

WIPO



WIPO/GRTKF/IC/2/5

ORIGINAL: English

DATE: August 8, 2001

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

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

**Second Session
Geneva, December 10 to 14, 2001**

**SURVEY ON EXISTING FORMS OF INTELLECTUAL PROPERTY PROTECTION
FOR TRADITIONAL KNOWLEDGE**

prepared by the Secretariat

- ◆ This Survey is addressed to the members of the Intergovernmental Committee, as well as those observers having legislative competence to draft and/or adopt laws or model laws providing for the intellectual property protection of traditional knowledge, such as those observers which are State members of the United Nations but not of the World Intellectual Property Organization (WIPO) and those regional intergovernmental organizations and associations having the legislative competence referred to.
- ◆ Members are requested to return their responses to the Survey to the Secretariat of WIPO before *September 30, 2001*.
- ◆ Responses should be addressed to the Global Intellectual Property Issues Division, 34 chemins des Colombettes, 1211, Geneva, 20. Fax: +41-22-338-8120.
- ◆ This Survey will be available at <www.wipo.int/globalissues>, and responses may also be submitted electronically through this site.

I. INTRODUCTION

1. During discussions under Agenda Item 5.2 (“Protection of Traditional Knowledge”) at the first session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (April 30 to May 3, 2001) (“the Intergovernmental Committee”), Members of the Committee expressed support for the following task referred to in document WIPO/GRTKF/IC/1/3:¹

“The Member States may wish to compile, compare and assess information on the availability and scope of intellectual property protection for traditional knowledge within the scope of subject matter which was delimited under Task B.1 and identify any elements of the agreed subject matter which require additional protection.”

2. This Task was referred to in document WIPO/GRTKF/IC/1/3 as Task B.2. The Task referred to as Task B.1 concerns the delineation of the scope of traditional knowledge subject matter that is or may be protected by intellectual property. Task B.1 is addressed further in document WIPO/GRTKF/IC/2/4. See also further under “Meaning of Traditional Knowledge for Purposes of this Survey” below.

3. This present document calls for information and case-studies on existing forms of intellectual property protection for traditional knowledge. This document is addressed to the members of the Intergovernmental Committee,² as well as those observers having legislative competence to draft and/or adopt laws or model laws providing for the intellectual property protection of traditional knowledge, such as those observers which are State members of the United Nations but not of the World Intellectual Property Organization (WIPO) and those regional intergovernmental organizations and associations having the legislative competence referred to.

4. The information and case-studies obtained in response to this document will be compiled, compared and assessed in a subsequent document or documents which will be made available to the Intergovernmental Committee.

¹ Par. 77. See also WIPO/GRTKF/IC/1/13 (“Report”), paras. 130 to 155.

² In accordance with paras. 4 to 7 of WIPO/GRTKF/IC/1/2 (“Rules of Procedure”), the members of the Intergovernmental Committee are the Member States of the World Intellectual Property Organization (WIPO), States which are parties to the Paris Convention for the Protection of Industrial Property but not members of WIPO, and the European Communities.

5. The structure of the remainder of this document is as follows:

Section II. Background.

This Section provides a general, wide-lens perspective on measures for the protection of traditional knowledge. In so doing, the Section aims to locate and describe the specific scope of this Survey, which is concerned with existing forms of intellectual property protection for traditional knowledge. This Section follows this structure:

- (a) Measures for the Protection of Traditional Knowledge

Non-IPR and IPR-related forms of protection
Legal and non-legal forms of protection
International, regional and national measures;

- (b) Meaning of “Traditional Knowledge” for Purposes of this Survey;

- (c) Structure of the Survey.

Section III. The Survey

Part I. Use of Existing Intellectual Property Standards to Protect Traditional Knowledge

Part II. Laws and Regulations Providing Specific Intellectual Property Protection for Traditional Knowledge

Part III. Special Measures to Assist Beneficiaries to Acquire, Exercise, Manage and Enforce Rights

Part IV. Perceived Limitations in Application of Existing Intellectual Property Standards to Protect Traditional Knowledge

Each Part of the Survey is introduced and explained in a text box.

II. BACKGROUND

A. Measures for the Protection of Traditional Knowledge

6. A variety of policy, legal, legislative and administrative measures that exist for the protection of traditional knowledge at international, regional and national levels.³ These may be bolstered by additional incentive and capacity-building measures.

