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NOTE

From: Presidency

To: Delegations

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Subject: 33rd Session of WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) (Geneva, 27 February - 3 March 2017)
- Final EU/Member States' statements

Delegations will find in Annex, for information, the EU/Member States' statements and oral interventions made at the above mentioned WIPO meeting.

Opening Statement IGC 33

Chair,

The European Union and its Member States are looking forward to the first session on Traditional Cultural Expressions under the IGCs 2016/2017 mandate. We would like to thank you Mr Chair for the work you have undertaken in preparing this meeting and the Secretariat for all the support it has provided.

We believe that this week we should focus our discussions on the core issues, as identified in our mandate, without prejudging the nature of the outcome. The information paper you provided usefully recalls that these core issues are objectives, subject matter, beneficiaries, scope of protection, exceptions and limitations, the relationship with the public domain and the definition of misappropriation. The EU and its MS believe that progress can only be achieved by discussing the objectives of all sides, which will allow us to reach a common understanding of the objectives and the core issues in relation to TCEs.

As it has been nearly 3 years since we last discussed TCEs, we welcome an exchange of views with other delegations about their national experiences on the subject matter. We strongly encourage delegations to engage in such discussion and to steer our decision-making based on facts and best practices.

In order to enable and inform a substantive debate that furthers mutual understanding of the facts and information available, and the solutions sought in WIPO context, the EU and its Member States have submitted a working document which requests the WIPO secretariat to undertake a study of recently adopted legislation and initiatives on TCE in general in the Member States of WIPO. This study should set out, in an objective manner, domestic legislation and its key definitions.

The study should provide concrete examples of subject matter covered, and it should take into account the variety of measures that can be taken. We would like to invite other delegations to study this proposal contained in document GRTKF/IC/33/6, as we would welcome the opportunity to consult with all interested parties and collectively address any concerns they may have.

We would like to note that the content of TCEs may already be protected via copyright and related rights, geographical indications, and trademarks. Much work has already been undertaken at the international level on TCEs, or expressions of folklore, that may be of help. These existing IP systems are readily available for potential beneficiaries. We believe Member States of WIPO should support awareness raising activities, encourage the use of these existing legal frameworks, and improve access to those frameworks. We also welcome discussions on these topics this week.

Thank you.

Interventions in relation to the Consolidated Text, WIPO/GRTKF/IC/33/4

Chair,

Objectives

At the outset, the EU and its Member States believe our TCE discussions need to focus on what it is that is needed and possible within the IP context, taking into account WIPO's mandate and the existing IP framework.

The use of and the possibilities the readily available IP framework contains should be promoted whenever applicable we believe. The EU and its Member States support targeted awareness raising activities and making sure there is access to IP rights such as copyright, trademarks and GIs, which can protect TCEs.

In addition, we would like to note explicitly that TCEs may also be protected via performers and producers related rights, and that the WIPO Performers and Phonograms Treaty as well as the Beijing Treaty on Audiovisual Performances expressly cover expressions of folklore.

As a last general comment, we note that much work has already been undertaken at the international level to safeguard TCEs, or expressions of folklore, under UNESCO instruments.

The EU and its Member States support "encourage creation and innovation" in para 1, sub d. By promoting the readily available IP framework, the creativity and innovation in indigenous and local communities could be encouraged and appropriate use of it by others could be allowed.

We are not in a position to support the language that has been integrated from the Nagoya Protocol, such as 'prior, informed consent', and 'access and benefit sharing', as contained in sub a-c. These terms have been used in a very specific context under that protocol. Further, we do not support references to 'misappropriation' and 'adaptation'.

We are generally supportive of language contained in objectives 3 and 4.

Use of terms

The EU and its Member States believe it is of the utmost importance to really know what we are talking about when it comes to the traditional cultural expressions. We support that a TCE should be 'artistic and literary' as well as 'creative', in order to establish a clear link with IP and WIPOs mandate.

Including a list of examples would not be something we could support. Having said this, it is unclear whether everything mentioned in the list qualifies as 'artistic and literary' and creative. We very much welcome a fact based discussion in this regard, preferably based on national examples.

We would like to make a reservation on the other definitions.

Subject matter (article 1)

The EU and its Member States support 'safeguarding' in the title, and that the eligibility criteria contained in this article are cumulative. Furthermore, it is of the utmost importance to establish eligibility criteria that are based upon the connection between the ILC and the TCE, as described in sub a) and sub b).

