

**Establishing Policy, Legal and Practical Measures
for the Protection of Traditional Knowledge, Genetic Resources and Traditional
Cultural Expressions**

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ESTABLISHING POLICY, LEGAL AND PRACTICAL MEASURES FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE, GENETIC RESOURCES AND TRADITIONAL CULTURAL EXPRESSIONS

Introduction

Establishing policy, legal and practical measures for the protection of traditional knowledge, genetic resources traditional cultural expressions (collectively herein referred to as “traditional knowledge”) involve developing a methodology for policy creation; identifying the principles for the protection of traditional knowledge; articulating legal measures which reflect those principles; and developing practical means for the implementation of the policy and legal measures.

This paper will explore the issues outlined above, with references made to the Caribbean context.

Establishing policy

A policy can be defined, generally, as a plan or course of action by a government, institution, group or individual to determine present or future decisions. Specifically, in the context of this seminar, it can be argued that there is a “plan” or “course of action” that traditional knowledge should be protected. At an international level, WIPO’s IGC is one of other forums where that specific issue is discussed and two draft instruments are under consideration. They are the Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore (the Draft TCE Instrument) and the Draft Provisions for the Protection of Traditional Knowledge (the Draft TK Instrument), collectively referred to as the Draft WIPO Instruments.

In the Caribbean context, for example, the Revised Treaty of Chaguaramas which establishes, *inter alia*, the Caribbean Community (CARICOM),¹ and its various organs, outlines a policy of protecting traditional knowledge. The relevant parts of Article 66 of that treaty state as follows:

¹ See the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy. The countries of the Caribbean which comprise the Caribbean Community are Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

“COTED [Council for Trade and Economic Development] shall promote the protection of intellectual property rights within the Community, by inter alia:

(c) the identification and establishment, by Member States of mechanisms to ensure:

(ii) the preservation of indigenous Caribbean culture; and

(iii) the legal protection of the expressions of folklore, other traditional knowledge and national heritage, particularly of indigenous populations in the Community”²

A step towards implementing the policy articulated in the Treaty of Chaguaramas was taken at the WIPO Ministerial-Level Meeting on Intellectual Property for Caribbean Countries which was held in Barbados in 2006 where a resolution was passed requesting WIPO’s assistance in developing the appropriate frameworks of protection for traditional knowledge. That resolution was reproduced in WIPO/GRTK/KIN/08/1³ as follows:

Whereas the sixth *Ministerial-Level Meeting on Intellectual Property for Caribbean Countries*, held on November 2 and 3, 2006, in Bridgetown, recognizes the importance of establishing legal and other regimes for the protection of traditional knowledge, folklore, genetic resources, indigenous Caribbean culture and national heritage, particularly of indigenous populations in Caribbean countries, as reflected in Article 66 of the Revised Treaty of Chaguaramas,

Be it resolved that the Ministers request WIPO’s assistance in developing appropriate frameworks for protection thereof.

² The full text of Article 66 states as follows:

“COTED shall promote the protection of intellectual property rights within the Community by, inter alia:

- (a) The strengthening of regimes for the protection of intellectual property rights and the simplification of registration procedures in Member States;
- (b) The establishment of a regional administration for intellectual property rights except copyright;
- (c) The identification and establishment, by Member States of mechanisms to ensure:
 - (i) The use of protected works for the enhanced benefit of Member States;
 - (ii) The preservation of indigenous Caribbean culture; and
 - (iii) The legal protection of the expressions of folklore, other traditional knowledge and national heritage, particularly of indigenous populations in the Community;
- (d) Increased dissemination and use of patent documentation as a source of technological information;
- (e) Public education;
- (f) Measures to prevent the abuse of intellectual property rights by rights-holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology; and
- (g) Participation by Member States in international regimes for the protection of intellectual property rights.”

³ See “Concept Note – Legal and Policy Options for the Legal Protection of Traditional Knowledge and Expressions of Folklore/Traditional Cultural Expressions” prepared by the International Bureau of WIPO, WIPO/GRTK/KIN/08/1, at p.1.

Articulating the details of that policy, plan or course of action to protect traditional knowledge should involve a process of consultation with all relevant stakeholders and a review of existing policies and laws to determine their suitability.

