002; Panama Law, 2000; Peru Law, 2002; GRULAC (WIPO/GRTKF/IC/1/5, Annex I, page 3), Islamic Republic of Iran (WIPO/GRTKF/IC/1/13, para. 30 and WIPO/GRTKF/IC/2/16, para. 168), Madagascar (WIPO/GRTKF/IC/1/13, para. 54), Panama (WIPO/GRTKF/IC/1/13, para. 170), Romania (WIPO/GRTKF/IC/1/13, para. 176), African Group (WIPO/GRTKF/IC/6/12), Japan (WIPO/GRTKF/IC/6/14, para. 70), Norway (WIPO/GRTKF/IC/1/13, para. 33), Egypt (WIPO/GRTKF/IC/2/16, para. 167), European Community (WIPO/GRTKF/IC/3/11.), New Zealand (WIPO/GRTKF/IC/6/14, para. 41), Egypt (WIPO/GRTKF/IC/2/16, para. 167), Ecuador (WIPO/GRTKF/IC/2/16, para. 166), Mexico (WIPO/GRTKF/IC/6/14, para. 74), UNESCO Convention on Intangible Cultural Heritage, 2003, Bangui Agreement, OAPI, as revised in 1999, Indonesian Copyright Act, 2002, Preamble; Indian Arts and Crafts Act, 1990 (USA).

(i) recognize the intrinsic value of traditional cultures and folklore, including their social, cultural, spiritual, economic, intellectual, commercial and educational value, and acknowledge that traditional cultures constitute diverse frameworks of ongoing innovation and creativity that benefit all humanity;

*[Promote respect]*

(ii) promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the 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 cultural communities, and contribute to the welfare and sustainable economic, cultural and social development of indigenous peoples and traditional and other cultural communities;

*[Empower communities]*

(iv) be achieved in a manner inspired by the protection provided for intellectual creations and innovations, in a manner that is balanced and equitable and that effectively empowers indigenous peoples and traditional and other cultural communities to exercise due authority over their own TCEs/EoF, including through appropriate moral and economic rights, should they wish to do so;

*[Support customary practices]*

(v) respect and facilitate the continuing customary use, development, exchange and transmission of TCEs/EoF by, within and between these communities;

*[Contribute to safeguarding traditional cultures]*

(vi) contribute to the preservation and safeguarding of TCEs/EoF and the customary means for their development, preservation and transmission, and promote the conservation, application and wider use of TCEs/EoF, for the direct benefit of indigenous peoples and of traditional and other cultural communities, and for the benefit of humanity in general;

*[Respect for and cooperation with relevant international agreements and processes]*

(vii) recognize, and operate consistently with, other international and regional instruments and processes;

*[Encourage community innovation and creativity]*

(viii) encourage, reward and protect authentic tradition-based creativity and innovation, particularly, when so desired by them, by indigenous peoples and traditional and cultural communities and their members;

*[Promote intellectual and cultural exchange]*

(ix) promote, where appropriate, access to and the wider application of TCEs/EoF on terms that are fair and equitable to indigenous peoples and traditional and cultural communities, for the general public interest and as a means of sustainable development;

*[Contribute to cultural diversity]*

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

*[Promote community development and legitimate trading activities]*

(xi) promote the use of TCEs/EoF for community-based development, recognizing them as a collective asset of the communities that identify with them; and promote the development of, and the expansion of marketing opportunities for, authentic TCEs/EoF, particularly traditional arts and crafts;

*[Preclude invalid IP rights]*

(xii) curtail the grant, exercise and enforcement of invalid intellectual property rights over TCEs/EoF, and derivatives thereof;

*[Enhance certainty, transparency and mutual confidence]*

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

*[Complement protection of traditional knowledge]*

(xiv) operate consistently with protection of traditional knowledge, respecting that for many communities knowledge and expressions of culture form an indivisible part of their holistic cultural identity.

## II. CORE PRINCIPLES

### II.1 General Guiding Principles

5. General guiding principles would ensure that the effect of the specific principles for protection are equitable, balanced, effective and consistent, and appropriately promote the policy objectives set out above. The following suggested guiding principles are set out at three levels of detail: a simple reference to the general principle, a description of the guiding principle with illustrative examples, and a brief summary of the principle.

#### *Responsiveness to aspirations and expectations of relevant communities*

Discussions within WIPO and elsewhere have stressed that indigenous, traditional and other cultural communities should be directly involved in decision-making about the protection, use and commercial exploitation of their TCEs/EoF, using customary decision-making processes, laws and protocols as far as possible.<sup>2</sup> New Zealand has stated that achieving the goals and aspirations of relevant communities and peoples should be a 'chief aim of TCE protection.'<sup>3</sup>

<sup>2</sup> See the statements of ARIPO (WIPO/GRTKF/IC/4/15, para. 114), European Community (WIPO/GRTKF/IC/3/16, page 5), Brazil (WIPO/GRTKF/IC/2/14, Annex, para. 15), Colombia (WIPO/GRTKF/IC/4/15, para. 145), Mexico (WIPO/GRTKF/IC/4/15, para. 97), Venezuela (WIPO/GRTKF/IC/4/15, para. 147), Saami Council (WIPO/GRTKF/IC/5/15, para. 76), GRAIN (WIPO/GRTKF/IC/5/15, para. 78), United Nations University (WIPO/GRTKF/IC/5/15, para. 103), GRULAC (para. 12, WIPO/GRTKF/IC/4/15), Indigenous' Biodiversity Network (WIPO/GRTKF/IC/4/15, para. 160), Mejlis of the Crimean Tartar Peoples (WIPO/GRTKF/IC/4/15, para. 162). See also WIPO/GRTKF/IC/1/13, paragraph 87; WIPO/GRTKF/IC/2/16, paras. 75, 91, 117; Position Paper of the Asian Group and China (WIPO/GRTKF/IC/2/10), WIPO-UNESCO African Regional Consultation on the Protection of Expressions of Folklore, Pretoria, March 23 to 25, 1999 (WIPO-UNESCO/Folk/AFR/99/1) p.3; WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO

6. This principle could refer, among other things, to:
- (a) the recognition and application of indigenous and customary laws as far as possible in systems for the protection of TCEs/EoF;<sup>4</sup>
  - (b) taking fully into account the IP-related needs and expectations of such communities. These include:
    - (i) complementary use of ‘positive’ or defensive’ protection measures as described in previous documents<sup>5</sup>;
    - (ii) addressing both the cultural and economic aspects of development, as many TCEs/EoF are not created, developed or performed for commercial purposes but rather for their significance as vehicles for religious and cultural expression;
    - (iii) given the cultural and spiritual nature of TCEs/EoF, particular emphasis on preventing the insulting, derogatory and culturally and spiritually offensive uses of them, particularly sacred TCEs;
  - (c) the full and effective participation by communities in international, regional and national consultations and legal and policy development; and
  - (d) recognizing that indigenous, traditional and cultural communities often regard their expressions of traditional cultures as inseparable from systems of traditional knowledge (TK) and that systems for the legal protection of TCEs/EoF and of TK should be complementary and mutually-supportive.<sup>6</sup>

*Principle of responsiveness to aspirations and expectations of relevant communities*

Protection should reflect the aspirations and expectations of indigenous peoples and traditional and other cultural communities; in particular, it should recognize and apply indigenous and customary laws and protocols as far as possible, promote complementary use of positive and defensive protection, address cultural and economic aspects of development, address insulting, derogatory and offensive acts, enable full and effective participation by these communities, and recognize the inseparable quality of traditional knowledge and TCEs for many communities. Measures for the legal protection of TCEs/EoF should also be recognized as voluntary from the viewpoint of indigenous peoples and other communities who would always be entitled to rely exclusively or in addition upon their own customary and traditional forms of protection against unwanted access to and use of their TCEs/EoF.

*Balance and proportionality*

7. Diverse stakeholders, public and community interests, legal mechanisms and policy processes are engaged by this debate. The need for balance and proportionality has therefore often been emphasized in WIPO’s activities in this area. Stakeholders have, for example, referred to the need for balance between:

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Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) pp. 80, 128, and 142; WIPO/GRTKF/IC/2/26, par. 152; WIPO/GRTKF/IC/2/16, par. 186; New Zealand (WIPO/GRTKF/IC/5/15, para. 41).

<sup>3</sup> WIPO/GRTKF/IC/6/14, para. 41.

<sup>4</sup> See *inter alia* Asian Group (WIPO/GRTKF/IC/1/13, para. 22), African Group (WIPO/GRTKF/IC/3/15).

<sup>5</sup> African Group, (WIPO/GRTKF/IC/6/14, paras. 73 and 188), Islamic Republic of Iran (WIPO/GRTKF/IC/6/14, para. 86), India (WIPO/GRTKF/IC/6/14, paras. 48 and 197), GRULAC (WIPO/GRTKF/IC/6/14, para. 189), Egypt (WIPO/GRTKF/IC/6/14, para. 196). See WIPO/GRTKF/IC/6/3, para. 115.

<sup>6</sup> For example, India (WIPO/GRTKF/IC/6/14, para. 197) but also others.

- (a) the interests of the community owning the folklore, users of expressions of folklore and society at large;<sup>7</sup>
- (b) the preservation, promotion and protection of TCEs/EoF;<sup>8</sup>
- (c) balance between protection and the challenges of multiculturalism and cultural diversity, particularly in societies with both indigenous and immigrant communities;<sup>9</sup>
- (d) maintaining traditions and respect for their cultural and spiritual values and encouraging development, creation and innovation;<sup>10</sup>
- (e) the protection of TCEs/EoF and the encouragement of individual creativity inspired by TCEs/EoF;<sup>11</sup>
- (f) protection and access to TCEs/EoF;<sup>12</sup>
- (g) protection, on the one hand, and artistic freedom, the sharing of knowledge and cultures and freedom of expression, on the other;<sup>13</sup>
- (h) protection and the maintenance of a vibrant and multi-cultural public domain;<sup>14</sup>
- (i) protection/preservation and use/exploitation of TCEs/EoF;<sup>15</sup>
- (j) protection of cultural expressions and the protection of and respect for human rights and fundamental freedoms.

*Principle of balance and proportionality*

Protection should reflect the need for an equitable balance between the rights and interests of those that develop, preserve and sustain TCEs/EoF, and of those who use and benefit from them; the need to reconcile diverse policy concerns; and the need for specific protection measures to be proportionate to the objectives of protection, actual experiences and needs and the maintenance of an equitable balance of interests.

*Respect for and cooperation with other international and regional instruments and processes*

8. Numerous Committee participants have stressed that the work of WIPO should be coordinated with the work of other intergovernmental organizations and processes.<sup>16</sup> Equally,

<sup>7</sup> See Action Plan, adopted at 'World Forum on the Protection of Expressions of Folklore', Phuket, Thailand, 1997; Canada (WIPO/GRTKF/IC/6/14, para. 39); Japan (WIPO/GRTKF/IC/6/14, para. 70).

<sup>8</sup> Norway (WIPO/GRTKF/IC/6/14, para. 53).

<sup>9</sup> See for example statements of Canada.

<sup>10</sup> For example, China (WIPO/GRTKF/IC/6/14, para. 32), Nigeria (WIPO/GRTKF/IC/6/14, para. 43).

<sup>11</sup> The Model Provisions, 1982 provide for an exception in respect of "the borrowing of expressions of folklore for creating an original work of an author or authors."<sup>11</sup> This exception was specifically crafted to allow free development of individual creativity inspired by cultural expressions. The Model Provisions, 1982 were not intended to hinder in any way the creation of original works based on cultural expressions. See also the responses to the WIPO folklore questionnaire of 2001 of Canada; China; Ecuador; Kyrgyzstan; Malaysia; Mexico; Republic of Korea; Romania; Switzerland; United States of America.

<sup>12</sup> Myanmar (WIPO/GRTKF/IC/6/14, para. 200).

<sup>13</sup> Response of the USA to WIPO folklore questionnaire 2001.

<sup>14</sup> For example, the European Community and its Member States (WIPO/GRTKF/IC/3/11.)

<sup>15</sup> Nigeria (WIPO/GRTKF/IC/6/14, para. 43).

<sup>16</sup> See the recommendations of the Sub-Regional Seminar on Traditional Cultural Expressions, Rabat, Morocco, May 20-21, 2003; African Group (WIPO/GRTKF/IC/4/13, Annex, page 8, and WIPO/GRTKF/IC/1/10, Annex, page 6, proposal 3.3(g)), Asian Group (WIPO/GRTKF/IC/4/14, Annex, page 4), the European Community and its Member States

there is concern that developments in WIPO should be consistent with existing international legal instruments and should respect the mandates of other international processes. Concerning TCEs/EoF, this includes the relevant conventions, programs and processes of UNESCO relating to cultural heritage, copyright, cultural diversity and the diversity of cultural contents and artistic expressions, the Office of the High Commissioner for Human Rights relating to human rights in general and in particular the heritage of indigenous peoples, the International Labor Organization relating for example to the cultural industries and Convention 169 insofar as it deals with indigenous and tribal peoples and handicrafts, the Permanent Forum on Indigenous Issues, the International Trade Centre (UNCTAD/WTO) on arts and crafts, UNCTAD on the creative industries, *l'Organisation arabe pour l'éducation, la culture et la science (ALESCO)*, and the Organization of American States (OAS), concerning cultural diversity and indigenous peoples' rights, as well as a wide range of regional legal and policy developments. During the third session of the Permanent Forum (May 2004), WIPO convened an inter-agency panel on the preservation, promotion and protection of traditional knowledge and cultural expressions, which was chaired by a member of the Permanent Forum.

