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MINISTRY OF COMMERCE
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WORLD INTELLECTUAL
PROPERTY ORGANIZATION

WIPO INTER-REGIONAL MEETING ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE

organized by
the World Intellectual Property Organization (WIPO)

and
the Ministry of Commerce,
Government of Thailand

Chiang Rai, Thailand, November 9 to 11, 2000

INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL
KNOWLEDGE AND FOLKLORE

BACKGROUND DOCUMENT

Document prepared by the International Bureau of WIPO

I. INTRODUCTION

1. With the emergence of modern biotechnologies, genetic resources have assumed increasing economic, scientific and commercial value to a wide range of stakeholders. Traditional knowledge, whether or not associated with those resources, has also attracted widespread attention from an enlarged audience. Other tradition-based creations, such as expressions of folklore, have at the same time taken on new economic and cultural significance within a globalized information society.

2. Conservation, preservation, management, sustainable utilization and benefit-sharing in respect of genetic resources, traditional knowledge and folklore are being addressed within a range of different policy areas, including food and agriculture, biological diversity and the environment, biotechnology innovation and regulation, human rights, cultural policies and trade and economic development. Within all these areas intellectual property issues have arisen and are assuming increasing importance. As the specialized United Nations agency responsible for the promotion of intellectual property worldwide, WIPO has been requested by its Member States to undertake exploratory groundwork and facilitate discussions for a better understanding of the often inter-related intellectual property issues regarding genetic resources, traditional knowledge and folklore.

3. Section I of the present document reviews the previous work of WIPO regarding genetic resources, traditional knowledge and folklore and Member State discussions that have taken place at WIPO regarding these subjects, particularly since 1998. Section II describes WIPO's current work program relating, specifically, to traditional knowledge and folklore. Section III reports on the recent decision by the Member States to establish a separate body within WIPO to facilitate the continuation of discussions concerning genetic resources, traditional knowledge and folklore.

II. WIPO'S WORK ON GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE SINCE 1998

(a) *Genetic Resources*

4. Since the 1998-99 biennium, issues related to intellectual property and genetic resources have been addressed in regular activities under WIPO's exploratory Subprogram 11.2 on "Biological Diversity and Biotechnology." The activities on intellectual property and genetic resources began with a study on the role of intellectual property rights in the sharing of benefits arising from the use of biological resources and associated traditional knowledge. The study was commissioned by WIPO jointly with the United Nations Environment Programme (UNEP) and resulted in three case studies, which provide lessons on how the effective protection of intellectual property rights can support the sharing of benefits arising from the use of genetic resources. A display copy of the study is available at this meeting and copies may be ordered from the International Bureau.

5. Issues related to intellectual property and genetic resources were also discussed by Member States at the third session of the Standing Committee on the Law of Patents (SCP), which took place in Geneva from September 6 to 14, 1999. The SCP requested the International Bureau to include the issue of protection of biological and genetic resources on the agenda of a Working Group on Biotechnological Inventions, to be convened at WIPO in

November 1999. The SCP further invited the International Bureau to take steps to convene a separate meeting involving a larger number of Member States early in 2000, to consider that issue.

6. The Working Group on Biotechnology, at its meeting on November 8 and 9, 1999, recommended the establishment of nine projects related to the protection of inventions in the field of biotechnology. The Working Group decided to establish a questionnaire for the purpose of gathering information about the protection of biotechnological inventions, including certain aspects regarding intellectual property and genetic resources, in the Member States of WIPO. The International Bureau is in the process of compiling the responses to the questionnaire.

7. In response to the invitation issued by the SCP, WIPO organized a Meeting on Intellectual Property and Genetic Resources on April 17 and 18, 2000. The Meeting addressed issues that generally are raised in the context of access to, and *in situ* preservation of, genetic resources in their direct or indirect relationship with intellectual property. The Chairman's Conclusions from the Meeting state that the exchange of views that took place at the Meeting produced a clear consensus that:

“WIPO should facilitate the continuation of consultations among Member States in co-ordination with the other concerned international organizations, through the conduct of appropriate legal and technical studies, and through the setting up of an appropriate forum within WIPO for future work.”

8. At the same meeting, it was agreed that the WIPO Secretariat should prepare and issue an additional questionnaire in the field of intellectual property and genetic resources, which would be based on submissions by Member States. To date, no such submissions have been received.

9. During the Diplomatic Conference for the Adoption of the Patent Law Treaty from May 11 to June 2, 2000, the Director General conducted consultations concerning formalities in relation to the question of genetic resources. As the outcome of the consultations, a statement was agreed upon among the groups and read out by the Director General, the relevant part of which is as follows:

“Member State discussions concerning genetic resources will continue at WIPO. The format of such discussions will be left to the Director General's discretion, in consultation with WIPO Member States.”

10. Following the Diplomatic Conference, consultations with Member States took place regarding the format and content of such discussions. As a result of the consultations, it was proposed that a distinct body should be established within WIPO to facilitate such discussions (see further below in Section III of this document) and that, in addition to the issue of genetic resources, the discussions should also include the results of WIPO's previous work on the related fields of traditional knowledge and expressions of folklore.

(b) *Traditional Knowledge and Folklore*

11. The potential role of intellectual property rights in the protection of traditional knowledge and folklore is an emerging field, which requires thorough exploration. Although there are at present no clear, specific international intellectual property standards for protecting such knowledge, there are a growing number of instances where individuals and organizations are resorting to existing patent, trademark or copyright systems to protect their knowledge and culture. These efforts have met with mixed success, but greater appreciation and respect for traditional knowledge is drawing international attention to these issues.

12. In search of a model that makes the intellectual property system and traditional knowledge more compatible, in 1998 WIPO initiated a program of activities (Main Program 11 – “Global Intellectual Property Issues”) to explore, study and consult on the intellectual property aspects of the protection of traditional knowledge and expressions of folklore. One of the projects undertaken in the past two years has been a global assessment of the needs and expectations of holders of traditional knowledge. For purposes of such work, WIPO has been treating “expressions of folklore” as a form, and thus a subset, of “traditional knowledge”.