Arising out of the Ministers' Meeting, and pursuant to the request made to WIPO, a Regional Expert Meeting on the Establishment of a Caribbean Framework for the Protection of Traditional Knowledge, Folklore/Traditional Cultural Expressions and Genetic Resources was held in Jamaica in 2008. The deliberations of that meeting resulted in the formation of a Working Group for the establishment of a Caribbean Framework of Protection for Traditional Knowledge, comprising a Consultation Team and Research Team.

The tasks of the Consultation Team were to undertake missions to selected CARICOM countries and consult with local and indigenous communities, government officials, non-government organizations, academics, researchers, users of traditional knowledge, private individuals and other relevant private and public stakeholders. The Research Team was responsible for, *inter alia*, reviewing existing CARICOM legislation relevant to the protection of traditional knowledge, analyzing existing and proposed laws for the protection of traditional knowledge, and the preparation of research and policy papers.

Another aspect of establishing traditional knowledge protection policy is the articulation of principles or justifications for protecting traditional knowledge. They include, briefly, the preservation of cultural diversity/protection of cultural identity argument; the equitable sharing of benefits argument; the respect and parity argument; the "quality of life" argument; and, in relation to traditional knowledge associated with biological diversity and genetic resources, the "prevention of biopiracy/preservation of biological diversity" argument.⁴

Other principles relevant to establishing a traditional knowledge protection policy may guide the manner in which protection should be realized, which may include the adoption of an intellectual property rights approach; an intellectual property inspired or *sui generis* rights approach; or a non-rights approach, for example, an unfair competition approach to protection; or a preservationist approach to protecting traditional knowledge which may include educational and other awareness-raising initiatives.

⁴ Although the various justifications are presented separately in the discussion, they are not necessarily articulated as such in the literature. These justifications are elaborated in the paper by the same author entitled "An Introduction to Core Concepts and Objectives: What are Traditional Knowledge, Genetic Resources (GRs) and Traditional Cultural Expressions (TCEs)? Why Should They Receive Legal Protection?"

There may also be a policy to protect traditional knowledge which is held by not only communities and groups but also countries. In either instance, the beneficiaries should be primarily, the traditional knowledge holders and practitioners.

Any policy needs to address the protection of traditional knowledge at the community, country, regional and international levels. This will entail different emphases at different levels, for example, at the community level, there may be a focus on building awareness and capacity to utilize the various existing and proposed tools to identify and protect traditional knowledge. At the national level, the focus may be on issues relating to the scope of protected traditional knowledge, beneficiaries of protection and the administration of protection, while ensuring that international initiatives are consonant with national efforts. At the international level, the focus could be the creation of mechanisms to trigger enforceable rights in foreign jurisdictions and securing harmonized minimum standards and norms. The Draft WIPO Instruments represent attempts at achieving these objectives.

LEGAL MEASURES - POLICY OPTIONS FOR MEASURES TO PROTECT TRADITIONAL KNOWLEDGE

In this section, the following options for measures to protect traditional knowledge will be outlined, namely (1) the protection of traditional knowledge via the ascription of rights and penalties for unauthorized use of such knowledge;⁵ the protection of traditional knowledge utilizing non-rights legal options; and (3) the preservation of traditional knowledge. These options are not mutually exclusive and may compliment one another.⁶ Also, these options have been expressly recognized in the Revised Treaty of Chaguaramas referred to above.

⁵ Note the WIPO document entitled “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Overview of Policy Objectives and Core Principles” WIPO/GTRKF/IC/7/3, Seventh Session (Geneva, November 1-5, 2004) at p.12 where it states that “the term ‘protection’ refers to protection such as that typically provided by IP laws, essentially to provide legal means to restrain third parties from undertaking certain unauthorized acts that involve the use of ...protected material. ‘Protection’ in this sense must be distinguished from the concepts of ‘preservation’ and ‘safeguarding’, which in the context of cultural heritage refer generally to the identification, documentation, transmission, revitalization and promotion of cultural heritage in order to ensure its maintenance and viability.”

⁶ See the “The Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)”, Geneva, 2001, (“the 2001 WIPO Report”) at p.193, which states that “protection and preservation cannot be clinically separated as protection by definition could contribute to preservation.”