*Principle of respect for and cooperation with other international and regional instruments and processes*

TCEs/EoF should be protected in a way that is consistent with the objectives of other relevant international and regional instruments and processes, and without prejudice to specific rights and obligations already established under binding legal instruments. These principles are not intended to pre-empt the elaboration of other instruments or the work of other processes which address the role of TCEs/EoF in other policy areas.

*Flexibility and comprehensiveness*

9. This principle concerns the need to respect that effective and appropriate protection may be achieved by a wide variety of legal mechanisms, and that too narrow or rigid an approach at the level of principle may constrain effective protection, conflict with existing laws to protect TCEs/EoF, and pre-empt necessary consultation with stakeholders and holders of TCEs in particular. It also concerns the need to draw on a wide range of legal mechanisms to achieve the intended objectives of protection. In particular, experience has shown that a mix of measures, between proprietary and non-proprietary approaches, and between distinct new measures and adaptations of existing IP rights, is more likely to achieve the objectives of protection. Document WIPO/GRTKF/IC/7/4 illustrates this necessary flexibility and comprehensiveness in more detail.

10. Exclusive property rights in TCEs/EoF, and IP-type mechanisms in general, should complement and be carefully balanced and coordinated with other non-proprietary and non-IP measures to reflect the characteristics of traditional forms and processes of creativity, the

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(WIPO/GRTKF/IC/3/16, page 5), GRULAC (WIPO/GRTKF/IC/4/15, para. 12), Brazil (WIPO/GRTKF/IC/2/14, Annex, para. 5), India (WIPO/GRTKF/IC/5/15, para. 100), Niger (WIPO/GRTKF/IC/3/17, para.237), Switzerland (WIPO/GRTKF/IC/3/17, para. 224), Venezuela (WIPO/GRTKF/IC/4/15, para. 122), Zambia (WIPO/GRTKF/IC/5/15, para. 19), FAO (WIPO/GRTKF/IC/5/15, para. 101), Saami Council (WIPO/GRTKF/IC/5/15, para. 76), International Plant Genetic Resources Institute (WIPO/GRTKF/IC/5/15, para. 104), INADEV (WIPO/GRTKF/IC/4/15, para. 116), European Community (WIPO/GRTKF/IC/6/14).

stakeholder interests involved, customary uses and practices associated with such forms and processes, and community social structures, practices and patterns.<sup>17</sup> Exclusive private property rights in TCEs, even if held by communities, may run counter to the characteristics of traditional forms and processes of creativity and may induce unforeseen side-effects, such as competition within and between communities.

11. National legislative experiences are instructive. Among the many countries that have already enacted specific protection for TCEs/EoF, few provide for genuine exclusive property rights in TCEs/EoF: most aim rather at the regulation of their exploitation.<sup>18</sup> In addition, while the Tunis Model Law, 1976 and the Model Provisions, 1982 seem to provide for copyright-style exclusive rights for TCEs/EoF, the results of the WIPO questionnaire on TCEs/EoF showed clearly that, while a number of countries provide specific legal protection for expressions of folklore (23, or 36%, of the 64 that responded to the questionnaire) and most of these do so on the basis of the Tunis Model law and/or the Model Provisions, 1982, there are few countries in which it may be said that such provisions are actively utilized and functioning effectively in practice. It was pointed out at the time that “It is unfortunately not possible to identify any single reason for this. States have cited a variety of legal, conceptual, infrastructural and other operational difficulties they experience in establishing and implementing workable and effective legislative provisions at the national level. The needs in this regard are diverse, and there are no single solutions or approaches.”<sup>19</sup> It is possible that part of the problem may be that the exclusive rights approach of the Tunis Model Law and the Model Provisions has proved unworkable or undesirable in practice. As also reported at the time, many States have suggested amendments to the Model Provisions, as well as the need to update them given technological advances and new forms of commercial exploitation since the early 1980’s.<sup>20</sup>

12. Thus, IP-type exclusive property rights are not the only way to provide protection for TCEs. Comprehensive protection may require a range of proprietary and non-proprietary, including non-IP, tools. Non-proprietary approaches that have been used include unfair competition; equitable remuneration schemes; trade practices and marketing laws; contracts and licenses; registers, inventories and databases; customary and indigenous laws and protocols; cultural heritage preservation laws and programs; and handicrafts promotion and development programs (such as ‘Seals of Excellence’). These are not mutually-exclusive

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<sup>17</sup> For example, New Zealand (WIPO/GRTKF/IC/ 6/14, para. 41) and Saami Council (WIPO/GRTKF/IC/ 6/14, para. 57).

<sup>18</sup> See WIPO/GRTKF/IC/ 3/10 and Lucas-Schloetter, ‘Folklore’ in von Lewinski, S. (Ed.), Indigenous Heritage and Intellectual Property, 2004 (Kluwer), page 291.

<sup>19</sup> WIPO/GRTKF/IC/3/10.

<sup>20</sup> See Statements of States at the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO/GRTKF/IC/1/13, WIPO/GRTKF/IC/2/16), and Responses to Questionnaire (for example, Burundi; Chad; Côte d'Ivoire; Colombia; Ecuador; Iran (Islamic Republic of); Jamaica; Kyrgyzstan; Malaysia; Mexico; Namibia; New Zealand; Pakistan; Panama; Philippines; Poland; Romania; Sri Lanka; Togo; Tunisia; Venezuela; Viet Nam and, the African Group). See also WIPO-UNESCO Regional Consultation on the Protection of Expressions of Folklore for countries of Asia and the Pacific, Hanoi, April 21 to 23, 1999 (WIPO-UNESCO/FOLK/ASIA/99/1); WIPO-UNESCO African Regional Consultation on the Protection of Expressions of Folklore, Pretoria, March 23 to 25, 1999 (WIPO-UNESCO/FOLK/AFR/99/1); See for example fact-finding mission to West Africa in WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001), p. 151.

options, and each may, working together, have a role to play in a comprehensive approach to protection. Which modalities and approaches are adopted will also depend upon the nature of the TCEs to be protected, and the policy objectives that protection aims to advance.

13. Similarly, it is well documented that some, if not many, of the needs and concerns of indigenous peoples and traditional and other cultural communities and their members may be met by solutions existing already within current IP systems, including through appropriate extensions or adaptations of those systems.<sup>21</sup> For example:

- (a) copyright and industrial designs laws can protect contemporary adaptations and interpretations of pre-existing materials, even if made within a traditional context;
- (b) copyright law may protect unpublished works of which the author is unknown;
- (c) the *droite de suite* (the resale right) in copyright allows authors of work of arts to benefit economically from successive sales of their works;
- (d) performances of TCEs/EoF may be protected under the WIPO Performances and Phonograms Treaty (WPPT), 1996;
- (e) traditional signs, symbols and other marks can be registered as trademarks;
- (f) traditional geographical names and appellations of origin can be registered as geographical indications;
- (g) the distinctiveness and reputation associated with traditional goods and services can be protected against ‘passing off’ under unfair competition laws and/or the use of certification and collective trade marks;
- (h) secret TCEs/EoF may be protected as ‘confidential information’ or under doctrines such as ‘breach of confidence’.

14. In many of these cases, international protection is available by virtue of relevant treaties, such as the Berne Convention, the TRIPS Agreement and the WPPT, 1996. Collective and certification trademarks, geographical indications and unfair competition law are particularly attractive options, not only because they already enjoy wide international recognition, but they also, not having been conceived with individuals in mind, can benefit and be used by collectivities such as indigenous communities (See further discussion on these doctrines and mechanisms below and WIPO/GRTKF/IC/7/4). Experience with existing mechanisms and standards is also a useful guide.

15. In this vein the Group of Latin American and Caribbean States (GRULAC) stated that ‘the resources offered by intellectual property have not been sufficiently exploited by the holders of traditional cultural knowledge or by the small and medium-sized businesses created by them.’<sup>22</sup> Tradition-based creativity should also be encouraged and current IP protection for TCEs/EoF and derivative works should be made use of as far as possible by communities and their members. For example, the African Group has noted that the protection of TCEs/EoF should aim to, amongst other things, ‘protect and reward innovations and creative works derived from traditional knowledge and expressions of folklore’.<sup>23</sup>

<sup>21</sup> European Community (WIPO/GRTKF/IC/1/13, paras. 20 and 165), Canada (WIPO/GRTKF/IC/1/13, paras. 46 and 166), Norway (WIPO/GRTKF/IC/1/13, para. 33), USA (WIPO/GRTKF/IC/1/13, para. 49), Poland (WIPO/GRTKF/IC/1/13, para. 156), the Asian Group (WIPO/GRTKF/IC/2/10 and WIPO/GRTKF/IC/2/16, para. 170).

<sup>22</sup> WIPO/GRTKF/IC/1/5, Annex II, page 2.

<sup>23</sup> WIPO/GRTKF/IC/6/12. See also European Community (WIPO/GRTKF/IC/3/11.).

16. At the same time, many Committee participants have argued that current IP systems are not entirely adequate or appropriate, and that they should be modified or *sui generis* systems should be established.<sup>24</sup> Even if the protection already available under current laws is acknowledged, it has been argued that the focus of the Committee's work should be on those elements and forms of creativity not currently protected by IP laws.<sup>25</sup>

17. The debate about the protection of TCEs often centers on whether adequate and appropriate protection is best provided through either the conventional IP system or through an alternative *sui generis* system. Yet the documented practical experiences of many Member States reflects that existing IP rights and *sui generis* measures are not mutually exclusive but are complementary options.<sup>26</sup> A comprehensive approach is likely to consider each of these options, and apply them judiciously to achieve the objectives of protection, accepting the practical reality that the boundaries between these options are not rigid. Effective protection may therefore be found in a combined and comprehensive approach, with a menu of differentiated and multiple levels and forms of protection. The options selected by various countries have depended to a large degree on the policy objectives and national goals being served.

*Principle of flexibility and comprehensiveness*

Protection should respect the diversity of TCEs/EoF and the diverse needs of the beneficiaries of protection, should acknowledge diversity in national circumstances and legal systems, and should allow sufficient flexibility for national authorities to determine the appropriate means of achieving the objectives of protection. Protection may accordingly draw on a comprehensive range of options, combining proprietary, non-proprietary and non-IP measures, and using existing IP rights (including measures to improve the application and practical accessibility of such rights for TCE/EoF protection), *sui generis* extensions or

<sup>24</sup> Ethiopia (WIPO/GRTKF/IC/1/13, para. 50), Asian Group (WIPO/GRTKF/IC/2/16 para. 170), Thailand (WIPO/GRTKF/IC/2/16, para. 172). African Group (WIPO/GRTKF/IC/4/15, para. 62), Brazil (WIPO/GRTKF/IC/4/15, para. 63), Venezuela (WIPO/GRTKF/IC/4/15, para. 65), Colombia (WIPO/GRTKF/IC/4/15, para. 67), Russian Federation (WIPO/GRTKF/IC/4/15, para. 68), Iran (Islamic Republic of) (WIPO/GRTKF/IC/4/15, para. 69), Indonesia (WIPO/GRTKF/IC/4/15, para. 74), Morocco (WIPO/GRTKF/IC/4/15, para. 76), Egypt (WIPO/GRTKF/IC/4/15, para. 80), and Andean Community (WIPO/GRTKF/IC/4/15, para. 82)

<sup>25</sup> As the Delegation of Nigeria aptly put it at the sixth session, '... the concerns of many developing countries as far as folklore was concerned was to protect those elements of creativity for which authorship had become unidentifiable with a single individual either because of the affluxion of time or because of the communal nature in which the materials had evolved' (WIPO/GRTKF/IC/6/14, para. 43).

<sup>26</sup> GRULAC (WIPO/GRTKF/IC/1/5), European Community (WIPO/GRTKF/IC/1/13, paras. 20 and 165), Canada (WIPO/GRTKF/IC/1/13, paras. 46 and 166), Norway (WIPO/GRTKF/IC/1/13, para. 33), USA (WIPO/GRTKF/IC/1/13, para. 49), Poland (WIPO/GRTKF/IC/1/13, para. 156), the Asian Group (WIPO/GRTKF/IC/2/10 and WIPO/GRTKF/IC/2/16, para. 170), Ethiopia (WIPO/GRTKF/IC/1/13, para. 50), Asian Group (WIPO/GRTKF/IC/2/16 para. 170), Thailand (WIPO/GRTKF/IC/2/16, para. 172). African Group (WIPO/GRTKF/IC/4/15, para. 62), Brazil (WIPO/GRTKF/IC/4/15, para. 63), Venezuela (WIPO/GRTKF/IC/4/15, para. 65), Colombia (WIPO/GRTKF/IC/4/15, para. 67), Russian Federation (WIPO/GRTKF/IC/4/15, para. 68), Iran (Islamic Republic of) (WIPO/GRTKF/IC/4/15, para. 69), Indonesia (WIPO/GRTKF/IC/4/15, para. 74), Morocco (WIPO/GRTKF/IC/4/15, para. 76), Egypt (WIPO/GRTKF/IC/4/15, para. 80), and Andean Community (WIPO/GRTKF/IC/4/15, para. 82), Peru (WIPO/GRTKF/IC/6/14, para. 77), India (WIPO/GRTKF/IC/6/14, para. 81), New Zealand WIPO/GRTKF/IC/6/14, para. 88)

adaptations of IP rights, and specially-created sui generis IP measures and systems, including both defensive and positive measures. Private property rights should complement and be carefully balanced with non-proprietary and non-IP measures.

