



INTELLECTUAL PROPERTY, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE

A GUIDE FOR COUNTRIES IN TRANSITION

Version One

Prepared by the Traditional Knowledge Division and the Department
for Transition and Developed Countries

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INTRODUCTION

This guide aims to help countries in transition decide whether and how best to protect traditional knowledge (TK) and traditional cultural expressions (TCEs) held by indigenous peoples and local communities. It describes the intellectual property (IP) concepts involved in protecting TK and TCEs and outlines existing international, regional and national protection systems. It then goes on to provide guidance on the issues that countries, and indigenous peoples and local communities, need to address when considering the role that IP can play in protecting TK and TCEs from misappropriation, and in generating and equitably sharing benefits from their commercialization.

Currently, countries in transition, like many other countries, lack a legal framework for protecting TK and TCEs as IP. This guide shows how such a framework can be developed as part of an overall IP strategy, by improving existing mechanisms and/or creating new ones. However, each country will need to consider the options that work best for it and the nature of the TK and TCEs for which protection is desired.

There are a number of reasons why countries in transition may not have instituted systems for protecting TK and TCEs in the past. They may not have seen the need to do so, for example, because they had not identified any TK or TCEs to protect, because misappropriation did not appear to be a problem, or because it was not clear who would benefit from protection. TK and TCEs may not have been recognized as subjects for IP protection because they are covered by other legislation on, for example, cultural heritage or biodiversity. Even where the need for IP protection has been recognized, introducing new legislation may not be a priority for hard-pressed governments or there may be unresolved issues that prevent a new legal framework being put in place.

To shed light on the current situation, countries in transition were asked to respond to a questionnaire seeking information on the following:

- existing legislation governing TK and TCEs in their countries;
- examples of TK and TCEs in their countries;
- how TK and TCEs are defined in existing national laws and regulations;
- the criteria used to characterize TK and TCEs; and
- communities with legal status of an indigenous community or people, or other traditional or local communities.

In addition, there were questions concerning current understandings of key legal concepts such as “subject matter of protection”, “beneficiaries of protection”, “scope of rights” and so on. Views were also sought on the parameters for possible future legal protection of TK and TCEs in each country, including criteria for protection, term of protection, formalities, possible exceptions and limitations, beneficiaries’ rights, and actions that might be considered offences. These issues are discussed in more detail later.

Questionnaires were sent to 33 countries, 22 of which responded. The information received has been taken into account in this guide, and the full responses are made available separately.

It is important to stress that this guide does not advocate or promote any particular approach to the relationship between IP and TK/TCEs. Rather, it provides information for policy-makers, heads of IP offices, and other decision-makers in countries in transition, on issues they need to consider before putting a legal framework in place, if they decide to do so. It aims to raise awareness of existing methods for the legal protection of TK and TCEs, as well as to improve understanding of the interrelations, at international, regional and national levels, between the IP system, on the one hand, and TK/TCEs and their implications for economic, social, cultural and technical development, on the other hand.

This guide may also help countries in transition to prepare for and participate in sessions of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The IGC is undertaking negotiations aimed at developing an international legal instrument (or instruments) for the effective protection of TK and TCEs, and to address the IP aspects of access to and sharing of benefits arising from the use of genetic resources.

WHY PROTECT TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS?

TK and TCEs are important elements of the cultural heritage and identity of many indigenous peoples and local communities, as well as of many countries and regions. They may contribute to the welfare, sustainable development and cultural vitality of those communities. Moreover, TK and TCEs were historically, and sometimes still are, recognized as part of the “common heritage of humanity”, meaning that their benefits belong to all mankind.

Furthermore, TK and TCEs have economic potential, forming a basis for creation and growth of culture-related enterprises and industries in the holder communities. The task of governments is to foster preservation and development of TK and TCEs, and facilitate their use by indigenous peoples and local communities to contribute to economic development, improve living standards and help overcome poverty.

TK and TCEs can also serve as a source of inspiration for other creators and innovators. However, the process of commercialization has raised concerns about the risks of misappropriation by third parties of the TK and TCEs held by indigenous peoples and local communities. There are a number of cases where indigenous creations have been copied by others for commercial gain, or where patents have been granted for TK-based inventions, that have bypassed the holders and deprived them of a fair share of the economic benefits.

Patenting of turmeric in the United States

Turmeric, a plant native to South Asia, is used for cooking, dyeing fabrics, gardening and ceremonies. It has also been used for thousands of years in Ayurvedic medicine for healing wounds. In 1995, the US Patent and Trademark Office (USPTO) granted a patent to the University of Mississippi Medical Center for “a method of promoting healing of a wound by administering turmeric to a patient afflicted with the wound”. The Council of Scientific and Industrial Research (CSIR) of India challenged the patent on the grounds that the invention claimed was not novel because the wound-healing properties of turmeric were well-known. The CSIR provided documentation on the prior use of turmeric for wound healing, including an ancient Sanskrit text and a paper published in 1953 in the Journal of the Indian Medical Association. The USPTO revoked the patent in 1997.

Benefit-sharing and TK in Samoa

Traditional healers of Samoa were recently acknowledged in a benefit-sharing agreement concerning the development of prostratin, an anti-AIDS compound derived from the Samoan native *mamala* tree (*Homalanthus nutans*). Prostratin forces HIV out of reservoirs in the body, so allowing anti-retroviral drugs to attack it. The bark of the *mamala* tree has been used by traditional healers to treat hepatitis, among other medicinal uses of the tree, and this traditional knowledge guided researchers in their search for valuable therapeutic compounds. Revenues from the development of prostratin will reportedly be shared with the village where the compound was found and with the families of the healers who helped discover it. Revenues will also be applied to further HIV/AIDS research, and it is additionally proposed to license the prostratin research to drug-makers so that the resultant drugs can be made available to developing countries for free, at cost, or at a nominal profit.

At present, the IP protection of TK and TCEs is a matter primarily for national governments. However, as already noted, negotiations are currently underway in the IGC to develop an international legal instrument (or instruments) for the effective protection of TK and TCEs, and to address the IP aspects of access to and sharing of benefits arising from the use of genetic resources.