7. These measures may be viewed along various axes.

Non-IPR and IPR-related forms of protection

8. Traditional knowledge protection measures may be classified into non-intellectual property and intellectual property-related and measures.

9. Non-intellectual property measures are found in a wide variety of policies, laws and regulations regarding such matters as land tenure, protected areas, protection of endangered species, land development, health, food and agriculture, language loss, water quality, waste disposal, cultural heritage protection, religious expression, natural resources (usually on a sectoral basis, for fisheries, forests, and so on), soil conservation and habitat protection.

10. Traditional knowledge protection measures are also found in specific legislation, processes, strategies and other mechanisms for the protection of indigenous peoples, local communities and minorities, some of which may arise out of treaty or constitutional obligations of States.

11. This Survey is concerned, however, with existing forms of intellectual property protection for traditional knowledge. The term “intellectual property protection” is taken to mean private property rights covering the intellectual contribution in traditional knowledge and conferring exclusive rights to (i) control the commercial exploitation of that intellectual contribution and (ii) safeguard the integrity of and attribution to works.

12. Further, intellectual property protection means the protection of rights in intellectual creations in order to:

(a) encourage new intellectual creations (one of the policy bases of the laws of patents, copyright and industrial designs, for example);

³ These measures may also provide for the respect for, maintenance, transmission, promotion, preservation, conservation and sustainable use of traditional knowledge. See generally UNEP/CBD/TKBD/1/2; UNEP/CBD/WG8J/1/2; UNEP/CBD/WG8J/1/INF/2; TD/B/COM.1/EM.13/2. As this survey is concerned with “intellectual property protection,” this is the term that will be used in this document. See further discussion under “Non-IPR and IPR-related forms of protection.”

(b) disclose new intellectual creations (one of the policy bases of the laws of patents and industrial designs, for example);

(c) facilitate the orderly functioning of markets through the avoidance of confusion and deception (the policy basis for the protection of trademarks and geographical indications), and the prevention of unfair competition;

(d) safeguard the integrity of and rights of attribution to certain works and creations (the policy basis of moral rights protection in copyright, for example); and/or

(e) protect undisclosed information from bad faith use or appropriation.

13. The meaning of “intellectual property protection” in this context is also discussed in document WIPO/GRTKF/IC/2/4 in respect of Task B.1.

Legal and non-legal forms of protection

14. There are also legally-binding and non-legally binding forms of protection. Legally-binding forms may include: intellectual property rights (IPR) systems; *sui generis* legislation; regimes regulating access to and benefit-sharing in genetic resources and associated traditional knowledge; contractual agreements; customary laws and protocols, in so far as they are recognized and enforceable within the applicable constitutional legal system; and common law regimes.⁴

15. IPR systems, *sui generis* legislation and regimes regulating access to and benefit-sharing in genetic resources and associated traditional knowledge are referred to further below under “International, regional and national measures” and in Section III “The Survey.”

16. Contractual agreements are, in the absence of or in addition to legislative forms of protection, often relied upon to capture benefits arising from traditional knowledge. The contractual approach, however, is also regarded as presenting some limitations, such as: the private bargain nature of contracts means they are not enforceable against third parties; disparities in bargaining power between contracting parties; high transaction costs; and, limited resources, access to legal advice and negotiating skills among some traditional knowledge holders may disable them from being able successfully to use contracts to regulate access to and secure benefit-sharing in their traditional knowledge.⁵

17. The respect for and use of customary laws and protocols and their use to protect traditional knowledge is advocated in numerous indigenous and local community

⁴ See UNEP/CBD/TKBD/1/2; UNEP/CBD/WG8J/1/2; TD/B/COM.1/EM.13/2

⁵ See UNEP/CBD/WG8J/1/2; UNEP/CBD/COP/5/8.

declarations, statements and charters.⁶ The draft American Declaration of the Rights of the Indigenous Peoples, approved by the Inter-American Commission on Human Rights, in 1997, provides for the recognition of indigenous law. Likewise, Convention 169 of the International Labour Organization (ILO) concerning Indigenous and Tribal Peoples in Independent Countries also supports the regard for customs and customary laws.⁷ At the national level, the access to genetic resources regime of the Philippines provides that prospecting for genetic resources within ancestral lands and domains of indigenous cultural communities shall be permitted only “with the prior informed consent of such communities, obtained in accordance with the customary laws of the concerned community.”⁸

18. Common law measures that may be used to protect traditional knowledge could include those common law principles governing unjust enrichment, breach of confidence, passing off, the disclosure of confidential information and unfair competition.⁹

19. Non-legally binding forms of protection may include voluntary guidelines and codes of conduct adopted by international, governmental and non-governmental organizations, professional societies and the private sector. Other non-legal measures may include the compilation of inventories, registries and databases of traditional knowledge.¹⁰ This Survey is concerned only with legal forms of protection.