*Recognition of the specific nature, characteristics and traditional forms of cultural expression*

18. Effective and equitable protection of TCEs/EoF should ideally be founded on an understanding of the origins, forms, nature and characteristics of traditional forms of cultural expression. This helps clarify the precise characteristics of TCEs/EoF for which protection is claimed, the forms such protection may take, the identities of the beneficiaries of protection and the objectives of protection.<sup>27</sup> The levels and forms of protection should take into account and respect the actual nature of traditional creativity and cultural expression.

19. Existing IP-based laws for the protection of TCEs/EoF generally ascribe to them qualities such as:

- (a) handed down from one generation to another, either orally or by imitation or may be contemporary expressions and interpretations of pre-existing materials;
- (b) reflecting a community's cultural and social identity and integrity, beliefs, spirituality and values;
- (c) consisting of characteristic elements of a community's heritage (this is generally intended to mean that the expression of folklore must be recognized as representing the distinct traditional heritage of a community);
- (d) made by 'authors unknown' and/or collectively by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so (it is therefore for this purpose not directly relevant whether the expression, consisting of characteristic elements of the traditional artistic heritage, has been developed by the collective creativity of a community or by an individual reflecting the traditional artistic expectations of the community);
- (e) tangible, intangible or, mostly, a combination of the two ('mixed TCEs'); and
- (f) constantly evolving, developing and being recreated within the community.

19. Additionally, experts<sup>28</sup> point out that TCEs/EoF are not necessarily created, developed or performed for commercial purposes but rather for their significance as vehicles for religious and cultural expression; do not 'reside' in particular countries or other geographical areas, but are rather carried, performed and modified by people as they

<sup>27</sup> See WIPO/GRTKF/IC/6/3, paras. 28 to 50. Stavenhagen, 'Cultural Rights: a social science perspective', in UNESCO, Cultural Rights and Wrongs, 1998, pages 2-7.

<sup>28</sup> Stavenhagen, 'Cultural Rights: a social science perspective', in UNESCO, Cultural Rights and Wrongs, 1998, pages 2-7; Personal communications with, amongst others, Professor Dorothy Noyes, Associate Professor of Folklore, Ohio State University; Valdimar Hafstein, Researcher, Reykjavik Academy, Iceland and Adjunct Lecturer in Ethnology and Folklore, University of Iceland; See also: Valdimar Tr. Hafstein. 2004. 'The Politics of Origins: Collective Creation Revisited' *Journal of American Folklore* 117 (465): 300-315, J. Sanford Rikoon. 2004 'On the Politics of the Politics of Origins: Social (In)Justice and the International Agenda on Intellectual Property, Traditional Knowledge, and Folklore'. *Journal of American Folklore* 117 (465): 325-336 and Brown, M., *Who Owns Native Culture*, Harvard University Press, 2003. Proceedings of 'Folklore, Aesthetic Ecologies and Public Domain', University of Pennsylvania, April 2 and 3, 2004 and 8<sup>th</sup> Congress of Societe Internationale d'Ethnologie et de Folklore/3<sup>rd</sup> Congress Association d'Anthropologie Mediterraneenne, Marseille, April 28, 2004.

migrate within and across ethnic groups; and have imprecise ‘origins’, often complicating efforts to determine or verify ‘authenticity’. It is pointed out that, in practice, traditional cultures are not always created within firmly bounded and identifiable ‘communities’ that can be treated as legal persons or unified actors. Thus, TCEs/EoF are not necessarily always the product of limited communities and the expression of local identities. Nor are TCEs/EoF often truly unique, but rather the products of cross-cultural exchange and influence resulting from migration, pilgrimage and sharing. In this context, the practical application of notions such as ‘authenticity’, ‘community’, ‘origin’, ‘source’, ‘distinctiveness’ and ‘characteristic’ may require special attention. See further below under ‘Criteria of protection’.

*Principle of recognition of the specific characteristics and traditional forms of cultural expression*

Protection should respond to the traditional character of TCEs/EoF; their collective or communal context and the inter-generational character of their development, preservation and transmission; their relationship to a community’s cultural and social identity and integrity, beliefs, spirituality and values; their being often vehicles for cultural and religious expression; and their constantly evolving character within a community. Special measures for legal protection should also recognize that in practice TCEs/EoF are not always created within firmly bounded identifiable ‘communities’ that can be treated as legal persons or unified actors. TCEs/EoF are not necessarily always the expression of distinct local identities; nor are they often truly unique, but rather the products of cross-cultural exchange and influence.

*Respect for customary use and transmission of TCEs/EoF*

20. Communities in which and by which expressions of folklore are created and used should be free to use their traditional artistic heritage and to develop it in accordance with their relevant indigenous and customary laws and practices. A balance between protection against abuses of TCEs/EoF and the encouragement of further development and dissemination of TCEs/EoF as part of ‘living cultures’ is key.<sup>29</sup>
21. Any protection of expressions of folklore should therefore not hinder their development, exchange, transmission and dissemination by the communities concerned in accordance with their customary laws and practices. No use of an expression of folklore within an community which has developed and maintained it should be regarded as distorting if the community identifies itself with the present-day use of that expression and its consequent modification. Such principles are embodied in, for example, the Model Provisions, 1982, the Pacific Regional Model, 2002 and the Panama Law, 2000.

*Principle of respect for customary use and transmission of TCEs/EoF*

Protection should promote the use, development, exchange, transmission and dissemination of TCEs/EoF by the communities concerned in accordance with their customary laws and practices. No contemporary use of a TCE/EoF within the community which has developed

<sup>29</sup> See response of the USA to WIPO folklore questionnaire, Panama (WIPO/GRTKF/IC/6/14, para. 28), Peru (WIPO/GRTKF/IC/6/14, para. 28), Russia (WIPO/GRTKF/IC/6/14, para. 45)....

and maintained it should be regarded as distorting if the community identifies itself with that use of the expression and any modification entailed by that use.

Customary use, practices and norms should guide the legal protection of TCEs/EoF as far as possible, on such questions as ownership of rights, management of rights and decision-making, equitable sharing of benefits, exceptions and limitations to rights and remedies.

*Effectiveness and accessibility of protection*

22. Any new forms of protection that might be established will have no practical meaning unless they include culturally appropriate, effective and accessible means by which communities can acquire rights and subsequently manage and enforce them. While a number of countries already provide specific legal protection for TCEs/EoF (23, or 36%, of the 64 that responded to the WIPO Questionnaire of 2001), it appears that there are few countries in which it may be said that such provisions are actively utilized and functioning effectively in practice. In addition, reported use of existing IP, where relevant, appears limited to a few countries only.<sup>30</sup>
23. Therefore, there is a need for special measures that will improve the usage and operational effectiveness of TCEs/EoF protection, taking into account the diverse legal, conceptual, infrastructural and other operational needs of countries. This may include tasking a specific national authority or making use of existing mechanisms such as collecting societies to manage and enforce the rights and interests of the holders and custodians of TCEs/EoF.

*Principle of effectiveness and accessibility of protection*

Measures for the acquisition, management and enforcement of rights and for the implementation of other forms of protection should be effective, appropriate and accessible, taking account of the cultural, social, political and economic context of indigenous peoples and traditional and other cultural communities.

II.2 Specific Principles

24. This section sets out suggested principles that could give more specific guidance on protection of TCEs/EoF through legal measures. It aims to address the main issues that any approach, system or instrument for the protection of TCEs/EoF would need to cover, as highlighted in previous discussions in the Committee and especially in the submission to the sixth session by the African Group (WIPO/GRTKF/IC/6/12). Such specific principles would seek to achieve the policy objectives (Part I) within the framework set by the general guiding principles (Part II.1).
25. These principles draw extensively upon existing IP and non-IP principles, doctrines and legal mechanisms, as well as national and regional experiences, both practical and legislative, from a wide cross-section of countries and regions. They recognize and take into account that current IP laws already some TCEs/EoF and derivatives, while meeting the request of many Member States, communities and others to address in particular

<sup>30</sup> WIPO/GRTKF/IC/3/10.

subject matter that is not currently protected under current international standards (although it is variously protected in some existing laws). The suggested principles, while recognizing an extended scope of protected subject matter, are firmly rooted in IP law, policy and practice and seek to strike the required balances in a manner that is complementary to and supportive of existing IP approaches.

*Scope of subject matter*

26. Many international IP standards defer to the national level for determining the precise scope of protected subject matter. This practice also conforms with the principles of flexibility and of responsiveness to the aspirations and expectations of relevant communities. Hence, to allow for appropriate national policy and legislative development, consultation and evolution, a specific principle could recognize that detailed decisions on protected subject matter should be left to national and regional implementation. Existing laws show diversity in the terms used to refer to this subject matter, and this practice should also be continued – noting, also, that ‘folklore’ is widely used in existing laws and instruments, but that some communities prefer to avoid this term. The question of terminology was extensively surveyed in document WIPO/GRTKF/IC/3/9.
27. Even so, several delegations have pointed to the desirability of clarity on the scope of ‘TCEs/EoF’.<sup>31</sup> This should also promote the principle of recognition of the specific characteristics and forms of cultural expression. No formal definition has been proposed, but the description of TCEs/EoF in the Model Provisions, 1982 provides a useful starting point, albeit out of date perhaps with more recent understandings of ‘folklore’ and related terms, and does concord with many existing national laws on folklore. This description provides a basis for ongoing discussion and the development of a core principle or principles. Existing and draft regional and national laws, as well as relevant international instruments, could be drawn upon to modify or further develop this description.<sup>32</sup>
28. In addition, it may be desirable in due course, given the particular attention paid to handicrafts, to work with a specific description or definition of ‘handicrafts’.<sup>33</sup>

*Principle on scope of subject matter*

Traditional cultural expressions or expressions of folklore may be understood as including productions consisting of characteristic elements of the traditional cultural heritage developed and maintained by a community, or by individuals reflecting the traditional artistic expectations of such a community. Such productions may include, for example, the following forms of expression, or combinations thereof:

- (i) verbal expressions, such as folk tales, folk poetry and riddles; aspects of language such as words, names, signs, symbols and other indications;
- (ii) musical expressions, such as folk songs and instrumental music;

<sup>31</sup> At the sixth session for example, the USA (WIPO/GRTKF/IC/6/14, para. 35), the Islamic Republic of Iran (WIPO/GRTKF/IC/6/14, para. 36), Switzerland (WIPO/GRTKF/IC/6/14, para. 37), Nigeria (WIPO/GRTKF/IC/6/14, para. 43), Russia (WIPO/GRTKF/IC/6/14, para. 45), International Publishers Association (WIPO/GRTKF/IC/6/14, para. 65).

<sup>32</sup> See for example the laws of Panama, the Pacific Island countries, the draft law of China (WIPO/GRTKF/IC/6/14, para. 32) and others. See WIPO/GRTKF/IC/5/INF 3.

<sup>33</sup> See, for example, Chapter 2, ITC/WIPO, ‘Marketing of Crafts and Visual Arts: The Role of Intellectual Property – A Practical Guide’.

- (iii) expressions by actions, such as folk dances, plays and artistic forms or rituals, whether or not reduced to material form; and
- (iv) tangible expressions, such as productions of folk art, in particular, drawings, designs, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, textiles, carpets, handicrafts, musical instruments and architectural forms.

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

### *Criteria for protection*

29. The Committee's discussions have clarified the distinction between the notion of TCEs/EoF in general, and those TCEs/EoF that are eligible for protection under a specific legal measure. Laws typically achieve this by stipulating the substantive criteria that TCEs/EoF should display in order to be protectable. As the Delegation of Nigeria has pointed out, not every expression of folklore could conceivably be an appropriate subject of protection within an IP framework.<sup>34</sup> The main options for substantive criteria that appear in existing laws are set out here with a view to distilling a core principle.

#### An 'originality' requirement

30. Existing *sui generis* systems for the protection of TCEs/folklore do not generally require the protected TCEs/EoF to be 'original' or 'new', because such a requirement would protect only those TCEs that are contemporary interpretations, arrangements, adaptations or collections of pre-existing cultural materials made by an identifiable individual or individuals, and not those materials themselves and mere recreations and imitations of them.<sup>35</sup> For example, the Model Provisions made no reference to an originality requirement; consequently, nor do many of the national copyright laws which have implemented them. The Panama Law and Pacific Regional Framework equally do not require originality. An originality requirement would be out of step with evolving practice, and would exclude significant amounts of TCE subject matter.

31. Even so, to be protectable as intellectual property, subject matter should be the result of creative human intellectual activity.<sup>36</sup> The Model Provisions, 1982 also make it clear that protectable expressions of folklore are those 'manifesting intellectual creativity'.<sup>37</sup> Indeed, TCEs/EoF are the products of creative and intellectual processes, and one objective of protection is to promote greater respect for the creative and intellectual value of this material.

