

APPENDIX II





WIPO FACT-FINDING CONSULTATIONS WITH TK HOLDERS:
RESPONDING TO THE NEEDS AND EXPECTATIONS IDENTIFIED







WIPO's program on traditional knowledge, genetic resources and folklore has been shaped from the beginning by direct input from the communities that hold and maintain TK and TCEs. The first step in the program was to undertake consultations with TK holders, in some 60 locations around the world. More than 3000 dialogue partners contributed to this first phase of WIPO's current program in this area. These dialogues culminated in a landmark publication, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge*, (WIPO 2001), which was published after an open peer-review process. Its publication immediately preceded the launch of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC), and its contents guided much of the development of the IGC's work. Fact-finding consultations have continued since then, disclosing a similar general pattern of needs and expectations in other regions.







The report summarized twenty-one key needs and expectations that were widely expressed by WIPO's dialogue partners in these extensive consultations. This checklist reviews the work done since then to deliver on those needs and expectations. Much of this work is still in progress, in various draft forms, and much of it is open-ended in nature, but this checklist aims to identify the interim outcomes and ongoing activities that respond to the needs and expectations expressed by TK holders. All these needs and expectations have been addressed to some extent, in some cases as part of general capacity-building exercises, but this checklist usefully identifies several of those needs and expectations for which only limited direct work has been done, possibly pointing the way to further, focused programs undertaken directly to support the needs and expectations of indigenous and local communities. Similar needs and expectations continue to be expressed by such communities, including in sessions of the IGC, suggesting that this checklist remains a relevant guide to future work. One immediate response to the first item on the checklist was to clarify the terms in use: this has led to a clearer understanding of the distinct terms 'traditional knowledge' and 'traditional cultural expressions' (or 'expressions of folklore'), and both terms are used in this checklist.

Key to status: : needs substantially addressed in the sense that some products are in a finished form and processes concluded, laying basis for ongoing practical application, consultation and further development # : needs substantially if partially addressed to the extent that materials are under development and interim outcomes recorded ►►: directly relevant program activities and consultations continue ■: limited direct work done, but needs partially addressed through related program activities.

Needs and expectations articulated by TK holders	Status	Some relevant outcomes and activities
1. The selection of an appropriate term or terms to describe the subject matter for which protection is sought.	☑	<ul style="list-style-type: none"> – Analysis of terms and their implications – Clarifying the scope of ‘traditional knowledge’ as a general label and as a specific term – Establishing ‘traditional cultural expressions’ as neutral synonym for expression of folklore
2. A clear definition or description of what is meant (and not meant) for IP purposes by the term or terms selected.	☑	<ul style="list-style-type: none"> – Creating working definitions of both TCEs/EoF and TK – Draft definition of sets of TCEs and TK that should be eligible for protection – Description and analysis of the character of TK and TCEs, and the distinction between them
3. The adjustment of expectations through effective awareness-raising as to the role and nature of IP protection in relation to TK.	# ▶▶	<ul style="list-style-type: none"> – Case studies on use of IP in protection of TCEs – Case studies on use of IP in benefit sharing relating to TK and GR – Surveys on the use of existing IP to protect TK and TCEs/folklore – Surveys of national patent mechanisms to disclose material relevant to GR/TK
4. The prevention of the unauthorized acquisition of IPRs (particularly patents) over TK by documenting and publishing TK as searchable prior art, where so desired by the relevant TK holders.	# ▶▶	<ul style="list-style-type: none"> – Revision of the International Patent Classification more fully to recognize TK – On-line portal for access to TK for reference in patent procedures – Revision of PCT minimum documentation to incorporate TK publications – Draft guidelines for examination of TK-related patent applications – Inventory of TK-related publications – Two CBD-commissioned studies on patent disclosure mechanisms relating to TK and genetic resources

