

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

**First Intersessional Working Group
Geneva, July 19 to 23, 2010**

DRAFT ARTICLES ON THE PROTECTION OF TRADITIONAL CULTURAL
EXPRESSIONS/EXPRESSIONS OF FOLKLORE PREPARED AT IWG 1

Document prepared by the Secretariat

ARTICLE 1

SUBJECT MATTER OF PROTECTION

1. "Traditional cultural expressions" and/or "expressions of folklore" are any form, tangible or intangible, in which traditional culture [and knowledge] are embodied and have been passed on from generation to generation, including, but not limited to:
 - (a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
 - (b) musical or sound expressions, such as songs, rhythms, and instrumental music;
 - (c) expressions by action, such as dances, plays, ceremonies, rituals, games, puppet performances, and other performances;
 - (d) tangible expressions, such as material expressions of art, handicrafts, architecture and spiritual forms.
2. Protection shall extend to any traditional cultural expression or expression of folklore which is the unique product of an indigenous people or local community and belongs to that people or community as part of their cultural or social identity or heritage.
3. The specific choice of terms to denote the protected subject matter should be determined at the national, sub-regional, and regional levels.

[Commentary on Article 1 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

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

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

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

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

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

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

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

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

COMMENTS BY EXPERTS

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

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

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

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

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

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

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

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

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

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

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

ALTERNATIVE OPTIONS BY EXPERTS

Makiese Augusto proposed alternative text for Article 1:

“CRITERIA

Protected TCEs/EOF shall be:

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

ARTICLE 2
BENEFICIARIES

Measures for the protection of traditional cultural expressions/expressions of folklore shall/should be for the benefit of the:

Option 1: Indigenous Peoples, Local Communities and Cultural Communities

Option 2: Peoples and Communities, for example Indigenous Peoples, Local Communities, Cultural Communities, and/or Nations

in whom the custody, and safeguarding of the traditional cultural expressions/expressions of folklore are entrusted or held in accordance with:

Option 1: the relevant law and/or practices (*consideration: to leave under domestic laws*)

Option 2: their law and/or practices (*consideration: reference to UNDRIP*)

and who maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic or genuine expressions of their cultural and social identity and cultural heritage.

[Commentary on Article 2 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

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

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

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

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

COMMENTS BY EXPERTS

Emmanuel Sackey wished to include a reference to “traditional communities”.

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

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

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

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

ARTICLE 3

SCOPE OF PROTECTION

Article A

Secret Traditional Cultural Expression

In respect of protected TCE/EoF, which is kept secret by the indigenous people or local community, that people or community shall have the means, through adequate and effective legal and practical measures, to prevent any unauthorized fixation, disclosure, use, or other exploitation.

Alternative 1

Article B

Rights Secured for Other Protected TCE

In respect of protected TCEs/EoF, there shall be adequate and effective legal and practical measures to ensure that the relevant IPLC has the exclusive and inalienable right to authorize the following:

- fixation
- reproduction
- public performance
- translation or adaptation
- making available or communicating to the public

In the case where the unauthorized user of a protected TCE/EoF made a genuine good faith effort to locate the beneficiary of these rights and did not, the beneficiary shall be entitled only to equitable remuneration or benefit-sharing, subject to the provisions of Article C.

Article C

Attribution, Reputation, and Integrity

The indigenous people or local community shall have the right to be acknowledged to be the source of the protected TCE/EoF and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said TCE/EoF which would be prejudicial to the indigenous people or local community's reputation or integrity.

Alternative 2

Article B

The economic and moral interests of the holders/beneficiaries of TCE, as defined in Articles 1 and 2, should be safeguarded in a reasonable and balanced manner.

As regards the moral interests, the holders/beneficiaries should have the right to be acknowledged to be the source of the TCE/EoF and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said TCE, which would be prejudicial to the reputation or integrity of the TCE.

[Commentary on Article 3 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

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

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

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

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

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

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

COMMENTS BY EXPERTS

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

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

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

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

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

Natacha Lenaerts expressed reservations on the whole article.

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

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

ALTERNATIVE OPTIONS BY EXPERTS

Makiese Augusto proposed an alternative for Article 3:

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

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

- the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography);
- any use which does not acknowledge in an appropriate way the indigenous peoples and communities and traditional and other cultural communities as the source of the traditional cultural expressions/expressions of folklore;
- any distortion, mutilation or other modification of, or other derogatory action that may prejudice the traditional cultural expressions, adaptation and derivatives and would damage the reputation, customary values or cultural identity or integrity of the community;
- any false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the traditional cultural expression/expression of

folklore of the indigenous peoples and communities and traditional and other cultural communities, suggest any endorsement by or linkage with such indigenous peoples and communities and traditional and other cultural communities, can be prevented and/or is subject to civil or criminal sanctions; and

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

ARTICLE 4
MANAGEMENT OF RIGHTS

1. The management of the rights provided for in Article 3 belongs to the beneficiaries as defined in Article 2, or to a designated competent authority (for example, regional, national, or local) acting at the request, and on behalf, of the beneficiaries. Where authorizations are to be granted by the competent authority:
 - (a) such authorizations shall/should be granted only after appropriate consultation and with the prior informed consent of the beneficiaries in accordance with their traditional decision-making and governance processes; and
 - (b) any monetary or non-monetary benefits collected by the competent authority for the use of the traditional cultural expressions/expressions of folklore shall/should be provided directly by the competent authority to the beneficiaries concerned or utilized for their benefits.