In relation to sub c), it is our interest to ensure that TCE which have not been practiced since historical times and have entered into the public domain, are not reclaimed as being the subject matter of 'protection'. The wording 'consecutively' should be clarified.

We support 'creative intellectual activity' in sub e), and suggest to add 'artistic and literary' in sub e), as used in the list of terms.

Beneficiaries (article 2)

The EU and its Member States support that 'indigenous and local communities', who 'create, express, maintain use and develop', are the beneficiary.

We do not support nations/states as a beneficiary, nor any language that potentially opens the instrument to nations/states. As a consequence, we do not support 'or as determined by national law' as included in 2.1 and the alternative, or paragraph 2.2. It is unclear how nations/states fulfil the eligibility criteria contained in article 1.

The EU and its Member States believe that article 2 should solely focus on the beneficiaries. Therefore we believe that paragraphs 2, 3 and 4 would be better placed under administration of interests, namely article 4.

In relation to paragraph 2, we believe that a competent authority, as appropriate, should solely act as a custodian, with the explicit consent of the beneficiaries. That authority should however not have any rights itself.

Likewise we do not support para 2.3. It is not clear how a TCE fulfilling the requirements of this provision can remain within the scope of the instrument, and especially the eligibility criteria in article 1.

Scope (article 3)

The EU and its Member States have a preference for option 2 which gives flexibility to WIPO Members. We believe however that article 3 should not be seen in isolation, as important safeguards are contained in other relevant places, such as exceptions/limitations and the relationship with the public domain.

The EU supports option 2 para 3.2, as it is important to safeguard the public domain. We would not support moving para 3.2 to article 5.

In relation to option 1, we look forward to a discussion on practical examples and national practices on the different levels of diffusion. As the workability in terms of legal and practical effects remains unclear, we are therefore not convinced by the tiered approach as it stands.

As noted before, we cannot accept references to PIC and MAT in this context, which have been integrated from the Nagoya protocol, and its context within TCEs is unclear.

Lastly, we believe that a principle of attribution (sub b ii) should not diminish legal certainty or society at large. At this stage it is unclear at what level attribution would have to be decided, and when and where it should apply. We welcome practical examples based on national experiences.

Exceptions (article 5)

On behalf of the EU and its Member States I would like to make a general comment. The EU and its Member States are supportive of including exceptions and limitations in this instrument, as these are needed to shield artists and creativity in general. In this regard we would like to note that exceptions should not depend on prior informed consent; it would be contrary to the nature of an exception for it to do so, and the exceptions would become wholly impractical for original creators, libraries, museums and cultural institutions.

We might come back with more detailed interventions during the course of the week.

Thank you.

Statement in relation to WIPO/GRTKF/IC/33/5 (US discussion paper)

Chair,

The EU and its Member States would like to thank the delegation of the US for their document which compiles a broad range of examples that may be regarded as traditional cultural expressions, in order to facilitate an informed discussion in the context of reaching a common understanding regarding the treatment of TCEs.

We very much welcome this paper as a tool to enhance the evidence based approach in line with the 2016/2017 mandate, and support a debate anchored in concrete examples and how these relate to the core issues under discussion this week. We hope to continue discussions on this in the informal session.

Thank you.

Statement on EU Study Proposal (WIPO/GRTKF/IC/33/6)

Chair,

The EU and its Member States would like to thank you for giving us the opportunity to introduce our proposal to request the Secretariat to undertake a study of recently adopted national experiences and domestic legislation and initiatives in relation to the safeguarding of TCEs. The study should in particular cover the period of the last 5 – 10 years.

The EU and its Member States firmly believe that the work in the IGC must be guided by solid evidence on the implications and feasibility in social, economic and legal terms.

The study should help to inform our discussions on TCE, following the evidence based approach in compliance with para (d) of the IGC mandate.

It is important to note that the study should build on existing material and other studies already conducted by the Secretariat in relation to TCE, such as information provided via the WIPO Lex portal, which is already readily available; as well as the information provided on the dedicated website on experiences¹ which has recently been launched.

The main focus of the study should be to set out, in an objective manner, domestic legislation and specific regimes for the safeguarding of TCEs. In this regard, the variety of measures that can be taken should be taken into account, as some could be measures based, whilst others could be rights-based.