Protection via the ascription of rights and/or penalties for unauthorised use of traditional knowledge

Protection can take the form of proprietary and non-proprietary measures. Examples of the types of proprietary measures that may be adopted are:

(i) existing intellectual property laws (where applicable and appropriate) such as copyright, patents, industrial designs laws, trade marks, and the law relating to geographical indications;

(ii) *sui generis* extensions or adaptations of intellectual property rights such as the folklore provisions in the Tunis Model Law on Copyright for Developing Countries (the Tunis Model);⁷ and

(iii) *sui generis* measures to protect traditional cultural expressions and *sui generis* measures to protect traditional knowledge.⁸

Intellectual property protection should be encouraged where appropriate. However, gaps have been identified in relation to intellectual property legislation and its ability to protect traditional knowledge. Those tend to relate to the characteristics of traditional knowledge and the ways in which that term is defined.

Common to most if not all the definitions are (i) the origin of the knowledge traceable to a particular people, group or community described as “indigenous” or “traditional” and more recently “cultural”; (ii) the collective characteristics of traditional knowledge; (iii) the oral nature of that knowledge and the oral transmission of that knowledge; (iv) the intergenerational nature of that knowledge; and (v) the importance of context in defining traditional knowledge. Implicit in all definitions, and explicit in some, is the capability of the particular people, group or community to define what constitutes their knowledge.⁹ In addition, the linkage of traditional

⁷ The Tunis Model has influenced some copyright legislation in the Caribbean.

⁸ See the laws and model laws referred to below.

⁹ In the 2001 WIPO Report, it is expressly stated that WIPO’s description of the subject matter of traditional knowledge reflected its intellectual property focus and acknowledged the right of indigenous groups, local communities and other traditional knowledge holders to decide what constituted their own knowledge, innovations, cultures and practices, and the way they should be defined: see The Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), Geneva, 2001 at p.25 (“the 2001 WIPO Report”).

knowledge to the identity of the source group or community is implicit (and at times explicit) in some definitions.¹⁰

However, intellectual property legislation generally provides for (a) individual and not collective or group rights with few exceptions; (b) the materiality of the subject matter as a prerequisite for protection although there are some exceptions to this general rule; (c) originality or novelty criterion; (d) durational limits for protection of rights; and (e) exceptions to rights. Conventional perspectives about “the public” domain and “moral rights” also present challenges for the use of intellectual property to protect traditional knowledge.

The intellectual property approach to protecting traditional knowledge should be supplemented by *sui generis* measures to protecting traditional knowledge which may prescribe acts for which the free prior and informed consent of the relevant group or organization should be obtained.

In terms of what is referred to as traditional cultural expressions, model laws include the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (“the Model Provisions”).

In terms of what is referred to as traditional knowledge, model laws include the Draft Legal Instrument for South Asian Association for Regional Cooperation (SAARC) Countries on Protection of Traditional Knowledge (“the Draft SAARC Framework”).

Regarding traditional knowledge associated with biological resources, laws include the Brazilian Provisional Measure No.2.186-16 of August 23, 2001 (the “Brazilian Law”); the Peruvian Law No.27811 (August 10, 2002) entitled “Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources” (the “Peruvian Law”); and the Decree-Law No.118/2002 (April 20, 2002) of Portugal (the “Portuguese Law”).

Some *sui generis* regimes deal with subject matter associated with traditional cultural expressions and traditional knowledge in the same instrument though separately, such as the

¹⁰ As Matthias Leistner writes,

“...[T]raditional knowledge systems ...are inextricably interwoven with historical, ethical and religious aspects that touch at the very identity of the respective indigenous group or local community. In this way artistic creations and even practical innovations are often at the same time ‘symbolic of a deeper order or belief system’”: see Matthias Leistner, “Part III Analysis of Different Areas of Indigenous Resources, Section I, Traditional Knowledge, Findings at the Factual Level, Characteristics of Traditional Knowledge” in Silke von Lewinski, ed., *Indigenous Heritage and Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore* (The Hague, The Netherlands: Kluwer Law International, 2004) at pp.56-57 (notes excluded).

African Regional Intellectual Property Organization (ARIPO) Instrument on the Protection of Traditional Knowledge and Expressions of Folklore (“the ARIPO Instrument”).

