

ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION



EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION

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EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION

I. INTRODUCTION

A. Background

1. Folklore has always been considered as part of the common heritage of the community without individual ownership, and there were no formal or informal laws in many developing countries, which specifically bestowed ownership rights of folklore on any community or group of persons, and prohibited its exploitation without their consent. This led to widespread exploitation of folklore inside and outside the State concerned.

2. The need for a strong legal mechanism for the protection of folklore has been a subject of discussion at the national and international levels since 1960s, and the two main international fora where most of the discussions were held, were the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). While WIPO is concerned with the intellectual property protection of folklore, UNESCO is concerned with the general protection. Apart from this, the African Intellectual Property Organization (OAPI), a regional organization reflects the collective thought of the like-minded States for the legal protection of creations of folklore.

3. The WIPO General Assembly, at its Twenty-Sixth Session, held in Geneva from September 26 to October 3, 2000, established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee” or “IGC”) in order to analyse *inter alia*, intellectual property issues that arise in the context of the protection of expressions of folklore.¹

4. The Secretary-General of AALCO realizing the extreme importance of the work undertaken by the WIPO IGC for the Asian and African countries, and the possible role that AALCO could play in formulating an international instrument, proposed to the AALCO Member States through an Explanatory Note dated 27 April 2004, to include the item “Expressions of Folklore and its International Protection” on the Agenda of the Forty-Third Annual Session of AALCO held in Bali (Republic of Indonesia) from 21-25 June 2004. This proposal was in line with Article 1 (b) of the AALCO’s Statutes which provides for exchange of views and information on matters of common concern having legal implications. The AALCO Member States welcomed the proposal and the item was deliberated at the Forty-Fifth (2006), Forty-Sixth (2007) and Forty-Ninth (2010) Annual Sessions. At the Forty-Ninth Annual Session (2010), the Member States through a resolution directed the Secretary-General to follow-up the developments within the

¹ WO/GA/26/6, paragraph 13, and WO/GA/26/10.

WIPO IGC on “Expressions of Folklore”, and to present the views of the AALCO Member States to the IGC and decided to place this agenda at the next Session.²

5. As a follow-up to the mandate received from the Forty-Ninth Annual Session, this report provides an overview of the work of the WIPO Intergovernmental Committee (IGC) since its inception in 2001, focusing its attention on the discussions held in Intersessional Working Group on TCEs/EoF as well as the deliberations took place at the Seventeenth Session of the IGC and the documents circulated during the IGC Seventeenth Session for the consideration of the Member States as annexure.

B. Summary of Deliberations at the Forty-Ninth Annual Session held at Dar es Salaam, United Republic of Tanzania (2010) on the Agenda Item

6. **Dr. Hassan Soleimani, the Deputy Secretary-General of AALCO** introduced the agenda item “Expressions of Folklore and its International Protection” and recalled that the topic had been on the agenda of the Organization since its Forty-Third Annual Session held at Bali, Indonesia in 2004.

7. The Deputy Secretary-General stated that folklore was an important element of the cultural heritage of every nation. For Asian-African countries, matters related to Folklore were extremely important because they own most of the world’s biological resources and also a great heritage of folklore. Therefore, it was important to negotiate a legally binding instrument to prevent the misuse and misappropriation of folklore at international level.

8. He pointed out that the Secretariat prepared the Report on the agenda item which provided an overview of the work of the World Intellectual Property Organization (WIPO) Intergovernmental Committee (IGC) since its inception in 2001, focusing its attention on the recently concluded Fourteenth, Fifteenth and Sixteenth Sessions of the Committee and the documents circulated at the Sessions for the consideration of the Member States. The report also reflected upon the WIPO Secretariat’s draft policy objectives and core principles for the protection of Expressions of Folklore, the recent text in the discussion of which had been annexed to the Secretariat’s Report.

9. He stated that the WIPO’s IGC, which had so far convened Sixteen Sessions, made considerable progress in formulating flexible policy objectives and core principles for the protection of Expressions of Folklore. At those Sessions, discussions focused on different options available to States to effectively protect Folklore and prevent its misuse and misappropriation. However, there were many outstanding issues on which the Committee was yet to evolve a consensus, which was considered at the First Intersessional Working Group Meeting of the IGC held from 19 to 23 July 2010 and it would be considered again during the Seventeenth Session scheduled in December 2010.

10. The DSG recalled that at the Fourteenth and Fifteenth Sessions of the Committee, the major focus were on renewal of the mandate of the IGC. Towards fulfilling that

² AALCO/RES/49/S 14 dated 8 August 2010.

objective, the Member States of WIPO, despite their differences worked together for an extension of the period of IGC to two more years. A concrete proposal was made by the African Group and it was supported by many of the Asian countries to win over a mandate for an extension of the IGC. The new mandate of the WIPO General Assembly called for “text based negotiations” by which, an effective protection of Expressions of Folklore *inter alia*, through the development of an international legal instrument was agreed largely by the Member States. The new mandate also received a clearly defined work program and made provision for four formal Sessions of the IGC and three Inter-Sessional Working Group Meetings.

11. The DSG informed that under the new mandate, the IGC had to submit the texts of the international legal instrument or instruments to the WIPO General Assembly in September 2011.

12. Further he stated that AALCO would be the appropriate forum for further discussion on the effective protection of folklore. The deliberations would help in consolidating the position of Asian-African countries on the substantive aspects of the future international instrument for the protection of Expressions of Folklore.

13. He also noted that discussions among AALCO Member States that keeping AALCO as a forum was necessary bearing in mind that the IGC were at the final stage of convening a Diplomatic Conference in 2011, in order to formulate an international legal instrument on Expressions of Folklore along with Traditional Knowledge and Genetic Resources, a joint seminar or expert meeting on the protection of Expressions of Folklore would be pertinent at the juncture. He welcomed on behalf of the AALCO Secretariat from the Member States any such proposals to organize such seminar or expert meeting in the near future.

14. The Delegations from **the Sultanate of Oman, People’s Republic of China, Republic of Indonesia, United Republic of Tanzania, Japan** and the **Kingdom of Saudi Arabia** made their statements. The delegations generally observed that the Folklore was an important element of the cultural heritage of every nation. They attached great importance to the protection of Genetic Resources, Traditional Knowledge and Folklore (GRTKF) as it had been increasingly exposed to misappropriation and was misused as a result of the continuous vacuum of the international legal regime for its protection.

15. The **Delegation of the Sultanate of Oman** stated that folklore was an important element of the cultural heritage of every nation. The reason being the development of a lucrative international trade in indigenous heritage which had seen most of the economic benefits diverted to non-indigenous persons and institutions, the protection of indigenous folklore and knowledge had become a pressing issue. In that regard, the delegate traced various international efforts to address the inadequacies of intellectual property in the protection of folklore.

16. The delegate noted that her country had signed a number of bilateral agreements to strengthen relationship in the field of culture and arts very recently. Under the agreements the parties, among other things, cooperate in the conservation of historical monuments, documents, and manuscripts; and hold cultural weeks and exhibitions.

17. The **Delegation of the People's Republic of China** informed that there was still no legally binding instrument on the protection of Expressions of Folklore at international level. He also welcomed on behalf of the Delegation, the 2 years renewal of the IGC mandate by the WIPO and hoped that IGC would continue to fulfill its mandate and achieve substantial progress in drafting international legal instrument on the issue.

18. The delegate cited the outline of Government's National Intellectual Property Strategy, 2008, which provided for the ways and means to protect the Expressions of Folklore and also emphasized the benefit sharing mechanism which would ensure a reasonable balance between conservators of Expressions of Folklore and those who use the resources, in order to protect the lawful interests of the individual and communities. Since the establishment of IGC, the Government had actively participated in the relevant negotiations and aligned itself with the developing countries. The Asian-African countries face common problems and sharing similar interests and positions on Expressions of Folklore, he observed.

19. The Delegate hoped that the Member States would impress upon the international community to have cooperation on the issue through the platform of AALCO, so that the interest of Member States could be safeguarded in a better way.

20. The **Delegation of the Republic of Indonesia** made few remarks on the issues related to the topic of Expressions of Folklore and its International Protection, including issues related to GRTKF. The delegate stated that his delegation was fully aware of the high economic and cultural value of the GRTKF, and such wealth should appropriately be utilized for the socio-economic development of the people to whom it belonged.

21. The delegate also shared his views on the discussions held in the Intersessional working group meeting which focused on the protection of expressions of folklore and stated that the following to be considered and observed by the AALCO:

- *Protection of TCE against unauthorized reproduction and other misappropriations;*
- *Prevention of derogatory and offensive uses and failure to acknowledge source;*
- *Prevention of false indications as to authenticity/community endorsement;*
- *'Defensive' protection (protection against acquisition of IP rights over TCEs adaptations); and*
- *Prevention of unauthorized disclosure of confidential/secret TCE.*

22. He also called upon AALCO to observe the development pertaining to the GRTKF not only in the topic of Expressions of Folklore but also on the topics of Genetic Resources and Traditional Knowledge.

23. The **Delegation of the United Republic of Tanzania** appreciated the AALCO Secretariat's report on reporting the efforts in trying to prevent the misuse, misappropriation and protection of the expressions of folklore at the international level and observed that almost all developing countries do not have legal mechanism whether formal or informal to protect folklore. The delegate made pertinent comments on the substantive aspects such as the lack of definition on the subject matter and also on the policy objectives and core principles.

24. The **Delegation of Japan** shared the importance of protection of traditional cultural expression/folklore. He stated that in their view, in order to obtain an appropriate outcome from the work at the WIPO, it was important to fully discuss basic questions such as: what should constitute traditional cultural expression/folklore eligible for protection and what kind of protection was required and to what extent. It was hoped that as regards such basic questions a common understanding would be formed through discussions as the WIPO-IGC and its inter-sessional IWG meetings in accordance with the mandate approved by the WIPO. With regard to the public domain, he said that it was a new primary source for creative activities and everybody should be aware that it should not restrain creative activities which would serve the development of culture.

25. The **Delegation of the Kingdom of Saudi Arabia**³ appreciated the statement made by the DSG of AALCO and also the report prepared by the Secretariat of AALCO on the agenda item. The Delegate stated that their Government attached greater significance to the matters relating to the protection of Expressions of Folklore. He informed that the Ministry of Culture and Information deals with the issues relating to protection of Expressions of Folklore, copyrights and also issues relating to the culture. 6.

C. Issues for Focused Consideration at the Fiftieth Annual Session of AALCO

26. Keeping in view of the importance of the agenda item being at the final stages of negotiation to formulate a binding international legal instrument by the WIPO IGC, the Secretariat finds it appropriate to include this agenda item for deliberation at the Fiftieth Annual Session. The deliberations in the Annual Session shall be focused on issues such as:

- i) the Draft Articles of the Intersessional Working Group on TCEs/EoF;
- ii) Prevention of the misuse, misappropriation and protection of Expressions of Folklore; and
- iii) Establishing an internationally legal binding instrument to safeguard the rights of Expressions of Folklore.

