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**INTERGOVERNMENTAL COMMITTEE ON
INTELLECTUAL PROPERTY AND GENETIC RESOURCES,
TRADITIONAL KNOWLEDGE AND FOLKLORE**

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ESTABLISHING EFFECTIVE SYSTEMS FOR THE PROTECTION OF TRADITIONAL
CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE

DRAFT QUESTIONNAIRE

Document prepared by the Secretariat

1. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the Committee) has supported the preparation of a comprehensive 'Practical Guide' on the effective protection of traditional cultural expressions/expressions of folklore (TCEs/EoF), and work on this Guide is underway.
2. In the interim, and in response to various requests from Member States and others for legal-technical assistance (see WIPO/GRTKF/IC/7/11), the draft Questionnaire in the Annex to this document has been prepared as a tool for facilitating and structuring community, national and regional consultations and discussions on the effective protection of TCEs/EoF. It uses the 'Practical Steps' set out in WIPO/GRTKF/IC/6/3 as its main structure, and seeks to guide those who may wish to use the Questionnaire through the range of diverse questions and options relevant to establishing policies and approaches to the protection of TCEs/EoF, as discussed in sessions of the Committee. The Questionnaire is set out in such a way that the questions are on odd numbered pages (right hand) and notes and commentary are on even numbered (left hand) pages.
3. The Questionnaire need not be completed as such and it is not intended that responses to any of the questions necessarily be communicated to any third parties; it is rather intended as a practical tool for domestic and internal use at community, national and regional levels. The eventual Practical Guide would in all likelihood refer to such a Questionnaire and include it as an annex.
4. Should the Committee consider that a Questionnaire such as that set out in the Annex is a useful and practical tool, it could be improved and updated on a continuous basis, particularly to take into account the most recent documents on TCEs/EoF, namely WIPO/GRTKF/IC/7/3 and WIPO/GRTKF/IC/7/4, and comments made on them.
5. *The Committee is invited to take note of and comment on this document and the draft Questionnaire contained in the Annex.*

[Annex follows]

ANNEX

ESTABLISHING EFFECTIVE SYSTEMS FOR THE PROTECTION OF TRADITIONAL
CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE

DRAFT QUESTIONNAIRE

Introduction

1. This draft questionnaire is intended to help facilitate community, national and regional consultations on options for the effective protection, in an intellectual property (IP) sense, of traditional cultural expressions/ expressions of folklore (TCEs/EoF). It is intended for use by policymakers, legislators, legal draftspersons, indigenous peoples and other traditional and cultural communities who are bearers and custodians of TCEs/EoF. There may be no need to complete the questionnaire as such – it could simply be used to structure discussions and consultations at the domestic and local levels. Responses to the questions need not be provided to any third parties.
2. It does not seek to place limits on the parameters of the debate concerning TCEs/EoF protection, nor prescribe any particular outcomes or solutions. The most appropriate options for the protection of TCEs/EoF should eventually be decided upon by the relevant Governmental authorities in consultation with appropriate stakeholders.
3. To enhance its practical usefulness, the document is brief and merely identifies and introduces key issues and questions without discussing them in great detail. For more detailed information, readers are referred to WIPO documents WIPO/GRTKF/IC/3/10, WIPO/GRTKF/IC/5/3, WIPO/GRTKF/IC/6/3, WIPO/GRTKF/IC/7/3, WIPO/GRTKF/IC/7/4 and WIPO/GRTKF/IC/5/INF/3. The WIPO web site also has numerous materials and links of interest (see <http://www.wipo.int/tk/cultural/index.html>). In addition, various studies and materials that could be consulted are listed in a Selected Bibliography annexed to this document. Most of these are available, generally in English, French and Spanish, on this web site.

The terms ‘traditional cultural expressions’/‘expressions of folklore’

4. The terms ‘expressions of folklore’ (EoF) and ‘traditional cultural expressions’ (TCEs) are used interchangeably and as synonyms in this questionnaire. The abbreviations ‘EoF’ and ‘TCEs’ are used to refer to both terms. The term ‘folklore’ is viewed pejoratively in certain cultures, regions and countries. On the other hand, the term ‘expressions of folklore’ has been used in earlier international processes and is used in many national laws.
5. These terms potentially cover an enormous variety of customs, traditions, forms of artistic expression, knowledge, beliefs, products, processes of production and spaces that originate in many communities throughout the world. There are no widely accepted definitions of them, since what is considered ‘expressions of folklore’ or ‘traditional cultural expressions’ depends upon the context and the purpose for which the definition is developed. Ultimately, the choice of an appropriate term and determination of what subject matter it covers is a question for decision at the local and national levels.

'Technical' traditional knowledge and associated genetic resources

6. An important issue related to scope of protection is whether to address only TCEs/EoF or also the protection of technical knowledge systems and know-how, such as medicinal and ecological knowledge (referred to as 'traditional knowledge *stricto sensu*', or 'TK', in WIPO's activities) and associated genetic resources.

