



INTERNATIONAL CENTRE FOR
TRADE AND SUSTAINABLE
DEVELOPMENT

The IGC negotiations on Traditional Cultural Expressions (TCEs): Issues and Challenges

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The IGC: Traditional Cultural Expressions (TCEs)


- ▶ In 2009, WIPO's Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and TCEs (IGC) was provided a new mandate to “undertake text based negotiations with the aim of “reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of genetic resources, traditional knowledge, and traditional cultural expressions.”
- ▶ To accelerate discussions, Inter-Sessional Working Groups (IWGs) were established to “provide legal and technical advice and analysis” to the IGC.
- ▶ The first IWG was held from 19 to 23 July 2010 to look into TCEs on the basis of a document entitled: ‘Revised Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore’ (WIPO/GRTKF/IC/17/4 Prov.).

Revised Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore

I- Objectives

II- General guiding principles

II- Substantive principles

- 1. subject matter of protection (Article 1)**
 - 2. beneficiaries/management of rights (Articles 2 and 4)**
 - 3. acts of misappropriation/exceptions and
limitations/formalities (Articles 3, 5 and 7);**
 - 4. term of protection/transitional measures (Articles 6 and 9)**
 - 5. sanctions/remedies and exercise of rights (Article 8)**
 - 6. relationship with IP protection and other forms of
protection, preservation and promotion (Article 10)**
 - 7. international and regional protection (Article 11)**
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Subject matter of protection (Article 1)

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

Beneficiaries (Article 2)

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

Option 1: Indigenous Peoples, Local Communities and Cultural Communities

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

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

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

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

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

Scope of protection (Article 3) – (1/3)

Article A

Secret Traditional Cultural Expression

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

Scope of protection (Article 3) – (2/3)

Alternative 1

Article B

Rights Secured for Other Protected TCE

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

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

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

Article C

Attribution, Reputation, and Integrity

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

Scope of protection (Article 3) – (3/3)

Alternative 2

Article B

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

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

Management of rights (4)

1. The management of the rights provided for in Article 3 belongs to the beneficiaries as defined in Article 2, or to a designated competent authority (for example, regional, national, or local) acting at the request, and on behalf, of the beneficiaries. Where authorizations are to be granted by the competent authority:

- a) such authorizations shall/should be granted only after appropriate consultation and with the prior informed consent of the beneficiaries in accordance with their traditional decision-making and governance processes;
- b) any monetary or non-monetary benefits collected by the competent authority for the use of the traditional cultural expressions/expressions of folklore shall/should be provided directly by the competent authority to the beneficiaries concerned or utilized for their benefits.

2. Where so requested by and in consultation with the beneficiaries, the competent authority shall:

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

Exceptions and Limitations (Article 5)

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

Proposed addition:

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

Term of Protection (Article 6) (1/2)

Option 1:

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

Option 2:

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

Option 3:

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

Formalities (Article 7)

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

Sanctions, Remedies and Exercise of rights (Article 8)

[Option 1 – consistency with other instruments]

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

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

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

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

1. Accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies including criminal and civil remedies, should be available in cases of breach of the protection for traditional cultural expressions/expressions of folklore.

2. If a [designated competent authority] is appointed under article 4, it may additionally be tasked with advising and assisting the beneficiaries referred to in article 2 with regard to the enforcement of rights and with instituting remedies provided under this article when appropriate and requested by the beneficiaries.

3. The means of redress for safeguarding the protection granted by this instrument should be governed by the legislation of the country where the protection is claimed.

4. Contracting parties should provide cooperation and assistance to facilitate the implementation of enforcement measures provided under this instrument, particularly where TCEs/EoF are located in the territories of neighboring countries or TCEs/EoF are shared by different countries or by indigenous peoples and communities in several jurisdictions.

Transitional measures (Article 9) (1/3)

Option 1:

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

Option 2:

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

Transitional measures (Article 9) (2/3)

Option 3:

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

Transitional measures (Article 9) (2/3)

Question 1:

Are institutions currently working in good faith?

Question 2:

Have third party rights been legitimately acquired?

Question 3:

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

Question 4:

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

Question 5:

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

Relationship with IP protection (Article 10)

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

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

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

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

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

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

Thank you for your attention

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