SOME CORE CONCEPTS

Traditional cultural expressions

WIPO uses the terms “traditional cultural expressions” and “expressions of folklore” to refer to tangible and intangible forms in which TK and cultures are expressed, communicated or manifested. Examples include traditional music, performances, narratives, names and symbols, designs, handicrafts and architectural forms. The terms “traditional cultural expressions” and “expressions of folklore” are used interchangeably and have the same meaning. “Expressions of folklore” was once the term most commonly used in international discussions and is found in many national laws. As above pointed out, nowadays, the WIPO IGC uses the term “traditional cultural expressions” (TCEs). However, the use of these terms is not intended to suggest any consensus among WIPO member states on the validity or appropriateness of these or other terms, and does not affect or limit the use of these or other terms in national or regional laws.

TCEs are integral to the cultural and social identities of indigenous peoples and local communities, embodying know-how and skills, and transmitting core values and beliefs. Their protection is related to the promotion of creativity, enhanced cultural diversity and the preservation of cultural heritage. For many indigenous peoples and local communities, TCEs, TK and associated genetic resources form part of a single integrated heritage. Yet, because TCEs raise some particular legal and policy questions in IP, they receive a distinct focus in many national and regional IP laws and in WIPO’s work.

Traditional knowledge

“Traditional knowledge”, as a broad description of subject matter (TK in a general sense or *lato sensu*), generally includes cultural heritage, practices and knowledge systems of indigenous peoples and local communities. In other words, TK in a general sense embraces the content of knowledge itself as well as TCEs, including distinctive signs and symbols associated with TK.

In international debate (and in this guide), “traditional knowledge” is used in a narrower sense (*stricto sensu*) to refer to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, which includes know-how, practices, skills and innovations. TK can be found in a wide variety of contexts, such as: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; and biodiversity-related knowledge.

Protection

The term “protection” conveys a number of meanings that need to be distinguished. WIPO is primarily concerned with protection in the IP sense – that is, protection against unauthorized copying, adaptation and use of TK and TCEs by third parties. The objective of IP protection is to use IP tools and principles to prevent unauthorized or inappropriate uses of TK/TCEs by third parties.

However, “protection” can also mean “preservation” and “safeguarding” - the identification, documentation, transmission, revitalization and promotion of cultural heritage in order to ensure its maintenance or viability. The objective in that case is to ensure that TK and TCEs do not disappear and are maintained and promoted. The needs of TK and TCE holders and guardians can sometimes be more appropriately addressed by preservation and safeguard measures, such as recording and documentation in a database, than by IP protection.

IP protection can take two forms – positive and defensive protection.

- *Positive protection* grants IP rights in the TK and TCEs. These rights may be used to prevent unauthorized or inappropriate uses by third parties. It may also enable active exploitation of TK and TCEs by the originating community itself, for example to build up its own handicraft enterprises.
- *Defensive protection* does not grant IP rights over the subject matter of TK and TCEs but aims to stop such rights from being acquired by third parties. Defensive strategies include the use of documented TK to preclude or invalidate patents that illegitimately claim pre-existing TK as inventions.

Prior informed consent

The notion of “prior informed consent” is derived from medical ethics in which a patient has the right to decide whether or not to undergo treatment after being fully informed about its risks and benefits. A right or principle of “prior informed consent”, or sometimes “free, prior and informed consent”, is referred to or implied in several international instruments, particularly in the environmental field.¹ Its use in the TK and TCE context embodies the general principle of participation of indigenous peoples and local communities in decision-making, and their involvement in the formulation, implementation and evaluation of programs affecting them.²

The purpose of the use of the adjective “free” is to ensure that no coercion or manipulation is used in the course of negotiations, while inclusion of “prior” acknowledges the importance of allowing time for indigenous peoples and local communities to fully review proposals, respecting the time required for achieving consensus. “Consent” is a process whereby permission is given, based on a relationship of trust. “Informed” consent implies that clear explanations are provided, along with contract details, possible benefits, impacts and future uses. The process should be transparent, and the language fully understood by indigenous peoples and local communities.³

Prior art

Prior art is, in general, all the knowledge that existed prior to the relevant filing (or priority date) of a patent application, whether in written form or oral disclosure. Some legal instruments differentiate between printed publications, oral disclosures and prior use, and where the publications or disclosure occurred.⁴

For the purposes of WIPO’s *Patent Cooperation Treaty*, prior art is defined as “everything which has been made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations) and which is capable of being of assistance in determining that the claimed invention is or is not new and that it does or does not involve an inventive step (i.e. that it is or is not obvious), provided that the making available to the public occurred prior to the international filing date.”⁵

¹ E.g. Article 6(4) of the *Basel Convention on the Transboundary Movement of Hazardous Wastes, 1989*, and the *Convention on Biological Diversity, 1992*.

² Art.32(2), *United Nations Declaration on the Rights of Indigenous Peoples, 2007*; see also United Nations Development Group, *Guidelines on Indigenous Peoples’ Issues, 2008*.

³ Stephen Allen and Alexandra Xanthaki, *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford and Portland (OR): Hart Publishing, 2011, p.49; see also United Nations Economic and Social Council Permanent Forum on Indigenous Issues, Fourth Session, and *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, E/C.19/2005/3, p.8.

⁴ *WIPO Intellectual Property Handbook*, WIPO Publication No. 489 (E), 2008, p.19.

⁵ Rule 33.1 of the *PCT Regulations*.

Public domain

Broadly speaking, a work is considered to be in the public domain if there is no legal restriction on its use by the public.⁶

Black's Law Dictionary defines the public domain as “[t]he universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to use without charge. When copyright, trademark, patent, or trade-secret rights are lost or expire, the intellectual property they had protected becomes part of the public domain and can be appropriated by anyone without liability for infringement.”⁷

The public domain has been defined in the field of copyright and related rights as “the scope of those works and objects of related rights that can be used and exploited by everyone without authorization, and without the obligation to pay remuneration to the owners of copyright and related rights concerned – as a rule because of the expiry of their term of protection, or due to the absence of an international treaty ensuring protection for them in the given country.”⁸

The public domain in relation to patent law consists of knowledge, ideas and innovations over which no person or organization has any proprietary rights. Knowledge, ideas and innovations are in the public domain if there are no legal restrictions on their use, after patents have expired or following non-renewal, revocation or invalidation of patents.⁹

The role, contours and boundaries of the “public domain” are under active discussion in several forums, including, in the context of TK and TCEs, the WIPO IGC.¹⁰

Publicly available

“Publicly available” does not necessarily mean “in the public domain”. Material in the public domain is freely available for use without charge. Material that is “publicly available” may be available only on agreed terms that could include payment for access. It is often assumed that “publicly available” TK that has been accessed and disseminated is in the public domain and hence freely available. But this may not be the case. The use of “publicly available” TK may still require prior informed consent from the holders as well as agreement on benefit-sharing provisions.