7. Many indigenous peoples and other cultural communities regard their TCEs and technical knowledge systems as parts of an inseparable whole, and that they should not be treated separately. On the other hand, TCEs and TK each raise some distinct policy issues, are relevant to different aspects of the IP system and involve different sets of interest groups and stakeholders. There is also more experience with protecting TCEs/EoF at the national and regional levels. As a result, TCEs have generally been accorded a somewhat distinct focus. However, linkages between cultural expressions, technical know-how and genetic resources should be borne in mind, and systems for their protection should be coordinated and complementary. Although this questionnaire focuses more on TCEs, issues related to TK are also raised where relevant.

Sui generis systems

8. Various *sui generis* systems have already been established at national or regional levels for the protection of expressions of folklore/TCEs. These will be used as examples in this questionnaire. They are:

- (i) the Tunis Model Law on Copyright for Developing Countries, 1976 (the Tunis Model Law);
- (ii) the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 (the Model Provisions, 1982);
- (iii) the Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI), as revised in 1999 (the Bangui Agreement);
- (iv) the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge of Panama, 2000 and the related Executive Decree of 2001 (the Panama Law);
- (v) the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002 (the Pacific Regional Model);
- (vi) the Indigenous Peoples Rights Act of 1997 of the Philippines (the Philippines Law); and,
- (vii) the Indian Arts and Crafts Act, 1990 of the United States of America (the U.S.A. Law).

Setting overall directions

9. The range of possible issues, objectives, principles and options for protecting TCEs that policymakers, legislators, communities and others could consider is vast. The protection of TCEs raises a number of complex legal and cultural policy questions, and there are several legal and non-legal tools that could be used, depending upon the objectives and principles that are sought to be achieved.

10. The following is a list of certain practical steps that policymakers, legislators, communities and other stakeholders could follow in order to ‘navigate’ their way through these issues and options and to set overall directions:

(a) Step One: identify cultural expressions for which protection is sought and gather information on the spiritual, social, economic and other values they hold for the communities and groups that regard themselves as their holders and custodians. What subject matter is to be protected? Against which acts is protection sought?

(b) Step Two: determine national developmental goals and the needs of the communities and groups concerned. Are the goals and needs related to IP (or more concerned with other policy goals such as preservation of cultural heritage?). Is the protection aimed at positive or defensive protection, or a combination of the two?

(b) Step Three: identify the policy considerations that may be relevant to framing overall directions (examples: promotion of cultural diversity; stimulation of cultural industries for economic development; preservation of cultural heritage; safeguarding of a vibrant and multicultural public domain: protection of cultural rights; protection of indigenous peoples’ human rights, etc).

(c) Step Four: to the extent that IP is relevant to meeting the desired objectives, identify options available under conventional IP systems, including unfair competition, as well as options for adapted or modified elements of existing IP.

(d) Step Five: analyze options available in non-IP systems relevant to meeting the desired goals, such as cultural heritage, consumer protection and marketing laws, and indigenous and customary laws.

(e) Step Six: determine whether a stand-alone *sui generis* system is necessary, or whether uses that can be made of existing rights and modifications to them, meet the needs identified and strike the right balances. If so, how would a *sui generis* system relate to conventional IP systems particularly in respect of overlapping subject matter?

(f) Step Seven: establish how national systems would interact with each other to provide regional and international protection, through bilateral, regional or international legal frameworks.

(g) Step Eight: identify which practical and operational measures and programs may be necessary to support the ability of communities to make full use of the system established for the protection of expressions of traditional cultures (awareness-raising programs, institution building, training, etc).

The structure of this questionnaire

11. Following roughly the sequence of steps set out above, this questionnaire begins with a series of initial questions aimed at determining overall needs and objectives and gathering information on existing IP and non-IP laws and measures that may be relevant (in other words, following broadly Steps One to Five). This first series of questions, contained in a section headed ‘Determining overall needs and assessing the existing legal framework’, are:

(i) Which cultural expressions should receive protection?

- (ii) What are the objectives of the desired protection?
- (iii) What roles do the cultural expressions play in the society? What attributes and economic and non-economic values for the society do they have? Have the cultural expressions been economically valued?
- (iv) Which IP laws are in force in the country and to what extent do they provide the desired protection? Are there any non-IP laws and measures in force that may be relevant to providing the desired protection?

12. The next series of questions (following roughly Steps Six and Seven) concerns policy and legal issues linked to the establishment, should that be desired, of adaptations to IP rights and of stand-alone *sui generis* systems and measures for the protection of traditional cultural expressions:

- (v) What criteria must the subject matter meet as a condition for its protection?
- (vi) Who owns and exercises the rights?
- (vii) Which rights should vest in the protected cultural expressions?
- (viii) Which exceptions and limitations may be appropriate?
- (ix) How are the rights acquired?
- (x) How are the rights lost or how do they expire?
- (xi) What transitional arrangements are necessary?
- (xii) How could regional and international protection be achieved?

13. Finally, the questionnaire ends with a question concerning an over-arching issue of relevance, referred to in Step Eight, namely practical and operational measures to facilitate the acquisition, exercise and enforcement of rights (whether existing or possible future rights) in traditional cultural expressions:

- (xiii) How are the rights to be administered, effectively used and enforced?

[Questionnaire follows]

QUESTIONNAIRE

Possible responses to some of the questions are indicated to assist persons using this Questionnaire. These possible responses are based upon information provided by States and other stakeholders in previous questionnaires or activities, and are merely intended as a guide. They do not necessarily represent the only possible responses to the questions. In each case, there is space provided for other responses. If none of the possible responses are applicable, please say so and explain why in the space provided.