³ Statement made in Arabic: Unofficial translation from the interpreter's version.

II. WIPO INTERGOVERNMENTAL COMMITTEE (IGC) ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

A. Introduction

27. The subject “expressions of folklore,” was first initiated by WIPO in cooperation with UNESCO in early 1978. During that time, it was considered as a subject of traditional knowledge. Since then the work on expressions of folklore has progressed to a more advanced stage, than the work on traditional knowledge in general. Apart from the piecemeal amendments in the existing intellectual property regime (IPR) for the protection of folklore, the major achievement was the adoption in 1982 of the Model Provisions on the Protection of Expressions of Folklore.

28. The Model Provisions were the result of several joint meetings convened by the WIPO and UNESCO to study the draft model provisions. The outcome of the meeting was submitted to the Committee of Governmental Experts, convened by the WIPO and UNESCO at Geneva in 1982, which adopted the famous “Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions (Model Provisions)”. The Model Provisions have attempted to achieve a balance between protection against abuses of expressions of folklore, on one hand and the freedom, and encouragement of folklore, on the other.

29. While the WIPO had been attempting to protect the “expressions of folklore” through piecemeal amendments in various international instruments, no comprehensive attempt was made to draft an international instrument for its protection. In this regard, WIPO and UNESCO met at Phuket, Thailand in April 1997 at the meeting of World Forum on the Protection of Folklore which was attended by more than 180 participants from approximately 50 countries. The major outcome of the meeting was the recognition of the need for preservation and conservation of folklore throughout the world, legal means of protection of expressions of folklore within national regimes, economic repercussions of exploitation and international protection of expressions of folklore.

30. In 1999, WIPO and UNESCO conducted four Regional Consultations on the Protection of Expressions of Folklore, each of which adopted resolutions or recommendations with proposals for future work. The consultations recommended that WIPO should increase and intensify its work in the field of folklore protection and recommended the establishment within WIPO of a separate committee on folklore and traditional knowledge to facilitate future work. Recommendations for the legal protection of folklore focused on the development of a *sui generis* form of legal protection at the international level (Asia/Pacific, Arab, Latin American Countries Recommendations) and also considered the UNESCO-WIPO Model Provisions to be an adequate starting point and relevant groundwork for future work in this direction. The African countries

recommended developing, in the shortest possible time, a broad consensus among States in favor of an international regime.⁴

31. Following the recommendations of the regional consultations on folklore, the WIPO General Assembly, at its Twenty-Sixth Session, held in Geneva from 26 September to 3 October 2000, established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore on the following general terms:

32. The Intergovernmental Committee (IGC) constituted a forum in which discussions would proceed among Member States on the three primary themes which they identified during the consultation: intellectual property issues that arise in the context of: (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore.⁵

33. In September 2003, the WIPO General Assembly at its Thirtieth Session decided to extend the mandate of the WIPO IGC and the mandate requires the IGC to accelerate its work and to focus in particular on the international dimension of folklore protection.⁶ Subsequently, at its Thirty-Eighth (19th Ordinary) Session in 2009, the WIPO General Assembly agreed to renew the mandate of IGC to continue its work and undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of folklore, genetic resources and traditional knowledge.⁷

B. Work of the IGC on the Protection of Expressions of Folklore from First to Sixteenth Session

34. The Committee's work programme focused an ongoing technical analysis of the use of existing intellectual property and *sui generis* approaches for the protection of expressions of folklore. The Committee's work has so far resulted in formulating draft Provisions on Objectives and Principles for the Protection of the Expressions of Folklore.

35. The Committee had built its work on the existing basis of consultations and earlier work done by its various bodies. An active programme of consultation and dialogue has complemented the formal proceedings of the Committee, with emphasis on the fostering of regional dialogue, and the enhanced participation of indigenous and local communities in WIPO activities. The Committee has also provided a framework for interaction with other international processes concerned with Intellectual Property (IP)

⁴ See documents WIPO-UNESCO/FOLK/ASIA/99/1, page 4, paragraph 4; WIPOUNESCO/FOLK/ARAB/99/1, paragraph II (b) 6; WIPO-UNESCO/FOLK/LAC/99/1, page 3. Matters Concerning Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore, WIPO General Assembly Twenty-Sixth (12th Extraordinary) Session Geneva, September 25 to October 3, 2000, WO/GA/26/6.

⁵ WO/GA/26/6, paragraph 13, and WO/GA/26/10.

⁶ WO/GA/20/8, paras. 94 and 95.

⁷ WIPO/GRTKF/IC/15/REF-DECISION 28 dated 1st October 2009.

aspects of Expressions of Folklore. Also a coordinated series of case studies and presentation on national experiences provides an additional source of practical information for holders of Expressions of Folklore and for policymakers alike.

36. The Committee's work has already led to a much greater understanding of the concept and issues that it has addressed, and has clarified how to deal with the concerns and inadequate recognition and protection of Expressions of Folklore. The discussions highlighted the expectation of a number of countries that specific steps should be taken to strengthen protection, including the development of specific new international instruments; others pointed out that the significance of the issues and their complexity, meant that further analysis and clarification was needed before crystallizing formal outcomes; there was a view that more work needed to be done to explore the full potential of existing IP rights and systems to protect Expressions of Folklore.

37. At its **Sixth Session** of the IGC held in March 2004, the Committee decided that the WIPO Secretariat should prepare drafts of an overview of policy objectives and core principles for the protection of Expressions of Folklore; and, an outline of the policy options and legal mechanisms for the protection of Expressions of Folklore subject matter, based on the full range of approaches already considered by the Committee, together with a brief analysis of the policy and practical implications of each option.⁸

38. At its **Seventh Session** in November 2004, the Committee took note of the detailed comments and drafting suggestions made on the draft objectives and core principles as set out in Annex I of document WIPO/GRTKF/IC/7/3; called for further comments on the draft objectives and core principles, including specific suggestions for wording, and requested the Secretariat to produce, on the basis of that Annex and all subsequent inputs and comments from Committee participants, a further draft of objectives and principles for the protection of Expressions of Folklore for consideration by the Committee at its Eighth Session.

39. At its **Eighth Session** in June 2005,⁹ the Committee considered the draft provisions embodying policy objectives and core principles for the protection of Traditional Cultural Expressions (TCEs)/Expressions of Folklore (EoF). The Annex to the document WIPO/GRTKF/IC/8/4 provided a revised version of the draft provisions for the Committee's further review. The draft had been revised in line with a commentary and review process established by the Committee at its Seventh Session. The draft provisions reflect the essence of the Committee's work on protection of TCEs/EoF since 2001. The provisions are based on the statements, comments and proposals made by Committee participants, and national and regional approaches to protection of TCEs/EoF described and discussed in the Committee's sessions. The latest draft is guided especially by the comments and specific suggestions made at the Committee's Seventh Session and during the commentary and review process since then.

⁸ Report of Sixth Session, WIPO/GRTKF/IC/6/14, para. 66.

⁹ WIPO/GRTKF/IC/8.

40. The **Ninth and Tenth Sessions** of WIPO IGC were held in the year 2006.¹⁰ As per the mandate, both meetings were accelerated to work in establishing a concrete outcome with particular focus on the international dimension on bringing out a legally binding instrument on the subject matter. The draft provisions developed by the previous IGC meetings had been taken further ahead. An important outcome of the Ninth Session was the launching of a new funding mechanism for indigenous and local communities and the purpose was to provide support for representatives of these communities to participate actively in the process of establishing international standards to prevent the misappropriation of expressions of folklore.¹¹

41. In the **Eleventh Session** (2007), the Member States agreed to undertake a sustained discussion of a list of ten issues related to the protection of Expressions of Folklore.¹² Over the last several sessions the IGC had made substantial progress in exploring the web of complex issues related to the protection, preservation and promotion of TCEs/EoF. This Session had the opportunity to engage in the kind of focused discussion among the Member States to reach a consensus on the agreed list of issues before the IGC. While there was a wide divergence of views in the IGC on issues relating to Expressions of Folklore, the Member States considered the progress could be made with respect to a number of concrete proposals outlined by the IGC. The IGC decided at this Session that the WIPO Secretariat should prepare “a factual extraction, with attribution, consolidating the view points and questions of Members and Observers on the List of Issues considered during the Eleventh Session including their comments submitted in writing for the Eleventh Session, subject to review of Member States and observers and without prejudice to any position taken on these issues.” It also decided that the revised objectives and principles for TCEs/EoF protection should remain on the table.¹³

42. At its **Twelfth Session** (2008), the IGC undertook a detailed debate by paying close attention to the interplay between the existing international legal frameworks and called for extended or enhanced protection of TCEs/EoF. It also reviewed the progress made on its substantive agenda items at the Session, and agreed that to prepare a working document on which: (a) describe what obligations, provisions and possibilities already exist at the international level to provide protection for TCEs/EoF; (b) describe what gaps exist at the international level, illustrating those gaps, to the extent possible, with specific examples; (c) set out considerations relevant to determining whether those gaps need to be addressed; (d) describe what options exist or might be developed to address any identified gaps, including legal and other options, whether at the international, regional or national level; and (e) contain an annex with a matrix corresponding to the items mentioned in sub-paragraphs (a) to (d) above.

¹⁰ Ninth Session was held from 24-28 April 2006 and Tenth Session was from 30 November to 8 December 2006.

¹¹ WIPO Press Release No. 446 dated 27 April 2006.

¹² WIPO/GRTKF/IC/11/4(A)

¹³ WIPO/GRTKF/IC/11/15 Prov. 2, p. 198.

43. At its **Thirteenth Session** (2008), an attempt to focus and intensify work on the protection of TCEs/EoF, the IGC drew up proposals to analyze gaps in the protection available in these respective areas. The “gap” analyses were prepared through an open commentary process and reviewed in the Thirteenth Session. The gap analyses contrast the current international legal framework with specific examples of gaps in protection and consideration of how these gaps might best be addressed.¹⁴ The gap analyses were expected to help prioritize issues, identify substantive areas for the Committee to focus upon, and to guide the future work of the Committee towards the expected concrete results.

44. The major focus of the **Fourteenth Session** (2009) was to renew the mandate of the IGC. The Member States despite their differences worked together for an extension of the period of IGC. Towards that end, the African Group proposed a concrete programme of action and a draft document titled "Elements for the New Mandate" which outlined a focus for the new mandate. The proposal was put up in the plenary for discussion by Member States which included: (1) a clearly defined work program and timeframe, including the holding of inter-sessional work sessions to be adopted at the Fifteenth Session, and (2) future work based on text based negotiations.