Other *sui generis* regimes, such as The Panamanian Law No.20 of June 26, 2000 on the Special Intellectual Property Regime Governing Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge (the “Panamanian Law”), deal with both subject matter associated with traditional cultural expressions and traditional knowledge defined as “traditional knowledge”.¹¹

The Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (“the Pacific Regional Framework”) deserves special mention. It provides for the protection of “expressions of culture”¹² and “traditional knowledge”¹³ and ascribes what is referred to “traditional cultural rights” to traditional owners which are rights normally associated with copyright.¹⁴ This approach should be compared with that adopted by the IGC in

¹¹ The regulating law passed further to the Panamanian Law defines “traditional knowledge” as the collective knowledge of an indigenous people based on the traditions of centuries, and indeed millennia, which are tangible and intangible expressions encompassing their science, technology and cultural manifestations, including their genetic resources, medicines and seeds, their knowledge of the properties of fauna and flora, oral traditions, designs and visual and representative arts: see Ministry of Trade and Industries Executive Decree No.12 (March 20, 2001).

¹² See Article 4 of the Pacific Regional Framework which provides that “expressions of culture” mean any way in which traditional knowledge appears or is manifested, irrespective of content, quality or purpose, whether tangible or intangible, and without limiting the preceding words, includes (a) names, stories, chants, riddles, histories and songs in oral narratives; (b) art and craft, musical instruments, sculpture, painting, carving, pottery, terra-cotta mosaic, woodwork, metalware, painting, jewellery, weaving, needlework, shell work, rugs, costumes and textiles; (c) music, dances, theatre, literature, ceremonies, ritual performances and cultural practices; (d) the delineated forms, parts and details of designs and visual compositions; and architectural forms.

¹³ See Article 4 of the Pacific Regional Framework which provides that “traditional knowledge” includes any knowledge that generally (a) is or has been created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative or recreational purposes; (b) is or has been transmitted from generation to generation; (c) is regarded as pertaining to a particular traditional group, clan or community of people in [enacting country]; and (d) is collectively originated and held.

¹⁴ See Article 7 (1), (2) and (3) of the Pacific Regional Framework which provides as follows:

- (1) Traditional cultural rights are the rights set out in subsections (2) and (3).
- (2) The following uses of traditional knowledge or expressions of culture require the prior and informed consent of the traditional owners in accordance with...[the provisions of this law]
 - (a) To reproduce the traditional knowledge or expressions of culture;
 - (b) To publish the traditional knowledge or expressions of culture;
 - (c) To perform or display the traditional knowledge or expressions of culture in public;
 - (d) To broadcast the traditional knowledge or expressions to culture to the public by radio, television, satellite, cable or any other means of communication;
 - (e) To translate, adapt, arrange, transform or modify the traditional knowledge or expressions of culture;
 - (f) To fixate the traditional knowledge or expressions of culture through any process such as making a photograph, film or sound recording;

the Draft WIPO Instruments which proposes protection of “expressions”, on the one hand, and “knowledge” on the other, in separate draft instruments.

Those draft instruments offer different forms of protection inspired by intellectual property laws. The Draft TCE Instrument proposes that the relevant community can prevent, *inter alia*, specified acts usually associated with the economic and moral rights granted in copyright law, without its free, prior and informed consent.¹⁵ The Draft TK Instrument, by contrast, is influenced by the principles of unfair competition, particularly, “misappropriation” which includes any acquisition of traditional knowledge by unfair or illicit means.¹⁶

Specifically, the proposed ambit of the Draft TCE Instrument is the protection of the *expression* of traditional culture and not the traditional culture itself, comparable to the protection of the expression of ideas, and not the ideas themselves, in copyright law. By contrast, the Draft TK Instrument proposes protection for “knowledge” as opposed to the “expression” of such knowledge.¹⁷ In Article 3 of the Draft TK Instrument, traditional knowledge refers to, *inter alia*, “...the content or substance of knowledge resulting from intellectual activity...”¹⁸ In this regard, it is not limited to the expression of knowledge but refers to the knowledge itself, and such knowledge can belong to any technical field, including, but not limited to agriculture, medicine, the environment, and knowledge associated with genetic resources.

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- (g) To make available online or electronically transmit to the public (whether over a path or a combination of paths, or both) traditional knowledge or expressions of culture;
 - (h) To create derivative works;
 - (i) To make, use, offer for sale, sell, import or export traditional knowledge or expressions of culture or products derived therefrom;
 - (j) To use the traditional knowledge or expressions of culture in any other material form.
- (3) To avoid doubt, the traditional owners are entitled to use traditional knowledge or expressions of culture in the ways mentioned in subsection (2) in the exercise of their traditional cultural rights.

¹⁵ See the Draft TCE Instrument, Article 3.