<p>5. An analysis of how prior art is established for purposes of patent examinations in the context of TK.</p>	<p> ▶▶</p>	<ul style="list-style-type: none"> – Survey of national laws and office practices regarding TK as prior art – Draft examination guidelines based on the survey
<p>6. Greater awareness-raising on the IP system, particularly among sectors of society and communities unfamiliar with it, such as indigenous and local communities and governmental offices not directly involved in IP law and administration.</p>	<p># ▶▶</p>	<ul style="list-style-type: none"> – Draft toolkit for dealing with IP aspects of TK documentation – Draft practical handbook for the protection of TCEs/EoF – Draft IP guidelines and resources for the digitization and dissemination of TCEs through Creative Heritage Project – Case studies, explanatory brochures, media publications – Seminars, workshops, training courses for diverse groups
<p>7. Greater understanding by the IP community of the perspectives, expectations and needs of TK holders.</p>	<p> ▶▶</p>	<ul style="list-style-type: none"> – Indigenous panel opens each session of the IGC – Voluntary fund to support Indigenous and local participation – Other initiatives include fast-track accreditation, a dedicated website, direct input to working documents, coordination with UN Permanent Forum, and engagement of indigenous experts provide case studies and participate in regional and national workshops.
<p>8. Facilitation of dialogue and contact between TK holders, the private sector, governments, NGOs and other stakeholders to assist in development of modalities for cooperation between them, at community, national, regional and international levels.</p>	<p> ▶▶</p>	<ul style="list-style-type: none"> – WIPO convenes and co-organizes numerous forums, workshops, seminars and other forms of dialogue engaging wide range of stakeholders – Contribution to conferences convened for policymakers, indigenous representatives, academic community, cultural institutions, – Cooperation and collaboration with other international and regional agencies
<p>9. Enhanced participation by the national and regional IP offices and the IP community at large in TK-related processes in which IP issues are raised.</p>	<p> ▶▶</p>	<ul style="list-style-type: none"> – The IGC has catalyzed greater participation and coordination between the IP community and TK-related policy processes – National expert missions at the request of Member States facilitate greater dialogue and coordination between IP offices and TK-related policy actors

<p>10. Study of the relationship between collectivity of TK and IPRs, more particularly testing of options for the collective acquisition, management and enforcement of IPRs by TK holders' associations, including the applicability of collective management of IPRs to TK.</p>	<p> </p>	<ul style="list-style-type: none"> – Case studies address this question – IGC analyses, reports and surveys address this question in relation to both TK and TCEs – Draft provisions set out possible mechanisms for defining, acquiring, managing and enforcing collective or community-held rights – Analysis of policy options and legal mechanisms clarify the options pursued in many national laws – Complementary work on alternative dispute resolution as a means of enforcing collective rights and interests
<p>11. Study of customary laws and protocols in local and traditional communities, including conclusions relevant for the formal IP system.</p>	<p> </p>	<ul style="list-style-type: none"> – Draft provisions (objectives and principles) clarify how customary laws and protocols may be used in defining TK/TCEs, establishing ownership/custodianship and ensuing rights and entitlements of and within communities, determining appropriate prior informed consent and benefit sharing arrangements, and determining remedies and consultative processes. – Draft issues paper developed and revised after consultations to serve as the nucleus of a study process – Further studies commissioned as part of a broad study process, in cooperation with other concerned processes such as the UN Permanent Forum
<p>12. In the shorter term, testing the applicability and use of existing IP tools for TK protection, through practical and technical community-level pilot projects and case studies; and, provision of technical information and training to TK holders and Government officials on possible options under the existing categories of IP for TK protection</p>	<p> </p>	<ul style="list-style-type: none"> – This need addressed through many training courses and awareness raising exercises, including consultative development of case studies and practical materials, toolkits, practical guides and a pilot distance learning course – At the request of Member States, numerous activities to provide expert advice, capacity building exercises and training. – Documentation of case studies and practical options based on diverse experience in many countries and communities.

<p>13. The provision of technical information and training to TK holders and government officials on possible options under the IP system for TK protection</p>	<p> </p>	<ul style="list-style-type: none"> – Extensive documentation on practical experiences with – Case studies on the use and the limitations of IP mechanisms in protecting TK and TCEs – Draft IP guidelines and resources for the digitization and dissemination of TCEs through Creative Heritage Project – This is in the process of being transformed into practical guides and other technical information and training resources
<p>14. In the longer term, the possible development of new IP tools to protect TK not protected by existing IP tools, the elaboration of an international framework for TK protection, using inter alia the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 as a possible foundation, and the development of a sui generis system of “community” or “collective” rights to protect TK.</p>	<p> </p>	<ul style="list-style-type: none"> – WIPO draft objectives and principles (‘draft provisions’), overviews of policy options and legal mechanisms, and related information on choices at the international dimension, provide potential ingredients for these developments, if so chosen by Member States – The draft provisions on TCEs/EoF draw on and update the WIPO-UNESCO Model Provisions – The draft provisions on TK provide possible elements of a <i>sui generis</i> system of community or collective rights to protect TK – The draft provisions are already drawn upon by a wide range of national, regional and international processes as helping to define the elements of protection of TK and TCEs/EoF.
<p>15. The provision of information, assistance and advice with respect to the enforcement of TK protection.</p>	<p> </p>	<ul style="list-style-type: none"> – No specific program activities concentrate on enforcement of TK protection as such, other than defensive protection of TK within the patent system. – However enforcement is dealt with as part of the overall range of aspects connected with the protection of TK and TCEs/EoF. – This work includes reviewing culturally appropriate approaches to enforcement of protection, including alternative dispute resolution and the recognition of customary law as guiding restitution and other suitable remedies.