45. The **Fifteenth Session** (2009) marked the resumption of the IGC’s substantive work after a lengthy focus on procedural questions. The meeting reviewed draft provisions for the protection of TCEs/EoF and TK, and considered options for future work on intellectual property and genetic resources. The new mandate of the WIPO General Assembly called for a “clearly defined work program” and made provision for four formal sessions of the IGC and three inter-sessional working group (IWG) meetings over the next two years. Discussions on IWGs and the modalities were based largely on a formal process by the African Group.¹⁵ Proposals were also presented during the meeting by a group of industrialized countries (Group B) and several other delegations.¹⁶

46. The **Sixteenth Session** (2010) of the WIPO IGC had witnessed agreement on the establishment of inter-sessional Working Groups (IWGs). These IWGs are meant to support and facilitate the negotiations of the IGC and to provide legal and technical advice and analysis. The Session decided to hold three IWGs which will deal on an equal footing on the matters pertaining to TCEs/EoF, TK and GR. The Delegates agreed that the first IWG would solely address TCEs/EoF issues in the month of July 2010.¹⁷ Over the course of the Session, the delegates also engaged in text-based negotiations on substantive issues. The discussion was on the newly revised paper on “Objectives and Principles” for the protection of TCEs/EoF prepared by the WIPO Secretariat. It was also decided that the WIPO Secretariat should “prepare and make available for the first session of the Intersessional Working Group a further draft of document WIPO/GRTKF/IC/16/4. The Session also considered the comments on the Policy

¹⁴ WIPO Press Release dated 22 October 2008.

¹⁵ WIPO/GRTKF/IC/15/5 dated 8 December 2009.

¹⁶ WIPO/GRTKF/IC/15/6 dated 11 December 2009.

¹⁷ The first IWG will discuss the issues of TCEs/EoF from 19-23 July 2010. For further details see the Doc. WIPO/GRTKF/IWG/1.

Objectives and Core Principles and also the Substantive Provisions on the protection of TCEs/EoF, the draft prepared by the WIPO Secretariat.¹⁸

C. Consideration of Aspects of the IGC Intersessional Working Group on TCEs/EoF

47. The Inter-sessional Working Group on TCEs/EoF (hereinafter IWG1) consists of group of experts mandated by the WIPO IGC, it met from 19-23 July 2010 to discuss possible text for an eventual international legal instrument on the protection of TCEs/EoF based on WIPO Secretariat document.¹⁹ Each country was allowed to nominate one independent subject-area expert on the meeting representing themselves from their independent capacity and not on their country's interests.

48. The IWG 1, had worked within the following mandate: (1) support and facilitate the negotiations taking place in the Committee; and (2) provide legal and technical advice and analysis, including, where appropriate, options and scenarios, for consideration by the Committee.

49. The IWG 1 discussed the following issues and articles: objectives and general guiding principles; subject matter of protection (Article 1); beneficiaries/management of rights (Articles 2 and 4); acts of misappropriation/exceptions and limitations/formalities (Articles 3, 5 and 7); term of protection/transitional measures (Articles 6 and 9); sanctions/remedies and exercise of rights (Article 8); relationship with IP protection and other forms of protection, preservation and promotion (Article 10); and, international and regional protection (Article 11).²⁰

50. After extensive and detailed deliberations in the plenary of IWG 1, six informal, open ended drafting groups were established to further discuss, exchange and consolidate the various views expressed in the plenary, and to propose streamlined text, including options, on each cluster of issues. The work of the informal drafting groups was consolidated and presented to all the experts in the IWG plenary as the advice that the IWG was requested to provide to the IGC. On July 23, 2010, the consolidated drafts as prepared by the informal working groups were commented on by the experts in the IWG 1 plenary and some experts added new options. The drafting proposals, comments and additional options were noted and not adopted as such.

51. During the deliberations, the IWG 1 identified the need to include definitions/a glossary of key terms in the text and recommends formally that, at its next session, the IGC request the Secretariat to prepare a glossary on the meanings of key terms in WIPO/GRTKF/IC/17/4 Prov. for consideration by the IGC. The IGC was invited to

¹⁸ The details of the WIPO Secretariat study can be accessed from WIPO/GRTKF/IC/16/4 dated 22 March 2010.

¹⁹ WIPO/GRTKF/IC/17/4 PROV. - The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles

²⁰ For more details see, Summary Report of the Intersessional Working Group, WIPO/GRTKF/IWG/1/2 dated 23 July 2010.

further consider whether or not this glossary could serve as a basis for an additional article including definitions of terms to be inserted within the text. This glossary should draw, as far as possible, from existing United Nations and other international instruments. The IGC was invited to consider whether such a glossary should also be prepared in respect of “traditional knowledge”, noting that at its 16th session, the IGC has already commissioned a glossary on intellectual property and genetic resources.

52. The IWG 1 had requested the Secretariat to prepare, for the next session of the IGC:

(a) a document²¹ incorporating the draft articles prepared by the informal drafting groups, as well as the additional comments and options made by the IWG 1 plenary on July 23, 2010;

(b) a record of the deliberations of IWG 1,²² reflecting all comments and proposals made during IWG 1 on the objectives, general guiding principles and substantive articles. Comments and proposals made during IWG 1 would, as far as possible, be attributed to the experts, identified in their personal capacities, who made them. Drafting proposals made by experts from observers would be included as part of the commentary for consideration by Member States.

III. CONSIDERATION OF ASPECTS OF EXPRESSIONS OF FOLKLORE AT THE SEVENTEENTH SESSION OF WIPO IGC

A. Summary of the Deliberations and Decisions adopted at the Seventeenth Session of WIPO IGC (6-10 December 2010)

i. Chairperson’s Report on the Outcome of Intersessional Working Group 1 (IWG-1)

53. At the current Session of IGC, the Chair of Intersessional Working Group 1 (IWG 1) reported on the outcomes of the work of IWG 1. She drew attention to the three IWG 1 documents which the WIPO Secretariat had prepared for consideration by the Committee and they were: (1) Summary report of the work of IWG 1²³; (2) Record of deliberations at IWG 1,²⁴ where comments and questions were made and raised in regard to document WIPO/GRTKF/IC/17/4 Prov.; and (3) the draft articles and options on the protection of TCEs, as proposed by IWG 1.²⁵ The recommended draft articles, prepared by the informal open-ended drafting groups, benefited from the wide-ranging participation of experts and from the subsequent work done in plenary, where the rapporteurs of the informal groups had presented their recommendations for review and discussion to ensure transparency and full participation. She informed that the Document

²¹ WIPO/GRTKF/IWG/1/3

²² WIPO/GRTKF/IWG/1/4

²³ WIPO/GRTKF/IC/17/8.

²⁴ WIPO/GRTKF/IC/17/INF/7.

²⁵ WIPO/GRTKF/IC/17/9.

WIPO/GRTKF/IC/17/9 not only contained the recommended draft articles, which consolidated and streamlined the views and analysis of the original text (document WIPO/GRTKF/IC/17/4), but also contained technical and legal explanations and arguments provided by experts as to why and how their recommendations were thus formulated.

54. Further, the Chair recalled that the subject of protection of TCEs/EoF was wide and extensive and, although divergent views had been expressed, IWG 1 had competently accomplished its task within the given time. The work of IWG 1 had been carried out in a very transparent and participatory manner. She had transmitted the recommended articles, together with the corresponding explanations,²⁶ which she suggested be used as basis for the Committee's substantive negotiations on TCEs.

ii. Comments by the Member States of AALCO at the Seventeenth Session of IGC

55. The Member States who attended the IGC Session welcomed the work done by IWG 1 and complemented the experts for the good work they had done in order to develop the document with their expertise on the subject. They also viewed that the document prepared at IWG 1 should be the basic document for further discussions. Following are the comments made by the Member States of AALCO during the IGC on the draft articles contained in the document²⁷ as prepared at IWG 1.²⁸

56. The Delegation of **Bangladesh**, on behalf of the **Asian Group**, stressed that document WIPO/GRTKF/IC/17/9, should be considered as the principal basis for text-based negotiations for an international legal instrument on TCEs. The document could be complemented by other relevant documents under consideration, as well as by comments and views by delegations in the course of the negotiation process of the Committee. It was mindful of the divergent views of experts participating in IWG 1. However, divergences tended to be pronounced in only a few articles and a large part of the text appeared to have broad agreement among experts. It recommended that the Committee deal with the non-controversial elements in the draft text, while an informal drafting group could be set up to work on some of the elements characterized by a wide divergences of views. It wished to contribute to the proposed parallel negotiation process. It said that by making the best use of time and resources, considerable progress could be made on text-based negotiations. However, it noted that it was perhaps not possible to conclude the work on text-based negotiations in the seventeenth session. It was useful to determine how the Committee intended to proceed with the remaining work on TCEs, if any, especially within the work program set out for the eighteenth session of the Committee. Finally, it expressed its preference for a definition of “beneficiaries” in Article 2 that would encompass indigenous communities, among others. The Delegation had difficulty in accepting a term that would restrict the scope of beneficiaries.

²⁶ Ibid.

²⁷ Ibid, note 24.

²⁸ Details of the comments were drawn out from the document WIPO/GRTKF/IC/17/12 Prov. 2 dated 28 March 2011.

57. The Delegation of Angola, on behalf of the **African Group**, believed that the results reflected the discussions that had taken place, not at the political level but at the level of experts. It reminded that it was not a political document, but one produced by experts, who had gone through the articles and set out options. It noted a certain consensus on each article on how the document should be and which negotiations should be sent to a diplomatic conference. The main purpose of the Committee was to go through it, article by article and then choose and adopt the option that had consensus. Regarding the objectives and principles, it believed that the complementary documents could be used as input.

Comments on Article 1²⁹

58. The Delegation of **Arab Republic of Egypt** stated that it was not possible to transmit something that was tangible or intangible from one generation to another, except if it was an expression of a community. Therefore, the condition was that it had to be *collective* and not attributable to just one individual. Second, it was well-known that TCEs creators were usually unknown; in the definitions of traditional folklore, such collective expressions were unknown as to the source. There were other documents, such as the UNESCO Convention on the Safeguarding of the Intangible Heritage, which dealt with the same topic. Throughout the discussions of that Convention, many of the delegations had not been satisfied with the term “collective” and hence the term was not used for those kinds of expressions. But it was understood that the TCEs were transmitted from one generation to the next, and that they were expressions of a traditional culture. A TCE had to express the community that had adopted it. On the question of games and sports, there was an agreement that the term “games” could include mental and physical games. The term referred to the forms of collective cultural expression currently being dealt with, and therefore it was agreed that this formulation would be the best.

59. Further, the Delegation stated that protection could not extend to expressions which one could not describe as traditional; the tradition had to have survived for a long period and had to have been transmitted from one generation to another. So, expressions which had not been passed on from one generation to another did not deserve protection. Furthermore, not all sports were traditional. Additionally, on the notion of beneficiaries, the Delegation was in full agreement with the proposal of the Delegation of Barbados to add the word “nation” to complete the list of communities that would benefit from protection. The Delegation also came back to the term “collective”, which it believed was implicit in a number of articles.