<sup>34</sup> WIPO/GRTKF/IC/6/14, para. 43.

<sup>35</sup> See WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

<sup>36</sup> The Convention Establishing the World Intellectual Property Organization, 1967 defines IP by reference to rights relating to: literary, artistic and scientific works; performances of performing artists, sound recordings, and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

<sup>37</sup> Preamble, 4 para.

32. In establishing principles for protection of TCEs/EoF in a manner inspired by IP, a focus on products of human intellectual creativity seems appropriate. This suggests a core of intellectual creativity as a substantive criterion for protectable TCEs/EoF. Much like ‘originality’, ‘creativity’ is not susceptible to precise and detailed definition at the international level, and conformity with this criterion would need to be determined by relevant judicial authorities on a case-by case basis, with due recognition of the nature of expressions of culture and guided as appropriate by customary practices and the cultural context of the relevant community that identifies with the TCE/folklore.

Fixation in material form

33. Many national laws require that a work be fixed in material form to be protected by copyright. But fixation is not a mandatory element of international copyright law, and many other countries, especially those following the civil law tradition, extend protection to works that are not fixed in material form. *Sui generis* laws for the protection of traditional literary and artistic productions generally do not require fixation (see for instance the Tunis Model Law, the Model Provisions, the Law of Panama, the Bangui Agreement and the Pacific Regional Model).
34. Many TCEs are preserved and passed between generations by oral means and are traditionally never written down. This suggests that a fixation requirement as understood in copyright law would not be a useful or appropriate criterion and that TCEs/EoF should be protected regardless of the form or mode of their expression. This accords with several guiding principles, in particular recognition of the specific characteristics and forms of cultural expression.
35. This implies the protection of TCEs/EoF should not require that they be documented or recorded, even though they may subsequently be published in databases or elsewhere. Previous documents have argued that documentation of TCEs/EoF is not necessarily a useful strategy for IP protection purposes.<sup>38</sup> TCEs/EoF are ‘living,’ constantly being adapted and recreated. Requiring some form of prior documentation and/or registration contradicts the oral, intangible and ‘living’ nature of many TCEs. The copyright system, whose principles and forms of protection are most closely relevant to TCEs, does not permit the imposition of any formalities, and protection is automatic upon the creation of a work. There is no prior examination, unlike most forms of industrial property. The inventories and databases of cultural materials may, of course, be useful for identifying, safeguarding and promoting their use as part of cultural heritage programs. But documenting or recording TCEs/EoF should not be seen as a stand-alone approach to protection, as this very process can facilitate and accelerate the kinds of misuse that communities seek protection against.
36. The question of a mandatory requirement is distinct from whether or not some form of notification of certain TCEs/EoF may be required or desirable, either to establish their protection or to serve certain evidentiary or ‘defensive’ purposes (this is discussed below under ‘Formalities’).

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<sup>38</sup> See WIPO/GRTKF/IC/5/3 and WIPO/GRTKF/IC/6/3.

Commercial value/utility

37. One existing *sui generis* system provides that protected TCEs must, amongst other things, be 'capable of commercial use.'<sup>39</sup> This provides protection only to those TCEs/EoF that have a commercial or industrial value or utility. The advantage of such a criterion may be that it requires enforcement of rights in and raises transaction costs only for those TCEs/EoF that are likely to be exploited. On the other hand, indigenous peoples and traditional and other communities stress that their concerns are not only economic in nature. Many TCEs/EoF are not created for commercial sale but are rather vehicles for spiritual and cultural expression. A broader approach may meet the principle of responsiveness to the aspirations and expectations of relevant communities, including addressing and balancing both the cultural and the economic aspects of development.

Linkage with community/ 'authenticity'/ 'characteristic' of community's identity and cultural heritage

38. Prevention of the misleading marketing and sale of imitations of TCEs/EoF, to the detriment of relevant communities and consumers, lies at the core of many approaches to the legal protection of TCEs/EoF. This requires some objective legal or practical criterion by which imitations, as opposed to 'authentic' TCEs/EoF, can be identified. Such a criterion would be practically useful in implying a clear and ongoing link between the TCE/folklore and an identifiable indigenous, traditional or other cultural community. It would also articulate the often collective and communal nature of TCEs/EoF. A broader conception of equity and the repression of unfair practices would suggest a focus on those TCEs/EoF that are linked with, maintained by and are distinctively associated with specific communities. 'Authenticity' as such is a contested term in folkloristics, and its use in international and national processes has been problematic.<sup>40</sup> Yet, at least in so far as it connotes 'actual character', 'genuine' and 'not false or an imitation'<sup>41</sup>, it begins to edge towards being an appropriate criterion establishing the desired linkage between the TCE/EoF and a community (or that the TCE/EoF is an 'attribute' of a particular community).

39. Most, if not all, current systems for the protection of TCEs/EoF require some form of linkage between a protected TCE/EoF and the community. Criteria may differ but they all seek to distinguish somehow between 'authentic' and 'non-authentic' TCEs/EoF. Some *sui generis* systems and measures circumscribe the qualities that the makers of the TCEs/EoF should display. For example, the USA's Indian Arts and Crafts Act provides protection only to arts and crafts that are 'Indian products' and the Indian Arts and Crafts Board to register trademarks of genuineness and quality; Australia's Label of Authenticity may be used only by 'Certified Indigenous Creators', as defined;<sup>42</sup> and the *Toi Iho*<sup>TM</sup> 'Maori Made' mark of New Zealand, a registered trade mark 'of authenticity and quality

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<sup>39</sup> The Law of Panama, 2000.

<sup>40</sup> See, generally, discussions at 'Folklore, Aesthetic Ecologies and Public Domain', University of Pennsylvania, April 2 and 3, 2004 and 8<sup>th</sup> Congress of Societe Internationale d'Ethnologie et de Folklore/3<sup>rd</sup> Congress Association d'Anthropologie Mediterraneenne, Marseille, April 28, 2004; Personal communications with, amongst others, Professor Dorothy Noyes, Associate Professor of Folklore, Ohio State University and Valdimar Hafstein, Researcher, Reykjavik Academy, Iceland and Adjunct Lecturer in Ethnology and Folklore, University of Iceland.

<sup>41</sup> See for example Merriam-Webster Dictionary and Concise Oxford Dictionary.

<sup>42</sup> Janke, Terri, 'Minding Culture', pages 134 to 158.

for Maori arts and crafts', is licensed to artists of 'Maori descent to be used on works produced by them which comprise an explicit or implicit Maori referent'.<sup>43</sup>

40. The essence of a TCE/expression of folklore is that it should represent, identify and be recognized as characteristic of the traditional heritage of a particular community (see above suggested principle of recognition of the specific nature, characteristics and forms of cultural expression). This suggests that, to be protectable, TCE subject matter should be 'characteristic' of a distinct traditional heritage of a particular community. Such a criterion is drawn almost directly from the Model Provisions, 1982 and the Tunis Model Law, 1976. Some of the more recent *sui generis* systems, such as the Law of Panama, 2000 and the associated Executive Decree of 2001 and the Pacific Regional Model, 2002, provide for a similar criterion although in varying terms.<sup>44</sup>
41. There is some overlap between the criteria of 'authenticity' (or 'genuineness') and 'characteristic'. Both seem aimed at establishing that only TCEs/EoF that have some true linkage with a community should be protectable. Given difficulties with use of the term 'authentic', it is not used in the wording of the specific principle below. The wording used, referring to TCEs/EoF that are 'characteristic' of a particular cultural and communal identity and heritage, is, however, intended to convey also a form of 'authenticity', in the sense of 'actual character', 'genuine' and 'not false or an imitation'. A criterion of 'characteristic' can cover this too. The commentary to the Model Provisions, 1982 are instructive here. Referring to the description of 'expressions of folklore' in the Model Provisions, the commentary states:

"Characteristic elements" of the traditional artistic heritage, of which the production must consist in order to qualify as a protected "expression of folklore," means in the given context that the element must be generally recognized as representing a distinct traditional heritage of a community. As regards the question of what has to be considered as belonging to the folklore of a "community," one or two members of the Working Group suggested that the answer required a "consensus" of the community which would certify the "authenticity" of the expression of folklore. The proposed definition does not refer to such "consensus" of the community since making the application of the law subject in each case to the thinking of the community, would render it necessary to make further provisions on how such consensus would have to be verified and at what point in time it must exist. The same would apply to the requirement of "authenticity," which would also need further interpretation. On the other hand, *both the requirement of "consensus" and "authenticity" are implicit in the requirement that the elements must be "characteristic," that is, showing the traditional cultural heritage: elements which become generally recognized as characteristic are, as a rule, authentic expressions of folklore, recognized as such by the tacit consensus of the community concerned* (emphasis added).

42. It seems from existing approaches that these kinds of criteria are neutral in so far as the physical residence of an individual TCE/EoF holder or performer or community might be. In other words, a TCE/EoF held or performed by an individual or a community living outside of his, her or its traditional geographical place of origin (for example, an

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<sup>43</sup> Rules Governing Use by Artists of the Toi Iho Maori Made Mark, at [www.toiho.com](http://www.toiho.com) (August 18, 2004).

<sup>44</sup> See WIPO/GRTKF/IC/ 3/10 and Lucas-Schloetter, 'Folklore' in von Lewinski, S. (Ed.), Indigenous Heritage and Intellectual Property, 2004 (Kluwer).

immigrant community) might still qualify as a protectable TCE/EoF if it remains 'characteristic' of the community's identity and heritage.

*Principle on criteria for protection*

TCEs/EoF should be protected, whatever the mode or form of their expression, provided they are:

- (i) the products of creative intellectual activity, including collective and cumulative creativity; and
- (ii) characteristic of a community's distinctive cultural identity and traditional heritage developed and maintained by it.

*Beneficiaries of protection*

43. Many Committee participants have emphasized that TCEs are generally regarded as collectively originated and held, so that any rights and interests in this material should vest in communities rather than individuals<sup>45</sup> (conforming with the principles of responsiveness to the aspirations of relevant communities and of recognition of the specific characteristics and forms of cultural expression). It may be necessary to clarify the allocation of rights or distribution of benefits among communities which share the same or similar folklore in the same country or in different countries (so-called 'regional folklore').

Recognizing communal rights and benefits

Protection of works of which there is no identifiable author is not uncommon in the copyright area. Existing copyright standards concern anonymous, unpublished, joint and collective works.<sup>46</sup> These are not perfectly suited to address TCEs/EoF. They do, however, provide a sure jurisprudential foundation for adapting new measures which would draw on and be congruent with long-standing copyright principles. There are also precedents for group-rights protection in related non-IP policy areas, including cultural properties and heritage laws such as the Native American Graves Protection and Repatriation Act (NAGPRA), 1990 and the Indian Arts and Crafts Act, 1990 in the U.S.A.; the Law on the Protection of Cultural Assets of the Republic of Korea, 1962; and the Law on the Protection and Preservation of Cultural Goods of Croatia, 1999.

44. Certain *sui generis* laws provide for communal rights and interests in TCEs/EoF, with direct reference to the communities covered by the laws. These include the Philippines Law, 1997, the Panama Law, 2000, and the Model Provisions, 1982. In particular, the Indian Arts and Crafts Act, 1990 of the United States (see further WIPO/GRTKF/IC/7/4) is limited to 'Indian tribes', Indian arts and crafts organizations and individual Indians, as defined. The Pacific Regional Framework, 2002 vests 'traditional cultural rights' in 'traditional owners'.

45. Communal rights could also be the subject of a specific *sui generis* provision within copyright legislation. Australia is, for example, developing legislation to grant

<sup>45</sup> GRULAC (WIPO/GRTKF/IC/1/5, Annex II, p. 5), SAARC (WIPO/GRTKF/IC/1/13, para. 26), Indonesia (WIPO/GRTKF/IC/1/13, para. 29).

<sup>46</sup> See Article 15, Berne Convention, 1971.

communities the right to exercise moral rights to protect against inappropriate, derogatory or culturally insensitive use of tradition-based copyright material (see WIPO/GRTKF/IC/7/4). In addition, courts in Australia have been prepared to recognize communal interests in a copyright work.<sup>47</sup>

46. However, most national laws which provide protection for TCEs/EoF, particularly those based upon the Tunis Model Law, 1976 or the Model Provisions, 1982, vest rights in the State or a statutory body, or at least provide that the rights should be managed and exercised by the State. In most of these cases, proceeds from the granting of such rights are applied towards national heritage, social welfare and culture-related programs. The African Group's submission made at the sixth session of the Committee stated as one of its Principles, 'Recognize the role of the State in the preservation and protection of traditional knowledge and expressions of folklore.'<sup>48</sup>

TCEs/EoF shared by several communities in the same country

47. In some cases, two or more communities in one country may hold potentially overlapping rights in the same or very similar TCEs. Options for resolving competing or overlapping rights or interests include co-ownership of rights (the approach of the Panama Law, 2000) and allowing communities separately to apply for (if some form of application is necessary) and hold rights in the same or similar TCEs. A further possible solution to this issue is to vest the rights in the State or statutory body, as mentioned above. See further below under 'Management of rights'.