¹ http://www.wipo.int/tk/en/resources/tk_experiences.html

On one hand, the study should set out recently adopted national IPR regimes such as IP laws, regulations, measures and procedures, and the study should look at a minimum at:

- Are existing IPR regimes - such as copyright, GIs, designs, trademarks and trade secrets - used?
- How have key definitions been defined?
- Is case law available?

On the other hand, other 'alternative' recently adopted IPR or other regimes, laws, measures, and procedures, should be set out in the study. At a minimum, the study should identify and summarize the specific regimes in force in WIPO Member States, and should set out:

- How have the policy objectives been defined?
- How have key definitions such as TCEs/subject matter, "traditional", misappropriation, scope, duration, exceptions and beneficiaries been defined?
- When a tiered approach is included, how have the different levels been defined, and how can they be distinguished from each other?
- How is legal certainty for different stakeholders ensured?
- Is case law and/or administrative practice available?

Taking into account concerns expressed about a delay of the TCE discussions, as well as our aim to stay within the current 2016/2017 mandate, we believe that if the study were agreed, the results of the study should be presented at IGC 34. We would like to stress the importance of the other questions as contained in 33/6. We would welcome if those questions could be addressed as well.

Thank you.

Second statement: On behalf of the EU and its Member States I would like to thank those delegations that expressed an interest in the study. We welcome the possibility to engage in bilateral discussions during the course of the week. We would be interested in the recently adopted initiatives during the last 5 - 10 years.

Intervention on facilitator work in progress

Chair,

On behalf of the EU and its Member States I would like to thank the facilitators for their work.

As a preliminary comment, the EU and its Member States have stated that we support safeguarding in the title of article 1, subject matter. We would kindly ask that safeguarding be reinstated in article 1, as well as elsewhere in the text.

Further, within the eligibility criteria, we would kindly ask that sub e) read 'artistic, literary, and creative intellectual activity'.

We reserve our right to come back in further details on the changes made, and look forward to continuing the discussions on these core issues.

Thank you.

EU comments on Rev 1

On behalf of the EU and its Member States I would like to thank the facilitators for their work.

Principles

We would ask for the reinstatement of the word 'preservation', in addition to the current wording. We reserve our position on the rest of the principles, and may make comments if we were to address the principles in plenary or informal.

Objectives (article 1)

The EU does not support alt 1, and we favour alt 2 as a basis to work from. Alt 3 requires some further reflection; we are looking forward to the informals to hear more about this option.

Specific comments in relation to Alt 2:

Sub a: at this stage we would like to bracket sub a.

Sub c: we would like to include 'to promote' at the start of the sentence, so that it read 'to promote/facilitate'.

Sub d: we would like to add 'to secure' at the start of the sentence, as used in the previous version of the document.

Use of terms (article 2)

The definition of TCE should be aligned with the language in article 3 alt 2(e).

To recall, we do not support that adaptations are covered by the instrument.

We reserve our position on the rest of the terms, as for instance we have concerns in relation to 'use' which now contains a circular definition. The EU and its Member States would like to retain the definition of public domain.

Subject matter and eligibility criteria (article 3)

During plenary and informal we have had discussions in relation to the concept ‘safeguarding’ and the concept of ‘protection’, there was no agreement on this. Therefore we would propose that throughout the document we use consistently the terminology protection/safeguarding, in order to encompass all views expressed.

We support Alt 2 as a basis to work from, and to include eligibility criteria, as it should be clear which TCEs could potentially be covered. In alt 2 sub b), we support cultural and social identity.

Beneficiaries (article 4)

In relation to the title, the EU and its Member States believe that throughout the document we should consistently use the terminology protection/safeguarding.

We do not support nations/states as a beneficiary, nor any language that potentially opens the instrument to nations/states, such as the language contained in alt 2 and 3.

We support that ‘indigenous and local communities’, who ‘create, express, maintain, use and develop’, are the beneficiary, and that these eligibility criteria are included in alt 1.

Lastly, we would like to recall our position in relation to the terminology and therefore request that ‘peoples’ be kept in brackets, for constitutional reasons in the Member States.

Scope (article 5)

Throughout the document we should consistently use the terminology protection/safeguarding.