Fact-Finding Missions on Traditional Knowledge, Innovations and Culture

13. In 1998 and 1999, WIPO’s Global Intellectual Property Issues Division undertook a series of nine Fact-Finding Missions (FFMs) to collect information on the intellectual property needs and expectations of holders of traditional knowledge. From the FFMs, WIPO learned that folklore and traditional knowledge are rich and diverse sources of creativity and innovation. The FFMs revealed that traditional knowledge systems are frameworks for continuing creativity and innovation in most fields of technology, ranging from traditional medicinal and agricultural practices to music, design, and the graphic and plastic arts. Stakeholders consulted during the FFMs considered traditional knowledge to be a constantly renewed source of wealth, both as an economic asset and as cultural patrimony. This was the case in both developing and developed countries visited during the FFMs.

14. WIPO learned from the FFMs that the intellectual property issues related to traditional knowledge cut across the conventional branches of intellectual property law, such as copyright and industrial property. In many cases traditional knowledge holders do not separate “artistic” from “useful” aspects of their intellectual creations and innovations; rather, both emanate from a single belief system which is expressed in daily life and ritual. The FFMs also revealed that numerous indigenous and local communities have protocols for the protection of traditional knowledge and traditional knowledge-based innovations under customary law. In general, the FFMs showed the richness and diversity of traditional knowledge on a global scale, both in terms of its inherent creativity and as potential subject matter for intellectual property protection.

15. From the preliminary data gathered during the FFMs, one can already see areas where the existing intellectual property system might be used to meet expressed needs of traditional knowledge holders. For example, under the umbrella of an association of grassroots innovators, fifteen traditional healers from India intend to collectively file a patent application for a veterinary medical kit consisting entirely of natural plant medicines and compiled from their traditional practices and formulations. The patent application names the 15 healers as inventors and the association as the applicant. This collective filing allows the healers — who individually could not afford the patent filing fees — to share the costs of the

application, the research on commercialization possibilities, and the risks of disclosure in case of rejection of the application. They suggested to WIPO to use this experience as a basis for the exploration of possible collective filing and management of patent rights by traditional knowledge holders and their associations.

16. The full results of the FFMs have recently been published by WIPO in draft form for public comment. The draft Report, entitled “Intellectual Property Needs and Expectations of Traditional Knowledge Holders: World Intellectual Property Organization (WIPO) Draft Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)” is available on WIPO’s website at <www.wipo.int/traditionalknowledge/report/> and in paper form. The Report is open for comments until December 15, 2000. An extract from the draft Report is attached as Annex A, and paper copies of the entire draft can be ordered from the International Bureau.

WIPO-UNESCO Regional Consultations on the Protection of Expressions of Folklore

17. A specific area of study related to traditional knowledge has been the protection of so-called “expressions of folklore.” The international community has recognized the need to protect expressions of folklore since the 1970’s. In 1982, a set of model provisions were developed under UNESCO/WIPO auspices which could be incorporated into national legislation to help protect expressions of folklore. These are entitled “Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions” (“the Model Provisions”). According to the Model Provisions, expressions of folklore include “productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community . . . or individuals reflecting the traditional artistic expectations of such a community . . .”. These productions included verbal, musical, and tangible expressions, as well as “expressions by action” (e.g., folk dances, plays, and artistic forms).

18. The provisions would provide economic rights to authorize or prevent the exploitation of a specific expression of folklore, and rights would be exercised by a governmental authority or the community concerned. Currently, 33 countries have established provisions within their national legislation (usually under copyright) for the protection of expressions of folklore.

19. Unfortunately, effective international regimes for the exercise and administration of these rights have yet to develop; however, at the 1997 World Forum on the Protection of Folklore, UNESCO and WIPO were requested to convene regional consultations on these issues.

20. Since then, in early 1999, WIPO and UNESCO convened four consultations, namely for African countries, for countries of Asia and the Pacific region, for Arab countries and for Latin America and the Caribbean. The primary purpose of these consultations was to enable representatives of countries from these regions to exchange views and clarify issues in relation to the protection of folklore. The consultations produced recommendations to countries in their regions and to WIPO and UNESCO for future work on the protection of folklore.

21. The recommendations from these consultations, which are addressed to States and to WIPO and UNESCO, generally focus on three areas: (1) the need for identification and documentation of expressions of folklore (including the development of international standards for documentation), (2) the need for study of a regional approach to exercise/administration of rights in expressions of folklore which originate or are used in more than one country of a region, and (3) the possible development of *sui generis* forms of protection (whether under national law or an international treaty, or under a "soft law" approach such as the preparation of guidelines) for expressions of folklore. Another important recommendation emerging from the regional consultations calls for WIPO to undertake work towards protecting traditional knowledge (e.g. medicinal, agricultural, ecological) which is not included in the subject matter covered by the 1982 Model Provisions. Copies of the recommendations from the four meetings are attached as Annex B.

22. In 1998 and 1999, the Global Issues Division also organized two Roundtables on intellectual property and traditional knowledge in Geneva. The multidisciplinary nature of this work necessitated WIPO's participation in meetings and processes on traditional knowledge taking place within other policy forums, such as UNESCO, the Office of the High Commissioner for Human Rights, the Secretariat of the Convention on Biological Diversity, the Food and Agricultural Organization, the World Health Organization and the United Nations Environment Programme.

III. WIPO's CURRENT WORK ON TRADITIONAL KNOWLEDGE AND FOLKLORE

23. Based on its exploratory work in the 1998-1999 biennium, WIPO is continuing its work on traditional knowledge and expressions of folklore in the 2000-2001 biennium. Several Main Programs in the Program and Budget for the 2000-2001 biennium contain proposed activities relating to these issues, including the Main Program of the Global Intellectual Property Issues Division.

24. These activities respond directly to many of the needs and expectations identified during the 1998-99 biennium. They include, for example:

- **The development of information materials on options under the existing intellectual property system for the protection of traditional knowledge**

These materials will provide practical information on options for the protection of traditional knowledge under the "intellectual property" IP system. The materials will be aimed at two main target groups, being traditional knowledge holders and the national IP offices responsible for the administration of the IP system in each country. The materials will form the basis of WIPO's traditional knowledge-related training activities, including the national workshops referred to below in activity 2 below. The materials will also be widely disseminated.

The same materials will also form the basis of an intellectual property/traditional knowledge Distance Learning Course to be offered by WIPO. The Distance Learning Program of the WIPO Academy takes full advantage of information technology and the Internet, offering new teaching methods, specially designed course materials, evaluation

tools, tailored means of delivery, and expanded audiences. A six part Introduction to Intellectual Property course has been developed and tested, and has been available to a worldwide audience since October, 1999, in English, French and Spanish. Teaching takes place in the virtual environment of the WIPO Academy's web site at <<http://academy.wipo.int>>. Further information is available at this website. It is expected that the new Distance Learning Course on IP and traditional knowledge will be available during the first half of 2001.