'Regional folklore'

48. Communities in different countries and even regions may lay claim to the same or similar folklore ('regional folklore'). States have suggested *inter alia* the use in such cases of national and/or international folklore registers and databases, alternative dispute resolution (ADR), systems of registration and notification, collective management and the establishment of dispute-resolution organizations, or maybe combinations of these.<sup>49</sup> Certain commentators, such as Kuruk, have suggested that regional systems, institutions and dispute resolution be established and used to deal with these questions,<sup>50</sup> and a Sub-Regional seminar on TCEs/EoF held in Rabat, Morocco in May 2003 recommended *inter alia* that Arab countries who share popular and traditional cultural patrimony should create joint commissions to study and put in place equitable strategies for protection of TCEs/EoF. Existing regional organizations and mechanisms (such as ARIPO and OAPI in Africa, who, together with Zambia, have raised this issue in the Committee<sup>51</sup>) may be important stakeholders in resolving the 'regional folklore' question. This question is tied to broader issue of creating institutional mechanisms, and is also linked closely to the questions of 'Formalities' and 'Regional and international protection' (for which see also below).

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<sup>47</sup> See Janke, Terri, 'Minding Culture – The Protection of Traditional Cultural Expressions', WIPO.

<sup>48</sup> WIPO/GRTKF/IC/6/12.

<sup>49</sup> See for example the responses to the WIPO Questionnaire of 2001 of Canada, Colombia, Egypt, Gambia, Indonesia, Jamaica, Kyrgyzstan, Malaysia, Mexico, Romania and the Russian Federation. See WIPO/GRTKF/IC/3/10.

<sup>50</sup> Kuruk, P., "Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States," 48 American University Law Review 769 (1999).

<sup>51</sup> WIPO/GRTKF/IC/5/15, paras. 48, 50 and 51.

*Principle on beneficiaries*

Measures for the protection of TCEs/EoF should be for the benefit of the indigenous peoples and traditional and other cultural communities:

- (i) in whom the custody and protection of the TCEs/EoF are entrusted in accordance with the customary law and practices of that community; and
- (ii) who maintain and use the TCEs/EoF as being characteristic of their traditional cultural heritage.

*Management of rights*

49. The guiding principle concerning effectiveness and accessibility of protection suggests the need to clarify how authorizations to use TCEs are applied for, to whom applications are addressed, public notification, identification of beneficiaries and allocation of benefits, how disputes are resolved, and similar issues. These should apply regardless of whether communities or State appointed bodies are the beneficiaries of protection (see ‘Beneficiaries’ above). Some existing laws have detailed provision for management of rights and the processing of applications for authorization (such as the Pacific Regional Model). This document seeks to identify the core principles that could apply. Clearly the elaboration of such measures will depend greatly on community factors: options for more detailed provisions could be further developed at the national and community levels.
50. Many States (based upon the Tunis Model Law, 1976 and the Model Provisions, 1982) designate a statutory body as the holder of the rights in TCEs and empower that body to grant authorizations for use.<sup>52</sup> The Philippines and Peru laws also do so. The African Group framework included the principle of recognizing ‘the role of the State in the preservation and protection of traditional knowledge and expressions of folklore.’<sup>53</sup> The Pacific Regional Model, 2002, incorporates a hybrid solution: the competent authority acts in the interests of the relevant communities and mediates between the communities and users.<sup>54</sup> The Indian Arts and Crafts Board, acting in terms of the USA Indian Arts and Crafts Act, seems to play a similar role. Although Indian tribes, Indian arts and crafts organizations and individual Indians have a right to bring civil suit under the Act, the Board can also receive complaints and act upon them.<sup>55</sup>
51. These examples suggest a possible role of an ‘authority’ established by the State, at least in some circumstances, to: grant authorizations to use TCEs/EoF, monitor uses of TCEs/EoF to ensure that these are appropriate (especially where the focus is on regulation of their use and not on an exclusive property right); advise and assist relevant communities; resolve disputes as to ownership and benefit-sharing; raise awareness of the need to respect and protect TCEs/EoF; institute civil or criminal proceedings on behalf of communities if needed. Where some form of notification system is adopted (see ‘Formalities’ below), such an authority could also maintain it. Many countries already have offices, boards, agencies and other authorities performing these or similar functions.

<sup>52</sup> See responses to folklore questionnaire and WIPO/GRTKF/IC/3/10, and GRULAC (WIPO/GRTKF/IC/1/5, Annex II, p. 5).

<sup>53</sup> WIPO/GRTKF/IC/6/12.

<sup>54</sup> See generally Part 4 of the Regional Model.

<sup>55</sup> See also presentation by US Delegation, Fifth Session (WIPO/GRTKF/IC/IC/5/INF 4).

*Principle on management of rights*

To ensure the effectiveness of protection of TCEs/folklore, a responsible authority, which may be an existing office or agency, should be tasked with awareness-raising, education, advice and guidance, monitoring, dispute resolution and other functions.

Authorizations required to exploit TCEs/EoF should be obtained either directly from the community concerned or the authority acting on behalf of and in the interests of the community. Where authorizations are granted by the authority:

- (i) such authorizations should be granted only after appropriate consultations with the relevant indigenous people/s or traditional or other community/ies, in accordance with their traditional decision-making and governance processes;
- (ii) such authorizations should comply with the scope of protection provided for the TCEs/folklore concerned and should in particular provide for the equitable sharing of benefits from their use;
- (iii) uncertainties or disputes as to which communities are concerned should be resolved as far as possible with reference to customary laws and practices;
- (iv) any monetary or non-monetary benefits collected by the authority for the use of the TCEs/folklore should be provided directly by the authority to the indigenous people or traditional or other community concerned;
- (v) enabling legislation, regulations or administrative measures should provide guidance on matters such as procedures for applications for authorization; fees, if any, that the authority may charge for its services; public notification procedures; the resolution of disputes; and the terms and conditions upon which authorizations may be granted by the authority.

*Scope of protection*

52. The central element of protection is the scope of the kinds of acts and omissions that should be prevented. Core principles for scope of protection can be drawn from a wide range of experience to date and existing laws for the protection of TCEs/EoF. The full range of legal doctrines and mechanisms through which the desired protection may be provided is set out in WIPO/GRTKF/IC/7/4 and is only briefly referred to here. However, the approach taken in framing this draft principle has been to consider the essence or the common denominator of protection afforded in the many countries that have reported their experience to the Committee.

Appropriations and misappropriations

53. In order to lend focus, specificity and practical relevance to the identification of the possible rights that might attach to TCEs/EoF, previous Committee documents drew upon earlier fact-finding and consultations with relevant communities to identify the kinds of uses and appropriations of TCEs/EoF which most often cause concern to indigenous and local communities and other custodians and holders of TCEs/EoF. These were:

- (a) unauthorized reproduction, adaptation and subsequent commercialization of TCEs/EoF, with no sharing of economic benefits;<sup>56</sup>

<sup>56</sup> This could include, for example, the recording of traditional music, the reproduction of paintings, the reproduction of designs embodied in textiles or handicrafts and the taking of photographs of traditional beadwork and attire worn by indigenous and traditional persons.

- (b) use of TCEs/EoF in ways that are insulting, degrading and/or culturally and spiritually offensive;<sup>57</sup>
- (c) unauthorized access to and disclosure and use of sacred/secret materials;<sup>58</sup>
- (d) appropriation of traditional languages;<sup>59</sup>
- (e) unauthorized fixation of live performances of TCEs/EoF and subsequent acts in relation to those fixations;<sup>60</sup>
- (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’;<sup>61</sup>
- (g) failure to acknowledge the traditional source of a tradition-based creation or innovation;<sup>62</sup>
- (h) granting of erroneous industrial property rights over TCEs/EoF and derivatives thereof.<sup>63</sup>

#### The legal form of protection

54. Existing laws for the protection of TCEs/EoF evidence a wide range of legal doctrines and mechanisms, which should inform the core principles regarding the scope of protection. Some extend a true exclusive right in TCEs/EoF as such. Most do not offer protection in the form of a true exclusive right, but rather focus on regulating use of the protected TCEs/EoF. WIPO/GRTKF/IC/7/4 surveys the range of existing approaches in detail which are, in sum:

- (a) exclusive property rights, giving the right to authorize or prevent others from undertaking certain acts in relation to TCEs/EoF.<sup>64</sup> An exclusive rights approach would be one way of giving effect to a principle of ‘prior informed consent’. Exclusive rights are provided for in the Tunis Model Law, 1976, the Model Provisions, 1982, the Panama Law, 2000, the Pacific Regional Framework, 2002, and the Philippines Law, 1997;
- (b) entitlements under a scheme for equitable remuneration/compensatory liability, providing for some form of equitable return to the rightsholders for use of their TCEs/EoF,

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<sup>57</sup> This could include for example the modification of a TCE/folklore to suit foreign markets, or the performance of a ritual or ceremony in an inappropriate context and setting.

<sup>58</sup> This could refer to, for example, the disclosure to the public at large of secret and/or culturally sensitive materials, such as tribal sites and objects of deep religious and cultural significance (as happened for example in *Foster v Mountford* (1976) 29 FLR 233, see WIPO/GRTKF/IC/5/3, para. 209).

<sup>59</sup> Previous documents have described cases in which indigenous and traditional words, symbols and other distinctive signs have been used by non-community members outside the traditional context. See WIPO/GRTKF/IC/5/3.

<sup>60</sup> For example, the photographing of live performances of songs and dances by indigenous persons, and the subsequent reproduction and publication of the photographs on CDs, tape cassettes, postcards and on the Internet. See, for example, ‘Minding Culture’ by Terri Janke. This could include the marketing of fake traditional souvenir items as ‘indigenous’, ‘Indian-made’ or ‘authentic’.

<sup>62</sup> Examples could include the use of traditional music as part of a ‘world music’ album without acknowledging the source of the music.

<sup>63</sup> A patent granted over a process for the formation of the Caribbean steelpan musical instrument has been cited as an example. See WIPO/GRTKF/IC/5/3, para. 188.

<sup>64</sup> GRULAC (WIPO/GRTKF/IC/1/5, Annex I, p. 2 and Annex II, p. 5), Zambia (WIPO/GRTKF/IC/1/13, para. 38)

without creating an exclusive right in the TCEs/EoF. This approach has been used in some systems for protection of TCEs/EoF, often through a *domaine public payant* system;<sup>65</sup>

(c) a moral rights approach, normally providing the rights: of attribution of ownership; not to have ownership falsely attributed; not to have the protected materials subjected to derogatory treatment; and, at least in some jurisdictions, the right to publish or disclose (the right to decide if, when and how the protected materials ought to be made accessible to the public).<sup>66</sup> “The integrity right which protects the reputation of creators may address the anxiety over the inappropriate use of expressions of folklore by preventing distortion, alteration or misrepresentation of creators’ works. This may provide redress against culturally inappropriate treatment of expressions of folklore. . . The publication right is the creator’s right to decide when, where and in what form a work will be published. It may be effective in providing creators of folklore with a degree of control over the publication or disclosure of sacred works and thus reduce the possibility of inappropriate use. Furthermore, it could potentially be coupled with a breach of confidence action if the sacred information was communicated in confidence.”<sup>67</sup> Protection of moral rights is found in the Model Provisions, 1982 and the Pacific Regional Model, 2002 (and, in relation to performances of TCEs/expressions of folklore, in the WPPT, 1996);

(d) an unfair competition approach, providing a right to prevent various acts that constitute ‘unfair competition’ broadly speaking, such as misleading and deceptive trade practices, unjust enrichment, passing off and taking of undue commercial advantage.<sup>68</sup> This approach underlies the Arts and Crafts legislation of the U.S.A., and is found in the Model Provisions, 1982;

(e) a penal sanctions approach, where certain acts and omissions are treated as criminal offences. The Model Provisions, 1982 and the Pacific Regional Model, 2002 provide for certain criminal offences.<sup>69</sup>

55. These various options are not necessarily mutually exclusive, and could be combined, in conformity with the guiding principle of flexibility and comprehensiveness. One option may, for example, be more relevant or suited for a particular form of TCEs/EoF than another. Most *sui generis* systems include one, and often more than one, of these options, and comprehensive protection of TCEs/EoF may be afforded through more than one piece of legislation as well as through background common law and general legal codes. (See WIPO/GRTKF/IC/7/4 for a more extensive survey of the range of options.)

#### The scope of the protection

56. To summarize reported experience to date, and the statements and submissions made by Member States, communities and other stakeholders, rights and entitlements that could be used to protect TCEs/EoF can include:

(a) following the example set by most copyright-inspired national laws for the protection of TCEs/EoF, rights over traditional literary and artistic materials could extend to acts such as reproduction, adaptation, public performance, distribution, public recitation,

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<sup>65</sup> GRULAC (WIPO/GRTKF/IC/1/5, Annex I, p. 2 and Annex II, p. 5), Bangui Agreement of OAPI, see WIPO/GRTKF/IC/5/INF 3.

<sup>66</sup> See Lucas-Schloetter, ‘Folklore’ in von Lewinski, S. (Ed.), Indigenous Heritage and Intellectual Property, 2004 (Kluwer), p. 298.

<sup>67</sup> Palethorpe and Verhulst, Report on the International Protection of Expressions of Folklore Under Intellectual Property Law, 2000, p. 31.

<sup>68</sup> GRULAC (WIPO/GRTKF/IC/1/5, Annex I, p. 2).