Additional explanatory and background information is provided in text boxes in order to clarify certain questions or provide examples which illustrate trends and experiences to date at national, regional and international levels.

Note: Responses to this Questionnaire need not necessarily be provided to third parties. The Questionnaire is primarily intended for local and domestic use. In no circumstances should any of the questions be understood as requiring the recordal, documentation and/or public disclosure or dissemination of cultural expressions and/or knowledge and know-how associated with them.

I. DETERMINING OVERALL NEEDS AND ASSESSING THE EXISTING LEGAL FRAMEWORK

Question 1: Description of subject-matter

14. Laws or regulations should identify, as clearly as possible, which TCEs/EoF are protected by them. They could for example identify specific TCEs (e.g., by naming the textile design of a particular community) or they could give illustrative and non-exclusive examples of the kind of TCEs/EoF that are protected. They may, but need not, contain a precise definition of the protected subject matter.

15. Yet, it might be helpful to concentrate on particular expressions of folklore which have actually been appropriated in ways that one would wish to prevent in future. To the extent that there is economic loss through the lack of adequate protection, it may, for example, be helpful to focus on TCEs which have or may have an economic value. Or, it may be preferred to focus on TCEs that have a particular cultural /spiritual value.

Describing ‘traditional cultural expressions’

‘Expressions of’ traditional culture/ ‘expressions of’ folklore may be either intangible, tangible or, most usually, a combination of the two. Culture is in a permanent process of production; it is cumulative and innovative. So, the term ‘traditional’ does not mean ‘old’ but rather that the cultural expressions derive from or are based upon tradition, identify or are associated with an indigenous or traditional people and may be made or practiced in traditional ways. Traditional cultural expressions/expressions of folklore often lack an identifiable creator, having been passed on from generation to generation by imitation or orally, and they often connote cultural and spiritual values and beliefs. Even where an individual has created a tradition-based work, for which he or she may claim copyright or other IP rights, there are often parallel community interests in the work, usually interests recognized by indigenous and customary laws.

Cultural expressions include music, stories, art, handicrafts, musical instruments, words, names and insignia, performances, textile, carpet and jewelry designs, and forms of architecture, to name only a few examples.

Each country and its communities, however, should decide which forms of cultural expressions should be protected and which terms best describe them. See further WIPO/GRTKF/IC/6/3.

Question 2: Objectives of protection**Defensive protection measures**

Specific defensive protection mechanisms may be built into national or regional IP laws: for instance, specific measures to prevent the acquisition of trademark rights over indigenous or traditional symbols have been already adopted by New Zealand, the United States of America and the Andean Community. See further WIPO document WIPO/GRTKF/IC/5/3, par. 161.

16. The way in which a protection system is shaped and defined will depend to a large extent on the objectives it is intended to serve. A key initial step, therefore, of any legal regime or approach for the protection of TCEs/EoF would be to determine relevant policy objectives.
17. At the outset, the needs and expectations of local indigenous peoples and traditional communities would need to be determined and taken into account. The possible objectives below are largely based upon consultations with indigenous peoples, traditional communities and other stakeholders.
18. Indigenous peoples and traditional communities have expressed various objectives concerned with IP protection, such as:
- (i) IP protection to support economic development: some communities wish to claim and exercise IP in their tradition-based creations and innovations to enable them to exploit their creations and innovations commercially as a contribution to their economic development;
 - (ii) IP protection to prevent unwanted use by others: some communities may wish to claim IP in order to be able to actively exercise IP rights that prevent the use and commercialization of their cultural heritage and TCEs by others, including culturally offensive or demeaning use. The uses to be prevented could include use that falsely suggests a connection with a community; derogatory, libelous, defamatory or fallacious use; and use of sacred and secret TCEs;
 - (iii) Prevention of others acquiring IP rights over TCEs: communities are also concerned to prevent others from gaining or maintaining IP over derivations and adaptations of TCEs and representations. This entails the use of defensive mechanisms to block or pre-empt third parties' IP rights that are considered prejudicial to the community's interests, and to the integrity of their cultural heritage and cultural expressions.
19. It is important at the outset to be clear on whether the kind of protection sought is protection of an IP nature (see text box 'The meaning of "intellectual property protection"').

Question 2: Objectives of protection

What are the general objectives of the protection?

- Wealth creation, trading opportunities and sustainable economic development
- Promotion of certainty in economic relations between communities and private sector
- Preservation and promotion of traditional cultures and folklore
- Promotion of respect for traditional cultures and the communities that preserve them
- Making EoF/TCEs available to the public
- Stimulation of creativity and investment
- Protection of the authenticity of Eof/TCEs
- Promotion of cultural diversity
- Other (please specify)

What are the IP objectives of the protection?