Customary law

Black's Law Dictionary defines “customary law” as law “consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.” Customary law has also been defined as “locally recognized principles, and more specific norms or rules, which are orally held and transmitted, and applied by community institutions to internally govern or guide all aspects of life.”¹¹

Customary laws can be codified, written or oral, expressly articulated or implemented in traditional practices. Another important element is whether these laws are “formally” recognized

⁶ See *Dissemination of Patent Information*, WIPO document SCP/13/5, 2009, p.26.

⁷ *Black's Law Dictionary* (8th ed., 2005), p.1027.

⁸ *WIPO Guide to the Copyright and Related Rights Treaties and Glossary of Copyright and Related Rights Terms*.

⁹ See *Dissemination of Patent Information*, WIPO document SCP/13/5, 2009, pp.26-28.

¹⁰ For further discussion of the meanings of the term “public domain” in relation to TK and TCEs, see *Note on Meanings of the Term “Public Domain” in the Intellectual Property System, with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore*, WIPO/GRTK/IC/17/INF/8.

¹¹ *Protection Rights over Traditional Knowledge: Implications of Customary Laws and Practices*, Research Planning Workshop, Cusco, Peru, May 20-25, 2005.

by and/or linked to national legal systems. In determining whether certain customs have status as law, a decisive factor is whether they have been and are being viewed by the community as having binding effect, or whether they simply describe actual practices.

Customary laws define rights and responsibilities of community members on important aspects of their lives, culture and world view. Customary law can relate to use of and access to natural resources; rights and obligations relating to land, inheritance and property; conduct of spiritual life; maintenance of cultural heritage and knowledge systems; and many other matters.

“Customary practices” may be described as the acts and uses governing and guiding aspects of the life of a community. Customary practices are engrained within the community and embedded in the way it lives and works. They cannot be perceived as stand-alone, codified “laws” as such.¹²

OVERVIEW OF RELEVANT INTERNATIONAL AND REGIONAL INSTRUMENTS/PROCESSES

A national strategy to protect TK and TCEs will need to take into account existing international and regional conventions, as well as other relevant work at international and regional level. This work can be divided into four groups:

1. International instruments providing IP protection for TK and TCEs.
2. International instruments relating to other forms of protection of TK and TCEs.
3. Regional agreements and non-binding instruments providing IP protection for TK and TCEs.
4. Activities of other international organizations

International instruments providing intellectual property protection

- *Berne Convention for the Protection of Literary and Artistic Works, 1971*
- *WIPO Performances and Phonograms Treaty, 1996* and the *Beijing Treaty on Audiovisual Performances, 2012*

The *Berne Convention for the Protection of Literary and Artistic Works* was amended in 1967 to cover unpublished works of unknown authorship, making it possible to protect TCEs with copyright. Under the Convention, national law can determine the competent authority to represent the author, and protect and enforce the author’s rights in the countries of the Berne Union. However, these provisions have not been widely used.

The related *WIPO Performances and Phonograms Treaty, 1996* and the *Beijing Treaty on Audiovisual Performances, 2012* provide protection for performances of TCEs, such as performances of music, dance and drama.

International instruments relating to other forms of protection

- *International Covenant on Civil and Political Rights, 1966*
- International Labour Organization Convention No. 169 on *Indigenous and Tribal Peoples in Independent Countries, 1989*
- *UNESCO Recommendation on Safeguarding of Traditional Culture and Folklore, 1989*
- *Convention on Biological Diversity, 1992, and its Nagoya Protocol, 2010*
- *International Convention for the Safeguarding of the Intangible Cultural Heritage, 2003*
- *Universal Declaration on Bioethics and Human Rights, 2005*

¹² WIPO, *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues*.

- *Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005*
- *United Nations Declaration on the Rights of Indigenous Peoples, 2007*

Article 23 of the International Labour Organization Convention 169 on *Indigenous and Tribal Peoples in Independent Countries* recognizes handicrafts, rural and community-based production, and traditional activities of indigenous peoples as important factors in the preservation of their culture and economic autonomy. Promotion of such activities and their development should be guaranteed by the governments of participating states.

UNESCO's *Recommendation on the Safeguarding of Traditional Culture and Folklore* includes a variety of measures covering:

- identification (for example, collection, cataloging, documentation);
- conservation (creation of archives, museums);
- preservation (support to maintain folklore traditions, for example, through education and awareness programs);
- dissemination (such as promoting festivals, seminars and conferences);
- protection, including protection related to the IP aspects of folklore, as well as rights of informants (privacy and confidentiality) and of collectors (proper maintenance of collections, safeguards against misuse and so on).

The *Convention on Biological Diversity (CBD)* also contains provisions recognizing the value of TK of indigenous and local communities. Under Article 8(j) of the Convention, each Contracting Party shall, in accordance with its national legislation: 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; promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices; and encourage equitable sharing of benefits arising from the utilization of such knowledge, innovations and practices.

The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization*, adopted in 2010, has not yet entered into force. Its objective (Article 1) is “the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.”

TK and TCEs also fall under the *International Convention for the Safeguarding of the Intangible Cultural Heritage*, which covers “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage”. However, the Convention mainly applies to TK not embodied in any tangible objects, such as oral traditions, rituals and festive events, and knowledge related to traditional crafts. Buildings, historic places and monuments do not fall within its scope. Protection under the Convention is aimed at the preservation, development and promotion of traditional activities. Signatory states are required to maintain registers of the intangible cultural heritage present in their territory (Article 12). They must also endeavor to put in place appropriate measures to ensure access to the intangible cultural heritage while respecting customary practices, and to create documentation institutions for the intangible cultural heritage and facilitate access to them (Article 13).

The preamble to the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* recognizes the importance of TK, in particular the knowledge systems of indigenous peoples, as a source of intangible and material wealth, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion.

Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples* refers to the rights of indigenous peoples to maintain, control, protect and develop their cultural heritage, TK and TCEs as their intellectual property, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games, and visual and performing arts.