¹⁶ See the Draft TK Instrument, Article 1.2. See also Article 1.3 where specific acts of misappropriation are outlined.

¹⁷ This is made clear in WIPO discussions on the scope of protection for traditional knowledge *stricto sensu*. The IGC stated that there is a requirement that the Draft TK Instrument protects “knowledge”. They further state that “this is a relatively open requirement, but does limit the definition by excluding form or expression as such, and cultural objects with no knowledge content, and therefore distinguishes ...[traditional knowledge *stricto sensu*] from...[traditional cultural expressions]...: see “The Protection of Traditional Knowledge: Revised Outline of Policy Options and Legal Mechanisms” IGC Ninth Session, Geneva, April 24 to 28, 2006, WIPO/GRTKF/IC/9/INF/5, Annex, at p.29.

¹⁸ See the Draft TK Instrument, Article 3.

In general, *sui generis* measures, whether they deal with traditional cultural expressions or traditional knowledge separately, or otherwise, also provide for ownership of rights or beneficiaries of any benefit-sharing provisions; the retroactivity of rights or benefits; the acquisition of rights or benefits with or without the prior execution of formalities; the duration of rights or benefits; exceptions and limitations to rights and benefits; the administration and enforcement of rights and benefits; and the treatment of foreign traditional knowledge.

The protection of traditional knowledge utilizing non-rights legal options

The following are examples of non-proprietary measures which include (i) unfair competition laws; (ii) equitable remunerations schemes; (iii) contracts and licences; (iv) customary laws and protocols; (v) unjust enrichment; and (vi) the law relating to confidential information.

Proprietary and non-proprietary measures may be used to provide positive protection against (i) unauthorized commercial exploitation of traditional knowledge and traditional cultural expressions; (ii) insulting, degrading or culturally offensive use; (iii) false or misleading indications that there is a relationship between the user of the traditional knowledge and traditional cultural expressions and the communities in which the material originated; (iv) the failure to acknowledge the source of material in an appropriate way; and (v) the unauthorized disclosure of confidential or secret traditional knowledge and traditional cultural expressions.¹⁹

PRACTICAL MEASURES

Preservation of traditional knowledge

There are various initiatives worldwide, and specifically in the Caribbean, to preserve traditional knowledge and conserve “the living cultural and social context of...[traditional knowledge] and...[traditional cultural expressions], so that the customary framework for developing, passing on and governing access to...[traditional knowledge] and...[traditional cultural expressions] is maintained...”²⁰

¹⁹ See “Concept Note – Legal and Policy Options for the Legal Protection of Traditional Knowledge and Expressions of Folklore/Traditional Cultural Expressions” prepared by the International Bureau of WIPO, WIPO/GRTK/KIN/08/1, at p.6.

²⁰ See “Concept Note – Legal and Policy Options for the Legal Protection of Traditional Knowledge and Expressions of Folklore/Traditional Cultural Expressions” prepared by the International Bureau of WIPO, WIPO/GRTK/KIN/08/1, at p.5.

“Preservation” may involve (i) the documentation of traditional knowledge via the provision of registers, inventories and databases;²¹ and (ii) the promotion of traditional knowledge through educational initiatives.

There are existing “preservationist” strategies which were identified in the “Report of National Consultations on Traditional Knowledge, Traditional Cultural Expressions, and Genetic Resources” for the Caribbean.²² That report noted that

“The Ministry of Culture of St Vincent and the Grenadines referred to a very ambitious project, embarked on with the assistance of UNESCO, to archive the knowledge and genetic resources of the country.... In addition, the Ministry was producing an annual cultural publication to mark significant events in the country’s history. [Also,] the Minister of Culture of Trinidad and Tobago spoke of plans to establish permanent Museums of Oral History and of the Steelpan....

Mention was also made of the existence of various national bodies such as Heritage Museums, National Councils for Culture, Cultural and Heritage Centres, Universities, environmental protection agencies, planning institutes, land and forest management institutes, marine protection institutes, all of which are supposed to protect and promote traditional knowledge in some way.”²³

Any “preservationist strategy must be in accordance with or consonant with the way in which the traditional knowledge is maintained or transmitted in the particular community or country. Some forms of knowledge do not lend themselves to fixation and documentation and there may be other modes of preservation²⁴ or means of valuing cultural objects that do not

²¹ The “The Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)”, Geneva, 2001 (“the 2001 WIPO Report) provides examples of documentation efforts: see p.195.