<sup>69</sup> Sections 26 to 29.

communication to the public, the making of derivative works and importation (of unauthorized copies and adaptations under the law of the importing country):

(i) existing *sui generis* measures in copyright laws are, however, very diverse in their treatment of rights, and it would be difficult to codify their common elements.<sup>70</sup> See also Pacific Regional Model, 2002 which includes typical copyright-type exclusive rights, including an adaptation right and a right ‘to create derivative works’;<sup>71</sup>

(ii) these rights could be assigned and licensed (although laws could restrict such assignment to ensure that rights remain with the traditional communities, such as the Pacific Regional Model<sup>72</sup>, or to require the consent of a competent authority<sup>73</sup>);

(iii) some key policy and legal questions pivot on the adaptation right, the right to make derivative works and on the setting of appropriate exceptions and limitations. The Model Provisions do not provide an adaptation right, and allow a wide exception in respect of ‘the borrowing of expressions of folklore for creating an original work of an author or authors.’<sup>74</sup> National *sui generis* laws for the protection of TCEs differ on this point: some grant an adaptation right and others do not. The Pacific Regional Framework has an adaptation right, and places upon external creators certain obligations towards the relevant community (such as to acknowledge the community and/or share benefits from exploitation of the copyright and/or respect some form of moral rights in the underlying traditions used);

(b) prevention of insulting, derogatory and culturally and spiritually offensive uses of TCEs/EoF, particularly sacred TCEs, based upon moral rights principles (for example, the Model Provisions, 1982 and the Pacific Regional Model, 2002.<sup>75</sup> As noted, Australia is developing legislation to introduce communal moral rights into its copyright law);

(c) failure to acknowledge source, or misleading indications as to source, again drawing upon moral rights jurisprudence in copyright law. The Model Provisions, the Pacific Regional Model and many copyright-based systems for folklore protection provide rights and remedies in respect of a failure to acknowledge source;

(d) both moral and economic rights for the performers of expressions of folklore in line with the protection already available under the WPPT, 1996;

(e) regarding handicrafts in particular, the Model Provisions and the Panama Law of 2000 provide explicitly for the protection of designs as tangible expressions of folklore;

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<sup>70</sup> See and compare, for example, the laws of Algeria, Angola, Benin, Burkina Faso, Cameroon, Congo, Ghana, Ivory Coast, Djibouti, Gabon, Guinea, Lesotho, Malawi, Mali, Morocco, Nigeria, Qatar, Republic of Central Africa, Senegal, Sri Lanka, Togo, and Tunisia. See WIPO/GRTKF/IC/3/10, as well as Lucas-Schloetter, ‘Folklore’ in von Lewinski, S. (Ed.), Indigenous Heritage and Intellectual Property, 2004 (Kluwer), pp. 286 to 291, where existing copyright-based systems are extensively analyzed and compared. Also, Kuruk, P., “Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States,” 48 *American University Law Review* 769 (1999).

<sup>71</sup> Section 7.

<sup>72</sup> Section 10.

<sup>73</sup> Mali, Morocco, Rwanda, Tunisia. See Lucas-Schloetter, ‘Folklore’ in von Lewinski, S. (Ed.), Indigenous Heritage and Intellectual Property, 2004 (Kluwer), *ibid*.

<sup>74</sup> Section 4 (1) (iii), Model Provisions, 1982.

<sup>75</sup> See Section 13.

(f) protection of reputation (the distinctiveness, ‘style’ and ‘authenticity’) of TCEs and prevention of false and misleading claims to ‘authenticity’, origin or link or endorsement by a community, through options such as:

(i) Certification trade marks (examples from Australia<sup>76</sup>, New Zealand,<sup>77</sup> and the USA<sup>78</sup>);

(ii) ‘truth in advertising’ and labeling laws (for example, the USA Indian Arts and Crafts Act, 1990<sup>79</sup>);

(iii) geographical indications (Portugal, Mexico and the Russian Federation have provided relevant examples of the registration of geographical indications with respect to TCEs and related TK<sup>80</sup>); and

(iv) unfair competition or trade practices law (for example, in a recent case, a company in Australia was prevented from continuing to describe or refer to its range of hand painted or hand carved Indigenous oriented souvenirs as ‘Aboriginal art’ or ‘authentic’ unless it reasonably believed that the artwork or souvenir was painted or carved by a person of Aboriginal descent<sup>81</sup>);

(g) prevention of the unauthorized registration of indigenous signs, symbols and other marks as trade marks. Mechanisms for such have been put in place by the Andean Community, the United States and New Zealand;<sup>82</sup>

(h) prevention of exploitation of sacred and secret materials, drawing upon principles dealing with unfair competition, undisclosed and confidential information, breach of trust and confidence and other such areas. For example, Article 39 of the TRIPS Agreement provides that in the course of protecting against unfair competition under Article 10*bis* of the Paris Convention, members of the World Trade Organization (WTO) must protect “undisclosed information”, as defined in the Article, against unlawful acquisition, disclosure or use in a manner contrary to honest commercial practices. In the Australian case of *Foster v Mountford*<sup>83</sup> the common law doctrine of confidential information was used to prevent the publication of a book containing culturally sensitive information;

(i) prevention of the grant of patent rights over TCEs/EoF and non-inventive derivatives thereof. In WIPO/GRTKF/IC/6/3 Add. information was provided on the possible development of industrial property classification tools for the purposes of the defensive protection of TCEs/EoF.

#### Communal control over derivative works

57. Previous discussions have focussed on the possibility of communal regulation of the exploitation of derivative works created by individuals, particularly those not connected

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<sup>76</sup> See *Minding Culture* case studies by Terri Janke, “Indigenous Arts Certification Mark”, <<http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html>>

<sup>77</sup> For more information on the Toi Iho™ Mark see <<http://www.toiiho.com>>

<sup>78</sup> Under the Indian Arts and Crafts Act, 1990, the Indian Arts and Crafts Board to register trademarks of genuineness and quality.

<sup>79</sup> WIPO/GRTKF/IC/3/10, par. 122 (i).

<sup>80</sup> See WIPO/GRTKF/IC/5/3.

<sup>81</sup> See further WIPO/GRTKF/IC/5/3 and <<http://www.accc.gov.au/>> (April 7, 2003).

<sup>82</sup> See WIPO/GRTKF/IC/6/3.

<sup>83</sup> (1976) 29 FLR 233.

with the traditions and cultural materials they adapted or were inspired by. The Model Provisions, the Tunis Model Law, the Bangui Agreement, and other *sui generis* systems and national laws do generally not regulate the exploitation of derivative works. The Model Provisions, 1982 contain no right of adaptation and have a wide ‘borrowing exception’. However, it is often the adaptation and commercialization of traditional materials by ‘outsiders’ that can cause the most cultural offence and economic harm. It has even been suggested that copyright and other IP rights should not be recognized in such tradition-based creations made by outsiders. Yet it has also been proposed that rights in derivative works should be fully recognized and respected and remain unencumbered by such obligations, since recognizing such rights encourages and promotes tradition-based creativity. This is precisely how, some argue, the IP system is intended to work - not to reward the preservation of the past, but rather to revitalize it and incentivize tradition-based creativity for economic growth.<sup>84</sup> It is pointed out that any copyright in the derivative work attaches only to new materials and leaves underlying materials unaffected. This was referred to in earlier documents as the ‘thin copyright’ principle.<sup>85</sup>

58. A possible midway approach, found in the Pacific Regional Framework, is to place upon the creators of derivative works certain obligations towards the relevant community (such as, in this case, to acknowledge the community, to share benefits from commercial exploitation of the IP in the derivative works, and to respect some form of moral rights in the underlying traditions and heritage used).

*Principle on scope of protection*

There shall be adequate measures to ensure:

- (i) the prevention of: the reproduction, adaptation, public communication and other such forms of exploitation of; any distortion, mutilation or other modification of, or other derogatory action in relation to; and the acquisition by third parties of IP rights over, TCEs/EoF of particular cultural or spiritual value or significance (such as sacred TCEs/EoF), and derivatives thereof;
- (ii) the prevention of the unauthorized disclosure and subsequent use of and acquisition by third parties of IP rights over secret TCEs/folklore;
- (iii) in respect of performances of TCEs/EoF, the protection of moral and economic rights as required by the WIPO Performances and Phonograms Treaty, 1996; and
- (iv) that, in the case of the use and exploitation of other TCEs/EoF:
  - the relevant indigenous, traditional or other cultural communities are identified as the source of any work derived from or inspired by the TCEs/EoF;
  - any distortion, mutilation or other modification of, or other derogatory action in relation to a TCE/EoF which would offend against or be prejudicial to the reputation, customary values or cultural identity or integrity of the community can be prevented and/or is subject to civil or criminal sanctions;
  - any false, confusing or misleading indications or allegations in the course of trade and contrary to honest business practices, as to the

<sup>84</sup> European Community (WIPO/GRTKF/IC/3/11.), Egypt (WIPO/GRTKF/IC/1/13, para. 34). African Group submission WIPO/GRTKF/IC/3/15).

<sup>85</sup> WIPO/GRTKF/IC/6/3.

- origin, the nature, the manufacturing process, the characteristics, the suitability for their purpose, the quantity, endorsement by or linkage with the community of goods or services that refer to, draw upon or evoke TCEs/EoF can be prevented and/or is subject to civil or criminal sanctions; and
- where the exploitation is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by a competent authority and the relevant community.

59. These suggested principles should be read in the light of the following additional comments and clarifications:

(a) the possible legal forms of protection (for example, through exclusive rights, non-exclusive rights, penal sanctions, or unfair competition, or other legal mechanisms) are discussed fully in WIPO/GRTKF/IC/7/4;

(b) in accordance with the guiding principles, the principle on scope of protection would treat varying kinds of TCEs/EoF in several differentiated ways:

(i) for example, in respect of culturally significant and secret TCEs/EoF, strong forms of protection are envisaged by the words ‘there shall be adequate measures to ensure ... the prevention of ...’ Precisely how such prevention is achieved could be left to national and regional laws. Such strong forms of protection could, for instance, take the form of an exclusive property right, or a right of prior informed consent (see WIPO/GRTKF/IC/7/4);

(ii) in addition, the reference to ‘(preventing) the acquisition of IP over’ signals ‘defensive protection’ measures to prevent the obtaining and exercise of copyright, trademark rights, patent rights or other IP rights over sacred and secret TCEs/EoF. Once again, this principle could be implemented or achieved through various means (see WIPO/GRTKF/IC/7/4);

(iii) particularly in respect of sacred or secret TCEs/EoF, these forms of protection should complement and be supportive of the right and responsibility of communities to exercise effective control over access to the TCEs/EoF that are particularly significant to them, in accordance with customary laws and governance systems (see the principle of responsiveness to the aspirations and expectations of relevant communities);

(iv) the protection for performances of expressions of folklore could follow broadly the moral and economic rights referred to in the WPPT, 1996 (articles 6 to 10) and the right of remuneration in the case where the performance is recorded on a sound recording (article 15), perhaps whether or not published for commercial purposes (see the second Agreed Statement concerning Article 15);

(v) for other TCEs/EoF, which would include in particular TCEs/EoF that are already publicly available or accessible, the emphasis is rather on regulation of their utilization. No earlier authorization may be required, but the uses are regulated, perhaps even by penal sanctions (again, however, the choice of sanction or right is left to national and regional laws). The use of such TCEs/EoF is regulated by drawing upon principles of moral rights, equitable remuneration schemes and unfair competition in particular. Communities always retain the right to deny access to their TCEs/EoF altogether, thus obtaining perhaps the most effective protection;

(c) the suggested principle of effective and accessible protection argues against the imposition of any formalities for special protection for TCEs/EoF (other than formalities applicable to the registration of conventional industrial property rights over tradition-based marks, innovations and designs.) On the other hand, the policy objectives of transparency and certainty points towards the value of notification or registration system for the strongest forms

of protection envisaged (sacred TCEs/EoF, for example, ensuring though that registration should not entail the inappropriate disclosure of such material);

(d) the word ‘source’ of a TCE is used rather than ‘origin’, because, as folklore experts and others point out, it is often very difficult to determine where a given TCE actually first originated from.

*Exceptions and limitations*

60. Previous discussions have identified three questions relevant to determining which utilizations of TCEs/EoF should be subject to some form of authorization:

- (a) whether there is gainful intent;
- (b) whether the utilization is made by members or non-members of the relevant community from which the expression comes; and
- (c) whether the utilization occurs outside the traditional or customary context.

61. First, as many have stated, the protection of TCEs/EoF should not prevent communities themselves from using, exchanging and transmitting amongst themselves expressions of their traditional cultural heritage in traditional and customary ways and in developing them by continuous recreation and imitation. Thus, a core principle should be that traditional and customary uses, exchanges and transmissions of TCEs/EoF, as determined by customary laws and practices, and whether or not made for commercial intent, should be exempted from the need to seek any authorization. The Model Provisions, 1982 apply only to uses of TCEs/EoF that take place within the customary or traditional context and with gainful intent, and the Pacific Regional Model does not apply to customary uses by ‘traditional owners’ (sections 5 and 7(3)). The Panama Law, 2000 and the Peru Law, 2002 also contain similar provisions.