Regional agreements and non-binding instruments providing intellectual property protection

- *Tunis Model Law on Copyright for Developing Countries, 1967*
- *UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action, 1982*
- *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, 2010*

The ability to protect national folklore using copyright is also provided for in the *Tunis Model Law on Copyright for Developing Countries*. Such protection can be described as special (*sui generis*) protection. It differs from standard copyright protection in that it is not limited in time, while moral rights (the rights to claim authorship and to prevent detrimental distortion) and economic rights (exclusive rights to authorize reproduction, translation, adaptation, performance, broadcasting and so on) are held by a designated competent authority.

The *Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Forms of Prejudicial Action* are designed to improve national legislation. They entail creation of a special mechanism for the protection of folklore in national laws. Any use of expressions of folklore for publication, reproduction, distribution, recitation, performance, broadcast or cable transmission, or other means of communication to the public would be prohibited if it is done for the purpose of making a profit, outside the traditional context. The use of folklore for commercial purposes or beyond the traditional context is only possible with the permission of the competent authority on the basis of a filed application. For granting such an authorization, the competent authority can charge a special fee for the purposes of promotion and preservation of national culture.

The provisions of the *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*, adopted by the African Regional Intellectual Property Organization (ARIPO), are aimed at protecting the rights of the holders of TK and TCEs against misappropriation, misuse, and illegal use outside the traditional context. The holders of TK and TCEs are granted the exclusive right to authorize their use, and protection under the Protocol includes the fair and equitable sharing of benefits arising from commercial or industrial use, by mutual agreement of the parties.

Activities of other international organizations

As shown by the above description of international and regional instruments, issues related to the protection and preservation of TK and TCEs are most actively discussed within WIPO, the CBD and UNESCO. However, relevant work is also being done by other international organizations.

The World Health Organization (WHO) has been looking at public health and innovation aspects of traditional medical knowledge that are linked to IP. The Food and Agriculture Organization of the United Nations (FAO) has undertaken research related to the rights of farmers, many of whom belong to indigenous (or local) populations. The United Nations Environment Programme (UNEP) deals with the preservation of TK, with a special focus on the knowledge of indigenous peoples in the context of conservation of the environment and resources needed for existence and biological diversity, as well as issues related to the preservation of endangered languages.

The United Nations Conference on Trade and Development (UNCTAD) held an Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovation and Practices (October - November 2000), to identify activities with potential benefits for developing countries and to examine ways to protect TK, innovation and practices.

DEVELOPING A NATIONAL STRATEGY

National laws are currently the prime mechanism for achieving protection of TK and TCEs. While there may be several approaches to protection, reflecting the diversity of TK and TCEs and their social context, developing a strategy for IP protection usually involves the following key components:

- *Policy initiatives*, including political decisions to give greater attention and value to TK and TCEs and their protection, as well as policy statements that set overall directions on key issues;
- *Legislative initiatives*, including strengthening existing legal tools and creating new ones;
- *Infrastructure*, especially inventories, databases and other information systems, which can complement and support the implementation of legal systems;
- *Practical tools*, including the use of contracts, guidelines and protocols, as well as capacity-building and awareness-raising steps, if and when appropriate.

These four components provide the basis for developing a comprehensive protection strategy that integrates policy, legal, infrastructural and practical steps. Developing such a strategy also needs to consider implementation at the community, national and possibly regional and international levels. It involves a review of the TK and TCEs held in the country, a decision on overall goals, and a survey of the options available to provide the desired level of protection.

A national strategy may be developed according to the following plan of action:

- Identification of stakeholders and actors (holders of TK and TCEs, experts, researchers, independent artists, writers, actors and professionals from other related industries, as well as government agencies and ministries);
- Creation of an *ad hoc* working group with representatives of identified stakeholders and actors. A smaller executive body could be tasked with preparing proposals under the guidance of the working group;
- A review of existing TK and TCEs in the country;
- Assessment of the current protection afforded to TK and TCEs;
- Analysis of stakeholders' interests and needs;
- Identification of the main goals and objectives;
- Review of possible options for protection;
- Risk assessment;
- Preparation of proposals;
- Coordination of the strategy with interested parties;
- Approval of the strategy by the relevant authority.

The strategy itself should explain the reasons for providing protection of TK and TCEs, set clear goals and objectives, list the measures needed to achieve those goals and objectives, establish an implementation timetable, and identify the mechanisms for implementation and subsequent enforcement. Importantly, the stakeholders should be involved at each stage.

Policy Initiatives

A first step towards policy development is to have a clear understanding of the IP interests of the holders of TK and TCEs, as well as the interests of other stakeholders such as curators, creators, users, the media and the public. It is important to determine what forms of TK and TCEs exist, and which TK and TCEs are considered to be in need of legal protection. The next

step is to set out general objectives for their protection. For example, is protection to be aimed at preserving TK and/or TCEs, preventing their misuse, or using them as a basis of community economic development? A decision on objectives will assist in the design of legal mechanisms and in assessing needs for capacity-building. Another issue to consider at this stage is the practicability of protection: will the results (for example, preservation of TK and TCEs, or protection against misuse) justify the introduction of new mechanisms and who will be the beneficiaries?

Identifying TK and TCEs

Countries may start by preparing a national inventory of TK and TCEs, involving:

- surveys, questioning holders of TK and TCEs;
- analysis of the literature on TK and TCEs;
- analysis of archival documents;
- analysis of existing records, registries, catalogs or databases on TK and TCEs;
- systematization of identified TK and TCEs;
- determination of various forms in which TK and TCEs may be found.

Many countries have difficulty in defining what constitutes “traditional knowledge” and “traditional cultural expressions”. For example, Latvia does not recognize the existence of TK, and recognizes TCEs only as part of the intangible cultural heritage. In the former Yugoslav Republic of Macedonia, Lithuania and Bulgaria, both TK and TCEs are recognized as intangible cultural heritage.

Compiling an inventory makes it possible to identify TK and TCEs with a high potential of scientific, cultural, social and/or economic value, to the holder communities and to the country. The inventory can also help in mapping TK and TCEs - a prerequisite for creating databases that can be digitized for protection and/or commercialization. The inventory, and establishment of the criteria for listing TK and TCEs, should be the responsibility of a special working group comprising experts, the holders of TK and TCEs, as well as other relevant commercial and non-commercial organizations.

It should be emphasized, however, that documentation does not, in and of itself, ensure legal protection for TK or TCEs. In fact, documentation of TK may inadvertently undermine IP interests (for example, by making the material more accessible to outsiders), unless it is carried out in full knowledge of the IP implications and in the context of an IP strategy.¹³

Establishing the legal status of TK and TCEs

Having identified TK and TCEs, it is necessary to look at their current legal status. Are they:

- part of a code, classification or other structured knowledge system?
- partially documented or recorded in some form?
- retained only as an oral or performance tradition (that is, not written down or recorded)?
- published or displayed to the public?
- part of the “public domain” from the viewpoint of the conventional IP system?
- disclosed to other people, such as researchers or journalists?