²² See the “Report on National Consultations on Traditional Knowledge, Traditional Cultural Expressions, and Genetic Resources conducted by the Caribbean Working Group on Traditional Knowledge During the Period from March to October, 2009” WIPO/HP/GND/09/6, November 4th, 2009, prepared by Mary-Ann Richards (“the Report on Caribbean Consultations”).

²³ See the Report on National Consultations, at p.24.

²⁴ See Christina Kreps, “Indigenous Curation as Intangible Cultural Heritage: Thoughts on the Relevance of the 2003 UNESCO Convention” Vol.1 No.2 Theorizing Cultural Heritage, at p.4 where she explores the concept of “indigenous curation” which she defines as incorporating non-western models of museums, curatorial methods, and concepts of heritage preservation which should be recognized and valued in their own right as “unique curatorial expressions and as evidence of human cultural diversity”.

involve objectification and reification for the purposes of collection, observation and display.²⁵ Also, there is a concern that documentation of traditional knowledge may make it more susceptible to misappropriation or misuse, and create intellectual property rights in the form of copyright in the compilation or database of traditional knowledge, which may be afforded to the owner of the compilation or database, which owner may not be the community or traditional knowledge holder. Therefore, “community representatives may choose to hold and exercise copyright over published records of their...[traditional knowledge and traditional cultural expressions] as part of a positive protection strategy...”²⁶

In relation to patents, however, the documentation of traditional knowledge can be a form of “defensive protection” of traditional knowledge as opposed to “positive protection” of traditional knowledge as discussed above, to preclude or to oppose patent rights on claimed inventions that make use of traditional knowledge. It is suggested that documentation of traditional knowledge should be limited to cases where traditional knowledge holders give their prior informed consent and certain practical guidelines should be followed, namely, “publication dates, the medium and language of publication, content of the disclosure, availability to the public, timing of publication, and the management of rights arising from the compilation and publication of the inventory.”²⁷

Further, initiatives to preserve traditional knowledge should be audited to (i) identify those activities; (ii) determine their capacity; (iii) determine their effectiveness; and (iv) determine their sustainability.

CHALLENGES TO FORMULATING AND IMPLEMENTING POLICY AND DEVISING LEGAL MECHANISMS IN THE CARIBBEAN CONTEXT

One of the main challenges to the formation of a policy regarding the protection/preservation of traditional knowledge, is the insufficient amount of persons trained in or au fait with firstly, intellectual property (beyond copyright); secondly, the issues involved in intellectual property

²⁵ Some cultural objects are not meant to be preserved at all but subject to natural degradation over time.

²⁶ See “Concept Note – Legal and Policy Options for the Legal Protection of Traditional Knowledge and Expressions of Folklore/Traditional Cultural Expressions” prepared by the International Bureau of WIPO, WIPO/GRTK/KIN/08/1, at p.8.

²⁷ See “Concept Note – Legal and Policy Options for the Legal Protection of Traditional Knowledge and Expressions of Folklore/Traditional Cultural Expressions” prepared by the International Bureau of WIPO, WIPO/GRTK/KIN/08/1, at p.18.

protection of traditional knowledge; and thirdly, in the developments at the IGC in crafting instruments for the protection of traditional knowledge beyond, arguably, those country representatives who attend those meetings. As a result, the discourse on traditional knowledge protection in the Caribbean may not be as developed as it should.²⁸ The situation has improved over the years with WIPO's involvement in the Caribbean and the introduction of the teaching of intellectual property law at the undergraduate and graduate levels.²⁹

With specific reference to the issues relating to the protection of traditional knowledge, a rudimentary survey³⁰ suggests that there are varying levels of awareness of those issues among different government and non-government organisations and other stakeholders.³¹

²⁸ See "The Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)", Geneva, 2001 ("the 2001 WIPO Report") at p.196 where it states that "some of the lawyers with whom the WIPO delegation met acknowledged that the protection of TK has not been debated in legal circles in many Caribbean countries hence the lack of an articulate legal response to the issues raised." (Note excluded).

²⁹ At the graduate level, students are exposed to copyright and related rights, patents, issues related to domain names and e commerce, trade marks and passing off and the international intellectual property: see Telephone interview with the Ms Roshene Betton, Research Fellow and LL.M. Coordinator, Faculty of Law, University of the West Indies, Cave Hill, Barbados, 13th March , 2008.