- Positive IP-type rights in EoF/TCEs to support economic development
- Positive IP-type rights in EoF/TCEs to prevent unwanted use by others
- Prevention of others acquiring IP rights over EoF/TCEs (defensive protection)
- Other (please specify)

Question 3: *The nature of the cultural expressions and the roles they play in the society*

The meaning of ‘intellectual property protection’

Most forms of IP, such as copyright, related rights, patents and industrial designs, establish private property rights in creations and innovations in order to grant control over their commercial exploitation and to provide incentives for the further creation and dissemination of the products of human creativity. IP protection must be distinguished from the concepts of “preservation” and “safeguarding” in the context of cultural heritage, which refers to the identification, documentation, transmission, revitalization and promotion of tangible or intangible cultural heritage in order to ensure its maintenance and viability. In some cases, the needs and expectations of cultural communities and creators might be addressed more appropriately by measures for the preservation and safeguarding of traditions and ways of life rather than IP protection. See further WIPO/GRTKF/IC/5/3, paras. 15 to 19.

20. Knowing about the roles that cultural expressions play in a given society or community can help to identify what forms of protection may be the most appropriate. For example, in the case of cultural expressions that have primarily a religious or spiritual value or function, ‘defensive’ protection against derogatory and spiritually offensive uses may be the most important. On the other hand, expressions that have largely a commercial value may require different forms of protection, designed to facilitate their commercialization and prevent their appropriation by free-riding competitors.

Question 4: Assessing the Existing Legal Framework

21. Existing IP systems already protect some TCEs. For example, contemporary adaptations and interpretations of indigenous and traditional literary and artistic productions are generally protected by current copyright law, while contemporary tradition-based designs have been protected as industrial designs in several countries. Performances of expressions of folklore are protected internationally under the WIPO Phonograms and Performances Treaty, 1996. Trademarks and unfair competition laws have also been used to combat misleading marketing of non-authentic arts and crafts.

22. It is unlikely that any single ‘one-size-fits-all’ solution will be found to protect TCEs in a comprehensive manner. Instead, effective protection may be found in a ‘menu’ of differentiated and multiple levels and forms of protection, which may, but need not necessarily, rely upon vesting property rights in the protected subject matter. To the extent property rights are useful, remedies might include drawing upon existing IP laws and/or adapted or enhanced IP laws and/or stand-alone *sui generis* systems. Unfair competition and non-IP remedies, such as trade practices laws, cultural heritage preservation laws and programs, indigenous and customary laws, contracts, the use of registers, inventories and databases, rights of publicity, the protection of confidential information and the law of unjust enrichment, may also have valuable roles to play.

23. Thus, tools for meeting desired objectives and implementing relevant principles may include:

- (i) Property rights: use of existing IP laws; adaptations or enhancements to IP laws; and/or new stand-alone IP-like systems;
- (ii) Unfair competition;
- (iii) Trade practices and marketing laws;
- (iv) Contracts (for example, ‘benefit-sharing’ agreements);
- (v) Registers, inventories and databases;
- (vi) Customary and indigenous laws and protocols;
- (vii) Cultural heritage preservation and safeguarding laws and programs;
- (viii) Other rights, such as the protection of confidential information, rights of publicity, blasphemy, criminal law and unjust enrichment.

II. POLICY AND LEGAL ISSUES RELATED TO ADAPTED IP RIGHTS AND *SUI GENERIS* SYSTEMS

24. Previous discussions have identified a series of issues, in addition to the above questions, that policymakers would need to address if they wish to provide protection for TCEs beyond that already provided for by current IP systems, whether they wished to do so by developing *sui generis* adaptations to IP rights or by establishing new, stand-alone *sui generis* systems:

- (i) Criteria the subject matter must meet as a condition for its protection;
- (ii) Holders of the rights and the management of rights;
- (iii) Rights conferred, and exceptions and limitations;
- (iv) Procedures and formalities, if any, for the acquisition and maintenance of the rights conferred;
- (v) How rights are lost and expire;
- (vi) Transitional arrangements;
- (vii) Enforcing rights internationally.

25. These issues provide the basis for the questions in this section.

Question 5: Criteria for protection

26. It may be necessary to clarify that even if some TCEs fit within the general description of TCEs as discussed above, only those TCEs meeting certain qualities or criteria would receive protection.

27. **Originality requirement.** Under copyright law, contemporary, tradition-based literary and artistic productions are often sufficiently 'original' to be protected. Such contemporary productions may include new interpretations, arrangements, adaptations or collections of pre-existing cultural expressions, or even their 're-packaging' in the form of digital enhancement, colorization and the like.

28. A key policy question is whether or not to protect underlying expressions of folklore *stricto sensu*, and mere recreations and imitations thereof, which are presently regarded as 'public domain'. In so far as criteria for protection go, this seems to turn on whether or not a form of 'originality' is required, and/or how it would be interpreted.

29. Generally, existing *sui generis* systems are not conceived as part of copyright and they do not require originality. For example, the Model Provisions, 1982 make no reference to an originality requirement; consequently, nor do many of the national copyright laws which have implemented them. Similarly, the law of Panama makes no reference to an originality requirement, and nor does the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture developed by Pacific Island countries.

30. **Fixation.** It is often suggested that oral traditional literary and artistic productions are not and cannot be protected because they are not fixed. Fixation is not a necessary element of copyright law, and States are free to provide that works in general or EoF/TCEs in particular do not need to be fixed in some material form in order to be protected.

31. This has been done – for example, the Tunis Model Law, 1976 rules out any possibility of demanding fixation for a work of folklore. The drafters felt that works of folklore are often by their very nature in oral form and never recorded, and to demand that they be fixed in order to enjoy protection puts any such protection in jeopardy and even, according to the commentary to the Model Law, risks giving the copyright to those who fix them. Fixation is not a requirement of the 1982 Model Provisions, the Law of Panama, the Bangui Agreement nor the South Pacific Model Law.