International, regional and national measures

20. Traditional knowledge protection may be afforded by international, regional and national measures.

International measures

21. There are at present no legally-binding international intellectual property standards for the protection of traditional knowledge. Legally binding standards exist in other policy areas, however.

⁶ For example, the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993); the Julayinbul Statement on Indigenous Intellectual Property Rights and Declaration Reaffirming the Self-Determination and Intellectual Property Rights of the Indigenous Nations and Peoples of the Wet Tropics Rainforest Area (1993); and the Heart of the Peoples Declaration (1997).

⁷ Article 8, ILO Convention 169, 1989. See also Articles 12 and 33, Draft United Nations Declaration on the Rights of Indigenous Peoples (1994), and Principle 4, ‘Principles and Guidelines for the Protection of the Heritage of Indigenous People,’ United Nations Working Group on Indigenous Populations.

⁸ Philippines Executive Order, No. 247, 1995, Section 2(a).

⁹ WIPO/GRTKF/1/5; UNEP/CBD/WG/8J/1/2.

¹⁰ UNEP/CBD/WG/8J/1/2.

22. For example, the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994 provides that Parties shall:

“*protect*, promote and use in particular relevant traditional and local technology, knowledge, know-how and practices and, to that end, they undertake to: [...] (b) ensure that such technology, knowledge, know-how and practices are adequately *protected* and that local populations benefit directly, on an equitable basis and as mutually agreed, from any commercial utilization of them or from any technological development derived therefrom.” (Article 18.2(b), emphasis added).

23. The Convention on Biological Diversity, 1992, although not using the word “protect”, mandates Contracting Parties, as far as possible and as appropriate, subject to their national legislation, to:

“respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.” (Article 8(j)).

24. In this context, mention could also be made of Article 15(4) of the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention). The 1967 Stockholm Diplomatic Conference for Revision of the Berne Convention made an attempt to introduce copyright protection for folklore at the international level. As a result, Article 15(4) of the Stockholm (1967) and Paris (1971) Acts of the Berne Convention contains the following provision:

“(4)(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.”

“(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General [of WIPO] by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.”

25. This Article of the Berne Convention, according to the intentions of the revision Conference, implies the possibility of granting protection for expressions of folklore.¹¹

26. The need for, and importance of, international frameworks for intellectual property protection for traditional knowledge have been stressed during past WIPO activities.¹² Certain Member States have requested WIPO to facilitate discussions on the possibility of establishing international standards for the availability, scope and use of intellectual property rights in respect of traditional knowledge.¹³

Regional measures

27. At the regional level, several regional intergovernmental organizations and associations have enacted, or are considering enacting, laws or model laws for the protection of traditional knowledge. Certain of these may deal more directly with access to genetic resources and benefit-sharing, but they also refer to associated traditional knowledge. Examples of regional laws, draft laws and model laws include:

- The Member States of the Andean Community have adopted four pieces of legislation, being “Decision 345 – Common Provisions on the Protection of the Rights of Breeders of New Plant Varieties”, “Decision 351 – Common Provisions on Copyright and Neighboring Rights”, “Decision 391 – Common Regime on Access to Genetic Resources”, and “Decision 486 – Common Intellectual Property Regime.” In addition, a Decision on a Common Regime on Protection of Traditional Knowledge is being prepared;¹⁴
- The Organization of African Unity (the OAU) has adopted a Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Genetic Resources. This Model Law was adopted by the Council of Ministers of the OAU in June 1998, and an updated version was more recently endorsed by the OAU Trade Ministries meeting in Algiers in 2000;¹⁵

¹¹ See Ficsor, M., “Attempts to Provide International Protection for Folklore by Intellectual Property Rights”, paper presented at the UNESCO-WIPO World Forum on the Protection of Folklore, Phuket, Thailand, April 8 to 10, 1997, p.17. Only one country, India, has made the designation referred to in the Article.