³⁰ In order to provide a preliminary overview of the Caribbean position on the protection of traditional knowledge in general, a short questionnaire was prepared and sent to intellectual property offices and departments responsible for such matters in the region. Less than 40% of the respondents were able to complete the questionnaire given the time constraints placed on them. The survey was done in 2008 and the questions are reproduced in the **Appendix**.

³¹ The responses to Question 4 of the questionnaire are indicated below.

Question 4

"How would you describe the level of awareness of issues relating to the protection of traditional knowledge among the following departments/groups

- | | | | |
|-----------------------------------------------------------------------------------------|---------------------|--|-----------|
| (1) Intellectual Property Office/other department responsible for intellectual property | | | |
| High | Low | | None |
| Belize | | | |
| | Grenada | | |
| Trinidad and Tobago | | | St. Lucia |
| (2) Other relevant government departments (Ministry of Culture, for example) | | | |
| High | Low | | None |
| | Belize | | Grenada |
| | Trinidad and Tobago | | St. Lucia |
| (3) Other stakeholders such as cultural groups who maintain and pass on traditions | | | |
| High | Low | | None |
| | Belize | | Grenada |

Regarding the development of a regional framework of protection, Question 5 (1)³² of the questionnaire specifically asked the respondents to indicate what, in their opinion, were the challenges to the development of such a regional framework of protection for traditional knowledge. The responses varied and included

- (1) National implementation;³³
- (2) The varying levels of awareness of the issues among Caribbean countries;³⁴ and
- (3) The need for greater involvement in the cultural department.³⁵

In response to Question 5 (2),³⁶ the respondents indicated that a lack of regional legal expertise in intellectual property contributed to the challenges faced in the development of a Caribbean framework for the protection of traditional knowledge.³⁷ One of the respondents indicated that persons involved in the cultural department (apart from those with legal expertise) could make invaluable contributions and maybe there could be further development of expertise in that area.³⁸

Question 5(3)³⁹ asked whether a lack of awareness of the international debate on the protection of traditional knowledge contributed to the challenges faced in developing a regional framework of protection for traditional knowledge. All respondents indicated that it did.⁴⁰

	Trinidad and Tobago	St. Lucia
(4) General public		
High	Low Trinidad and Tobago	None Belize; Grenada St. Lucia

Positive responses were received from Belize, Grenada, St. Lucia, and Trinidad and Tobago.

³² See Appendix.

³³ Belize.

³⁴ Grenada.

³⁵ St. Lucia.

³⁶ That question asked whether a lack of legal expertise in intellectual property law contributed to the challenges faced in the development of a Caribbean framework for the protection of traditional knowledge.

³⁷ Belize and Grenada.

³⁸ St. Lucia.

³⁹ See Appendix.

⁴⁰ Belize, Grenada, and St. Lucia.

These findings were reflected in the Report on Caribbean Consultations which were conducted approximately one year later. That report stated that “it should be borne in mind that the notion of protection of traditional knowledge was a new concept for many of the people who participated in the consultations. In addition, many were not familiar with intellectual property or intellectual property rights, much less with the notion of the use of Intellectual Property Rights (IPRs) to protect traditional knowledge. In discussing how best to protect traditional knowledge, participants seemed to find it difficult to delink preservation issues from the issue of legal protection through IPRs or *sui generis* systems, seeing the two as being inextricably linked.”⁴¹

Also, notwithstanding its shared history, the Caribbean is a very diverse space⁴² and articulating policy particularly on issues that impact on culture may be challenging. Population composition varies from country to country and may or may not include indigenous peoples so the emphasis may be on local communities, and the economies of the various countries are diverse in their emphases ranging from agriculture, tourism and energy. Therefore, there will be different resource capacities among Caribbean states to implement any policy to protect traditional knowledge.

In order to address some of these challenges, the followings courses of action are suggested:

1. The consultations should be expanded to countries which were not visited, and regarding the countries which were visited, those consultations should be replicated on a community basis.

As part of that exercise, countries/communities should be asked to (i) offer their definitions of traditional knowledge; and (ii) identify the most significant forms of traditional knowledge in their country. The latter could act as a catalyst for action and add a more practical dimension to what may be an abstract exercise. In this regard, specific

⁴¹ See the “Report on National Consultations on Traditional Knowledge, Traditional Cultural Expressions, and Genetic Resources conducted by the Caribbean Working Group on Traditional Knowledge During the Period from March to October, 2009” WIPO/HP/GND/09/6, November 4th, 2009, prepared by Mary-Ann Richards (“the Report on Caribbean Consultations”) at p.4.