We support Alt 1, and are interested in exploring the newly inserted Alt3 option 2.

We have concerns in relation to the option proposed in alt 2, which inserts a new concept of exclusive rights for each tier which has not been discussed yet.

The wide range of alternatives and options within this article remind us of the wide range of views currently on the table.

Exceptions and limitations (article 7)

The EU and its Member States support alt 3 as a basis. We are supportive of including specific exceptions and limitations in this instrument, as these are needed to shield artists and creativity in general.

In this regard we would like to note that exceptions should not depend on prior informed consent; it would be contrary to the nature of an exception for it to do so, and the exceptions would become wholly impractical for original creators, libraries, museums and cultural institutions.

Comments on REV 2

On behalf of the EU and its Member States I would like to thank the facilitators for their work.

Principles

We would like to continue the discussions on the principles, and we note in this regard that it is key that the IGC focus on those principles that relate to IP, namely principles 9, 10, 11 and 12, which should not have any brackets we believe.

We also note that we need to continue our discussions on the meaning of the word ‘traditional’ within the context of this instrument. This is the reason why there used to be brackets around traditional, and we would request that ‘traditional’ be bracketed in principle 6.

Policy objectives (article 1)

The EU does not support alt 1, and we favour alt 2 as a basis to work from. We are interested in further exploring alt 3 at the next session.

As we have stated many times before, we would request that the word ‘peoples’ is bracketed throughout the document, for constitutional reasons within the Member States.

Use of terms (article 2)

In relation to the definition of TCE, we have requested that the first line is aligned with the language contained in art 3 alt 2 sub e), which reads ‘creative and literary or artistic’.

The first option of the definition of the public domain should not be bracketed we believe.

We need to continue our discussions on the definition of use, as the current definition is circular.

Therefore we would kindly request to include brackets around the words ‘use’ and ‘using’.

Subject matter and eligibility criteria (article 3)

We are glad to see the wording safeguarding in the title to encompass all views expressed, but believe it should be treated the same as ‘protection’. As a result, either both terms should be in brackets, or both should be without brackets. This should be reflected throughout the document as well as in the title.

The EU and its Member States proposed that the text read cultural and social identity.

We believe we should reinstate the previously used language, which read [unique product] [directly linked] as we believe more discussions about this would be useful.

We support Alt 2 as a basis to work from, and to have the eligibility criteria in article 3.

Beneficiaries (article 4)

The EU and its member States supports alt 1 as a basis.

We have proposed to include ‘create, express, maintain, use and develop’ in alt 1, and we would like to see this language reflected.

We support that only ‘indigenous and local communities’ are the beneficiaries, and note that alt 2 and alt 3 seem to introduce a new concept in this regard, which we clearly need to discuss further in order to understand its scope and implications. For consistency, ‘peoples’ should be bracketed throughout the text in alt 2 and alt 3. We ask to replace the ‘comma’, with ‘and’ in alt 2 and 3.

We do not support any language that opens the possibility for other beneficiaries, such as nations/states.

The comment under art 3 in relation to protection/safeguarding applies here as well.

Scope (article 5)

We support Alt 1. I understand the whole article is within brackets. Therefore we should un-bracket alt 1, as none of the other alternatives are bracketed. We are interested in exploring the newly inserted Alt4 option 2.

Administration (article 6)

We support Alt 2 as a basis, and we would like to focus this option on interests, thus deleting ‘rights’.

Exceptions and limitations (article 7)

The EU and its Member States prefer alt 3, we are however also interested in discussing Alt 2. We are looking forward to the next session to further work on the exceptions.

For consistency reasons, ‘prior informed consent and with the involvement of the beneficiaries’ should also be deleted from the general exception in alt 3.

Non-derogation (article 16)

We would like to make a reservation on new text that has been proposed. As in general the whole text is under discussion and there is no agreement on the nature of the instrument, we ask that brackets be used consistently throughout the text, including around the article titles itself and the options/alternatives therein.

Indicative list outstanding issues

On behalf of the EU and its Member States I would like to thank you for indicative list. We understand your standing practice not to accept any modifications to this list. That being said, for the record, we would like to reiterate that the second policy objective ‘the recognition of rights already acquired by third parties’ should also be understood to cover the securing of IP rights in general as well as encouraging creation and innovation.

Thank you.