- **Practical, national information and training workshops on the IP system and the protection of traditional knowledge**

The workshops will provide information and training on the IP system and the protection of traditional knowledge to traditional knowledge holders and other persons at the grassroots level, and to national IP offices. The workshops will be based on the written information materials referred to above. In addition to these workshops, traditional knowledge protection is now almost invariably included in the programs for the many training activities organized by WIPO's Cooperation for Development sector.

- **IP information, training and standards for the documentation of traditional knowledge**

The activity would pursue two practical results: (1) it will allow traditional knowledge documentation initiatives to manage IP rights (IPRs) during the traditional knowledge documentation process, and (2) it will allow national IP offices to integrate the traditional knowledge documentation from those initiatives into their existing procedures for filing, examining and granting of IPRs under the existing IP system. For example, by integrating traditional knowledge documentation into existing procedures and IP information systems, IP offices could include traditional knowledge documentation into their prior art searches when examining applications for patents in respect of traditional knowledge-based inventions. The output of the activity would be practical information materials on managing IPRs during the documentation process, written in a "How To"-format and accessible to users with limited IP-background. The information materials would be applied in practical training workshops on IPR management for communities and key documentation institutions. The workshops would seek to link communities, documentation initiatives, and national IP offices so as to initiate cooperation between IP offices and traditional knowledge documentation initiatives at the national level

- **Practical studies of actual examples in which traditional knowledge protection has been sought under the IP system**

The activity will provide practical information on specific and actual examples in which indigenous and local communities have taken advantage of, or attempted to use, the IP system to either protect their traditional knowledge or to further their own interests in the commercial application and utilization of their traditional knowledge. The output of the activity will include practical information on difficulties and successes experienced in applying the IP system to traditional knowledge, lessons learned and divergences between identified needs of traditional knowledge holders and the protection provided by the existing IP system. The results of the activity will be disseminated and used in WIPO's training activities, including those referred to above.

- **Feasibility studies on the applicability of customary laws to traditional knowledge**

Traditional knowledge holders are subject to both customary and modern legal systems, since their knowledge constitutes subject matter to which both may apply. The interfaces, similarities and differences between customary and modern legal systems require understanding and management. This activity would seek ways to manage the relationship between modern and customary understandings of IPRs over traditional knowledge subject matter. It would record customary law systems and related cultural understandings relevant for traditional knowledge protection and draw implications on how the IP system may recognize and use customary law to manage the relationship with traditional knowledge holders.

- **A pilot project on collective acquisition, management and enforcement of IPRs in traditional knowledge**

One of the problems in the IP/traditional knowledge field is the collectivity of creation and ownership of traditional knowledge. This activity would specifically address this issue by exploring options for the collective acquisition, administration and enforcement of IPRs by traditional knowledge holders' associations. It would seek to examine the capacity of a selected community or traditional knowledge holder association to acquire, collectively exercise and enforce all relevant IPRs on behalf of the holders.

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

25. At the Twenty-Sixth Session of the General Assembly of the Member States of WIPO, held in Geneva from September 25 to October 3, 2000, the Member States established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore for the purpose of discussions on these subjects. The Intergovernmental Committee will constitute a forum in which discussions can proceed among Member States on three primary themes, namely intellectual property issues that arise in the context of (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore. A copy of the document prepared by the International Bureau for purposes of the discussion of this subject at the General Assembly (WO/GA/26/6) is attached and marked C.

26. Each one of these themes cuts across the conventional branches of intellectual property law and does therefore not fit into existing WIPO bodies, such as the Standing Committee on the Law of Patents, the Standing Committee on Copyright and Related Rights, the Standing Committee on Trademarks, Industrial Designs and Geographical Indications, and the Standing Committee on Information Technologies. At the same time, the three themes are closely interrelated, and none can be addressed effectively without considering aspects of the others.

27. The Intergovernmental Committee will be open to all Member States of WIPO. As is usual in WIPO bodies, relevant intergovernmental organizations and accredited international and regional non-governmental organizations will be invited to participate in an observer capacity. The Committee will hold its first session in the Spring of 2001.

[Annexes follow]

ANNEX A

EXTRACT

**Intellectual Property Needs and Expectations of
Traditional Knowledge Holders**

**World Intellectual Property Organization (WIPO) Draft Report
on Fact-finding Missions on Intellectual Property
and Traditional Knowledge (1998-1999)**

Draft for Comment July 3, 2000

General Information on the Availability of this draft Report and the Commenting Procedure

This draft is being published for public comment until **December 15, 2000**.

The draft has also been posted on WIPO's website
<<http://www.wipo.int/traditionalknowledge>>.

The languages in which the draft Report is or will be available: The Report was written in English and the draft is available in English. Parts of the draft will also, as soon as possible, be available, electronically and in paper form, in five other languages (Arabic, Chinese, French, Russian and Spanish). As far as the chapters on the individual fact-finding missions are concerned, to facilitate the public commenting process, they are being translated into the language(s) most commonly spoken in the region in which the FFM took place. WIPO's resources do not allow for the whole draft Report to be translated into all six languages.

Further information on when the translations become available will be posted on the above website. If you wish to receive information on the availability of the translated parts of the Report, please send an email to <majordomo@listbox.wipo.int> with the words "subscribe traditional knowledge" in the message box, and leaving the subject line of the email blank. To unsubscribe, send an email to the same address with the words "unsubscribe traditional knowledge" in the message box, leaving the subject line blank. This mailing list is for information on the availability of the Report in different languages only.

The final Report will, however, be made available in all the languages (Arabic, Chinese, English, French, Russian and Spanish).

Inquiries, requests for paper copies of the draft Report and comments on the draft Report may be submitted as follows:

1. By **post**: to The Global Intellectual Property Issues Division, WIPO, 34 chemin des Colombettes, 20, Geneva, 1211, Switzerland;
2. By **telefax**: to The Global Intellectual Property Issues Division, WIPO, telefax number +41-22-338-8120;
3. By **email**: to this email address <ffm-report-comments@listbox.wipo.int>;

Note - persons who comment should include their full names, affiliations and addresses. In addition, comments on the draft Report may be submitted by using the **electronic commenting facility** provided in connection with the electronic version of the draft at the above website. Comments received by email and through the electronic commenting facility will in due course be posted on the website, so that the public will have access to previously submitted comments.