¹² See, for example, WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1, WIPO-UNESCO/FOLK/ARAB/99/1, WIPO-UNESCO/FOLK/LAC/99/1; WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001) p. 226; and, Meeting Statement and Action Plan of WIPO Inter-Regional Meeting on Intellectual Property and Traditional Knowledge, held in Chiangrai, Thailand from November 9 to 11, 2000 (the Chiangrai Statement).

¹³ *Idem*.

¹⁴ WIPO/GRTKF/IC/1/11, p. 2.

¹⁵ See WIPO/GRTKF/IC/1/10. See also Ekperere, J.A., *Explanatory Booklet on the Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Genetic Resources* (OAU, 2000).

- The ten countries of the Association of South East Asian Nations (ASEAN) are elaborating a Framework Agreement on Access to Biological and Genetic Resources.¹⁶
- Pacific Island States are considering draft guidelines and a draft *sui generis* Model Law for the protection of traditional knowledge and expressions of culture in the Pacific region.¹⁷

National measures

28. At the level of national laws, several States have enacted or are enacting legislation in the area of traditional knowledge protection. These may be IPR- or non-IPR-related. Examples include Brazil, Costa Rica, India, Nigeria, Panama, Peru, the Philippines, South Africa and Thailand.¹⁸

29. National measures may be further classified into national, sub-national and local measures. Within any one country, similar legislation may exist at national, sub-national and local levels, which may result in inconsistencies and complications.

B. Meaning of “Traditional Knowledge” for Purposes of this Survey

30. As indicated above in the Introduction, Task B.2¹⁹ refers to information on the availability and scope of intellectual property protection for traditional knowledge within the scope of subject matter delimited under Task B.1.

31. Task B.1 is addressed further in document WIPO/GRTKF/IC/2/4. The result of work related to Task B.1 is expected to be a clearer understanding of the traditional knowledge subject matter that is or should be protected by intellectual property. In other words, Task B.1 should in due course provide clarity on what is meant by “traditional knowledge” for purposes of discussions concerning the intellectual property protection of traditional knowledge.

32. In the interim, and for purposes of this Survey only, it is suggested that traditional knowledge be considered as encompassing traditional and tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other traditional and tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

¹⁶ WIPO/GRTKF/IC/1/13 (“Report”), para. 22.

¹⁷ *Ibid*, paras. 74 and 75.

¹⁸ See documents TD/B/COM.1/EM.13/2; TD/B/COM.1/EM.13/3; UNEP/CBD/WG8J/1/2; UNEP/CBD/WG8J/1/INF/2.

¹⁹ As referred to in document WIPO/GRTKF/IC/1/3.

33. In this regard:

(a) “Traditional” and “tradition-based” refer to knowledge systems, creations, innovations which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are continually evolving in response to a changing environment;

(b) Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; and, elements of languages, such as names, geographical indications and symbols.

34. “Expressions of folklore” are not included within the above description of traditional knowledge, which has been derived from the results of the WIPO fact-finding missions and other activities. In previous WIPO activities, the term “traditional knowledge” has included “expressions of folklore” as a sub-set. However, experiences with the legal protection of expressions of folklore, including handicrafts, is the subject of a separate questionnaire (WIPO/GRTKF/IC/2/7). This Survey does therefore not cover “expressions of folklore” or handicrafts.

C. Structure of this Survey

35. This Survey seeks information on existing forms of intellectual property protection:

(a) provided by existing intellectual property standards, including the common law (Part I of the Survey); or,

(b) contained within laws and regulations providing specific intellectual property protection for traditional knowledge (*sui generis* legislation) (Part II of the Survey).

36. Part III of the Survey seeks information on special measures to assist beneficiaries to acquire, exercise, manage and enforce rights in traditional knowledge.

37. Part IV of the survey: To the extent that States or observers responding to this Survey are not able to provide information on experiences with the use of existing intellectual property standards to protect traditional knowledge, or have not established *sui generis* legislation, Part IV of the Survey calls for general information and comments on perceived limitations in the application of existing intellectual property standards to protect traditional knowledge.