60. The Delegation of **India** stated that, concerning paragraph 1, it was concerned with the deleting of the word “fixation”. The justification given at IWG 1 was that the use of the words “tangible and intangible” removed the need for restating whether a TCE was fixed or unfixed. But in sub-paragraphs (a), (b) and (c), the use of the word “expressions” gave an impression of a fixation requirement as one of the conditions for protection. It needed to be clarified that the protection was irrespective of whether a TCE

²⁹ The comments made by the Member States are based on the draft articles and options as proposed by the IWG 1. For the Document see, WIPO/GRTKF/IC/17/9.

was fixed or unfixed. It suggested reinserting at the end of sub-paragraph (c), the words “whether it is fixed or unfixed”. Furthermore, the Delegation was concerned with paragraph 2, which put three onerous conditions for the protection of TCEs: (1) a TCE had to be a *unique* product; (2) a community needed to prove that the TCE *belonged* to them; (3) a community needed to also prove that it was *part of their culture*. This placed the onus on the community to show that the TCE was unique, while it was not clear what “unique” meant and what it could include. Also, the word “belongs” brought in the notion of ownership; the community had a responsibility to ensure that it was *theirs* and ownership had to be established. It suggested that instead of *unique* the word “indicative” be used and instead of *belongs*, the phrase “used and developed by” be used. It suggested deleting “as part of their culture”, because that was presumed.

61. Further the Delegation believed that the Delegation of Australia had identified the fundamental questions. Paragraph 1 provided the broad definition, which was expressed with “from generation to generation”. On paragraph 2, it had two questions: (1) whether there was a link between the subject matter and the community, (2) whether the TCE was still being maintained or used as part of the cultural identity. If the two conditions were satisfied, protection had to be given irrespective of the terminology used, otherwise the majority of TCEs could be excluded. The words “unique” or “belonging” were problematic. The incorporation proposed by the Delegation of USA created more problems than it solved. The words “authenticity” and “being genuine” also created problems. The “community identity” had to be kept.

62. The Delegation of **South Africa** commented on the terms “from generation to generation” and “cultural identity” and stated that, as these were criteria for defining the subject matter, they should not be dropped.

63. The Delegation of **Japan** stated that it had raised questions on the subject matter of protection in document WIPO/GRTKF/IC/17/4. Although Article 1 in document WIPO/GRTKF/IC/17/9 was more readable, the questions were still unanswered. For example, it had questions about the word “traditional”: how many generations were sufficient for the expression to be “traditional”? Further, how could a specific definition of TCEs ensure predictability for users and third parties? Lastly, it voiced concerns with the relationship with the public domain. It wondered how expressions belonging to the public domain would be treated and how the public domain would be defined in that context. It said that the ambiguity of the subject matter of protection and the lack of predictability discouraged the use of expressions by creators, and it was not appropriate to leave such fundamental issues to the discretion of the national, sub-regional and regional levels. It expected further deliberations by the Committee. Regarding paragraph 2, it suggested replacing the word “shall” with “should”.

64. The Delegation of **Kenya** echoed the sentiments of the Delegations of South Africa, Egypt and USA as they related to the fundamental elements of defining TCEs in relation to “being passed on from generation to generation” and having a cultural *uniqueness* or *character*. Many countries had various TCEs, which they wanted to include in the text. It noted that the text was supposed to be an international document,

which did not go into the minute detail. It covered the general principle while the exhaustive list could be included in national laws. On the issue of “sports and games”, it explained that the reason the word “traditional” did not appear was because the chapter was about traditional “things”. It did not say *traditional* dances, songs, *etc.*, so it was assumed that games were traditional games.

65. The Delegation of the **Islamic Republic of Iran** supported removing the brackets from “and knowledge”. It also believed that “from generation to generation” was essential. It supported the Delegation of Egypt that the term of protection had to be unlimited. In sub-paragraph (d), it asked to add “sacred places” to the list. In paragraph 2, it proposed that the phrase “Indigenous people or local community” be replaced by Option 2, in Article 2, which read “Peoples and community including indigenous peoples, local communities, cultural communities and nations”.

66. The Delegation of **Nigeria** believed the idea was to see what definition Member States could adopt at the international level, which would give an idea of what the subject matter was without necessarily drawing up a long catalog of specific examples. It was not possible to bring in every illustration of what the article would likely cover. It supported removal of the brackets around “and knowledge”. It also supported the need to retain the reference to “from generation to generation”. However, it did not agree to introduce the concept of “original”. It found some merit in the suggestion by the Delegation of Mexico for the inclusion of “gestures and body movements”. It had believed that “game” was supposed to cover “sports”, but it had been enlightened that the two might be exclusive; however, the inclusion of “traditional” before “games” was not warranted. In subparagraph 1(d), it was not comfortable with the inclusion of “designs”.

67. The Delegation of **Cameroon** had noted that there was no disagreement over the essence of the article as stated by the Delegations of Canada, Kenya, Nigeria and others. The international instrument could only exist if it was flexible and concise. In the end, each State would have leeway to adapt the text to its local conditions; it was clear the text could not be exhaustive for that meant ignoring the wealth of cultural diversity. It noted that “from generation to generation” was a constant characteristic of TCEs, so it could not be deleted. It also reflected a world where the expressions were transmitted or passed on. Further, to include examples would make the text not only cumbersome but it would remain incomplete as it was impossible to put in all examples.

68. The Delegation of the Islamic Republic of Iran suggested adding, in paragraph 1, after “intangible”, the phrase “or a combination thereof”.

Comments on Article 2

69. The Delegation of **India** preferred Option 2, in which it proposed replacing “for example” with “including”. It also suggested deleting “custody and” as well as “entrusted or held” and replacing it with “presumed to be vested”. It also suggested replacing “and” with “or” at the beginning of Option 2, in the second cluster, then replacing “characteristic or genuine” with “indicative”, as used in Article 1. At the end

of that sentence, it proposed adding: “In case a traditional cultural expression/expression of folklore is specific to a nation, the authority as determined by the national law”.

70. The Delegation of **Bangladesh**, on behalf of the **Asian Group**, preferred Option 2. It also suggested that the Committee consider replacing the long phrases throughout the text with the word “beneficiaries”, with the understanding that Article 2 would contain the exact definition of the term “beneficiaries.” It also supported Option 2 in the second cluster. It called for consistency between Article 1 and 2.

71. The Delegation of **Indonesia** believed Option 2 represented the global interest of the communities, so “peoples and communities” reflected the consistency of the communities. The words “for example” could introduce confrontation between the proponent and opponent states. It preferred Option 1 in the second cluster because it made reference to national law and regulation of individual states.

72. The Delegation of the **Islamic Republic of Iran** could not accept Option 1. It preferred amending Option 2, by including “nations” after “peoples”, and by adding “individual groups and families” at the end of the sentence. In the second cluster, it supported Option 1. The role of government in management would be pivotal and the role of national legislation was important.

73. The Delegation of **South Africa**, on behalf of the African Group, preferred Option 1. It recommended shortening the definition, which should read “Indigenous peoples, communities and nations”, adding a footnote at “communities” to explain what communities were and their different layers. On the second cluster, it preferred Option 2, because it was consistent with the wording “in whom the custody and safeguarding of ...” It did not support the addition of “individuals”.

74. The Delegation of **Singapore** was still considering the options. It had concerns on how the article would be implemented in the context of sovereignty and territoriality.

75. The Delegation of **People’s Republic of China** preferred Option 2. It supported the legitimate demands of indigenous peoples. The Delegation stated that, because in China there was no concept of “indigenous people”, the Delegation expressed concern about the meaning of “local communities”. The text had to be flexible and reflect the actual situation of different countries. It had to include “nations”, “state” and other concepts, such as “minorities”. It could also consider discussing Option 1, following the changes put forward by the Delegation of South Africa.

76. The Delegation of **Arab Republic of Egypt** stated that, despite the fact that Egypt did not have indigenous nations as such, it supported the idea of protection being given to the rights of indigenous peoples to protect and preserve their culture and cultural heritage. Egypt was the oldest country in the world and Egyptians strived to maintain harmony between their communities. Among the definitions, there had to be a reference to “indigenous peoples and indigenous communities”.

77. The Delegation of **Nigeria** aligned itself with the statement made by the Delegation of South Africa on behalf of the African Group. It wished to go along with the retention of “shall” in the first paragraph. On the first cluster of options, it preferred Option 1. It was particularly interested in how the suggestion made for a footnote would help to define the word “nations” in view of the different understandings that the word entailed. On the second cluster of options, it preferred Option 2 and suggested changing “their law” to “their laws”. The Delegation did not agree with the inclusion of “individuals”.

Comments on Article 3

78. The Delegation of **Japan** stated that it still had doubts regarding the ambiguous way in which the scope of protection was formulated. It referred to document WIPO/GRTKF/IC/17/4, page 23. It was of the view that the present formulation increased unpredictability or uncertainty for third parties. In this regard, it expressed a preference for building upon Alternative 2, Article B, but disagreed with the proposal made by the Delegation of Barbados regarding the replacement of “should” by “shall”. Reminding that the formulation of the following articles might depend on the formulation of previous articles, it reserved the right to revert to those at a later stage.

79. The Delegation of **India** went along with Article A as it stood. With reference to the other categories of TCEs, it expressed preference for Alternative 1, although it expressed reservations. While it supported the principle of exclusive rights, it was of the view that those rights should be further developed in accordance with the categories of TCEs that have been developed under Article 1 and requested that Article B, under Alternative 1, be amended after the word “following”, as follows: “a) in respect of TCEs/EoFs other than words, signs, names and symbols: – fixation – reproduction - public performance – translation or adaptation - making available or communicating to the public, and b) in respect of TCEs/EoFs which are words, signs, names in symbols, including derivatives thereof: (i) any use for commercial purposes, other than their traditional use; (ii) acquisition or exercise of IP rights; (iii) the offering for sale or sale of articles that are falsely represented as TCEs/EoFs made by the beneficiaries as defined under Article 2; (iv) any use that disparages, offends, or falsely suggests a connection with the beneficiaries as defined under Article 2 or brings them into contempt or disrepute.” Regarding Alternative 1, Article B, it stated that “IPLC” should be deleted and replaced by “beneficiaries under Article 2”. It suggested also that Alternative 1, Article B, specified that the envisaged “right” was a “collective right”. Regarding its last paragraph, it suggested adding “for the use already made and with authorization for the continued use” at the end of the sentence. It expressed its disagreement with Alternative 2 and suggested deleting it.

80. The Delegation of **Indonesia** supported the proposals made by the Delegation of Barbados regarding the description of beneficiaries in Article 3.

81. The Delegation of the **Islamic Republic of Iran** suggested that the word “beneficiaries” replace other similar terms used throughout the text, *e.g.*, “IPLC” and also

was of the view that by referring to “beneficiaries” the draft took on board all right holders, including indigenous people.

82. The Delegation of **South Africa** endorsed Article A but reserved the right to come back to it in light of the many changes that had been made. Regarding Article B, it expressed a preference for Alternative 1. It suggested that “genuine good faith” be deleted from Article B under Alternative 1, since such criteria could not be established and be replaced by “proven”.