¹³ WIPO *Traditional Knowledge Documentation Toolkit - Consultation Draft*, November 2012.
http://www.wipo.int/export/sites/www/tk/en/documents/pdf/tk_toolkit.pdf

Identifying beneficiaries of protection

Another issue is the identification of beneficiaries. It is important to determine who should benefit from any such protection or who holds the rights to protectable TK and TCEs. Should it be:

- traditional communities?
- indigenous peoples?
- individuals within these communities?
- cultural organizations?
- other persons?

Paramount in any national protection strategy should be the rights and interests of the holders of TK and TCEs, who create, preserve and transmit them between generations. Protection provisions should promote respect for their cultural and community values, and should not restrict their use of TK and TCEs within the traditional context. Provisions should be established after consultations with the interested communities and should be based, as far as possible, on their customs. One of the goals of a national strategy may be strengthening and enforcing the principle of “free, prior and informed consent” of the holders in relation to access, documentation and use of their TK and TCEs.

Establishing the purpose of protection

Legal protection of TK and TCEs is not an end in itself but a means to achieve the goals and aspirations of indigenous peoples and local communities, and/or to help meet national policy objectives. It is vital to clarify the purpose of protection as this will influence the means of protection chosen (for example, whether protection should be positive, defensive or both). Is protection to be aimed at:

- preserving TK and TCEs?
- preventing others from misusing TK and TCEs?
- preventing others from claiming IP rights in TK and TCEs?
- establishing IP rights in TK and TCEs as the basis of community economic development?
- avoiding culturally offensive use of TK and TCEs?
- securing attribution for TK and TCEs?

IP-type protection of TK and TCEs should be set in the context of other policy issues and objectives, including the safeguarding of intangible cultural heritage, promotion of cultural diversity and pluralism, increased respect for the rights of indigenous peoples and local communities, revival of traditional cultures, the conservation of biodiversity, sustainable development, basic health care, assistance to the economic activities of indigenous peoples and local communities, recognition of the contribution of indigenous peoples and local communities to the wealth of national and international knowledge and culture, fair compensation for use of TK and TCEs, and promotion of innovation and cultural exchange. Will IP protection contribute to or hinder achievement of these other objectives?

Identifying gaps in existing IP protection

To identify gaps in existing IP protection and determine future options, answers are needed to the following questions:

- What do existing IP systems already cover (for example, patentable inventions)?
- What do existing IP systems *not* cover?

- What kind of threats do existing systems protect against (for example, misuse by third parties)?
- What kind of threats do existing systems *not* protect against (for example, in many countries patentable inventions are not protected against use for non-commercial research)?
- What protection is given (period of protection, protection formalities, and limitations and exceptions)?

It may be possible to apply or adapt existing IP systems to protect TK and TCEs. In some countries, holders of TK and TCEs are already using the IP system to protect their rights (see below). However, in many cases the conventional IP system is not well adapted to protect TK and TCEs. For example, the concept of exclusive rights does not normally apply to collective rights. And there may be difficulties applying IP concepts to material that is already known not only to indigenous peoples and local communities or in the public domain. Protection (in the IP sense) should also be practicable and must not create an undue burden for the holders of TK and TCEs, for example, through onerous formalities.

Taking account of customary law and protocols

Many holders of TK and TCEs want legal protection to be based on customary law. A number of existing *sui generis* systems refer to customary law and protocols as an alternative or in addition to the creation of contractual rights with respect to TK and TCEs.

One of the important functions of customary law is to define a set of rights: the rights of “ownership” of TK and TCEs and associated liabilities and interests; the rights to common use of TK and TCEs under a protection regime; and the rights to the distribution of benefits from the use of TK and TCEs. Customary law can help to clarify how these various rights and benefits are identified and allocated within indigenous peoples and local communities.

Striking a balance with the public interest

Any national strategy on protecting TK and TCEs needs to balance the interests of TK and TCE holders with the public interest. This balance depends largely on the extent of “publicly available” material – those elements of TK and TCEs that have become widely known and used. In countries in transition, the prevailing view seems to be that “publicly available” TK and TCEs should not be protected and should be available to the public without restriction.

Legislative Initiatives

When considering legislative options for the IP protection of TK and TCEs, it is first necessary to examine the available legal and policy options under conventional IP systems. Existing IP rights can indeed be useful for the protection of TK and TCEs; for example, rights granted by laws on trademarks and geographical indications, as well as the protection afforded by unfair competition laws, can be helpful in protecting reputations associated with TK and TCEs and related goods and services. If there are gaps in existing national legislation, it may be possible to fill them by adapting the existing IP framework.

However, in some cases, adapting existing IP rights may not be considered sufficient to cater for the holistic and unique character of TK and TCEs. A decision may then be taken to protect TK and TCEs through *sui generis* systems. These are specialized measures or laws aimed exclusively at addressing the characteristics of specific subject matter, such as TK and TCEs.

It will also be necessary to take into account and coordinate with non-IP legislative and policy measures such as those concerning cultural diversity and cultural heritage, regional development, the conservation of biodiversity, the promotion of the use of traditional medicine and the collection of ecological TK.

Depending on protection needs and the existing IP framework, the options are:

- use of existing IP measures and systems;
- development of additional regulatory mechanisms;
- adaptation of legal mechanisms unrelated to IP;
- additions or amendments to existing legislation (filling in the gaps);
- development of special (*sui generis*) laws and regulations.

Use of existing intellectual property measures and systems

This section gives a brief description of the kinds of protection that TK and TCEs can enjoy through conventional IP systems and institutions.

Patents

A patent is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem. In order to be patentable, the invention must fulfill certain conditions (novelty, inventive step, industrial application).

However, TK as such cannot be patented, since it does not satisfy the novelty and/or inventive step criteria.

In general, any invention which is made public before an application is filed would be considered prior art (although the definition of the term “prior art” is not unified at the international level, in many countries, it consists of any information which has been made available to the public anywhere in the world by written or oral disclosure). For example, in the Russian Federation, in the course of reviewing “prior art”, information is considered to be publicly available if any person can become acquainted with it, or it can be lawfully communicated to any person. Thus, if TK is disclosed, a patent cannot be granted on an invention based on such knowledge.