Comments received will as far as possible and as appropriate be incorporated into the Report (with acknowledgement), after which the Report will be published in final form.

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EXECUTIVE SUMMARY

This Report presents information compiled by the World Intellectual Property Organization (WIPO) from nine fact-finding missions conducted by WIPO in 1998 and 1999 on the intellectual property (IP) needs and expectations of holders of traditional knowledge (TK).

The fact-finding missions (the FFMs) were designed to enable WIPO to identify, as far as possible, the IP needs and expectations of TK holders. While the needs of TK holders have been referred to in other international fora, there has been to date no systematic global exercise by international organizations to document and assess, first-hand, the IP-related needs of TK holders. As the United Nations specialized agency responsible for the promotion of the protection of IP, WIPO undertook the FFMs as part of a new program of activities, initiated in 1998, to explore and study current approaches to, and future possibilities for, the protection of the IP rights of holders of TK.

The purpose of the Report is to provide information to WIPO Member States, holders of TK, including indigenous peoples, the private sector, intergovernmental and non-governmental organizations, academic and research institutions and other interested parties on the IP needs and expectations of TK holders expressed to WIPO during the FFMs.

It is expected that the findings of this Report will be discussed with WIPO Member States and others at fora in the course of the 2000-2001 biennium, with a view, particularly, to defining and guiding future WIPO activities on the IP protection of TK.

The main body of the Report is contained in the chapters **“Framing the Intellectual Property Needs and Expectations of Traditional Knowledge Holders”**, **“Identifying the Intellectual Property Needs and Expectations of Traditional Knowledge Holders”** and **“Summary, Reflections and Conclusions”**.

The first section of the chapter **“Framing the Intellectual Property Needs and Expectations of Traditional Knowledge Holders”** provides a basic and general introduction to the IP system, containing an overview of the different types of protection offered, as well as the management, transfer and enforcement of rights.

This section points out *inter alia* that IP is not limited to existing categories such as patents, copyright and trademarks. Indeed, the definition of IP in the Convention Establishing the World Intellectual Property Organization (WIPO), 1967 makes it clear that “intellectual property” is a broad concept and can include productions and matter not forming part of the existing categories of intellectual property, provided they result, as the definition states, “*from intellectual activity in the industrial, scientific, literary or artistic fields.*” This part of the chapter also demonstrates that IP is evolutionary and adaptive. New advances in technology – information technology and biotechnology particularly – and changes in economic, social and cultural conditions require continuous appraisal of the system and at times adjustment and expansion, accompanied often by controversy. For example, the last few decades have seen the recognition of new forms of IP, such as a *sui generis* form of protection for plant varieties (in the 1950s and 1960s), patent protection for biological material, plants and animals (in the

1970s and 1980s), a *sui generis* form of protection for layout designs (topographies) of integrated circuits (1980s), copyright protection for computer software (1980s) and protection for databases and compilations of data (1980s and 1990s). The possible protection of tradition-based innovations and creations by the IP system, the subject of this Report, is a more recently articulated question.

The second section of the chapter **“Framing the Intellectual Property Needs and Expectations of Traditional Knowledge Holders”** describes briefly other multilateral institutions and initiatives in which TK protection has emerged and is being addressed, while the final section presents information, with examples from the FFMs, of how informal IP regimes and customary law are being applied to the protection of TK.

The chapter **“Identifying the Intellectual Property Needs and Expectations of Traditional Knowledge Holders”** contains individual, detailed reports on each of the nine FFMs. The earlier chapter on **“Methodology”** provides information on how the FFMs were planned, conducted and subsequently reported on.

The chapter on **Terminology** describes certain terms as they are used by WIPO in the Report and in its work. The Chapter seeks less to define such terms, than to provide some clarity and a common basis upon which the Report can be understood.

The **“Summary, Reflections and Conclusions”** chapter seeks to summarize, reflect upon and draw broad conclusions on what may be considered to be the main and most prevalent IP-related needs and expectations expressed to WIPO during the FFMs by TK holders and others with whom WIPO consulted. The main needs and expectations may be summarized as follows:

- The selection of an appropriate term or terms to describe the subject matter for which protection is sought.
- A clear definition or description of what is meant (and not meant) for IP purposes by the term or terms selected.
- The adjustment of expectations through effective awareness-raising as to the role and nature of IP protection in relation to TK.
- The prevention of the unauthorized acquisition of IPRs (particularly patents) over TK by documenting and publishing TK as searchable prior art, where so desired by the relevant TK holders.
- An analysis of how prior art is established for purposes of patent examinations in the context of TK.
- Greater awareness-raising on the IP system, particularly among sectors of society and communities unfamiliar with it, such as indigenous and local communities and Governmental offices not directly involved in IP law and administration.
- Greater understanding by the IP community of the perspectives, expectations and needs of TK holders.

- Facilitation of dialogue and contact between TK holders, the private sector, Governments, NGOs and other stakeholders to assist in development of modalities for cooperation between them, at community, national, regional and international levels.
- Enhanced participation by the national and regional IP offices and the IP community at large in TK-related processes in which IP issues are raised.
- Study of the relationship between collectivity of TK and IPRs, more particularly testing of options for the collective acquisition, management and enforcement of IPRs by TK holders' associations, including the applicability of collective management of IPRs to TK.
- Study of customary law and informal IP regimes in local and traditional communities, including conclusions relevant for the formal IP system.
- In the shorter term, testing the applicability and use of existing IP tools for TK protection, through practical and technical community-level pilot projects and case studies; and, provision of technical information and training to TK holders and Government officials on possible options under the existing categories of IP for TK protection.
- In the longer term, the possible development of new IP tools to protect TK not protected by existing IP tools, the elaboration of an international framework for TK protection, using *inter alia* the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 as a possible foundation, and the development of a *sui generis* system of "community" or "collective" rights to protect TK.
- Facilitating access to the IP system, to enable TK holders to use and enforce rights under the IP system.
- The provision of information, assistance and advice with respect to the enforcement of TK protection.
- The provision of legal/technical assistance with TK documentation, including information and advice on the IP implications of TK documentation.
- The provision of IP advice and assistance in respect of legislation, regulations, guidelines, protocols, agreements (including model terms), policies and processes on access to and benefit-sharing in genetic resources.
- Assistance and training for TK holders in the negotiation, drafting, implementation, and enforcement of contracts.
- The development and testing, with the close involvement of indigenous peoples and local communities, of "best contractual practices", guidelines and model clauses for contracts.