62. Second, many States have stressed that any IP-type protection of TCEs should be subject to certain limitations so as not to protect them too rigidly. Overly strict protection may stifle creativity and cultural exchanges, as well as be impracticable in its implementation, monitoring and enforcement.<sup>86</sup>

63. Further exceptions and limitations could be drawn from existing IP principles (such as the typical copyright exceptions found in most national copyright laws and the ‘three-step’ test). The Pacific Regional Model, for example, includes typical copyright exceptions (section 7(4)), as do the Model Provisions, 1982. Once again, existing national laws within the copyright system vary considerably as to the exceptions they allow. See WIPO/GRTKF/IC/7/4 for more examples. Not all typical copyright exceptions may be appropriate, however, as they might undermine customary rights under customary laws and protocols – for example, exceptions which allow a sculpture or work of artistic craftsmanship permanently displayed in a public place to be reproduced in photographs,

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<sup>86</sup> Similar thoughts motivated the Committee of Governmental Experts which elaborated the Model Provisions, 1982, which did not lose sight of the necessity of maintaining a proper balance between protection against abuses of expressions of folklore, on the one hand, and the freedom and encouragement of further development and dissemination of folklore, on the other. The Committee took into account that expressions of folklore form a living body of human culture which should not be stifled by too rigid protection. It also considered that any protection system should be practicable and effective, rather than a system of imaginative requirements unworkable in reality.

drawings and in other ways without permission.<sup>87</sup> Similarly, national copyright laws often allow public archives, libraries and the like to make reproductions of works and keep them available for the public. However, doing so in respect of copyrighted cultural expressions may raise cultural and spiritual issues.

64. It is specifically pointed out that, as noted in earlier documents, the Model Provisions do not provide rightsholders in TCEs/EoF with an adaptation right and also provide a wide exception in respect of ‘the borrowing of expressions of folklore for creating an original work of an author or authors.’<sup>88</sup> However, it is often the adaptation and commercialization of traditional materials by outsiders that can cause the most cultural offense and economic harm.
65. Relevant general guiding principles in this respect are principles such as ‘Balance and proportionality’ and ‘Respect for customary use and transmission of TCEs/EoF’.

*Principle on exceptions and limitations*

Measures for the protection of TCEs/EoF should:

- (a) not restrict or hinder the normal use, transmission, exchange and development of TCEs/folklore within the traditional and customary context by members of the relevant community as determined by customary laws and practices;
- (b) extend only to utilizations of TCEs/EoF outside the traditional or customary context, whether or not for commercial gain;
- (c) be subject to the same kind of limitations as are permitted with respect to the protection of literary and artistic works, designs, trademarks and other IP, as relevant and as the case may be. Such limitations should not, however, permit the use of TCEs/EoF in ways that would be offensive to the relevant community.

*Term of protection*

66. Many indigenous peoples and traditional communities desire indefinite protection for at least some aspects of expressions of their traditional cultures, and in this instance most branches of the IP system do not meet their needs (trademarks are renewable, and unfair competition protection is indefinite, however). It is generally seen as integral to the balance within the copyright system that the term of protection not be indefinite, so that works ultimately enter the ‘public domain’. Calls for indefinite protection are closely linked to calls for retroactive protection (see under ‘Application in time’ below). What options are there?:

- (a) first, it may be noted that extended protection in the copyright domain is not entirely without precedent. While the Berne Convention and the TRIPS Agreement stipulate 50 years as a minimum period for protection, countries are free to protect copyright for longer periods (and many do so). Rights to the famous work ‘Peter Pan’ vest in perpetuity under United Kingdom copyright law for the benefit of a charitable

<sup>87</sup> McDonald, I., *Protecting Indigenous Intellectual Property* (Australian Copyright Council, Sydney, 1997, 1998), p. 44.

<sup>88</sup> Section 4 (1) (iii), Model Provisions, 1982.

cause, and a proposal has been made in Australia to grant perpetual protection to the art works of a renowned indigenous artist for the benefit of his descendant;

(b) in so far as *sui generis* legislation goes, no time limit is set in the Model Provisions, the Panama Law and the Pacific Regional Framework;

(c) in Committee discussions, it has been suggested that the claim for indefinite protection might be limited to a ‘forward-looking’ term of protection, rather than retrospective, and that TCEs could be protected for the next 150 years, for example;<sup>89</sup>

(d) a commentator has also suggested that the maximum term of protection could be linked to the lifespan of the source community. This would entail a trademark-like emphasis on current use, so that once the community that the TCE identifies no longer uses the TCE or no longer exists as a defined entity (analogous too to abandonment of a trademark), protection for the TCE would lapse.<sup>90</sup> Such an approach has the merit of giving effect to customary laws and practices and drawing upon the very essence of the subject matter of protection (it being recalled that at the heart of TCEs/EoF is that they are characteristic of and identify a community (see above)). When a TCE ceases to do so, it ceases by definition to be a TCE and it follows that protection should lapse. There is something of this line of thinking in the USA’s Arts and Crafts Act, 1990 which excludes from protection products which are no longer ‘Indian’, because, for example, they have become ‘industrial products’. The Act sets out in some detail what constitutes an ‘Indian product’. Most relevant principles in this regard are the suggested general principles ‘Balance and proportionality’, ‘Responsiveness to aspirations and expectations of relevant communities’ and ‘Recognition of the specific nature, characteristics and forms of cultural expression’.

67. If any notification or registration requirements were to be considered useful, and depending also on their legal effects, the period of protection might also be an issue linked to the maintenance of any registrations (discussed under ‘Formalities’ below).

*Principle on term of protection*

Protection of any TCE/EoF should endure for as long as the TCE/EoF continues to be maintained and used by, and is characteristic of, the cultural identity and traditional heritage of the relevant indigenous people or traditional or cultural community.

Measures for the protection of TCEs/EoF could specify circumstances in which an expression will be deemed no longer to be characteristic of a relevant people or community.

*Formalities*

68. Committee participants have suggested that the acquisition and maintenance of protection should be practically feasible, especially from the point of view of traditional communities, and not create excessive administrative burdens for right holders or administrators alike. See the suggested general principle ‘Effectiveness and accessibility of protection’ above. Equally important, is the need, expressed by many stakeholders and especially external researchers and users, for certainty and transparency in their relations

<sup>89</sup> See WIPO/GRTKF/IC/5/15, par. 37.

<sup>90</sup> Scafidi, S., ‘Intellectual Property and Cultural Products,’ 81 *B.U.L. Rev.* 793.

with communities (see Policy Objectives above). The African Group has referred to the need for consideration of ‘registration and administration mechanisms’.<sup>91</sup>

Automatic protection/registration

69. A key choice is whether or not to provide for automatic protection or for some of registration.

(a) one option would be to require automatic protection without formalities, so that protection would be available as of the moment a TCE is created, similarly with copyright (the Model Provisions, 1982 and the Pacific Regional Framework, 2002);

(b) a second option is to require some form of registration, possibly subject to formal or substantive examination. A registration system may merely have declaratory effect, in which case proof of registration would be used to substantiate a claim of ownership, or it may constitute rights. Some form of registration may provide useful precision, transparency and certainty on which TCEs are protected and for whose benefit (the Panama Law, 2000, the Peru Law, 2002 and the database established in the USA to prevent the inappropriate registration of Native American words and symbols as trademarks, see above).

Recording and documentation of TCEs/EoF

70. As discussed earlier and elsewhere in this document, it is not suggested that the documentation or recording of TCEs/EoF is necessarily useful as an IP strategy (although it serves useful preservationist purposes).<sup>92</sup>

*Principle on formalities*

The protection of TCEs/EoF should not be subject to any formalities.

In the interests of transparency and certainty, measures for the protection of TCEs/EoF may require that certain categories of TCEs/EoF for which protection is sought should be notified to a competent authority, including TCEs/EoF of particular cultural or spiritual value or significance such as sacred TCEs/EoF. Such notification would have a declaratory function, would not in itself constitute rights, and could contribute towards ‘positive’ and/or ‘defensive’ forms of protection. It should not involve or require the documentation, recordal or public disclosure of the TCEs/EoF.

*Sanctions, remedies and enforcement procedures*

71. This issue, which concerns which civil and criminal sanctions and remedies may be made available for breaches of the rights provided, is not elaborated on in detail at this stage. Existing IP and *sui generis* legislation, case law and other sources provide a basis for developing appropriate principles, options and mechanisms at a later stage, perhaps once core principles for protection have been further discussed. The Pacific Regional Model, for example, sets out detailed provisions on enforcement of rights.<sup>93</sup> Reference has been

<sup>91</sup> WIPO/GRTKF/IC/6/12.

<sup>92</sup> See also Brazil (WIPO/GRTKF/IC/6/14, para. 69), Egypt (WIPO/GRTKF/IC/6/14, para. 196).

<sup>93</sup> Sections 26 to 34.

made above to the possible role of an ‘authority’ in assisting communities to enforce their rights.

72. It is noted, however, that communities and others argue that the remedies available under current law may not be appropriate to deter infringing use of the works of an indigenous artist copyright holder, or may not provide for damages equivalent to the degree of cultural and non-economic damage caused by the infringing use. Damages awarded by courts could take such cultural issues into account, as in the case *George M\*, Payunka, Marika and Others v Indofurn Pty. Ltd.*<sup>94</sup> References have also been made to the desirability of alternative dispute resolution (ADR) in this area,<sup>95</sup> and the Pacific Regional Model makes specific reference to ADR.<sup>96</sup>

*Principle on sanctions, remedies and enforcement*

Accessible and appropriate enforcement and dispute-resolution mechanisms, sanctions and remedies should be available in cases of breach of the protection for TCEs/EoF.

An authority should be tasked with, among other things, advising and assisting communities with regard to the enforcement of rights and with instituting civil and criminal proceedings on their behalf when appropriate and requested by them.

*Application in time*

73. This issue concerns whether protection should have some retroactive effect, and in particular how to deal with utilizations of TCEs/EoF that are continuing when the law or instrument enters into force and had lawfully commenced before entry into force. Several options are apparent in existing laws:

- (i) retroactivity of the law, which means that such utilizations of TCEs would also become subject to authorization under the new law or regulation;
- (ii) non-retroactivity, which means that only those utilizations would come under the law or regulation that had not been commenced before their entry into force; and
- (iii) an intermediate solution, in terms of which utilizations which become subject to authorization under the law or regulation but were commenced without authorization before the entry into force, should be brought to an end before the expiry of a certain period if no relevant authorization is obtained by the user in the meantime.

74. The general law of copyright and related rights provides an array of approaches to such questions of ‘application in time,’ when it is necessary to clarify whether new or newly expanded rights should extend retrospectively to existing subject matter. The options include no retroactive effect, some retroactive effect with the recognition of rights to continuing use acquired by third parties on the basis of past good faith use, and other safeguards of the equitable interests of third parties.

<sup>94</sup> 30 IPR 209. See Janke, ‘Minding Culture’.

<sup>95</sup> GRULAC (WIPO/GRTKF/IC/1/5, Annex I, p.9), Asian Group (WIPO/GRTKF/IC/2/10), African Group (WIPO/GRTKF/IC/3/15).

<sup>96</sup> Section 33.

75. The Model Provisions do not deal with this question. The Panama Law, 2000 states that rights previously obtained shall be respected and not affected by the Law. The Pacific Regional Model follows in general the intermediate solution described above (see sections 3(2) and 3(3), as well as 35). The Indian Arts and Crafts Act, 1990 only operates prospectively (as from 1935, when the predecessor Act came into force).

*Principle on application in time*

Continuing uses of TCEs/EoF that had commenced prior to the introduction of new measures that protect such TCEs/EoF should be brought into conformity with those measures within a reasonable period of time after the measures enter into force, subject to equitable treatment of rights and interests acquired by third parties through prior use in good faith. Long-standing prior use in good faith may be permitted to continue, but the user should be encouraged to acknowledge the source of the TCEs/EoF concerned and to share benefits with the original community. Other uses should cease at the end of a reasonable transition period.

*Relationship with intellectual property protection*

76. It has been previously discussed that any special protection for TCEs/EoF should be concurrent with and not prejudice the acquisition of IP protection that might also be available under IP laws. This question is most relevant with regard to derivative works. Earlier discussions have focused on possibly regulating the use of derivative works in some cases, without suggesting that IP rights in derivative works should not be recognized:

(a) the Model Provisions, 1982 do not limit or prejudice any protection applicable to expressions of folklore under IP or cultural heritage laws (section 12);

(b) the Pacific Model also provides that traditional cultural rights in TCEs/EoF are in addition to, and do not affect, any IP rights that may subsist (section 11), and that any IP right that exists in relation to a derivative work vests in the creator of the work or as otherwise provided by the relevant IP law (section 12).

*Principle on relationship with intellectual property protection*

Special protection for TCEs/EoF should not replace and is complementary to any protection applicable to TCEs/EoF and derivatives thereof under other intellectual property laws.

*International and regional protection*

The international dimension of IP in general, and of the Committee's work in relation to TCEs/EoF, refers mainly to the recognition of foreign right holders as having access to national systems of protection on a par with domestic nationals; the creation of practical mechanisms to facilitate the obtaining and administration of IP rights in foreign jurisdictions; and the development of substantive standards, setting international standards for how IP should be protected at the national level (such as minimum standards for protection), and how other interests, such as third parties and the general public, should be safeguarded (such as through exceptions to IP rights and remedies for the abuse of IP rights).