However, some TK-based inventions may meet the requirements of patentability if the details of the TK are not published or widely known (including to patent offices). Patentable inventions containing elements of TK may include, for example, previously unknown foods and their manufacturing methods; personal and household goods; devices and methods for farming, hunting and fishing; ways to prevent and/or treat diseases in humans or animals; and medicines derived from plants. Such inventions are generally covered by Section A, "Human necessities", of the International Patent Classification (IPC).

TK-based patents granted in countries in transition include, for example, “method of making decorative items made of wood”, “multilayer article of birch bark” in the Russian Federation, “method for the production of cow’s milk kumys” and “method for building Yurt” in Kyrgyzstan, and “method for preparation bran bread” in Uzbekistan.

Industrial designs

The artistic and design aspect of a product, determining its appearance, may be protected as an industrial design. This option may be available for product designs containing elements of TK and TCEs that are not available from public sources.

Examples include industrial designs related to food, garments, household appliances, jewelry, tools, toys, equipment for hunting and fishing, articles and accessories for animal welfare and care, and decorative surfaces and design.

Industrial designs relating to TK/TCEs registered in countries in transition include, for example, the production of “Gzhel Association” containing elements of folk ornaments – “plate”,

“Kvasnik” and “tea set” in the Russian Federation, and “ear-flapped hat” and “skullcap” in Kyrgyzstan.

Trademarks

Trademarks are another common method of protection, which grant to an individual or a group of individuals the exclusive right to use a distinctive sign that identifies the community as a whole with the production or distribution of the trademarked products or services. Trademarks are often used for the protection of goods and services incorporating TCEs, especially collective and certification marks

For example, in February 2009 a sign of “nestinars” (people who dance on hot coal) was registered as a trademark with the Bulgarian Patent Office. The trademark owner is the municipality of Tsarevo and the City Council controls and exercises the trademark rights. The trademark was registered in the category “Education, training, cultural and recreational activities” in accordance with the International Classification of Goods and Services for the Purposes of the Registration of Trademarks (Nice Classification).

However, this form of protection of TCEs does not prohibit others from using the sign as a trademark for other activities or from using the TCE itself - for example, the registration of “nestinar” as the names of companies (hotels and restaurants).

Confidential information

Laws on confidential information, also known as trade secrets, may protect TK that is not known by outsiders and has actual or potential commercial value that would give the community a competitive edge in producing a good or service.

In small local communities, it is usually a shaman or tribal leader who is the holder and the main user of secret TK. Those possessing this secret knowledge today are those who were “confided” in by their ancestors, with the responsibility of transmitting this knowledge to future generations. In Bulgaria, examples include the “conspiracies” (mumbling incantations) or “cast bullets” (casting bullets) that are considered as conventional treatments for illness. Keeping TK secret provides solid protection: it does not require registration and it lasts indefinitely, as long as the exclusive right to use the TK is passed in a relatively informal way from generation to generation.

Geographical indications (appellation of origin)

A geographical indication is a sign used on goods that have a specific geographical origin and possess qualities, reputation or characteristics that are essentially attributable to that place of origin. Most commonly, a geographical indication includes the name of the place of origin of the goods.

An appellation of origin is a special kind of geographical indication, generally consisting of a geographical name or a traditional designation used on products that have a specific quality or characteristics that are essentially due to the geographical environment in which they are produced.

Examples of geographical indications (appellations of origin) registered in countries in transition include Elets lace in the Russian Federation, Gračaničko Keranje (lace and crocheted doilies from Gračaničko) in Bosnia and Herzegovina, Bulgarian yoghurt, and Koufeta Amygdalov Geroskipou (almond candies from Geroskipou) in Cyprus.

Copyright and related rights

Copyright protection is granted to TCEs, or their derivatives, that have specific authors. Copyrighted TCEs can include composite works (for example, a collection of fairy tales) and derivative works (such as variations on folk songs). TCEs (for example, the performance of folk songs and dances, and recordings of folk music) may be protected by related rights. As noted above, international copyright and related rights instruments already provide some protection for TCEs. Countries that have adapted copyright legislation to protect TCEs include the former Yugoslav Republic of Macedonia and Lithuania.

Sui generis approaches

The evaluation of options may lead to the conclusion that a *sui generis* approach is needed. In this case, it will be important to clarify the gaps in the existing framework of IP protection a *sui generis* system is intended to fill and to learn from the experience of other countries with *sui generis* systems in place.¹⁴

When considering a *sui generis* system for the protection of TK and TCEs, the key questions include:

- What is the subject matter to be protected?
- What are the objectives of protection?
- What threats are the TK and TCEs to be protected against?
- What form of protection is needed and what rights will be granted?
- Who will be the rights-holders or beneficiaries?
- What forms of behavior should be considered unacceptable or illegal?
- What exceptions and limitations to the rights should there be (for example, for use of TK and TCEs in archives, libraries or museums for non-commercial cultural heritage purposes)?
- How will rights be acquired? Will formalities be required (such as registration)?
- For how long will protection be accorded?
- Should newly recognized rights have retrospective effect?
- How should these rights be managed and how will implementation be ensured?
- What forms should judicial procedures and dispute resolution mechanisms take?
- What sanctions or penalties should apply to behavior or acts considered unacceptable or illegal?
- How should foreign rights-holders/beneficiaries be treated and what about trans-boundary situation (for example, some TK and TCEs may be located in more than one country)?

In answering these questions, the following considerations should be borne in mind:

- *Identifying the objectives of protection:* These may include the promotion of respect for TK and TCEs, as well as for the dignity, cultural identity, and intellectual and spiritual values of the holders who preserve and maintain these systems; meeting the basic needs of the holders of TK and TCEs; promoting the preservation of TK and TCEs; stopping the unfair and inequitable use of TK and TCEs; and increasing transparency and mutual trust between the holders of TK and TCEs and their users.
- *Determining the principles of protection:* Legal mechanisms should respect, for example, the principle of effectiveness and accessibility of protection; the principle of compliance and consistency with other international and regional agreements and processes; and the principle of respect for customary ways of using and transmitting TK and TCEs.

¹⁴ See, for example, *Law of the Kyrgyz Republic on the Protection of Traditional Knowledge, 2007* and *Law of the Republic of Azerbaijan on Legal Protection of Expressions of the Azerbaijan Folklore, 2003*.