III. SURVEY

Contact Details

Name: _____
 Title: _____
 Office: _____
 Member _____
 State/Organization: _____
 Email: _____
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 Facsimile: _____

Part I: Experiences with the Protection of Traditional Knowledge by Use of Existing Intellectual Property Standards

- **Use of Existing Intellectual Property Standards:** During the Fact-finding Missions on the Intellectual Property Needs and Expectations of Traditional Knowledge Holders undertaken by WIPO in 1998 and 1999 (the FFMs), and in other related WIPO activities, traditional knowledge holders and other stakeholders indicated that intellectual property protection for traditional knowledge could be made available by one or more of the following:
 - a) the application of existing IP standards;
 - b) the adjustment of existing IP standards; and/or,
 - c) the development and application of new intellectual property standards.¹

The use of existing, or adjusted, standards to protect traditional knowledge may take, *inter alia*, the following forms:²

Trademarks. Certain States are considering, or already provide, mechanisms designed to prevent the registration as trademarks of indigenous words, imagery and other distinctive signs if their registration would be likely to offend a significant section of the community, including the relevant indigenous community. In addition, traditional communities are seeking to register collective and certification trade marks to establish signs under which goods emanating from their community or group, or manufactured in accordance with particular methods or standards, can be sold.

1. WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), (WIPO, 2001) pp. 223 to 226; WIPO/GRTKF/IC/1/3; WIPO/GRTKF/IC/1/5; WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1, WIPO-UNESCO/FOLK/ARAB/99/1, WIPO-UNESCO/FOLK/LAC/99/1; Meeting Statement and Action Plan of WIPO Inter-Regional Meeting on Intellectual Property and Traditional Knowledge, held in Chiangrai, Thailand from November 9 to 11, 2000 (the Chiangrai Statement).

2. See generally WIPO, *op. cit.*, pp. 223 to 228; UNEP/CBD/WG8J/1/2; UNEP/CBD/COP/5/8; Downes, D., "How Intellectual Property Could be a Tool to Protect Traditional Knowledge", (2000) Columbia Journal of Environmental Law 25, pp. 253-282; Dutfield, G., Can the TRIPs Agreement Protect Biological and Cultural Diversity, 10, (Biopolicy International Series, 1997).

Geographical indications. Some traditional knowledge holders are considering the registration of geographical indications, as referred to in Article 22.1 of the TRIPS Agreement and as contemplated internationally in the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1979). (Continued)

Patents. Attempts have been made for the collective filing of patent applications by associations of traditional knowledge holders on behalf of their members, in order to share the filing costs. Proposals have also been put forward to include in patent applications, which claim traditional knowledge-based inventions, an indication that the traditional knowledge and/or biological resource has been obtained with the prior informed consent (PIC) of the country or community of origin.

Copyright and related rights. Traditional knowledge holders have sought to protect their rights to integrity and attribution using the moral rights concept in copyright. They have also expressed an interest in protecting compilations of traditional knowledge documentation through the concept of original and non-original database protection. Related rights may indirectly protect traditional knowledge through the protection of the rights of performers. There have also been debates on utilizing the *domain public payant* system in respect of traditional knowledge, under which royalties continue to be paid for the use of literary and musical works in the public domain. The *droite de suite*, a resale royalty under which an artist receives a share of the price paid for his or her original work from all sales subsequent to the first sale of the work by the artist, has also been mooted as potentially useful in this area.

Unfair competition. There have been extensive debates on protecting certain elements of traditional knowledge by using trade secrecy, or the protection of undisclosed information as referred to in the Article 39 of the TRIPS Agreement, as well as the common law remedy of “passing off.”

▪ **Case-studies:** WIPO’s various activities in relation to intellectual property and traditional knowledge demonstrated the need for empirical information on how existing intellectual property law, procedure and administration can be used for the protection of traditional knowledge. The need for case-studies in this area has also been identified in other fora, notably the Convention on Biological Diversity (the CBD).³

Following the conclusion of the FFMs and as envisaged in the WIPO Program and Budget for 2000-01,⁴ WIPO launched a case-study in Australia which set out to provide practical information on and draw general lessons from specific and actual examples in which Indigenous Australians have taken advantage of, or attempted to use, existing intellectual property standards to either protect their traditional knowledge or to further their own interests in the commercial application and utilization of their knowledge. This case-study will be published by WIPO once it is completed. A second case-study in another country will be launched in the second part of 2001.

3. For example, COP IV, Decision IV/9; UNEP/CBD/WG8J/1/INF/2 (which provides a synthesis of case-studies and relevant information in response to Decision IV/9); COP V, Decision V/16.