<p>16. Facilitating access to the IP system, to enable TK holders to use and enforce rights under the IP system.</p>	<p>#</p> <p>▶▶</p>	<ul style="list-style-type: none"> – No systematic program activities have so far been aimed directly at facilitating access in the sense of directly enabling use of the IP system. Several partnerships with governments and community organizations address this as one of several related goals, however. – Capacity building activities also aim at developing skills and awareness in forms that are appropriate to and targeted at the needs of holders of TK and TCE bearers. – Work on analyzing practical and policy options for protection of TK and TCEs consider possibilities for enhanced access to IP system suitable for holders of TK and TCE bearers, including through collective management structures and alternative dispute resolution mechanisms. – Policy objectives and principles emphasize need for forms of administration, access to rights and remedies appropriate to needs of TK holders/TCE bearers
<p>17. The provision of legal/technical assistance with TK documentation, including information and advice on the IP implications of TK documentation.</p>	<p>#</p> <p>■</p>	<ul style="list-style-type: none"> – IGC adopted standards for TK documentation which incorporate safeguards against breach of prior informed consent – Draft toolkit provides the required legal and technical assistance, with a focus on the IP implications of TK documentation – Draft IP guidelines and resources for the digitization and dissemination of TCEs through Creative Heritage Project – Further work supports the recognition of documented TK within the patent system to safeguard against illegitimate patenting
<p>18. The provision of IP advice and assistance in respect of legislation, regulations, guidelines, protocols, agreements (including model terms), policies and processes on access to and benefit-sharing in genetic resources.</p>	<p>#</p> <p>■</p>	<ul style="list-style-type: none"> – Draft guidelines and principles on IP aspects of equitable benefit sharing relating to use of genetic resources – Searchable data base of IP-related provisions used in arrangements for benefit-sharing relating to genetic resources – Collaboration with UNEP in the development of case studies and related independent analysis of the role of patents in access and benefit-sharing

<p>19. Assistance and training for TK holders in the negotiation, drafting, implementation, and enforcement of contracts.</p>	<p>■ ▶▶</p>	<ul style="list-style-type: none"> – Extensive capacity-building resources have been developed and disseminated, but specific targeted assistance and training initiatives actually putting these draft materials have been limited until limited; – Following a series of pilot programs, proposals are in train to undertake such assistance in a more systematic manner in partnership with concerned national authorities, regional initiatives and international agencies.
<p>20. The development and testing, with the close involvement of indigenous peoples and local communities, of “best contractual practices”, guidelines and model clauses for contracts, as well as the provision of information on and protection against “unfair contract terms”.</p>	<p># ▶▶</p>	<ul style="list-style-type: none"> – Draft guidelines and principles on IP aspects of equitable benefit sharing relating to use of genetic resources – Searchable data base of IP-related provisions used in arrangements for benefit-sharing relating to genetic resources – Collaboration with UNEP in the development of case studies and related independent analysis of the role of patents in access and benefit-sharing – However, these have not extended to on-the-ground testing at the community level, although proposals are in train to apply these materials
<p>21. Awareness-raising on the potential commercial value of TK and the development of tools for the economic valuation of TK.</p>	<p>■ ▶▶</p>	<ul style="list-style-type: none"> – Limited work only directly dealing with commercial valuation. Concepts of protection considered go beyond commercial aspects of IP as such. – Preliminary work under way on approaches to valuation of TCEs/EoF and divergent approaches to valuing life sciences, including TK. – Draft guidelines on IP aspects of equitable benefit sharing relating to access to genetic resources deal with valuation methodologies. – Draft IP guidelines and resources for the digitization and dissemination of TCEs through Creative Heritage Project