- Awareness-raising on the potential commercial value of TK and the development of tools for the economic valuation of TK.

It is evident that some of the needs and expectations conflict, or reflect competing policy objectives. WIPO has not attempted to mediate the needs or “resolve” conflicts, but rather to report as fully as possible on the information received from FFM informants. WIPO recognizes that it cannot address all these needs and a collaborative effort by other relevant organizations and processes would be desirable. The needs as identified pose challenges for the entire IP community – national and regional IP offices, collective management societies, the private sector, NGOs, civil society, consumers, and the international community, including WIPO and its Member States. The needs and expectations as identified do not, therefore, represent a work program for WIPO, although they are reflected in WIPO’s activities relating to TK in the 2000-1 biennium, which was developed based on the information obtained during the FFMs and other activities. These are described at the end of the “**Summary, Reflections and Conclusions**” chapter.

Further exploration of the role of IP in TK protection also requires a technical understanding of IP and application in the specifics of concrete uses of TK. For its part, as the specialized United Nations agency responsible for the promotion of IP worldwide, WIPO is committed to continuing to address conceptual problems and undertake a practical and technical examination of the application of the IP system to various forms of TK in order to provide an informed and realistic analysis of the IP aspects of TK protection.

An efficient IP system that protects TK will promote continued creation and innovation based on that knowledge. IP is not only about conferring property rights. It is also about recognition of and respect for the contributions of human creators. From this perspective, IP has a very important role to play in protecting the dignity of holders of TK and, by recognizing property rights in relation to such knowledge, giving those holders a degree of control of its use by others. The protection of TK also benefits third parties, who are able to enjoy access to protected tradition-based innovation and creation that may not be collected, captured in some media, or find channels of distribution without IP protection.

The FFMs have shown the richness and diversity of TK on a global scale, both in terms of its inherent creativity and as potential subject matter for IP protection. The IP system cannot, however, respond fully to all the needs of TK holders. Many of the problems encountered by TK holders are less “legal” than “operational” – TK holders (as do some other sectors of society) often lack the know-how and financial resources to take advantage of the IP system, whether in its present or in an evolved form, and they need support in this respect. There are nevertheless certain conceptual difficulties. However, the fact that existing standards of IP may not be in perfect harmony with elements of TK worthy of protection, should not be seen as an insuperable obstacle. IP has consistently evolved to protect new subject matter, such as software and layout-designs, the emergence of which was unforeseeable even twenty years earlier. Copyright protection has been extended to the digital environment. IP is now moving forward to protect databases. Given its evolutionary and adaptive nature, it is not inconceivable that the IP system might provide effective protection for traditional knowledge.

[Annex B follows]

ANNEX B

WIPO-UNESCO AFRICAN REGIONAL CONSULTATION ON
THE PROTECTION OF EXPRESSIONS OF FOLKLORE

organized by
the World Intellectual Property Organization (WIPO)
in cooperation with
the United Nations Educational, Scientific and Cultural Organization
(UNESCO)

with the assistance of
the Government of the Republic of South Africa

Pretoria, March 23 to 25, 1999

RESOLUTION

Introduction

The African Regional Consultation on the Protection of Expressions of Folklore, organized by WIPO and UNESCO in cooperation with the Department of Trade and Industry of the Republic of South Africa, was held in Pretoria from March 23 to 25, 1999. The opening ceremony was addressed by Mr. MacDonald Netshitenzhe, Registrar of Patents, Trademarks, Designs and Copyright; Mr. Richard Owens, Director, Global Intellectual Property Issues Division, WIPO; and Mr. Salah Abada, Chief, Copyright and Creativity Section, UNESCO.

Participants at the Consultation were drawn from the Republic of South Africa, Benin, Botswana, Burkina Faso, Côte d'Ivoire, Ghana, Kenya, Malawi, Mali, Mauritius, Mozambique, Namibia, Nigeria, Senegal, Tanzania, Togo, Uganda, Zambia, and from the following intergovernmental organizations; African Regional Intellectual Property Organization (ARIPO), Organisation Africaine de la Propriete Intellectuelle (OAPI), and the Secretariat of the South African Development Community (SADC).

Resource persons were from Ghana, Kenya, South Africa and Tunisia. Delegates presented country reports on the experiences in their countries concerning the protection of expressions of folklore.

Preamble

Having listened to the introductory remarks which detailed the work on protection of expressions of folklore already undertaken by UNESCO and WIPO, the presentations of the resource persons, the country reports and ensuing discussions,

Considering that folklore as a manifestation of intellectual creativity deserves to be accorded legal protection as is provided to other forms of intellectual property,

Aware of the fact that protection of folklore is indispensable for the development, perpetuation and dissemination of cultural heritage,

Noting the serious damage to the integrity of folklore in Africa occasioned by technology and the forces of modernization,

Recognizing the important potential role that expressions of folklore play in the socio-economic and cultural development of the African continent,

Considering that this potential is not being realized,

Noting that legal protection of expressions of folklore is provided under national copyright laws of several African countries,

Recognizing that UNESCO and WIPO have made significant efforts to promote the adequate and effective protection of expressions of folklore,

Noting that at present there is no regional or international regime for the legal protection of expressions of folklore,

Noting that adequate and effective protection of expressions of folklore at national level may require a *sui generis* form of legal protection, and that the model provisions developed by UNESCO and WIPO in 1982 provide an appropriate framework for further work,

Considering that the lack of legal protection of expressions of folklore at regional level and beyond is detrimental to the preservation and maintenance of the integrity of expressions of folklore,

Noting that current efforts at national, regional and international levels should be strengthened to achieve positive results for the protection and preservation of folklore,

Considering the urgent need for identification, documentation and conservation of expressions of folklore,

Considering that WIPO and UNESCO stand ready to assist developing countries in the protection of expressions of folklore in the framework of their respective programs,

Recommend As Follows

To African States:

That as a matter of urgency expressions of folklore should receive appropriate protection at national level, in order that African peoples derive the maximum socio-economic benefits from such protection.

That appropriate national structures should be put in place to ensure the regulation, coordination and protection of expressions of folklore, as a strategy for cultural development.