77. Beyond these main aspects, the international dimension potentially covers a range of policy, legal, technical and practical elements, which may interact in various ways with national and regional laws and institutions. WIPO/GRTKF/IC/6/6 identified these elements as:

- (a) coordination and clarification of linkages with other elements of international law;
- (b) consideration of current international IP law and standards that apply to TCE subject matter;
- (c) interpretation of existing standards and development of new international standards that apply to the treatment of TCEs under national legal systems, and clarification of the range of legal options available under national law to give effect to these standards;
- (d) international mechanisms for enabling nationals of one country to enjoy IP rights in a foreign jurisdiction;
- (e) coordination and articulation of common policy positions and objectives, and guidelines for achieving them;
- (f) international mechanisms for enabling or facilitating notification or registration as the basis for recognizing an IP right under national law;
- (g) administrative coordination, facilitation and cooperation in the operation of systems of IP rights under national law, including international classification and documentation standards;
- (h) international coordination of mechanisms for the collective administration and management of IP rights;
- (i) settlement of international disputes; and
- (j) settlement of private disputes involving more than one jurisdiction, through international or quasi-international means.

78. WIPO/GRTKF/IC/6/6 discussed each of these in detail. Without repeating all the information contained in that document, the following paragraphs identify information of particular relevance to TCEs/EoF in respect of certain of these issues.

(a) Considering the full international law context

79. The international dimension of the Committee's mandate includes consideration of existing international law in other areas of law other than IP. With respect to TCEs/EoF, these areas would include cultural heritage, education, creative industries, tourism promotion, human rights, labor standards, indigenous peoples' issues and trade and industry (small business development, arts and crafts promotion). Participants in the Committee have expressed the concern that there should be close cooperation with other international agencies and processes that have bearing on the Committee's mandate. As discussed above (the guiding principle of concord with other international and regional instruments and processes), international legal instruments of particular relevance to TCEs/EoF would include those administered or under development by UNESCO (such as the Convention for the Safeguarding of the Intangible Cultural Heritage and the draft Convention on the Diversity of Cultural Contents and Artistic Expressions). The General Assembly of WIPO has indicated that the Committee's focus on the 'international dimension' of its work should be 'without prejudice to the work pursued in other fora,' suggesting a further necessary basis for consultation, coordination and reporting on developments elsewhere.

(b) Existing international IP standards

80. Existing IP treaties contain many provisions that correspond to reported practical experience in the protection of TCEs as IP. A brief selection would include:

- The Berne Convention – economic and moral rights in artistic and literary works where these are expressions of traditional cultures, including anonymous and unpublished anonymous works (Article 15) and the possibility of protecting unfixated works (Article 2(2));
- The Paris Convention – protection of collective and certification marks, protection of armorial bearings, flags, other State emblems, official signs and hallmarks (Article 6*ter*), the protection of industrial designs, and the suppression of unfair competition (including false indications that products are traditional or associated with an indigenous or local community);
- The WPPT – the protection of performances of expressions of folklore;
- The Lisbon Agreement – the protection of appellations of origin related to products that embody traditional knowledge or are associated with traditional cultures;
- The Madrid Agreement Concerning the International Registration of Marks (and the Madrid Protocol) – the protection of certification marks relating to products of traditional origin;
- The WTO TRIPS Agreement – a range of IP rights recognized under TRIPS have been reported as applicable to traditional subject matter; apart from those categories noted above, TRIPS provides for two categories of protection that have been used for the protection of subject matter associated with TCEs/EoF - geographical indications (a category broader in scope than appellations of origin) and undisclosed information (confidential information or trade secrets), linking both forms of protection to the suppression of unfair competition under the Paris Convention.

(c) International standard-setting: norm-building and harmonization

81. Proposals have been put forward for the development of new international norms and standards in the context of the Committee,<sup>97</sup> the WIPO General Assembly<sup>98</sup> and in various other fora.<sup>99</sup> The setting of standards, and the choice of mechanism, are essentially political questions, for WIPO's Member States to consider and determine. Accordingly, the present document does not seek to promote any particular outcome nor to express any preference, but simply aims to catalogue and factually describe the available options. The range of options would include:

- a binding international instrument or instruments;
- a non-binding statement or recommendation;
- guidelines or model provisions;
- authoritative or persuasive interpretations of existing legal instruments; and
- an international political declaration espousing core principles and establishing the needs and expectations of TCE holders as a political priority.

82. These options are discussed further in WIPO/GRTKF/IC/6/6. Concerning TCEs/EoF in particular, the WPPT is a stand-alone agreement (i.e. not a special agreement within the

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<sup>97</sup> See for example various proposals made in the Committee's Fifth Session (document WIPO/GRTKF/IC/5/15, under 'general statements' and 'future work.'

<sup>98</sup> See document WO/GA/30/8, 'Report of the WIPO General Assembly, paragraph 65 to 92, *passim*.

<sup>99</sup> For example, draft 'Decision on Traditional Knowledge' contained in WTO document IP/C/W/404 "Taking Forward the Review of Article 27.3(b) of the TRIPS Agreement, Joint Communication from the African Group."

scope of a broader convention or union), but is nonetheless part of a wider international legal matrix. By contrast, its copyright counterpart, the WIPO Copyright Treaty (WCT) is a special agreement under Article 20 of the Berne Convention.

83. A number of provisions of the Berne Convention may lend themselves to further development in relation to some aspects of protection of TCEs. For instance, Berne Convention provisions on unfixed<sup>100</sup> and ‘anonymous’<sup>101</sup> works are generally viewed as being potentially relevant to the protection of copyright works developed in a traditional context, where oral transmission and uncertainty over authorship are more likely than in a conventional setting. Some national laws explicitly specify that these provisions apply to folklore. Berne Convention provisions on moral rights (Article 6*bis*) may also apply to misrepresentation of the source of TCEs and derogatory use of TCEs. The Paris Convention provisions on unfair competition have also been mentioned as a potential analogue or model for protection. Both the Paris and Berne Conventions are potential vehicles for clarifying the availability of rights for foreign nationals, in particular, through the principle of national treatment. Inasmuch as TCEs are protected through copyright, the Berne Convention provides for national treatment, for example.
84. WIPO has in the past developed model provisions on various subjects, including the Tunis Model Law for Copyright in Developing Countries (1976) and the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1982); the latter provisions were in fact planned as the basis of an international treaty, but the experts concerned concluded at the time that this step was premature. Many States which replied to the 2001 WIPO folklore/TCE questionnaire indicated a need to develop new non-binding model provisions, guidelines or recommendations for national laws, using the 1982 Model Provisions as a starting point. The results of the WIPO questionnaire and other WIPO activities showed several suggestions for the updating and modification of the Model Provisions (see the Report on the results of the questionnaire, WIPO/GRTKF/IC/3/10). A proposal in the Report that new non-binding model provisions for national laws on the protection of expressions of folklore be developed was, however, not approved by the Committee at its third session in June 2002.

(d) Recognition of rights of foreign nationals through international law

85. One of the cornerstone elements of the international dimension of the conventional IP system is the mechanism for establishing the entitlement of foreign nationals to receive protection. As a rule, the international standard is for relatively open access to IP systems for foreign nationals (provided that they are nationals of a country with relevant treaty commitments), a rule that dates back to the first international conventions in the 1800s. By virtue of the obligations under Paris, Berne, TRIPS and other IP treaties, the principle of national treatment applies to most categories of IP protection (subject to certain exceptions). In addition, WTO Members are required (also subject to certain exceptions) to apply the most-favored nation (MFN) principle at least in relation to the IP protection required under the WTO TRIPS Agreement. Some specific aspects of IP protection (such as the duration of term of copyright protection) may also be determined in certain circumstances by the principle of reciprocity.

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<sup>100</sup> Article 2(2).

<sup>101</sup> Article 15(4).

86. By contrast, some *sui generis* forms of IP protection established under national laws do not necessarily provide for automatic access by foreign nationals or protection for TCEs held by foreign nationals. Some systems of registration and recognition of *sui generis* rights in TCEs appear to be focused on right holders who are nationals of the country of protection, or who are communities recognized in that country<sup>102</sup> One model that has been applied has been for reciprocal protection to apply. For example, two laws, the Panama Law of 2000 and the Pacific Regional Framework of 2002 provide for protection of foreign materials. The Model Provisions, 1982 provide protection for TCEs/EoF of foreign origin either according to a reciprocity principle or on the basis of international treaties.<sup>103</sup>
87. In principle, access by foreign TCE custodians to national *sui generis* protection systems may entail various forms of recognition. For instance, it may concern:
- recognition as eligible indigenous or local communities, or recognition of the legal identity of a collective or community as right holder;
  - entitlement to be granted a right relating to TCEs, including entitlement for TCEs or related subject matter to be entered on a register, where applicable;
  - participation in any official mechanisms for the collective administration of rights;
  - participation in benefit-sharing arrangements or other funds concerning the exploitation of TCEs; and
  - entitlements concerning enforcement of rights, including *ex officio* enforcement action taken by national authorities or public prosecutors.
88. Under some national laws, rights in TCEs may be specifically reserved for certain classes of individuals or communities, identified and recognized under domestic law – for example, ‘Indians’ in the Indian Arts and Crafts Act, 1990, or certain local or indigenous communities. Hence, the availability of such rights to foreign individual or collective claimants may also be dependent on their compliance with similar or adapted criteria to be eligible right holders. This may entail clarifying whether eligibility of foreign right holders for rights or benefits reserved for particular categories of TCE holders would be assessed according to the laws of the country of origin, or the laws of the country in which protection is claimed.

(e) Policy coordination

89. Part of the international dimension of IP protection, and the promotion of social and economic benefits from IP, is the coordination of relevant policy approaches by means other than through international instruments. International policy coordination has the effect of ensuring that the choices taken by national authorities are informed by a wide range of experience gleaned in other countries, that practical implementation of policy options is consistent and mutually supportive where appropriate, and that the benefits of the creation of awareness and capacity-building materials can be enjoyed by a wider range of beneficiaries than the initial target audience. Such coordination of policy approaches potentially includes:
- the exchange of information between Member States and other stakeholders (notably representatives of indigenous and local communities) on domestic

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<sup>102</sup> See for example the annexes to document WIPO/GRTKF/IC/5/INF/2, and the tables in documents WIPO/GRTKF/IC/5/INF/3 and 4.

<sup>103</sup> Section 14.

- consultative and policy development practices, reflecting the particular concerns of traditional, local and indigenous communities;
- support for networks of traditional communities in different countries;
- the development of information and capacity-building materials for the use of TCE holders; and
- pooling of experience in supporting the use of TCE as the basis for community development, community-based enterprises and appropriate commercial partnerships.

(f) International notification or registration

90. Apart from international standards (binding or otherwise) concerning protection of IP at the national level, there are a number of practical mechanisms that facilitate and clarify the process of obtaining and protecting IP rights. For example, an international system can operate to register or to notify subject matter for which protection is claimed. This means that, by one central act, an applicant or interested party can put others on notice in potentially many other countries. It was suggested earlier in this document that, in the interests of transparency and certainty, some form of notification or registration may be desirable, particularly perhaps in respect of sacred TCEs for which stronger forms of protection may be appropriate.

91. There are several international registration or notification systems that already have application to subject matter relevant to TCEs:
- the protection of armorial bearings, flags, and other State emblems, and official signs and hallmarks indicating control and warranty under Article 6<sup>ter</sup> of the Paris Convention;
  - international registration of trademarks, including collective and certification marks, for traditional products and products of origin embodying TK under the Madrid system;
  - international registration of appellations of origin for products embodying traditional knowledge under the Lisbon system; and
  - international registration of original designs developed within traditional cultural framework under the Hague system.

There are a number of bilateral systems for recognition or notification, raising the possibility of reciprocal notification and protection for TCEs through bilateral agreement.

(h) Collective administration and management of IP rights

92. Systems of collective administration and management of IP rights are well developed for copyright and certain related rights. The availability of such collective mechanisms for the management and enforcement of rights, and their international dimension of the cooperation between such agencies, are highly important ingredients in the overall IP system, ensuring that the intended beneficiaries of IP protection do get effective access to the benefits.

93. Whatever legal means are decided upon, at the national, regional or international level, for the protection of TCEs, an immediate question will arise as to how these rights can be managed and enforced in a way that is workable, consistent with the resources and capacities of right holders, and yet is effective on the international plane, so that the fruits

of the IP protection of TCEs can be enjoyed in practice by the intended beneficiaries. This may entail consideration of the practical lessons from existing systems for the collective administration of IP rights, and the possible extension or adaptation of such mechanisms for the benefit of the holders of TCEs.<sup>104</sup>

*Principle on regional and international protection*

Legal and administrative mechanisms should be established to provide effective protection in national systems for the TCEs/EoF of foreign rightsholders. Measures should be established to facilitate as far as possible the acquisition, management and enforcement of such protection for the benefit of indigenous peoples and traditional and other cultural communities in foreign countries. Existing or new regional organizations could be tasked with resolving competing claims to the same or similar TCEs/EoF by communities within distinct countries, using customary laws, local information sources, alternative dispute resolution (ADR) and other such practical arrangements as necessary.

[End of Annex II and of document]

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<sup>104</sup> Drahos, P. (2000), 'Indigenous Knowledge, Intellectual Property and Biopiracy: Is a global bio-collecting society the answer?' *European Intellectual Property Review*, 22:245-250.