2. Where so requested by and in consultation with the beneficiaries, the competent authority shall:
 - (a) conduct awareness-raising, education, advice and guidance functions;
 - (b) monitor uses of traditional cultural expressions/expressions of folklore for purposes of ensuring fair and appropriate use;
 - (c) establish the criteria to determine any monetary or non-monetary benefits; and,
 - (d) provide assistance in any negotiations for the use of the traditional cultural expressions/expressions of folklore.

[Commentary on Article 4 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

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

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

COMMENTS BY EXPERTS

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

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

Natacha Lenaerts expressed reservations on the article.

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

ARTICLE 5
EXCEPTIONS AND LIMITATIONS

1. Measures for the protection of TCEs/EoF should:
 - (a) Not restrict the normal use, transmission, exchange and development of TCEs/EoF within the traditional and customary context by members of the IPLC as determined by customary laws and practices; and
 - (b) Extend only to utilization of TCEs/EoF taking place outside the membership of beneficiary community or outside traditional or customary context.
2. It shall be a matter of national legislation to permit the use of protected TCE/EoF in certain special cases, provided that such utilization does not conflict with the normal utilization of the TCE/EoF by the beneficiary and does not unreasonably prejudice the legitimate interests of the beneficiaries.

Proposed addition:

3. Regardless of whether such acts are already permitted under 2 or not, the following acts should be permitted:
 - (a) The making of recordings and other reproductions of TCE/EoF for purposes of their inclusion in an archive, inventory, dissemination for non-commercial cultural heritage safeguarding purposes; and incidental uses; and
 - (b) An original work of authorship inspired/borrowed by TCEs/EoF.

[Commentary on Article 5 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

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

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

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

COMMENTS BY EXPERTS

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

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

Paul Kuruk proposed adding:

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

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

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

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

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

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

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

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

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

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

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

ARTICLE 6
TERM OF PROTECTION

Option 1:

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

Option 2:

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

Option 3:

1. Protection of traditional cultural expressions/expressions of folklore should endure for as long as the traditional cultural expressions/expressions of folklore continue to meet the criteria for protection under Article 1 of these provisions; and,
2. At least as regards the economic aspects of TCEs/EoF are concerned, their protection should be limited in time.

Question 1:

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

Question 2:

How might provisions impact upon different stakeholder groups?

Question 3:

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

Question 4:

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

Question 5:

Should the scope of protection affect the time of protection?

Question 6:

Should secret TCEs be explicitly mentioned?

Question 7:

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

Question 8:

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

[Commentary on Article 6 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

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

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

COMMENTS BY EXPERTS

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

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

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

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

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

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

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

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

ARTICLE 7
FORMALITIES

As a general principle, the protection of TCE/EoF shall not be subject to any formality. National authorities may maintain registers or other records of TCE/EoF.

[Commentary on Article 7 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

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

COMMENTS BY EXPERTS

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

Robert Leslie Malezer said that the second sentence posed problem. Youssef Ben Brahim agreed.

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

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

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

ARTICLE 8
SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

[*Option 1* – consistency with other instruments]

1. Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this instrument.

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

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

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

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

[Commentary on Article 8 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

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

COMMENTS BY EXPERTS

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

Mara Rozenblate supported Option 1.

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

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

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

ALTERNATIVE OPTIONS BY EXPERTS

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

“TRANSBOUNDARY COOPERATION

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

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

ARTICLE 9
TRANSITIONAL MEASURES

Option 1:

1. These provisions apply to all traditional cultural expressions/expressions of folklore which, at the moment of the provisions coming into force, fulfill the criteria set out in Article 1.
2. Continuing acts in respect of traditional cultural expressions/expressions of folklore that had commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, should be brought into conformity with the provisions within a reasonable period of time after they enter into force, subject to respect for rights previously acquired by third parties through prior use in good faith.

Option 2:

1. These provisions apply to all traditional cultural expressions/expressions of folklore which, at the moment of the provisions coming into force, fulfill the criteria set out in Article 1.
2. The state should ensure the necessary measures to secure the rights, acknowledged by national law, already acquired by third parties.

Option 3:

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

Question 1:

Are institutions currently working in good faith?

Question 2:

Have third party rights been legitimately acquired?

Question 3:

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

Question 4:

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

Question 5:

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

[Commentary on Article 9 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

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

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

COMMENTS BY EXPERTS

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

Raúl Rodríguez Porras supported Option 2.

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

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

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

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

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

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

ARTICLE 10

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

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

Protection for a traditional cultural expression/expression of folklore in accordance with these provisions does not replace and is complementary to protection and measures that apply to that expression and derivatives/adaptations thereof under international intellectual property instruments as well as legal instruments and programs for the safeguarding, preservation, promotion of cultural heritage and the diversity of cultural expressions.

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

Protection under this instrument should leave intact and should in no way affect the protection of provided for in international legal instruments on intellectual property rights. Consequently, no provision of this instrument may be interpreted as prejudicing such protection.

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

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

[Commentary on Article 10 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

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

COMMENTS BY EXPERTS

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

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

Pavel Zeman expressed a strong preference for Option 2.

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

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

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

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

ARTICLE 11

NATIONAL TREATMENT

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

[Commentary on Article 11 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

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

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

COMMENTS BY EXPERTS

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

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

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

[End of document]