32. **Capable of commercial use.** One existing *sui generis* system has provided that protected TCEs must amongst other things be 'capable of commercial use'.

33. **'Traditional'.** Several *sui generis* systems provide that the protected subject matter must be or based upon 'tradition' or 'traditional' (meaning in one case that the TCE must have been created for traditional purposes, be inter-generational, pertain to a particular group and be collectively held).

34. A related important issue is whether or not the registration and/or recording and documentation of TCEs should be a condition for their protection. See question 7 below.

Question 5: Criteria for protection

What criteria must the subject matter meet as a condition for its protection?

'Originality'

Fixation

Capable of commercial use

'Traditional'

Other (please specify)

Question 6: Owner of Rights

35. Several States have emphasized that as TCEs/EoF are generally regarded as collectively originated and held, rights in them should vest in communities rather than individuals.

36. Communal or collective copyright could, for example, be the subject of a specific *sui generis* provision within copyright legislation. Australia is, for example, studying the possibility of granting communities the right to exercise moral rights to protect against inappropriate, derogatory or culturally insensitive use of copyright material. Collective rights could also be provided for in stand-alone *sui generis* legislation. For example:

- (i) the Indigenous People's Rights Act, 1997 of the Philippines provides rights for 'indigenous cultural communities/indigenous peoples';
- (ii) the Panama Law, 2000 provides for the protection of the 'collective rights of the indigenous communities,' and applications for registration of these rights shall be made by 'the respective general congresses or indigenous traditional authorities';
- (iii) the Pacific Regional Model Law, 2002 vests 'traditional cultural rights' in 'traditional owners', defined as the group, clan or community of people, or an individual who is recognized by a group, clan or community of people as the individual, in whom the custody or protection of the expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community. These rights are in addition to and do not affect any IP that may subsist in the expressions of culture.

37. However, most national laws which currently provide *sui generis* protection for TCEs, and which were based on the Model Provisions, 1982 and the Tunis Model Law, 1976, vest rights in the State or a statutory body. In most of these cases, proceeds from the granting of such rights are applied towards national heritage, social welfare and culture-related programs.

38. States have also noted that individuals develop and create EoF/TCEs and that rights they have under copyright and other IP rights should be recognized. It is argued by some that recognizing such rights is essential to encouraging and promoting tradition-based creativity.

(a) The question arises, however, whether individuals, particularly those not connected with the traditions and cultural materials they adapted or were inspired by, should be regulated in some way in the manner in which they use their derivative works.

(b) The Model Provisions, 1982, the Tunis Model Law, 1976, the Bangui Agreement, as revised in 1999 and other *sui generis* systems and national laws generally contain no such restrictions. The Model Provisions, 1982, for example, contain no rights of adaptation and a wide 'borrowing exception'. A possible approach, found in the Regional Framework developed for Pacific Island countries, is to place upon external creators certain obligations towards the relevant community (such as to acknowledge the community and/or share benefits from exploitation of the copyright and/or respect some form of moral rights in the underlying traditions used). This approach fills the 'gap' in the Model Provisions, 1982 in respect of adaptation of folklore and the creation of derivative works.

Question 6: Owner of Rights

Who owns and/or exercises the rights?

The country/State as a whole

Indigenous or other local communities

Individual creators (artists, composers, performers, craftmakers etc)

Other (please specify)

In cases where individual creators are recognized as rightsholders in tradition-based creativity:

No obligations to source community

Obligations to source community

Other (please specify)

Question 6: *Owner of Rights* [continued]

39. In some cases, two or more communities in one country may hold potentially overlapping rights in the same or very similar TCEs. How would competing claims to rights in the same or similar TCEs be dealt with? In this regard, lawmakers could establish co-ownership of rights or they can leave it to the communities separately to apply for (assuming some form of application is necessary, see below) and hold rights in the same or similar TCEs. A possible solution to this issue is to vest the rights in the State or statutory body.

Question 6: *Owner of Rights* [continued]

In cases where more than one community in a country may claim the same TCEs:

- Co-ownership of rights
- Independent ownership of rights in same TCE
- Vest rights in Governmental authority
- Other (please specify)

WIPO-UNESCO Model Provisions for National Laws, 1982

In 1982, Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (the Model Provisions, 1982) were adopted under the auspices of WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO). They establish two main categories of acts against which TCEs are protected, namely 'illicit exploitation' and 'other prejudicial actions'. The Model Provisions have influenced the national laws of many countries. Several States and other stakeholders have suggested that the Model Provisions require improvement and updating.

In 2001, WIPO issued a questionnaire on experiences with implementing the Model Provisions. 66 responses were received to the questionnaire (available at <http://www.wipo.int/tk/en/questionnaires/ic-2-7/index.html>). A full report summarizing and analyzing the responses is also available (WIPO/GRTKF/IC/3/10).