⁴² Stuart Hall, on visiting the Caribbean for a BBC assignment, remarked that he was “staggered by the ethnic and cultural diversity” he encountered: see Stuart Hall, “*Negotiating Caribbean Identities*” in Brain Meeks and Folke Lindahl, eds, *New Caribbean Thought. A Reader*, (Jamaica, Barbados, Trinidad and Tobago: The University of the West Indies Press, 2001) at p.27 (Hall, “*Negotiating Caribbean Identities*”). “Not a single Caribbean island looks like any other in terms of its ethnic composition” according to Hall, “...and that is before you touch the question of different languages and different cultural traditions that reflect the different colonizing cultures”: *ibid.*

case studies could be done in relation to those forms of traditional knowledge as well as those shared by more than one territory.

2. Instances of unauthorised use or appropriation of traditional knowledge should be documented.⁴³
3. An educational programme should be on-going to sensitise government and non-governmental personnel and organisations about the relevant laws, the issues, and the international debate concerning the expansion of intellectual property rights and the protection of traditional knowledge.
4. An audit should be taken of the following: (i) legal and non-legal regional expertise; (ii) existing legislation which offers protection for traditional knowledge; and (iii) any proposed legislation for the protection of traditional knowledge.
5. A system (probably web-based) should be devised to facilitate the easy access to information and the sharing of information so that information as basic as the contact names and addresses for persons responsible for intellectual property matters in the relevant government agencies, to information regarding specific forms of traditional knowledge and any initiatives concerning their protection/preservation, could be accessible. This may involve establishing a unit (virtual or otherwise) from which and through which information can be received and disseminated.

The recent WIPO initiative regarding assistance to Caribbean States for the development of a Caribbean Framework of Protection for Traditional Knowledge would have moved the process forward and it will up to the governments of the region, through the intellectual property offices, universities, communities and other relevant organizations to implement and expand the policy articulated in the Revised Treaty of Chaguaramas which created, among other things, the Caribbean Community.

⁴³ See “Concept Note – Legal and Policy Options for the Legal Protection of Traditional Knowledge and Expressions of Folklore/Traditional Cultural Expressions” prepared by the International Bureau of WIPO, WIPO/GRTK/KIN/08/1, at p.12.

APPENDIX

LIST OF QUESTIONS POSED TO CARIBBEAN INTELLECTUAL PROPERTY OFFICES

Question 1:

What legislation, if any, presently exists in your country concerning the protection of the following:

- (1) Traditional knowledge;
- (2) Folklore or traditional cultural expressions;
- (3) Genetic Resources

Question 2:

- (1) Is a distinction made between “traditional knowledge” and “folklore” in your country?
- (2) What constitutes traditional knowledge and/or folklore in your country?
- (3) What, in your opinion, is/are the most significant form of forms of traditional knowledge and/or folklore in your country which should be protected. (Protection in this context, refers to legal protection from commercial and other forms of exploitation or reproduction without prior authorisation).

Question 3

- (1) Does a representative from your office, other government department or non-governmental organisation attend meetings of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC Meetings)?
- (2) Are you familiar with the draft traditional knowledge treaties which are being developed by WIPO, namely, (i) the “Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore” (the Draft TCET), and the “Draft Provisions for the Protection of Traditional Knowledge” (the Draft TKT)?

Describe your familiarity with the draft treaties in terms of the following:

High Low None

Question 4

How would you describe the level of awareness of issues relating to the protection of traditional knowledge among the following departments/groups:

(1) Intellectual Property Office/other department responsible for intellectual property

High Low None

(2) Other relevant government departments (Ministry of Culture, for example)

High Low None

(3) Other stakeholders such as cultural groups who maintain and pass on traditions

High Low None

(4) General public

High Low None

Question 5

(1) What do you think are the challenges to the development of a regional framework of protection for traditional knowledge?

(2) Does a lack of legal expertise in intellectual property law contribute to the challenges faced in the development of a Caribbean framework for the protection of traditional knowledge?

(3) Does a lack of awareness of the international debate on the protection of traditional knowledge contribute to the challenges to the development of a regional framework for the protection of traditional knowledge?