4. The Global Intellectual Property Issues Program of the WIPO Program and Budget for the 2000-2001 biennium includes “a feasibility study on the use of intellectual property law or practice to protect traditional knowledge, innovations and creativity” (Main Program 11).

Part II: Laws and Regulations Providing Specific Intellectual Property Protection for Traditional Knowledge

- Certain Member States and traditional knowledge holders have pointed to limitations which are inherent in existing intellectual property standards and have articulated a need for the development of new intellectual property tools to protect forms of traditional knowledge not already covered. New intellectual property standards could be accommodated within the broad concept of “intellectual property” in the WIPO Convention, which provides that intellectual property shall include existing intellectual property rights “and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”¹
- New standards for traditional knowledge protection have been or are being developed, mostly in the form of *sui generis* legislation, to protect elements of traditional knowledge not covered by existing intellectual property systems. For example:
 - (a) At the international level, WIPO has developed a model for *sui generis* protection of certain traditional knowledge-related subject matter in cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO), namely the UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1982) (see document WIPO/GRTKF/IC/2/7);
 - (b) Within the frame of indigenous peoples’ rights, the Principles and Guidelines for the Protection of the Heritage of Indigenous People, elaborated by the United Nations Working Group on Indigenous Populations,² has also been cited as an example of a *sui generis* model at the international level;
 - (c) At the regional and national levels, reference has already been made, under “Regional measures” and “National measures” in Section II “Background” above, to the laws or draft laws of certain organizations, associations and States;
 - (d) Several intergovernmental processes have identified ‘common elements of national *sui generis* legislation’ to protect the full scope of traditional knowledge subject matter;³
 - (e) Additionally, several non-governmental organizations have developed models for the *sui generis* protection of traditional knowledge.⁴

1. Article 2(viii), Convention Establishing the World Intellectual Property Organization, 1967.

2. E/CN.4/Sub.2/1994/31.

3. See recommended “common elements” for national *sui generis* legislation for traditional knowledge protection in document TD/B/COM.1/EM.13/3, paragraph 34. See also “Possible Elements of *Sui Generis* Legislation to Protect the Knowledge, Innovations and Practices of Local and Indigenous Communities” in document UNEP/CBD/COP/5/8, Annex VI.

4. These include, *inter alia*, “A Conceptual Framework and Essential Elements of a Rights Regime for the Protection of Indigenous Rights and Biodiversity” (1996) by the Third World Network; the “Model Biodiversity Related Community Intellectual Rights Act” (1997) by the Research Foundation for Science, Technology and Ecology; and the “Intellectual Integrity Framework” (1994) by the Rural Advancement Foundation International.

Entitlement to the Rights Granted

Question 16: Who is entitled to acquire the protection provided for?

Question 17: Does the law or regulation allow for the acquisition and exercise of the rights by a community or other collective?

Yes

No

If yes, please provide further information.

Question 18: Does the law or regulation allow for the acquisition and exercise of the rights by more than one community?

Yes

No

If yes, please provide further information, specifically on the obligations of each group towards the other.

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Exceptions to the Protection Granted

Question 19: What exceptions, if any, are there in respect of the rights granted (such as customary use, use for scientific and academic purposes, prior use)?

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Part IV. Perceived Limitations in Application of Existing Intellectual Property Standards to Protect Traditional Knowledge

- To the extent that States or observers responding to this Survey are not able to provide information on experiences with the use of existing intellectual property standards to protect traditional knowledge, or have not established *sui generis* legislation, this Part IV of the Survey calls for general information and comments on perceived limitations in the application of existing intellectual property standards to protect traditional knowledge.

Question 27: Please provide any general information or comments on perceived limitations in the application of intellectual property laws and procedures to the protection of traditional knowledge. Practical, empirical information, based on actual examples, is sought.

For example, are there cases where you consider that existing intellectual property standards did not provide protection but should have done so? Are there any elements of traditional knowledge which require protection additional to that provided by existing intellectual property standards?

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[Annex follows]

ANNEX

Case-Studies on Experiences with the Protection of Traditional Knowledge by Use of Existing Intellectual Property Standards, Including the Common Law

Indicative Format

To the extent possible, case-studies should be short, concise summaries of examples and experiences not exceeding 20 pages.

In preparing the case-studies, authors are recommended to follow the suggested format as far as possible. However, if authors of the case-studies feel it useful to include information not covered by the outline, they are encouraged to do so.