83. The Delegation of **Arab Republic of Egypt** reiterated that its country fully respected the rights of all peoples, including indigenous peoples, to protect their heritage. In this regard, it requested a glossary where the meaning of “beneficiaries” would be spelled out. Such a definition would spare the Committee the need to spell out in each paragraph of the text who these beneficiaries were.

84. The Delegation of **Nigeria** supported Alternative 1. Referring to the alternative option made by Mr. Makiese Augusto in his capacity as expert at IWG 1, Nigeria suggested adding in Article C, under Alternative 1, after the words “derogatory action”, the words “including any false, confusing or misleading indications which, in relation to goods or services which suggest any endorsement by or linkage with such indigenous peoples, local communities or nations”.

85. The Delegation of **South Africa** favored terminology already used in other international instruments, that is, “indigenous peoples and local communities”. This terminology might not be the solution for all, but it would avoid long debates in WIPO trying to define terms like “nations”. The Delegation of South Africa reminded that in its country “indigenous peoples” were recognized as “communities” that are parts of a diverse cultural nation. It wondered whether the term “communities” would not meet the concerns expressed by the Delegation of Barbados.

86. The Delegation of **Senegal** proposed that the interests of disappearing communities be also addressed, as it referred to a precise case in its country close to the border with Guinea.

87. The Delegation of **India** expressed serious concern regarding paragraph (e) of the New Zealand proposal and suggested replacing the word “enable” by “ensure that” and adding, after the words “local communities”, the words “shall have exclusive and inalienable collective rights to authorize”.

Comments on Article 4

88. The Delegation of the **Islamic Republic of Iran** suggested adding the word “national” after the word “designated” in the second line of paragraph 1. It proposed to add “in accordance with the national law” after “beneficiaries” in the same paragraph and to delete the word “only” in the subsequent sub-paragraph (a). In the same sub-paragraph, it suggested replacing the words “in accordance with the traditional decision-

making and governance processes" by the words "in accordance with the national procedure".

89. The Delegation of **India** expressed two major concerns regarding Article 4. There was no conclusion yet about the beneficiaries under Article 2. If Option 2 were to be adopted for this Article, the management of rights might be impacted accordingly. The Delegation reserved its comments for later but suggested at this stage qualifying the word "management" in the title of Article 4 with the word "collective". Regarding paragraph 1 of Article 4, it proposed again to add the word "collective" before "management" and to delete all the rest of the paragraph. It argued that the right to manage the collective rights given to communities must rest with them. It added that in case the beneficiaries were expanded or could not be identified, it might be necessary to look into how the management of rights would be organized.

90. The Delegation of **South Africa** opposed the suggestion made by the Delegation of the EU and its Member States regarding the addition of a new paragraph 3 that created, in its view, an unnecessary burden on the beneficiaries. It expressed instead a preference for the alternative suggestion made by the representative of KEI. Regarding the suggestion made by the representative of LCA on the creation of databases, it stated that while it recognized that databases might be necessary to manage the rights, the Committee should limit these kinds of new inputs or exercise caution in constructing those in order not to create new burdens on the beneficiaries.

91. The Delegation of **Kenya** invited again the Delegation of Belgium, on behalf of the EU and its Member States, to explain why it kept insisting on substituting the word "shall" to "should". It could not find the word "should" in the many international instruments that it had examined. It stated that Article 4 as drafted by the IWG captured the whole essence of the management of rights and encompassed what the African Group had drafted in its original document. It therefore requested that Article 4 stand as it was submitted by IWG 1.

92. The Delegation of **Indonesia** suggested that the word "or" be replaced by "and" in paragraph 1, sub-paragraph (b).

93. The Delegation of **Cameroon** supported the suggestions made by the Delegation of Jamaica. It invited the Committee to take into account the realities and circumstances of each country in defining the competent authority and to keep therefore the draft as flexible as possible. It pointed out that the draft needed to avoid redundancy when it referred to beneficiaries and the preservation of their rights. It also referred to delegations who reserved their rights on Article 4 because of the fact that there was no consensus yet on the beneficiaries. It was concerned that the present session of the Committee had only addressed four articles related to TCEs.

Comments on Article 5

94. The Delegation of **India** referred to the proposal made by the Delegation of USA saying that it reserved its right to reflect on it and react, since this proposal seemed to have many implications on how cultural expressions and limitations in this field would interact with existing copyright and trademark laws. It referred to paragraph 3, as a “proposed addition”, sub-paragraph (b) and noted that the Delegation of Australia made also reference to it. It stated that it looked very broad in scope and had the potential to convert TCEs to private property through copyright and trademark law. It therefore proposed that this sub-paragraph be qualified in order to make sure that the envisaged exception benefited only the beneficiaries or be controlled by them. In this context, it proposed that the words “by the beneficiaries or in association with them” be added after the word “authorship”. It would mean that the rights associated with the new forms or expressions would still belong to the communities and would be collectively managed by the communities, rather than be privatized. It added that exceptions and limitations should be permissible provided they facilitated adding value to collective ownership and collective management.

95. The Delegation of **South Africa** suggested deleting the “proposed addition” under Article 5 since it introduced exceptions and limitations that were too broad, unclearly formulated, intrusive and burdensome to indigenous and local communities. It also invited the Committee to reconsider the exceptions and limitations, make an enumeration of them and reconsider their formulation with more precision, taking the example of the new exception that was suggested by the representative of SIEF. It also argued against reflecting in the field of TCEs protection the exceptions and limitations that corresponded to copyright and trademarks.

96. The Delegation of **Kenya** noted that the formulation of this Article was complicated because of its linkage with Article 3 on which there was no consensus yet. It added that the exceptions and limitations regarding TCEs/EoFs protection should be considered in the specific context of customary practices and be submitted to prior consent where appropriate. It invited the Committee to take into consideration the comments made by the representative of Tulalip Tribes in this regard. It expressed its discomfort with the “proposed addition” and reserved the right to come back to the proposal made by the Delegation of USA.

97. The Delegation of the **Islamic Republic of Iran** proposed that in Article 5 the acronym “IPLC” be replaced with “Beneficiaries”, in order to maintain consistency throughout the text.

Comments on Article 6

98. The Delegation of **India** expressed support for Option 2 of Article 6 and proposed a new paragraph be included, which would read: “Secret TCEs shall enjoy the protection given to disclosed TCEs as long as they continue to meet the criteria for protection under Article 1.” This would allow secret TCEs to continue to be protected, whether or not it

might have been disclosed, in the same way as disclosed TCEs, provided that the TCEs would comply with the requirements in Article 1. Option 1 was deemed not valid, as it was based on the scope of protection in WIPO/GRTKF/IC/17/4. The scope of protection was now changing, which may exclude the question of registration. The Delegation had reservations on Option 3.

99. The Delegation of **Indonesia** expressed its support for option 2 of Article 6.

100. The Delegation of **South Africa** expressed its support for Option 2 of Article 6.

101. The Delegation of the **Islamic Republic of Iran** supported Option 2 of Article 6. The living nature of TCEs should not be forgotten, and with this in mind, it could only accept an indefinite term of protection for TCEs.

102. The Delegation of **Angola**, on behalf of the **African Group**, stated that the African Group position was consistent with the statement made by the Delegation of South Africa, which supported Option 2 of Article 6.

103. The Delegation of **Arab Republic of Egypt** supported the statement made by the African Group regarding Option 2 of Article 6. In addition, the protection of TCEs should be protected for an indefinite period.

104. In examining the three options in Article 6, the Delegation of **Singapore** stated that the main idea was to protect TCEs against distortion and mutilation, which should last in perpetuity. Economic rights should, however, have a limited term. One question raised was how distortion would be defined, as the line between distortion and original inspiration may be blurred. The Delegation referred to the glossary to be prepared for next session and proposed that a definition of distortion be included.

105. The Delegation of **Nigeria** supported Option 2 of Article 6 as originally formulated by IWG 1. It questioned the value of the new insertions. For instance, whether a TCE was secret or not, so long as it remained a TCE, it should be protected as stated in Option 2. The Delegation sought clarification on the purpose of the new paragraph in Option 2 as proposed by the Delegation of India. It recommended that Option 2 be limited to the two paragraphs as originally formulated. The Delegation had reservations on the new paragraph proposed by the Delegation of India in Option 2 of Article 6 and proposed that the phrase “continue to” be inserted between “shall” and “enjoy”, so as to read: “shall continue to enjoy”, which could better express the continuity of that expression.

106. The Delegation of **India** clarified the purpose of its proposed paragraph. No reference was made in the IWG 1 text to the protection of secret TCEs which could have been disclosed. Such disclosure could have been done by the communities or third parties. In both cases, upon disclosure, the TCEs should continue to receive the same protection enjoyed by other forms of TCEs.

Comments on Article 7

107. The Delegation of **India** supported Article 7, and proposed that the term “national authorities” be replaced with “Beneficiaries under Article 2”.

108. The Delegation of **Angola**, on behalf of the **African Group**, recommended that Article 7 be adopted by the Committee, with the amendment made by the Delegation India.

109. The Delegation of **Arab Republic of Egypt** supported the statement made by the Delegation of Canada. References should be made to “national authorities” as well as to “registries”. The possibility to maintain registries by national authorities was important. Agreement should be made on this in relation to the protection of TCEs and TK, and this would put an end to the registration of rights or other formalities.

110. The Delegation of **Indonesia** expressed support for the proposal made by the Delegation of India to insert the word “beneficiaries”, as well as that of the Delegation of Switzerland with regard to “declaratory registers or other records”. It sought guidance as to whether the English term should be “declaratory registers” or “declaratory registrations”.

111. The Delegation of **Senegal** supported Article 7 and stated that other registration entities could maintain records.

Comments on Article 8

112. The Delegation of **Indonesia** expressed support for Option 3 of Article 8. Option 3 resembled a comprehensive approach in that it included reference to national law as well as covered the context of international cooperation. Option 3 also provided that any criminalization could be addressed by the national law. Further, it wanted to make sure that there was consistency between this Article and Article 2 on beneficiaries.

113. The Delegation of **Angola**, on behalf of the **African Group**, expressed support for Option 3 of Article 8, as the position of the African Group. It also supported the inclusion of the Article on transboundary cooperation.

114. The Delegation of **South Africa** supported Option 3 of Article 8 as a comprehensive base. Referring to paragraph 4 of Option 3, it proposed to rephrase it as follows: “where TCEs are shared by different countries or by indigenous peoples in several jurisdictions, contracting parties should provide cooperation and assistance to facilitate the implementation of the enforcement measures provided under this instrument.”

115. The Delegation of **Kenya** supported Option 3 as the basis of discussions on Article 8.

116. The Delegation of **Nigeria** supported Option 3 of Article 8, and the amendments suggested by the Delegation of South Africa. It agreed with the representative of ARIPO that it could be useful to use generic terms that would allow regional bodies to act as competent authorities in cases of transboundary cooperation.