- *Identifying those TK and TCEs that will be subject to protection:* Eligibility for protection may require TK and TCEs to: be a unique product of identifiable beneficiaries or clearly associated with them; be collectively created, used, stored and transmitted from generation to generation; be an integral part of the community's cultural identity; not be in the public domain; and not be protected by IP rights.
- *Identifying the beneficiaries:* These may be indigenous peoples and local communities, agencies acting on their behalf, cultural organizations, or others.
- *Determining the scope of protection:* Measures may be needed to prevent unauthorized disclosure, use or operation of TK and TCEs; to ensure recognition and indication of sources in cases where TK and TCEs are disclosed or used; to require references and sources if TK and TCEs are borrowed for the purposes of publication or use outside the traditional context; to encourage the use of TK and TCEs while respecting cultural norms and practices of their holders; to require the disclosure of the origin of TK in patent applications; and to provide assistance to the holders and users of TK and TCEs in formulating mutually agreed terms and conditions governing access and benefit-sharing arising from the commercial application of TK. Legislation may also include a list of those actions considered unacceptable or illegal and against which the protection is directed. The list might contain, for example, the prohibition of the use of TK or TCEs in any form that is derogatory or insulting to the honor and dignity of those using TK and TCEs in the traditional context. That said, the amount of protection can vary depending on the type of TK and TCEs.
- *Providing for limitations and exceptions:* These could include customary use by the holders; the use of TK and TCEs in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research, presentation and education; and/or use for a national emergency or other circumstances of extreme urgency.
- *Establishing a term of protection and transitional measures:* Some people believe that protection of TK and TCEs should be indefinite, while others advocate a limited term depending on the characteristics of TK and TCEs. New rules on legal protection may be given retrospective effect, may exclude retroactivity, or may adopt an intermediate approach that applies varying degrees of retroactivity. Applying protection with retrospective effect can create difficulties because third parties may have already used the protected material in good faith, believing it not to be subject to legal protection. In some legal and policy contexts, the rights and interests of such good-faith third parties are recognized and respected through measures such as a continuing entitlement to use the protected TK and TCEs, possibly subject to an equitable compensation, or a prescribed period within which to conclude any continuing good-faith use (such as sales of existing goods that would otherwise infringe the new right). On the other hand, the traditional context of TK and TCEs means that proponents of protection have generally sought some degree of retrospectivity.
- *Establishing formalities:* Claiming rights may require registration. However, registration should not jeopardize or compromise the rights and interests of TK and TCE holders in relation to undisclosed elements of their knowledge and expressions.
- *Establishing violation procedures and penalties:* These include means of legal defense and enforcement of rights in case of violations of the relevant obligations, and whether civil or administrative procedures will apply.
- *Determining responsibility for implementation:* Legislation could include creation of a special competent authority to administer the law, or responsibility could be assigned to a governmental agency, non-governmental organizations, or others.

- *Determining the protection granted to foreign holders:* Legislation needs to make clear how the rights and interests of foreign holders of TK and TCEs will be recognized. Under what conditions and circumstances would foreign rights-holders have access to national protection systems, and what level of protection would be available to them? Issues include the principle of national treatment (equal treatment for foreign and domestic rights-holders), which is the principle most often deployed in IP conventions, the principles of reciprocity and assimilation, and the determination of points of attachment.

Legal mechanisms unrelated to intellectual property

Appropriate legal mechanisms that are not related to IP can be adapted and supplemented to promote and enhance protection of TK and TCEs. Such mechanisms include legislation on culture, on the intangible cultural heritage of folk arts and crafts,¹⁵ on the conservation of biodiversity, on farmers' rights, and on indigenous peoples and local communities.

Other non-IP options include laws on unfair competition, trade practices, consumer protection and labeling; the use of contracts; customary and indigenous laws and protocols; civil liability and common law remedies such as unjust enrichment, rights of privacy and blasphemy; and criminal law.

Infrastructure and Practical Tools

Inventories, databases and other information systems can form part of the infrastructure that complements and supports policies and legal systems. Over the past decades, initiatives to document TK and TCEs have taken place all over the world, sometimes in conjunction with the legal protection of TK and TCEs, sometimes simply for preservation or safeguarding purposes.¹⁶ While documentation does not in itself ensure legal protection of TK or TCEs, inventories and databases may nevertheless create rights, whether these are to restrain use by third parties, or to be used by the holders themselves to derive economic benefits from their TK or TCEs. Databases may thus be used as part of a positive or defensive protection system. One defensive measure is to make available TK that is in the public domain to patent-granting authorities for "prior art" searches, in order to prevent the grant of patents on that TK.

Documentation

Documenting TK and TCEs includes recording them, writing them down, taking pictures of them or filming them - anything that preserves them and potentially makes them available for others to learn about them. Documentation is different from the traditional ways of preserving and passing on knowledge within the community; it is often the way people beyond the traditional circle can get access to TK and TCEs.

However, the mere documentation of TK or TCEs cannot stand alone as an effective strategy for protecting TK and TCEs. Documentation should not take place within a legal and policy vacuum.

Depending on how documentation is carried out, it can promote a community's interests or damage those interests. Important IP rights may be lost or strengthened when TK is documented. The *WIPO Traditional Knowledge Documentation Toolkit* has been developed to help holders of TK take care of their interests, if they decide to document their TK. This toolkit focuses on management of IP concerns during the documentation process, and also takes the documentation process as a starting point for a more beneficial management of TK as a community's intellectual and cultural asset. It describes the legal tools that are available,

¹⁵ For example, Lithuania's *Law on the Principles of State Protection of Ethnic Culture*, 2006.

¹⁶ See Vladia Borissova, *Digitizing Cultural Heritage in Bulgaria: A Survey of Intellectual Property-related Experiences and Practices*, 2010. http://www.wipo.int/export/sites/www/tk/en/culturalheritage/casestudies/borissova_report.pdf

discusses how they can be successfully used, and thereby aims to enable informed choices by TK holders themselves. The intention is to allow stakeholders to determine whether, and in what circumstances, IP rights are the appropriate means to achieve their objectives concerning TK.

Practical tools, such as contracts, guidelines and protocols, and practical steps, such as community consultations, capacity-building and awareness-raising activities, are also valuable to support the overall policy objectives and complement the development and implementation of legal measures.