Question 7: Rights

40. Previous activities of WIPO have provided information on several examples of the kinds of appropriations of cultural expressions that Indigenous and local communities and other custodians and holders wish protection against, such as:

- (i) unauthorized adaptation, reproduction and subsequent commercialization of traditional cultural expressions, with no sharing of economic benefits;
- (ii) use of traditional cultural expressions in ways that are insulting, degrading and/or culturally offensive;
- (iii) appropriation of the reputation or distinctive character of traditional cultural expressions in ways that evoke an authentic traditional product, by use of misleading or false indications as to authenticity or origin, or adoption of their methods of manufacture and “style”; and,
- (iv) failure to acknowledge the source of a tradition-based creation or innovation.

41. These concerns demonstrate that the protection of TCEs may refer to protection of (i) the expressions themselves; and/or (ii) the reputation or distinctive character associated with them; and/or (iii) their method of manufacture (in the case of handicrafts, for example). All branches and forms of IP are therefore relevant, whether copyright, related rights, trademarks, industrial designs, patents or unfair competition, for the protection of traditional cultural expressions.

42. A number of the legal and cultural policy challenges raised by the protection of TCEs pivot perhaps on the adaptation right in copyright, because TCEs are seldom reproduced, they serve rather as a source of adaptation or inspiration. Does one grant an exclusive adaptation right in TCEs? The Model Provisions, 1982 do not and contain a wide ‘borrowing’ exception. On the other hand, a Regional Framework developed for South Pacific Island countries deals with this issue differently (see text box ‘Trends and Experiences I’).

Question 7: Rights

What rights should vest in the protected cultural expressions?

Nature of rights

Exclusive rights

Rights to remuneration (compulsory licenses)

Other (please specify)

Traditional literary and artistic works

Reproduction

Public performance

Distribution

Adaptation

Public recitation

Communication to the public

Importation

Moral rights (to claim authorship and to integrity of work)

Rights to assign and license

Question 7: Rights [continued]

Trends and experiences I

The Indian Arts and Crafts Act, 1990 (the IACA) of the U.S.A. protects Native American artisans by assuring them the authenticity of Indian artifacts under the authority of an Indian Arts and Crafts Board. The IACA, a “truth-in-marketing” law, prevents the marketing of products as “Indian made” when the products are not made by Indians as they are defined by the Act.

Question 7: Rights [continued]

Other (please specify)

Handicrafts

Unauthorized use (making, using, offering for sale, selling or importing)

Unauthorized use of traditional process for making handicraft

Other (please specify)

Traditional words, names, symbols and distinctive signs

Prevention of their registration as trademarks

Other (please specify)

Question 7: Rights [continued]

General

Acknowledgement of source

Prevention of insulting, derogatory and culturally/spiritually
offensive uses

Prevention of false or misleading claims to authenticity and origin

Prevention of imitation of 'style'

Other (please specify)

Question 8: *Exceptions and Limitations*

43. Exceptions and limitations are also important. In so far as traditional literary and artistic works go, copyright-style exceptions and limitations may well be appropriate. In recognizing artistic freedom and cultural borrowings that have gone on since time immemorial and which enrich cultural diversity, copyright supports the idea that new artists build upon the works of others and it rewards improvisation and adaptation.

44. On the other hand, it is argued by some that some copyright-style exceptions are not suitable for indigenous and traditional productions, such as the exception relating to works permanently displayed in public that may be reproduced without consent.

45. Existing *sui generis* systems have created other exceptions too. For example, customary and traditional uses are normally unaffected by the new protection. Some specifically exempt from their provisions folkloric dance groups and small non-indigenous artisans in certain cases.

Question 8: *Exceptions and Limitations*

Which exceptions and limitations may be appropriate?

- Customary/traditional uses
- Educational uses
- Criticism or review, reporting news or current events, uses in judicial proceedings
- Incidental uses
- Uses by way of illustration
- 'Borrowing' for creation of an original work
- Non-commercial uses
- Uses by folkloric dance groups
- Uses by non-indigenous/non-traditional artisans
- Uses by public entities
- Uses by nationals (as opposed to non-nationals)

Question 9:

Acquisition of Rights (procedures and formalities, if any, for the acquisition and maintenance of the rights conferred)

Trends and experiences II

Under the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002, 'traditional owners' have the right to authorize or prevent, amongst others, the adaptation, transformation and modification of the protected TCEs. An external user must receive consent to make new derivative works (works made based upon a TCE). Any IP rights vesting in derivative works vest in the work's author. However, if the work is used for commercial purposes, the rightsholder must share benefits with the traditional owners, acknowledge the source of the TCE and respect moral rights in the TCE.

For a copy of the Regional Framework and other information on it, see WIPO/GRTKF/IC/4/INF 2.

46. One option could be a total lack of formalities. Here protection would be available as of the moment that the TCE in question was created, as is the approach in copyright.

47. A second option is to require some form of registration. In this case, the application could be subject to formal or substantive examination. A registration system may merely have declaratory effect, in which case proof of registration would be used to substantiate a claim of ownership, or it may constitute rights. The choice depends to upon the kind of expression of folklore being addressed. A lack of formalities might be more appropriate for literary and artistic productions, following copyright principles, that for handicrafts or distinctive signs, following industrial property principles.

Question 9:

Acquisition of Rights (procedures and formalities, if any, for the acquisition and maintenance of the rights conferred)

How are the rights acquired?