Comments on Article 9

117. The Delegation of **Indonesia** supported Option 1 of Article 9 as that context would be more suitable to the protection of TCEs.

118. The Delegation of Angola, on behalf of the **African Group**, expressed support of Option 3 of Article 9. It requested the possibility to confirm this support at a later stage. Further, they supported Option 3 of Article 9 for the reasons given by the Delegation of South Africa, which also reflected the African Group position. Option 3 included certain important issues, while Option 1 could be deleted.

119. The Delegation of **South Africa** supported Option 3 of Article 9. This Article was important, as probably 80% of Africa's TCEs had been taken to other countries for centuries. Some of the TCEs were critical to the cultural identities of the peoples of Africa. To that extent, if paragraph 3 of Option 3 did not provide for the recovery of such TCEs, Africa would be losing a whole wealth of treasury of the continent. The insistence by Africa on this issue was in line with other international conventions, such as UNESCO. It insisted that this was a significant issue at the international level and within the mandate of the Committee, when considering that volumes of African TCEs were taken away from the continent, for research, archiving, and record keeping.

120. The Delegation of **Kenya** supported the African Group position on paragraph 3 of Option 3 particularly because it functioned as a remedy and provided an opportunity to recover what was taken without the consent of the communities.

121. The Delegation of **Cameroon** reminded the Committee that it was trying to develop a *sui generis* protection system for TCEs, as conventional IP was not sufficient to provide the type of protection being sought. UNESCO provisions existed, but were also not adequate. It would not always be necessary to talk about an equilibrium between those who create and those who use. It would be like putting the rights of owners and the rights of users into the same scales.

122. The Delegation of **Nigeria** favored Option 3. TCEs had been misappropriated for a long time and it was appropriate that the protection sought would address misappropriation in very clear terms and in a decisive manner. It appreciated the concerns of delegations that would want to secure flexibilities for users and holders. Such concerns could be properly addressed in Article 5 on exceptions and limitations. In supporting Option 3 of Article 9, the Delegation was mindful that this process was aimed at developing a *sui generis* regime with joint obligations. It also supported the deletion of Option 1.

Comments on Article 10

123. The Delegation of the **Islamic Republic of Iran** preferred Option 1 of Article 10 and proposed to delete “does not replace and” in the second line. In the third line, the Delegation proposed to insert “in accordance with international law” after the word “thereof”.

124. The Delegation of **Indonesia** supported Option 1 of Article 10, which provided for complementarities to conventional IP protection that could be relevant to the protection accorded under this instrument.

125. The Delegation of **Cameroon** urged the Committee to move forward in finding specific solutions to the problems that the Committee was facing. If the Committee took the view that there was no complementary protection or that the special regulations being sought were intended to fill in gaps in the IP system, then what exactly was the Committee doing? In Cameroon, the Bamum people lost the throne of their sultan and the original of that throne was now in Germany. The Committee spoke about balance between creators and users. What is Cameroon’s recourse in this particular case? Should the throne be divided up or should Germany just keep it as Cameroon had no right to claim it. What should be done about the said artifact?

126. In supporting the position of the African Group, the Delegation of **Kenya** emphasized that Option 1 of Article 10 was more encompassing because it clearly stated the relationship that these particular provisions would have with the existing IP regime.

127. There were no substantial comments on Article 11 by the AALCO Member States.

iii. Summary of the Outstanding Policy Issues as resulted from the Drafting Group

128. The IGC after discussing the document³⁰ in the plenary established an Open-Ended Drafting Group on TCEs (“the Drafting Group”) to clean the text and submit it to the plenary. It was understood that the Drafting Group was not a decision-making body. The tasks of the Drafting Group, as directed by the Chair of the Committee, were: (a) attempt to reduce the number of options in each article; (b) remove non-controversial text where there was agreement, but not add text; (c) address an “indicative list of issues” (enclosed); and (d) identify outstanding policy issues.³¹

129. The Drafting Group’s discussions revealed that a number of difficult policy issues still had to be resolved. Some of the most difficult were as follows:

³⁰ Ibid, note 24.

³¹ The document submitted to the plenary was entitled *Draft Articles of the Open-Ended Informal Drafting Group of IGC 17*. The *Draft Articles* has been annexed in this Report.

- a. In Article 1, there was no agreement on the scope of protected TCEs and how they should be described.
- b. In Article 2, there was no agreement on the scope of beneficiaries and the extent to which the instrument should extend beyond Indigenous peoples and local communities.
- c. In Article 3, there was no agreement on the scope of protection, including whether there should be economic rights, and whether these rights should be qualified.
- d. In Article 5, there was disagreement on the degree of flexibility Member States should have to determine appropriate exceptions, and whether specific exceptions should be included.
- e. In Article 8, there was disagreement on whether to be prescriptive about sanctions or whether to provide domestic flexibility on that matter.

Article 1 – Subject Matter of Protection

130. The Drafting Group considered the following issues concerning the subject matter of protection:

- a. Whether the definition of TCEs should include a list of examples or simply categories of TCEs (issue 2(a) in the indicative list of issues). There was no consensus to remove the examples that followed paragraph 1, so the examples remained in the document.
- b. Whether the proposal from an expert at IWG 1, consisting of a set of criteria for protected TCEs, could be merged with paragraph 2, where some Member States had proposed the addition of criteria (issue 2(b) in the indicative list of issues). There was no consensus on merging the proposals.
- c. Whether the recommendations of the working group on Article 1, which considered the concerns raised by some delegations that “works of mas” were not encompassed in the definition of TCEs, could be supported. The recommendation of the working group was to insert the phrase “or a combination thereof” after “tangible or intangible” in the second line of paragraph 1; that proposal had also been made by the Delegation of the Islamic Republic of Iran during the plenary. There was no consensus that this amendment addressed the “works of mas” issue.
- d. Whether the article could be condensed or clarified. Some minor changes were made including the removal of the reference to “gestures and body movements” in subparagraph 1(c), as it was covered by “expressions by action”. The addition of “sacred places” to subparagraph 1(c), by the Delegation of Mexico, was clarified to refer to rituals in sacred places.

131. In Article 1 there was no agreement on the scope of protected TCEs and how they should be described. Questions included:

- a. Whether the definition of TCEs should be based on general categories or should include lists;
- b. Whether the lists could be rationalized;
- c. How expressions such as “works of mas” should be dealt with; and
- d. Which terminology best captured the key elements of TCEs.

Article 2 - Beneficiaries

132. The Drafting Group considered the definition of beneficiaries and the choice of terms to be used throughout the text (issue 3(a) in the indicative list of issues). This included consideration of the recommendation of the working group that had been formed to consider whether the term “nations” should be included in the definition of beneficiaries. The working group, in addressing the issue and the concern of some delegations about the situation where their TCEs may be held by the remaining individuals of a community, proposed the following definition of beneficiaries:

Beneficiaries are Indigenous peoples, local and cultural communities and the rightful holders in whom the custody and safeguarding of TCEs are entrusted or held in accordance with...

133. There was no consensus to adopt the definition proposed by the working group, and no consensus on the two options contained in Article 2. The document therefore retained the two options for the definition of beneficiaries.

134. The Drafting Group also considered whether it was possible to reduce the duplication between Articles 1 and 2 (issue 3(c) of the indicative list of issues). There was no consensus on that point and the articles remained separate.

135. The Delegation of Nigeria agreed that it could remove the brackets around the word “should,” and the Delegation of Australia removed its comment regarding the distribution of benefits, as that was a comment rather than a drafting proposal.

136. The scope of beneficiaries was one of the key outstanding policy issues. This was closely related to the scope of the proposed instrument and the extent to which it should extend beyond Indigenous peoples and local communities.

Article 3 – Scope of Protection

137. The Drafting Group considered whether the proposal made by the Delegation of New Zealand on the scope of protection, as amended by the plenary, could form the basis of future negotiations on Article 3 (issue 3(a) on the indicative list of issues). While there was interest from some delegations in using the proposal, others wanted to consider it further, and no consensus was reached.

138. The Drafting Group also considered if there was a preference between alternatives 1 and 2 (issue 3(b) from the indicative list of issues). There was no consensus on which option would prevail, or on the amendments that had been proposed to them. As a result, alternatives 1 and 2 were retained, and the “New Zealand” proposal became alternative 3. In its discussion of alternative 3, the Drafting Group agreed that the references to “beneficiaries/indigenous peoples or cultural community, etc” in that alternative needed only refer to “beneficiaries” since Article 2 defined beneficiaries. However, a footnote was added to indicate that the definition of beneficiaries was still a matter to be settled. Similarly, it was agreed that it was not necessary to always make references to beneficiaries “under Article 2” as that was implied.

139. There was no agreement on the scope of protection. One of the key policy issues was whether there should be economic rights, and whether they should be qualified by the other articles in the document.

Article 4 – Management of Rights

140. The Drafting Group considered the two additions that had been proposed in the plenary (issue 4(a) in the indicative list of issues). These were paragraph 3, which proposed that competent authorities report to WIPO each year, and paragraph 4 (proposed by the representative of KEI and endorsed by the Delegation of the United States of America), which provided that the management of the financial aspects of rights should be transparent. In response to the question in the indicative list of issues, there was no agreement to delete either proposal, so both remained in the document to be discussed by the Committee at a later stage.

141. The outstanding policy issues included whether governments should be able to legislate or make decisions concerning the management of rights (for example through national authorities), whether to refer to prior informed consent or “approval and involvement”, and whether there should be reporting requirements for competent authorities.

Article 5 – Exceptions and Limitations

142. There was no clear preference for one particular option or agreement to delete any of the options. As a result all options remained in the document.

143. Some minor changes were made to Article 5 to improve flow and coherence. Those included changing “between communities” (in paragraph 1(a)) to “among communities,” removing the reference to “members of the IPLC” (in the same paragraph) because it was a duplication of the term “beneficiaries”. The reference to “normal” in paragraph 1(a) was deleted as it no-longer made sense given the additions and changes that had been made in the plenary.

144. The structure of the article was amended slightly, to make it clear that what had been paragraph 3 was an alternative to paragraph 2. That paragraph was clearly identified as an alternative.

145. The outstanding policy issues included the degree of flexibility Member States should have to determine appropriate exceptions, whether specific exceptions should be included, and the degree to which the concept of prior informed consent or “approval and involvement” of indigenous peoples and local communities should feature in the article.

Article 6 – Term of Protection

146. The Drafting Group considered the three options on the term of protection (issue 6(a) from the indicative list of issues). It was determined that as there was no support for option 1 during the plenary, it could be deleted. There was no consensus concerning options 2 or 3, so both options remained in the document (as options 1 and 2).

147. It was agreed that the questions from IWG 1 in Article 6 should be deleted.

148. The bracketed words “are concerned”, in option 2, were deleted as they were not needed.

149. The outstanding policy issues included whether the elements of the new option 1 in Article 6 made sense as a package (for example, are elements of the option contradictory?), and whether time limits should be imposed on the period of protection for moral and economic rights.