1. Overview.

Executive summary of the case-studies/information.

2. Description of the Traditional Knowledge (TK)

A brief identification and description of the tradition-based innovation or creation that forms the subject matter of the study: its origin, creation, nature, use and significance within the relevant community. If necessary, a brief identification and explanation of the terminology used by the relevant person or community to describe the subject matter of the study. A brief description of the TK holder, the relevant community, and the social, cultural and ecological context in which they live.

3. Decision-making and Consent

How was the decision to seek intellectual property (IP) protection, initiate IP litigation or commercialize the TK (as the case may be) taken? Is the TK regarded as “collective”? If so, in what way(s)? Did the collective nature of the TK present difficulties in applying IP standards? How was it resolved? In the case of TK held by several TK holders or a community, who acted on behalf of the TK holders or community? How was this person selected? Were other communities relevant and, if so, were they consulted?

4. Rights and Remedies

What rights or interests were being infringed, or for which rights or interests was protection sought? Why did the TK holder take the IP action concerned, or invoke IP protection, as the case may be? To what extent was the TK holder aware of or familiar with the IP system before he/she embarked on the action concerned? What was the understanding of the nature and scope of the IP system before the action commenced? What is his/her familiarity and understanding now? What other remedies or options (non-legal and legal) were available? Were any other remedies or options pursued in conjunction with the IP action taken?

5. Customary Law and Regimes

What part did customary law, practices and regimes play at any stage of the actions taken by the TK holders?

6. Benefits

What benefits did the TK holder or community initially seek in taking the action? Did the action result in the benefits sought? What role, if any, did IP instruments play in the generation and delivery of these benefits.

7. Financial Questions

What financial obligations did the action taken by the TK holders entail? What forms of financial outlay were involved (e.g., bonds of security, deposits, court costs, stamp duties, summons/application fees (litigation), application costs and renewal fees (industrial property registration), lawyers' fees and disbursements, costs incurred in negotiating license agreements)? How was the money raised? Was legal aid available? Did the financial obligations affect or impede the way in which the case was handled or conducted? If so, in what ways? What are the perceptions of the TK holder on this question?

8. Legal Questions

What form(s) of IP protection were deemed applicable, and why? In what ways was IP protection pursued? Was the attempt to protect the TK under IP successful? If so, in what ways? If not, in what ways and why not? Were any legal problems encountered? (e.g., problems with notions of authorship/inventorship, originality/novelty, the limited duration of IPRs)?

What advantages and disadvantages of existing IP principles were encountered by the TK holder? What recommendations for change, if any, to IP principles would the TK holders and other stakeholders suggest to enhance the usefulness of the IP system in the particular examples concerned?

9. Operational Questions

How did the TK holder(s) obtain legal advice and assistance in bringing this action? How did the TK holder engage with the administration of IP at the national level (including the relevant Government departments). What are the experiences and perceptions of the relevant Government departments? What recommendations for change, if any, to international IP procedural rules would the TK holders and other stakeholders suggest to enhance the usefulness of the IP system in the particular examples concerned?

10. Third Parties

Were the rights or interests of third parties (such as a non-indigenous person or private sector entity) affected by the action taken by the TK holder?

11. Dissemination of TK/Promotion of Innovation and Creation

Did the IP protection of the TK contribute to the dissemination of the TK that would otherwise not have been disseminated? Has the TK protection encouraged the TK holder to innovate and create further? If the IP system was unsuccessful in protecting the TK, has this caused the TK holder not to disclose the TK, or discouraged further innovation and creation? Are disclosure, dissemination and promotion of TK relevant objectives for the TK holders?

12. Commercialization of the TK

If one of the aims was to commercialize the TK, was this achieved, and if so, what role did IP protection play therein?

13. Expected Results

What were the expectations of the TK holder before taking the action? Have the expectations been met? If so, in what ways? If not, why not?

14. Enforcement of Rights

Where applicable, have the TK holders had to enforce IP rights in their TK? How have they done so? What were their experiences, and what are the lessons learned?

15. Conclusions

Generally, were difficulties and successes experienced in applying the IP system to TK, what lessons were learned and to what extent were divergences perceived between identified needs of TK holders and the protection provided by the existing IP system. In the examples studies, what forms of the TK were not protected by IP? What are the author's conclusions on the examples studied ?

[End of Annex and of document]