No formalities – automatic protection

Registration

Question 9: [continued]*Recording and documentation of cultural expressions*

48. Several States have called for the documentation of expressions of folklore and the establishment of inventories, databases and lists. In some cases, it seems that these calls are made mainly within the context of programs for the preservation of folklore and cultural heritage. The documentation issue relates in some ways to the fixation requirement in copyright law (see discussion above) and the question of whether registration should be required for protection (see discussion above).

49. Cultural heritage programs at the international, regional and national levels frequently establish registers, lists and inventories of intangible and tangible cultural heritage as useful tools for identification, promotion and safeguarding. For example, Brazil has established a Registry of Intangible Heritage and the newly adopted International Convention on the Safeguarding of the Intangible Cultural Heritage of UNESCO envisages the establishment of national and international inventories and lists.

50. However, it is not clear to what extent the documentation of TCEs, and the establishment of registries, lists and inventories, could play a role in relation to the IP protection of the TCEs.

51. As previously noted, expressions of folklore are often intangible and orally maintained. This is one of the reasons why the fixation requirement for copyright protection is criticized, and why most *sui generis* systems do not require fixation. Expressions of traditional cultures are also 'living', constantly being adapted and recreated. Requiring some form of prior documentation and/or registration seems to stand in contradiction to the oral, intangible and 'living' nature of many expressions of traditional cultures.

52. The copyright system, whose principles and forms of protection are most closely relevant to EoF/TCEs, does not permit the imposition of any formalities and protection is automatic upon the creation of a work. There is no prior examination, as is the case in industrial property. Thus, reasons there may be for the documentation of technical TK in order to defeat claims of novelty and inventive step for patent examination purposes, are not applicable to cultural/copyright materials.

53. As noted earlier in this document, earlier drafts of the Model Provisions, 1982 provided for a registration system for folklore, but this was later deleted because it was felt that registration/documentation was more relevant to preservation than IP protection. The Tunis Model Law, 1976 rules out any possibility of demanding fixation for a work of folklore. The drafters felt that works of folklore are often by their very nature in oral form and never recorded, and to demand that they be fixed in order to enjoy protection puts any such protection in jeopardy and even, according to the commentary to the Model Law, risks giving the copyright to those who fix them. Fixation is not a requirement of the 1982 Model Provisions, the Law of Panama (although it has a registration requirement, a distinct issue), the Bangui Agreement nor the South Pacific Model Law.

54. Apart from the huge costs involved in documenting and recording TCEs, the copyright that may vest in the documentation and recordings may (i) not vest in the communities themselves (unless they are the authors or have taken assignment of the rights) and (ii) in any event extends only to the ways in which the TCEs are expressed and not to the values,

meanings and other 'ideas' connoted by the TCEs. Documentation and recordal, on the other hand, and particularly if it is made available in digitized form, makes the TCEs more accessible and available and may undermine the efforts of communities to protect them.

55. Documentation does of course play an important role in strategies for the safeguarding of cultural heritage and traditional cultures, and it could be explored further how existing cultural heritage inventories and lists could be used for IP purposes, such as to identify traditional owners and applicable customary laws.

56. There are in addition some other areas worth pursuing that may enhance the value of documentation/recordal of TCEs as a strategy for positive protection, namely the use of software and digital rights management tools and the evolving the protection available for collections and databases.

Question 9: [continued]

Recording and documentation of cultural expressions

What needs, objectives or strategies would documentation meet or advance?

- Preservation of cultural heritage
- Promotion of public access to cultural heritage
- Educational purposes
- Obtain information on cultural expressions (list, inventory)
- Defensive IP protection (e.g., a register of sacred expressions)
- Other (please specify)

Question 10: Term of Protection

Trends and experiences III

The Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge of Panama, 2000 establishes a registration system for TCEs. A special office has been created within the country's IP office to approve the applications and maintain the register. The procedure before the IP office will not require the services of a lawyer and there are no application fees.

For a copy of the law and other information on it, see WIPO/GRTKF/IC/4/INF 4 (Spanish).

57. One of the concerns often expressed by Indigenous and other cultural communities is that the time limits of copyright and some other forms of IP are inappropriate for TCEs. One option, therefore, is to provide for indefinite protection.

58. On the other hand, protection could be limited to the life span of the relevant source community, in place of being linked to the life of an 'author'. There could alternatively be a trademark-like emphasis on continuing use or a requirement that the source community continue to derive benefit from the TCE – once the TCE has become obsolete or no longer meets the criteria established in the law, such as that it identifies a community, its protection expires. Another consideration is whether or not to provide for renewal of the protection after a certain length of time has passed (as with trademarks).

Trends and experiences IV

Not all TCEs necessarily require the same level and kind of protection. In fact, some should perhaps not be protected at all, as they should remain a source of cultural exchange and inspiration to the public at large. In some cases, the community may wish only to protect the "authenticity" of their genuine cultural products. In this case, trademarks, especially certification marks, can play an important role, as can unfair competition law. Certification marks have been registered by Indigenous peoples in Australia and New Zealand to safeguard the authenticity and quality of genuine Indigenous-made products. See further WIPO document WIPO/GRTKF/IC/5/3, paras. 164 to 170.

Question 10: Term of Protection

How are the rights lost or how do they expire?