Article 7 – Formalities

150. Article 7 only had one option, with some additions made during the plenary. It was agreed that the second sentence concerning the possibility of maintaining registers should be deleted, on the basis that it was not necessary to specify that registers could be kept and on what basis, as the general principle concerning formalities was established in the first sentence.

151. The Drafting Group did not identify outstanding policy issues on the question of formalities.

Article 8 – Sanctions, Remedies and Exercise of Rights

152. Article 8 had three options on the issue of sanctions, remedies and rights, and two new proposals (concerning trans-boundary co-operation and alternative dispute resolution).

153. Of the three options on sanctions, it was agreed that option 2 should be deleted because there was no support for that option during the plenary. As a result there were only two options in the document prepared by the Drafting Group (one provided

flexibility for States to determine appropriate sanctions based on domestic law, while the other was more prescriptive).

154. The text in square brackets in paragraph 4 of original option 3/new option 2 was deleted on the basis that it repeated text at the beginning of the paragraph. The delegation that had proposed the square brackets during the plenary agreed to that change.

155. The Drafting Group then considered the two new proposals in Article 8:

- a. On the question of whether trans-boundary co-operation should be dealt with in paragraph 4 of option 2 or a separate article (issue 9(a) from the indicative list of issues) it was determined that the matter could be dealt with in option 2.
- b. On the question of whether an article on dispute resolution should be added (issue 9(b) of the indicative list of issues) there was no consensus. That proposal remained on the table for further consideration at the next session of the Committee. A minor amendment was made to reflect that it was a proposal for an additional article, and not an option under Article 8.

Article 9 – Transitional Measures

156. Of the three options on transitional provisions, it was agreed that option 1 should be deleted because there was no support for it during the plenary. As a result there were only two options in the Drafting Group's text. One protected the existing rights of third parties, while the other provided for continuing uses by third parties to be brought into conformity with the provisions after a period of time.

157. Some minor restructuring of the article was also undertaken, to move paragraph 1 of the remaining two options to the beginning of the article, to show that it applied to both options and to clarify the differences between the options.

158. There was some discussion of paragraph 3 in option 3/new option 2, and whether that was a reference to the repatriation of TCEs rather than their protection, and, if so, whether that was a matter to be dealt with in transitional provisions or in an IP instrument. That was an outstanding policy issue to be addressed at future meetings of the Committee. There were also unresolved discussions about whether the references to "good faith" should appear. The questions from IWG 1 were deleted.

Article 10 – Relationship with Intellectual Property Protection and Other Forms of Protection, Preservation and Promotion

159. There were three options in Article 10. It was agreed that option 3 should be deleted as there was no support for it in the plenary. As a result there were two options in the Drafting Group's text.

160. In option 2 the bracketed word "of" was removed as it was a typographical error.

161. There was some discussion about whether the text that had been added to option 1, which provided that TCEs should be protected without time limit for the safeguarding of the cultural heritage of indigenous peoples, should remain in Article 10. One possibility was to move it to Article 6 on the term of protection. If the focus of the additional text was not about the term of protection, but about safeguarding cultural heritage, the question was raised whether that matter belonged in an IP instrument. This issue remained to be considered at a future meeting of the Committee.

Article 11 – National Treatment

162. As that article was not controversial, it was not discussed by the Drafting Group. However one delegation did suggest that further work could be done by the Committee or the Secretariat on the question of eligible foreign beneficiaries.

C. Date and Venue of the Eighteenth Session of IGC

163. The Eighteenth Session of the IGC will be held from 9-13 May 2011 at Geneva, Switzerland.

IV. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

164. For every country, folklore is the root of the nation's cultural tradition; for mankind, it is the rich and varied but non-regenerative resources as well as the incomparably valuable heritage of human society. The Asian-African countries which are the owners of major resources are still to find a best possible model to protect the Expressions of Folklore (EoF) both at national, regional and international level. In the asymmetrical situation prevailing at present between the developing and the developed countries, the Member States should utilize all available options, whether inside or outside the Intellectual Property system, preventive or defensive, national or international, to seek the objective of effective protection of expressions of folklore.

165. The WIPO Intergovernmental Committee as an international forum was successful in drafting Provisions for the Protection of Expressions of folklore. Although these provisions are in the draft stage, they present a comprehensive framework for a future Convention. It is a welcoming trend that WIPO General Assembly had decided to renew its mandate by extending the period of IGC in October 2009, to start with text based negotiations aimed at creating a legal mechanism to protect the Expressions of Folklore. Under the new mandate, the IGC is to submit the texts of the international legal instrument to the WIPO General Assembly in September 2011. The Assembly would then decide on convening a Diplomatic Conference.

166. In the previous Sessions of the IGC, most of the developing countries were of the view that the approach of the document should focus on defining the framework of an international legally binding instrument as the first priority. Further, it was pointed out that the developed countries, had taken a more methodical approach to internationalizing the issue of intellectual property which is a special concern to developing countries.

167. The Intersessional Working Group on TCEs/EoF established by the IGC composed of group of technical experts, each from the WIPO Member States, participated in their individual capacity had discussed the possible text for an international legal instrument on the protection of TCEs/EoF. The meeting of the IWG 1 had made a real progress in developing concrete rules to protect the TCEs/EoF.

168. In the current Session of IGC, a method of article wise discussions held based on the IWG 1 draft articles on the subject matter. The Delegations of the Member States made real effort to refine text, and disagreements were revealed on several of the articles in the form of different options, comments to the text, and questions on the state of play of protection and related institutions. There are currently 11 articles in the compilation text, some of which have been more controversial than others.

169. As the matter relating to the adoption of an international legal instrument on the protection of TCEs/EoF at the penultimate stage, the AALCO Member States are requested to fully engage in the process of adopting such an instrument in an effective and fair manner.

170. AALCO an intergovernmental legal Organization with representation from almost all major countries from Asia and Africa could be a suitable forum for further discussion and deliberation on the protection of expressions of folklore. This would help in consolidating the position of the Asian-African countries on the substantive aspect of the future international instrument for the protection of expressions of folklore. AALCO also feels that a joint seminar/expert meeting in order to find a common ground to protect the expressions of folklore both at national and international level, would be useful.

Annex-I

DRAFT ARTICLES OF OPEN-ENDED INFORMAL DRAFTING GROUP OF THE IGC 17 (9 December 2010)

OBJECTIVES (to be discussed at a later stage)

The protection of traditional cultural expressions should aim to:

Recognize value

(i) recognize that indigenous peoples and communities and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity;

Promote respect

(ii) promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore;

Meet the actual needs of communities

(iii) be guided by the aspirations and expectations expressed directly by indigenous peoples and communities and by traditional and other cultural communities, respect their rights under national/domestic and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such peoples and communities;

Prevent the misappropriation and misuse of traditional cultural expressions

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

Empower communities

(v) be achieved in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and communities and traditional and other cultural communities to exercise in an effective manner their rights and authority over their own traditional cultural expressions;

Support customary practices and community cooperation

(vi) respect the continuing customary use, development, exchange and transmission of traditional cultural expressions by, within and between communities;

Contribute to safeguarding traditional cultures

(vii) contribute to the preservation and safeguarding of the environment in which traditional cultural expressions are generated and maintained, for the direct benefit of indigenous

peoples and communities and traditional and other cultural communities, and for the benefit of humanity in general;

Encourage community innovation and creativity

(viii) reward and protect tradition-based creativity and innovation especially by indigenous peoples and communities and traditional and other cultural communities;

Promote intellectual and artistic freedom, research and cultural exchange on equitable terms

(ix) promote intellectual and artistic freedom, research practices and cultural exchange on terms which are equitable to indigenous peoples and communities and traditional and other cultural communities;

Contribute to cultural diversity

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

Promote the [community] development of indigenous peoples and communities and traditional and other cultural communities and legitimate trading activities

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

Preclude unauthorized IP rights

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

Enhance certainty, transparency and mutual confidence

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

GENERAL GUIDING PRINCIPLES (to be discussed at a later stage)

- (a) Responsiveness to aspirations and expectations of relevant communities
- (b) Balance
- (c) Respect for and consistency with international and regional agreements and instruments
- (d) Flexibility and comprehensiveness
- (e) Recognition of the specific nature and characteristics of cultural expression
- (f) Complementarity with protection of traditional knowledge
- (g) Respect for rights of and obligations towards indigenous peoples and [other traditional communities] communities and traditional and other cultural communities
- (h) Respect for customary use and transmission of traditional cultural expressions
- (i) Effectiveness and accessibility of measures for protection

ARTICLE 1 - SUBJECT MATTER OF PROTECTION

1. "Traditional cultural expressions"³² are any form, tangible or intangible, or a combination thereof, in which traditional culture and knowledge are embodied and have been passed on [from generation to generation], / tangible or intangible forms of creativity of the beneficiaries, as defined in Article 2 including, but not limited to:

- (a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, [signs,] names, [and symbols];
- (b) [musical or sound expressions, such as songs, [rhythms,] and instrumental music, the sounds which are the expression of rituals;]
- (c) expressions by action, such as dances, plays, ceremonies, rituals, rituals in sacred places and peregrinations, [sports and [traditional]] games, puppet performances, and other performances, whether fixed or unfixed;
- (d) tangible expressions, such as material expressions of art, [handicrafts,] [works of mas.] [architecture,] and tangible [spiritual forms], and sacred places.

2. Protection [shall] should extend to any traditional cultural expression which is the [unique] / indicative / characteristic product of a people or community, including an indigenous people or local community and cultural communities or nations as defined in Article 2, and [belongs to] is used and developed by that people or community [as part of their cultural or social identity or heritage]. Protected traditional cultural expressions 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.

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

ARTICLE 2 - BENEFICIARIES

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

³² "Traditional cultural expressions" and "expressions of folklore" are synonymous for the purposes of this text.

Option 1: Indigenous Peoples, communities³³ and nations, Local Communities and Cultural Communities [and individuals of those communities]

Option 2: Peoples and Communities, [for example] including Indigenous Peoples, Communities, Local Communities, Cultural Communities, and/or Nations, and individual groups and families and minorities.

[in whom the [custody, and] safeguarding of the traditional cultural expressions are [entrusted [or by whom they are held] presumed to be vested] in accordance with:]

[*Option 1:* the relevant national/domestic laws and/or practices

Option 2: their laws and/or practices, including customary law and community protocols]

[[and] or who maintain, control, use or develop the traditional cultural expressions as being [characteristic or genuine] indicative expressions of their cultural and social identity and cultural heritage. In case a traditional cultural expression is specific to a nation, the authority as determined by the national/domestic law.]