That African Governments devote more attention and resources to folklore issues and to intellectual property generally, and involve relevant communities and civil society in raising awareness of the value of expressions of folklore and the importance of protecting them.

That all African States evaluate measures for the protection of traditional culture and expressions of folklore in their respective national legislation, for adaptation or amendment where necessary.

That the adaptation of existing legislation and adoption of specific legislative texts for the protection of expressions of folklore should take into account the model provisions developed by UNESCO and WIPO.

That the attention of African States be drawn to the urgency of creating an African regional framework for the preservation, protection and maintenance of the integrity of folklore, including the establishment of national and regional documentation centers.

To WIPO and UNESCO:

That WIPO, UNESCO, and other relevant intergovernmental organizations intensify their collaboration and offer increased assistance to developing countries in the form of:

- legal and technical assistance,
- specialized training in identification, documentation and conservation of folklore,
- provision of necessary equipment and other financial resources.

That WIPO and UNESCO increase budgetary resources for African countries in order to ensure the effective protection of expressions of folklore.

That WIPO and UNESCO assist African States in initiating appropriate measures to intensify intra-and inter-regional cooperation in respect of protection of expressions of folklore (for example, SADC countries, ECOWAS).

That work towards the protection of expressions of folklore and of traditional knowledge should be undertaken in parallel, taking into account the common elements, as well as the distinct characteristics and social functions of each.

That WIPO and UNESCO increase their efforts to develop, in the shortest possible time, a broad consensus among States in favor of an adequate and effective international regime for protection of expressions of folklore.

Appreciation

Participants express their gratitude to the Government of the Republic of South Africa, to WIPO, and to UNESCO, for organizing the Consultation, and for their continued assistance to African countries in particular, and to developing countries in general.

WIPO-UNESCO REGIONAL CONSULTATION ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE FOR COUNTRIES OF ASIA AND THE PACIFIC

organized by
the World Intellectual Property Organization (WIPO)
in cooperation with
the United Nations Educational, Scientific and Cultural Organization
(UNESCO)
with the assistance of
the Government of Viet Nam
Hanoi, 21 to 23 April 1999

RECOMMENDATIONS

The WIPO-UNESCO Regional Consultation on the Protection of Expressions of Folklore for Countries of Asia and the Pacific was organized in Hanoi from April 21 to 23, 1999 with the cooperation of the Government of Viet Nam. Representatives from 15 countries, namely Bangladesh, Brunei Darussalam, China, Fiji, India, Indonesia, Japan, Mongolia, Nepal, Pakistan, Philippines, Singapore, Sri Lanka, Thailand, and Viet Nam were present at the consultation meeting. In addition facilitators from six countries as well as four non-governmental organizations from the Region were present at the Consultation.

The Opening Session was addressed by the Deputy Minister of Culture and Information, Government of Viet Nam, Mr. Nguyen Trung Kien. Mr. Salah Abada, Chief, Creativity and Copyright Section of UNESCO, and Mr. Richard Owens, Director, Global Intellectual Property Issues Division of WIPO addressed the audience and spoke about the relevance of folklore and its protection for the countries of the region.

The subsequent sessions were devoted to topics like Practical Perspectives on the Preservation, Conservation, and Protection of Folklore; Options for the Legal Protection of Expressions of Folklore at National, Regional and International Levels; National Experiences with the Protection of Expressions of Folklore; The WIPO-UNESCO Model Provisions FOR National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 (the Model Provisions); International Developments Towards the Protection of Traditional Knowledge; Use of the Existing Intellectual Property System to Protect Folklore; Initiatives for the Identification, Documentation, Protection and Use of Folklore in Australia and the Philippines.

The discussions were very stimulating and the interactions intensive. During the deliberations the consultation meeting noted the following points:

1. The countries of Asia and the Pacific region are very rich in their cultural heritage, including, but not limited to, folk-literature, folk arts and crafts, music, visual arts, ceremonies, folk-beliefs, folk-architecture associated with particular sites, as well as forms of traditional knowledge related to folk-medicines and folk-medical practices, agriculture, and conservation and sustainable use of biological diversity.
2. There is widespread unfair exploitation of the cultural heritage of these nations for commercial and business interests.
3. Important elements of traditional knowledge and folklore are being lost and will continue to be lost in the absence of a proper legal protection mechanism at national and international levels.
4. The existing Intellectual Property Rights (IPR) regimes are inadequate to address all of the issues involved in protection of traditional knowledge and folklore.
5. The initiative taken by the Republic of the Philippines in enacting the Indigenous Peoples Rights Act of 1997 RAA 8371 is commendable and provides useful guidance for further work in addressing the protection of traditional knowledge and folklore.
6. The leading role played by WIPO and UNESCO in offering a set of the Model Provisions for the purpose of protecting expressions of folklore, has been commendable.
7. Effective protection of traditional knowledge and folklore at national and international levels requires *sui generis* legislation. The Model Provisions provide an appropriate starting point, but further work is required to take into account the technological, legal, social, cultural and commercial developments which have taken place since the Model Provisions were concluded, and to examine the scope of subject matter coverage of folklore. Such work should take into account the common elements and distinct characteristics of traditional knowledge and folklore, in order to evaluate whether protection for both forms of cultural heritage can effectively be provided under a single legislative framework, or whether work on each should proceed separately but with equal urgency and commitment.
8. It is imperative for governments to devote greater attention and resources to the aspects of preservation, conservation, documentation, development and legal protection of traditional knowledge and folklore, and also for ensuring the safety and security of the materials and documents so collected to prevent unfair exploitation.
9. It is imperative for governments to devote greater attention and resources to support communities who are responsible for the creation, maintenance, custodianship and development of traditional knowledge and folklore.
10. There is a need to raise the level of awareness about the desirability of having a legal mechanism at the national level through dissemination of information to the

public through mass media, debates, discussions, studies with experts and all interested groups. This is necessary for the benefit of policy makers, government functionaries and judiciary, social activists, academics and experts, and the general public, to ensure their active and meaningful participation in the process of national consensus building.

11. Institutional consultation and cooperation are essential for the nations in the region to develop a regional approach to the protection of traditional knowledge and folklore.
12. There is a need for vigorous consultation through formal consultative processes at international level to bridge the gaps in the perceptions of traditional knowledge and folklore and their protection, as viewed by the developing and developed countries.