The following additional measures should thus be considered:

- documentation of TK and TCEs;
- creation of public and special registers and databases;
- compilation of a list of symbols and characters that cannot be registered (for example, because they are sacred or because their use breaches community morality);
- creation of special sites and forums for the exchange of experience and information on preserving and protecting TK and TCEs;
- development of guidelines for the protection and preservation of TK and TCEs;
- development of model contracts for the use of TK and TCEs;
- recording in databases and registries of TK and/or TCEs if granted patents are based on TK, or if TK or TCEs are involved in disputes;
- other activities aimed at capacity-building and raising awareness.

Registries or databases of TK and TCEs should include the following information:

- the name of the object;
- the form of expression;
- the place of existence;
- the origin;
- the disclosing source;
- particularities of use;
- the holders and carriers;
- methods of fixation; and
- categories of users.

However, as mentioned above, documentation of TK and/or TCEs should only take place within the context of an IP strategy.

Other considerations

Developing a national strategy also needs to consider enforcement and implementation, as well as organizational issues.

Dispute Settlement

In developing policies and legislation for the protection of TK and TCEs, provisions need to be made for dispute settlement. Indigenous peoples or traditional communities may have a claim against outsiders for violation of their interests, for instance, through misuse, degrading use or non-payment of compensation for use. Disputes related to the use of TK and TCEs may also arise between users, cultural organizations and the representatives of different indigenous peoples and local communities.

At present, countries in Eastern Europe, Central Asia and the Caucasus tend to treat disputes between individuals in courts of law and economic disputes - in particular, disputes between

business entities - through arbitration. There are no special courts or other authorities to address disputes related to the misuse of TK and TCEs.

It may thus be worth considering creation of a special body to resolve disputes relating to the use of TK and TCEs, either under the auspices of a state entity responsible for policy in the sphere of culture and national development, or by setting up a special court or arbitration tribunal. Arbitration tribunals may be ad hoc, for the particular dispute, or permanent. One of the benefits of dispute resolution in the courts is the ability to hear evidence from the parties, from witnesses and from experts, and to receive evidence in a variety of forms including documentation, physical evidence, audio and video recordings. In judicial proceedings, the authorities may submit any information about the facts relevant to the case, subject to procedural law.

It is important to keep in mind that, in most countries, establishing a body to address such disputes will require adoption of a special law, or other changes in the justice system. Before taking this step, it may be sensible to look at the options for using existing courts and arbitration tribunals to hear disputes relating to the use of TK and TCEs, in order to accumulate and synthesize case law for publication and judicial review.

Organizational Issues

Consultation with and participation of indigenous peoples and local communities is critically important, not only when developing a national strategy on protection of TK and TCEs, but also when implementing it.

Executive bodies

Implementing a national strategy on TK and TCEs requires a well-functioning system of governmental bodies, which should coordinate with other parts of government responsible for national (and, where appropriate, regional) policy, including economic policy. It may be worth considering establishment of a special agency responsible for the protection of TK and TCEs.

In Bulgaria, for example, the protection of TK and TCEs as intangible heritage is managed by the Ministry of Culture in cooperation with state and local authorities and cultural organizations for the protection of intangible heritage. There are also links to the Bulgarian Academy of Sciences, universities, unions, creative industries, professional associations and other social organizations. However, there are no legal provisions governing IP protection and commercialization of TK and TCEs; the principles of the common law are applied, that is, TK and TCEs are deemed to be publicly available.

In most countries, copyright issues are handled either by a competent patent and trademark office or the culture ministry. In some countries, these two bodies are combined in one department or ministry. It would be logical to allocate issues related to the economic and IP aspects of TK and TCEs to one of these existing agencies. For example, the former Yugoslav Republic of Macedonia has suggested establishing a department for TK and TCEs in the government office for industrial property.

By contrast, Georgia argues that every state should establish a dedicated public body to handle TK and TCEs. In Georgia, that body is the National Center for Folklore.

Professional training

The availability of trained personnel is of particular importance for the development and implementation of public policy for the protection and commercialization of TK and TCEs. Those working in this area should receive appropriate training, to learn both about traditional culture and about IP legislation and rules. Training should also be offered to representatives of

indigenous peoples and local communities. This can be done through organized courses and seminars, as well as in postgraduate education.

In order to improve coordination of protection activities, it is recommended to develop an information network to link the relevant institutions and professionals.

Business participation

The role of the private sector in the commercialization and protection of TK and TCEs cannot be underestimated. Subject to proper organization, businesses and non-profit foundations can make a significant contribution to the protection of TK and TCEs, for example, by providing direct incentives or financial support, by sponsoring traditional festivals and other public events, or by practical use of certain TK or TCEs. In addition, private companies often have more flexibility than state or public organizations responsible for TK and TCEs when it comes to development of and participation in international cultural projects, which may be an alternative source of financing of a country's cultural traditions.

Businesses are interested in exploiting the economic potential of TK and TCEs (their ability to generate profit), which converts them into a productive resource and gives companies an incentive to support an effective system of conservation, protection, access and use. In most countries, the free use of TK and TCEs is not contrary to the law, since they are considered part of the public domain. However, unauthorized commercial use carries the risk of misrepresentation and distortion of the traditional nature of the appropriated TK or TCEs. This poses a major obstacle to the harnessing of a country's comparative advantage in using TK and TCEs to further the social, cultural and economic interests of its people.

Coordination with international and regional activities

The IGC was established in 2000 by the WIPO General Assembly in order to discuss the IP protection of TK and TCEs and issues concerning IP aspects of the use of genetic resources.

Negotiations are currently underway in the IGC towards the development of an international legal instrument for the effective protection of TCEs and TK, and to address the IP aspects of access to and benefit-sharing of genetic resources. The texts follow a *sui generis* approach.

FURTHER INFORMATION

- Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions: An Overview (WIPO Publication No. 933), http://www.wipo.int/export/sites/www/tk/en/publications/933e_booklet_1.pdf
- A series of briefs, <http://www.wipo.int/tk/en/briefs.html>
- The WIPO Traditional Knowledge Documentation Toolkit, consultation draft, November 1, 2012, http://www.wipo.int/export/sites/www/tk/en/resources/pdf/tk_toolkit_draft.pdf
- Database of legislative texts on the protection of TK and TCEs, http://www.wipo.int/tk/en/legal_texts/
- The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), <http://www.wipo.int/tk/en/igc/index.html>
- 22 responses to the questionnaires sent to 33 countries, http://www.wipo.int/dcea/en/tools/tool_09/index.html