ARTICLE 3 - SCOPE OF PROTECTION

Article A

Secret Traditional Cultural Expressions

In respect of protected traditional cultural expressions, which are kept secret by the beneficiaries/indigenous people [or] local or cultural community, or nation, that people [or] community or nation shall/should have the means, through adequate and effective [legal and practical] appropriate measures, to prevent any unauthorized fixation, disclosure, use, or other exploitation.

Alternative 1

Article B

Rights Secured for Other [Protected] Traditional Cultural Expressions

In respect of [protected] traditional cultural expressions, there shall be adequate and effective legal and practical measures to ensure that the relevant beneficiaries under Article 2 [IPLC] has the exclusive and inalienable collective right to authorize and prohibit the following:

- a) in respect of traditional cultural expressions other than words, signs, names and symbols:
 - i) fixation;
 - ii) reproduction;
 - iii) public performance;
 - iv) translation or adaptation;
 - v) making available or communicating to the public;
 - vi) distribution; and

- b) in respect of traditional cultural expressions which are words, signs, names and symbols, including derivatives thereof:
 - i) any use for commercial purposes, other than their traditional use;
 - ii) acquisition or exercise of intellectual property rights;

³³ Footnote explaining different layers of communities.

- iii) the offering for sale or sale of articles that are falsely represented as traditional cultural expressions made by the beneficiaries as defined under Article 2;
- iv) any use that disparages, offends, or falsely suggests a connection with the beneficiaries as defined under Article 2 or brings them into contempt or disrepute.

[In the case where the unauthorized user of a protected traditional cultural expression made a [genuine good faith] proven 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 [for the use already made and with authorization for the continued use].]

Article C

Attribution, Reputation, and Integrity

The beneficiaries / indigenous people [or] local community or nation shall have the right to be acknowledged to be the source of the protected traditional cultural expression except where omission is dictated by the manner of the use and to object to any distortion, mutilation or other modification of, or other derogatory action, including any false, confusing or misleading indications which, in relation to goods or services, suggest any endorsement by or linkage with such indigenous peoples, local communities and nations, / in relation to the said traditional cultural expression which would be prejudicial to the beneficiaries / indigenous people [or] local community's [or nation's] reputation or integrity.

Alternative 2

Article B

The economic and moral interests of the beneficiaries of traditional cultural expressions, as defined in Articles 1 and 2, [should] [shall] be safeguarded in a reasonable and balanced manner.

As regards the moral interests, the beneficiaries should have the right to be acknowledged to be the source of the traditional cultural expression unless this turns out to be impossible/except where omission is dictated by the manner of the use and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said traditional cultural expression, which would be prejudicial to the reputation or integrity of the traditional cultural expression.

Alternative 3

Adequate and effective [legal or practical] measures should be provided to:

- 1) prevent the [unauthorized fixation, disclosure, use or other exploitation] disclosure of secret traditional cultural expressions;
- 2) require the acknowledgement of beneficiaries³⁴ as the custodians of their traditional cultural expressions unless this turns out to be impossible;
- 3) protect against the offensive use of traditional cultural expressions which would be prejudicial to the reputation of the beneficiaries or the integrity of traditional cultural expressions;
- 4) protect against the use of the non-authentic traditional cultural expressions in trade that suggests a connection that does not exist with beneficiaries; and
- 5) [where appropriate,] provide equitable remuneration to the beneficiaries for [[enable]

³⁴ To be defined in Article 2.

ensure the beneficiaries shall have exclusive and inalienable collective rights to authorize] the following uses of traditional cultural expressions:

- i. fixation
- ii. reproduction
- iii. public performance
- iv. translation or adaptation
- v. making available or communicating to the public

ARTICLE 4 - COLLECTIVE MANAGEMENT OF RIGHTS

1. The collective management of the rights provided for in Article 3 belongs to the beneficiaries as defined in Article 2. [The beneficiaries may authorize [or to] a [designated] national competent authority [(for example, regional, national, or local)] [acting at the request, and on behalf, of the beneficiaries], in accordance with the national/domestic law / their traditional decision-making and government process / international law. Where an authorization[s] is [are to be granted] given, [by] [the] a competent authority may:

- (a) Grant licenses only after appropriate consultation and with the prior informed consent or approval and involvement of the beneficiaries in accordance with their traditional decision-making and governance processes;
- (b) Collect monetary or non-monetary benefits from the use of the traditional cultural expressions providing such benefits shall/should be provided directly by the competent authority to the beneficiaries concerned or utilized for their benefits;
- (c) [such authorizations shall/should be granted to a user by the designated competent authority [only] after appropriate consultation and with the prior informed consent or approval and involvement of the beneficiaries in accordance with their national/domestic procedure and their customary rights [traditional decision-making and governance processes]; and
- (d) any monetary [or] and non-monetary benefits collected by the competent authority for the use of the traditional cultural expressions shall/should be provided directly by the designated competent authority to the beneficiaries concerned or utilized [for their benefits] for the direct benefit of relevant beneficiaries and the preservation of traditional cultural expressions.]

2. Where so requested by and in consultation with the beneficiaries, [the] a competent authority [shall] may / should

- (a) conduct awareness-raising, education, advice and guidance functions;
- (b) monitor uses of traditional cultural expressions for purposes of ensuring fair and appropriate use;
- (c) establish the criteria to determine any monetary or non-monetary benefits; and,
- (d) provide assistance in any negotiations for the use of the traditional cultural expressions.

3. [The competent authority shall report to WIPO, each year, and in a transparent way, on the distribution of benefits arising from the use of traditional cultural expressions.]

4. [The management of the financial aspects of the rights should be subject to transparency, concerning the sources and amounts of the money collected, the expenditures if any to administer the rights, and the distribution of money to the beneficiaries.]

ARTICLE 5 - EXCEPTIONS AND LIMITATIONS

1. Measures for the protection of traditional cultural expressions should:
 - (a) Not restrict the creation, customary use, transmission, exchange [and development] of traditional cultural expressions within and among communities in [the traditional and customary context by the beneficiaries [as determined by customary laws and practices] consistent with domestic laws of the member states; and
 - (b) Extend only to utilization of traditional cultural expressions taking place [outside the membership of the beneficiary community or] outside traditional or customary context.
2. [It shall be a matter of national/domestic legislation in accordance with the Berne Convention and the WCT to provide exception and to permit the use of protected traditional cultural expressions in certain special cases, provided that such utilization does not conflict with the normal utilization of the traditional cultural expressions by the beneficiary and does not unreasonably prejudice the [legitimate interests of] the beneficiaries.]
2. Alt. Parties may adopt appropriate limitations or exceptions, provided that the use of traditional cultural expressions is compatible with fair practice, acknowledges the indigenous or local community where possible, and is not offensive to the indigenous or local community.
3. Except for the protection of secret traditional cultural expressions against disclosure, to the extent that any act would be permitted under the national/domestic law for works protected by copyright or signs and symbols protected by trademark law, such act shall not be prohibited by the protection of traditional cultural expressions [, provided such exceptions to the protection of traditional cultural expressions are limited to certain special cases that do not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries and do not unreasonably prejudice the legitimate interests of the beneficiaries.]
4. [Regardless of whether such acts are already permitted under paragraph 2 or not, the following acts should be permitted:
 - (a) The making of recordings and other reproductions of traditional cultural expressions for purposes of their inclusion in an archive, inventory, dissemination for non-commercial cultural heritage safeguarding purposes; and incidental uses; and
 - (b) the creation of an original work of authorship by the beneficiaries or in association with them inspired/borrowed by traditional cultural expressions.]

ARTICLE 6 - TERM OF PROTECTION

Option 1

1. Protection of traditional cultural expressions should endure for as long as the traditional cultural expressions continue to meet the criteria for protection under Article 1 of these provisions; and,
2. The protection granted to traditional cultural expressions against any distortion,

mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the community, indigenous peoples and communities or region to which they belong, shall last indefinitely.

3. Secret traditional cultural expressions shall continue to enjoy the protection given to disclosed traditional cultural expressions as long as they continue to meet the criteria for protection under Article 1.

Option 2

1. At least as regards the economic aspects of traditional cultural expressions, their protection should be limited in time.

ARTICLE 7 - FORMALITIES

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

ARTICLE 8 - SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

Option 1

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

2. Contracting parties will take measures against the willful or negligent infringement of the economic and/or moral interests of the beneficiaries sufficient to constitute a deterrent to further infringements.

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.

Option 2

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.

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

Proposed Article 8 bis on Alternative Dispute Resolution

Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional cultural expression, each party shall be entitled to refer the issue to an independent alternative dispute resolution mechanism, recognized by international and/or national/domestic law.³⁵

ARTICLE 9 - TRANSITIONAL MEASURES

1. These provisions apply to all traditional cultural expressions which, at the moment of the provisions coming into force, fulfill the criteria set out in Article 1.

Option 1

2. The state should ensure the necessary measures to secure the rights, acknowledged by national/domestic law, already acquired by third parties.

Option 2

2. Continuing acts in respect of traditional cultural expressions that had commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, should be brought into conformity with the provisions within a reasonable period of time after they enter into force, subject to respect for rights previously acquired by third parties qualified by paragraph 3.

3. With respect to traditional cultural expressions that have special significance for the relevant communities having rights thereto and which traditional cultural expressions have been taken outside control of such communities, the communities shall have the right to recover such traditional cultural expressions.

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

Option 1

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

Despite what is stipulated in this option / anything to the contrary, traditional cultural expressions should be protected without time limit for the safeguard of the tangible and intangible cultural heritage of indigenous peoples.

Option 2

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

³⁵ Such as the WIPO Arbitration and Mediation Center.

ARTICLE 11 - NATIONAL TREATMENT

The rights and benefits arising from the protection of traditional cultural expressions under national/domestic 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.

EXPRESSIONS OF FOLKLORE AND ITS INTERNATIONAL PROTECTION
(Deliberated)

The Asian-African Legal Consultative Organization at its Fiftieth Session,

Considering the Secretariat Document No. AALCO/50/COLOMBO/2011/S 14;

Noting with appreciation the introductory statement of the Deputy Secretary-General;

Recognizing the importance of protection of the 'Expressions of Folklore' for the Asian-African countries;

Welcoming the World Intellectual Property Organization (WIPO) General Assembly initiative in establishing an Intergovernmental Committee (IGC) with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of Expressions of Folklore (EoF);

Also welcoming the work done by the Intersessional Working Group 1 in developing agreed rules to protect the EoF:

1. **Expresses** the hope that the WIPO IGC would be able to reach agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of Expressions of Folklore (EoF).
2. **Requests** the Secretary-General to organize an Expert Meeting in cooperation with WIPO or with any other Member State (s), to facilitate the exchange of views by Member States on the issues relevant to the protection of Expressions of Folklore.
3. **Encourages** Member States to actively participate in the future work of the agenda item at all the WIPO meetings.
4. **Directs** the Secretariat to follow up the developments within the WIPO IGC on 'Expressions of Folklore', and to present the views of the AALCO Member States to the IGC.
5. **Decides** to place the item on the provisional agenda of the Fiftieth Annual Session.