Protection limited in time

Indefinite protection

Protection linked to life of community or culture that the expressions of folklore identifies

Other (please specify)

Question 11: Transitional Provisions

59. Each country which adopts a law or regulation for the protection of TCEs would need to enact rules dealing with their utilizations but lawfully commenced before their entry into force.

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

Question 11: Transitional Provisions

What transitional arrangements are necessary?

Retroactivity

Non-retroactivity

Grace period (intermediate solution)

Other (please specify)

Question 12: *International Protection*

61. Many States, communities and others have stressed the importance of establishing an international system of protection for TCEs.

62. Currently, Article 15.4 of the Berne Convention for the Protection of Literary and Artistic Works, 1971 provides a mechanism for the international protection of unpublished and anonymous works. As already mentioned, the WIPO Performances and Phonograms Treaty, 1996 includes performances of ‘expressions of folklore’ as protected performances.

63. A national law may protect TCEs emanating from another country by either providing for reciprocity or on the basis of international treaties, especially national treatment. The question of the protection of the same or similar cultural expressions from neighboring countries (so-called “regional folklore”) is relevant here.

64. Discussions are continuing in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore on the desirability of establishing an international system in this regard, and, if so, what form it could take. See further document WIPO/GRTKF/IC/6/6.

Question 12: *International Protection*

III. ADMINISTRATION AND EFFECTIVE USE OF RIGHTS

Question 13

65. Effective and cost-efficient systems are needed to administer and enforce any law. One of the difficulties countries have found in establishing systems for the protection of TCEs is their effective implementation. The Model Provisions, 1982 propose the creation of a 'competent authority' and/or a 'supervisory authority' to perform certain tasks. There may be a role for existing or new copyright collective management societies. Or, a specific role for a government agency to monitor and pursue infringements may be desirable.

66. In 2001, the WIPO Secretariat issued a wide-ranging questionnaire to gauge practical experiences with the implementation of existing systems for the protection of TCEs. 66 States replied and the results of the questionnaire and all responses received have been published.¹

67. The responses to the questionnaire found, amongst other things, that when it comes to implementation, even in those countries which provide specific legal protection for TCEs, it appears that there are few countries in which such provisions are actively utilized or effective in practice. There appears to be little practical experience with the implementation of existing systems and measures which countries have established in law. States cited a variety of legal, conceptual, infrastructural and other operational difficulties they experience in implementing workable and effective legislative provisions at the national level. States have requested enhanced legal-technical cooperation in this respect.

68. Various proposals have been made for improving the effective implementation of protection for TCEs. These have included:

- (a) Awareness-raising and training programs for Governmental officials and the public, especially communities;
- (b) Reduced registration and renewal fees (industrial property rights);
- (c) National and local consultations;
- (d) Establishment of national focal points;
- (e) Creation of operational links between IP offices and cultural heritage institutions, museums and archives;
- (f) Use of alternative dispute resolution (ADR).

¹ See WIPO/GRTKF/IC/3/10.

Question 13

How to administer and enforce the rights?

Establishment of Governmental authority

Use of existing authorities and collective management societies

Other (please specify)

[Selected bibliography follows]

Selected Bibliography

Ficsor, M., “Attempts to Provide International Protection for Folklore by Intellectual Property Rights”, paper presented at the WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, Thailand, April 8 to 10, 1997

Janke, T., Minding Culture – Case Studies on Intellectual Property and Traditional Cultural Expressions, prepared for WIPO

Kutty, P. V., National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines”, prepared for WIPO

WIPO-UNESCO World Forum on the Protection of Folklore, Phuket Thailand, (WIPO Publication Number 758 (E/F/S))

WIPO, “Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions (1998-1999)”, WIPO Publication 768E/F/S

Resolutions/Recommendations of WIPO-UNESCO Regional Folklore Consultations, 1999 – WIPO UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1; WIPO UNESCO/FOLK/ARAB /99/1; WIPO-UNESCO/FOLK/LAC/99/1

Group of Countries of Latin America and the Caribbean “Traditional Knowledge and the Need to Give it Adequate Intellectual Property Protection” (WIPO/GRTKF/IC/1/5)

European Community and its Member States “Expressions of Folklore” (WIPO/GRTKF/IC/3/11)

China “Current Status on the Protection and Legislation of National Folklore in China” (WIPO/GRTKF/IC/3/14)

WIPO Secretariat “Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore” (WIPO/GRTKF/IC/2/7)

WIPO Secretariat “Final Report on National Experiences with the Legal Protection of Expressions of Folklore” (WIPO/GRTKF/IC/3/10)

WIPO Secretariat “Presentations on National and Regional Experiences with Specific Legislation for the legal Protection of Traditional Cultural Expressions (WIPO/GRTKF/IC/4/INF 2 to 5Add)

WIPO Secretariat “Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions” (WIPO/GRTKF/IC/5/3)

WIPO Secretariat “Comparative Summary of *Sui Generis* Legislation for the Protection of Traditional Cultural Expressions” (WIPO/GRTKF/IC/5/INF 3)

WIPO Secretariat “Update on Technical Cooperation on the Legal Protection of Traditional Cultural Expressions” (WIPO/GRTKF/IC/5/4)

WIPO Secretariat, “Traditional Cultural Expressions/Expressions of Folklore: Legal and Policy Options” (WIPO/GRTKF/IC/6/3).

[End of Annex and of document]