In view of the above, the consultation meeting made the following recommendations:

To the Governments of Asia and the Pacific Region:

1. The nations of the Asia-Pacific region need to devote greater attention and resources to the issues of legal protection of traditional knowledge and folklore.
2. There is a need to initiate wide-ranging discussions with various experts on traditional knowledge and folklore, societies responsible for creating resources of traditional knowledge and folklore, academics, social activists and other interested groups to identify essential aspects of an action plan, aiming, ultimately, at the formulation of a legal mechanism for protection of traditional knowledge and folklore at national and international levels.
3. Nations of the region should cooperate to find solutions to problems of common concern and also to develop strategies, at regional level, for exercise and management of rights in traditional knowledge and folklore, and to support communities which are responsible for the creation, maintenance, custodianship and development of such traditional knowledge and folklore.

To WIPO/UNESCO:

1. Extend cooperation and support for national initiatives for awareness-building including through discussion, debates, seminars.
2. Institute studies and projects for in-depth study of these issues relating to protection of folklore and traditional knowledge.
3. Initiate steps for development of a *sui generis* form of binding legal protection at national and international levels for the protection of traditional knowledge and folklore, taking into account the technological, legal, social, cultural and commercial developments which have taken place since the Model Provisions were concluded.

4. Establish a Standing Committee on Traditional Knowledge and Folklore within both WIPO and UNESCO to facilitate the process of establishing legal protection of folklore and traditional knowledge. The Standing Committee will, *inter alia*, implement Recommendation 3 above, and facilitate and fund intra- and inter-regional consultation on the protection of traditional knowledge and folklore.

5. Increase WIPO-UNESCO cooperation in providing assistance to developing countries in the form of:

- legal and technical assistance;
- specialized training in identification, documentation and conservation of folklore and traditional knowledge; and
- provision of necessary equipment and other financial resources.

All the participants wholeheartedly expressed their sincere appreciation to the Government of Viet Nam, in particular the Copyright Office of Viet Nam within the Ministry of Culture and Information, for extending their cooperation for the successful organization of the Consultation Meeting. The delegates and other participants thanked the Chairman of the Meeting, Dr. S. Samarasinghe (of Sri Lanka) for his excellent guidance and leadership during the proceedings. In addition, the delegates and other participants expressed their sincere gratitude to WIPO and UNESCO profusely for organizing this meeting and also for the assistance they offered to the countries of Asia and the Pacific on various issues.

**WIPO-UNESCO REGIONAL CONSULTATION ON THE
PROTECTION OF EXPRESSIONS OF FOLKLORE
FOR ARAB COUNTRIES**

organized by
the World Intellectual Property Organization (WIPO) November 29, 1999
in cooperation with
the United Nations Educational, Scientific and Cultural Organization
(UNESCO),
with the assistance of
the Government of Tunisia
Tunis, 25 to 27 May, 1999

RECOMMENDATIONS

The World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) organized on May 25 to 27, 1999 in Tunis, the Regional Consultation for Arab countries on the Protection of Expressions of Folklore, in cooperation with the Ministry of Culture of the Republic of Tunisia.

The meeting was opened by Dr. Abdul Baki El Harmassi, Minister of Culture of the Republic of Tunisia, Mr. Salah Abada, Chief, Copyright and Creativity Section and representative of Dr. Frederico Mayor, the Director General of UNESCO and Mr. Richard Owens, Director of the Division of Global Intellectual Property Issues, and representative of Dr. Kamil Idris, the Director General of WIPO.

Delegations from Algeria, the National Palestinian Authority, Egypt, Jordan, Kuwait, Lebanon, Libya, Morocco, Mauritania, the Sultanate of Oman, the Sudan, Tunisia and Yemen participated in the meeting and presented reports on their countries' experience in respect of the protection of the expressions of Folklore.

Lecturers from Egypt, Jordan, the Sultanate of Oman, Tunisia and the Folklore Center of the Arab Gulf Countries attended the meeting.

The introductory speeches on the protection of expressions of folklore were presented by UNESCO and WIPO and followed by other lectures. The participants took note of the experience of various delegations. Following constructive and serious discussions, the meeting made the observations and recommendations below:

I. OBSERVATIONS

1. Arab countries are rich with one of the most precious cultural and civilizational heritage in the world which constitutes an important pillar for human civilization and an integral part of the world patrimony.
2. Arab folklore (Arab popular heritage) is a strong means of bringing together the Arab peoples. However, this common aspect does not exclude, nor does it diminish, the importance of the local variations specific to each people.
3. Arab folklore (Arab popular heritage) and traditional knowledge are subject to various dangers, including negligence, disappearance, piracy, mutilation and illegal exploitation.
4. Arab folklore (Arab popular heritage) and traditional knowledge are intellectual property resources important to Arab countries in particular and developing countries in general. Therefore, there is a need for a thorough study as well as the provision of legal protection at national, regional and international levels.
5. WIPO and UNESCO devote all the necessary efforts to set the appropriate legal framework for the protection and preservation of expressions of folklore.
6. Currently, there is not a legal framework for the protection of expressions of folklore at both national and international levels.
7. The protection of expressions of folklore at the national level is important. The meeting considers that WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore from Illegal Exploitation and Other Prejudicial Actions, 1982 (the Model Provisions) are a relevant groundwork for protection, preservation, and conservation.
8. The collection, documentation, conservation and dissemination of expressions of folklore are necessary to ensure the means of protection.
9. UNESCO and WIPO have the capacity, through their programs, to provide assistance to Arab and developing countries.

II. RECOMMENDATIONS

(a) To Arab Countries:

1. Arab countries should create specialized institutions or centers as a national and cultural necessity for the collection, classification, conservation, documentation and dissemination of folklore (Arab popular heritage) and develop a specialized environment.
2. Arab countries should include among their priorities working together on their national legislation for the provision of measures aiming at the protection of expressions of folklore. Such protection would have positive implications on development and economy.

3. Each Arab country should prepare an open list of expressions of folklore and traditional knowledge the preservation and protection of which are considered necessary.

4. Arab countries should rely, when reviewing and amending their legislation, on the model provisions set, as adapted to recent developments in the field.

(b) To International Organizations :

The meeting calls upon WIPO, UNESCO and the specialized international organizations to intensify their efforts in order to provide greater assistance to Arab countries in particular and developing countries in general by:

1. providing technical and legal cooperation to Arab countries;
2. providing training to officers in the field of collection, classification, conservation, documentation and dissemination of expressions of folklore;
3. providing technical equipment and material support;
4. Assisting Arab countries in the creation of national centers specialized in the conservation of expressions of folklore, strengthening such existing centers and creating a pilot regional center for the conservation, documentation and promotion of expressions of folklore by granting the expected protection and training of officers responsible for its management;
5. elaborating an international convention on the protection of expressions of folklore; and
6. establishing a standing committee on expressions of folklore and traditional knowledge in both WIPO and UNESCO.

III. CONCLUSION

The participants in the meeting expressed their grateful thanks and appreciation to the Tunisian Government represented by the Ministry of culture and the Tunisian Institution for the Protection of Copyright, their hospitality and organization that contributed to the success of the meeting.

They also thanked WIPO and UNESCO for their ongoing efforts for the benefit of Arab countries in particular and developing countries in general.

WIPO-UNESCO REGIONAL CONSULTATION ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE FOR LATIN AMERICA AND THE CARIBBEAN

organized by
the World Intellectual Property Organization (WIPO)
in cooperation with
the United Nations Educational, Scientific and Cultural Organization
(UNESCO),
with the assistance of
the Government of Ecuador
Quito, June 14 to 16, 1999

RECOMMENDATIONS

Representatives of Bolivia, Brazil, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, Guatemala, Haiti, Jamaica, Mexico, Nicaragua, Panama, Peru, Suriname, Trinidad and Tobago and Venezuela, and also representatives of the Caribbean Community Secretariat (CARICOM), the Permanent Secretariat of the General Treaty on Central American Economic Integration (SIECA) and the General Secretariat of the Andean Community, met in Quito, Ecuador, from June 14 to 16, 1999, under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO), to discuss matters concerning the protection of expressions of folklore (which can relate to popular culture, traditional culture and traditional knowledge).

At the start of the meeting the delegates elected the Attorney, Nelson Velasco, President of the Ecuadorian Institute of Intellectual Property, as Chairman.

Experts from Mexico, Peru, Trinidad and Tobago and Venezuela made presentations on practical aspects, legal options and national initiatives in connection with the perpetuation, preservation and protection of expressions of folklore in Latin American and Caribbean countries, as provided in the program for the Regional Consultation.

The delegations made presentations on the position in their countries and sub-regions regarding the identification, documentation, dissemination and protection of their expressions of folklore.

After a wide-ranging debate, the delegations,

Considering:

That expressions of folklore are basic elements of national identity,

That Latin America and the Caribbean is a region with a wealth of expressions of folklore that form part of its cultural identity,

That there is ever-greater international recognition of the socio-economic value of expressions of folklore, and also growing commercial exploitation thereof,

That the situation in Latin America and the Caribbean is complex and diverse with respect to experience and the extent of, and resources available for, the protection of expressions of folklore,

That the momentum of globalization exposes expressions of folklore to a greater degree of distortion and misuse that is detrimental to national identity,

That the ever-greater development of the technology of communication media and technology in general represent both opportunities and also new challenges for expressions of folklore which necessitate the introduction of strategies and means of adequate protection to ensure that cultural diversity is maintained,

That the measures for the perpetuation, preservation and protection of expressions of folklore hitherto undertaken in the various countries of the region do not afford sufficient protection against distortion and misuse and the eventual disappearance of expressions of folklore,

That greater protection has various aspects, which may be sub-regional, regional and international as well as national, and that it is necessary to work in those different areas,

That the pioneering work of UNESCO and WIPO has contributed to greater awareness on the part of individual countries and to a strengthening of the protection of expressions of folklore;

Recommend:

That countries should promote the creation or strengthening, as the case may be, of national, sub-regional, regional and international legislation on the protection of expressions of folklore;

That UNESCO and WIPO should make the necessary legal-technical assistance and financial cooperation and experience available to Latin American and Caribbean countries to start, or where appropriate continue, their work of identifying, documenting, uniformly classifying, perpetuating, preserving and disseminating expressions of folklore;

That UNESCO and WIPO should provide assistance or cooperation with a view to heightening awareness and recognition of the importance of expressions of folklore and their protection by all segments of society;

That UNESCO and WIPO should continue their work of nurturing expressions of folklore and their protection at the international level, and that, to the same end, a Standing Committee should be created within WIPO to study and implement means of strengthening that protection, taking due account of the similarities and differences between traditional knowledge and other expressions of folklore;

That UNESCO and WIPO should carry out pilot projects in Latin America and the Caribbean in connection with the management of expressions of folklore.

The delegates expressed their appreciation of the hospitality shown by the Government of Ecuador in acting as host to the Regional Consultation, and also of the support provided by UNESCO and WIPO.

[Annex C follows]

ANNEX C

WIPO**WO/GA/26/6****ORIGINAL:** English**DATE:** August 25, 2000**WORLD INTELLECTUAL PROPERTY ORGANIZATION**

GENEVA

**WIPO GENERAL ASSEMBLY
Twenty-Sixth (12th Extraordinary) Session
Geneva, September 25 to October 3, 2000**

MATTERS CONCERNING INTELLECTUAL PROPERTY AND GENETIC RESOURCES,
TRADITIONAL KNOWLEDGE AND FOLKLORE

Document prepared by the Secretariat

1. With the emergence of modern biotechnologies, genetic resources have assumed increasing economic, scientific and commercial value to a wide range of stakeholders. Traditional knowledge associated with those resources has, in consequence, attracted widespread attention from an enlarged audience. Other tradition-based creations, such as expressions of folklore, have at the same time taken on new economic and cultural significance within a globalized information society.

2. Conservation, management, sustainable utilization and benefit sharing in respect of genetic resources and associated traditional knowledge are being addressed within a range of different policy areas, including food and agriculture, biological diversity and the environment, biotechnology innovation and regulation, human rights, cultural policies and trade and economic development. Within all these areas intellectual property issues have arisen and are assuming increasing importance. As the specialized UN agency responsible for the promotion of intellectual property worldwide, WIPO has been requested by its Member

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States to undertake exploratory groundwork and facilitate discussions for a better understanding of the often inter-related intellectual property issues regarding genetic resources, traditional knowledge and folklore.

3. Section I of the present document reviews previous work and Member State discussions that have taken place at WIPO regarding these subjects. Section II proposes the establishment of a separate body within WIPO to facilitate the continuation of these discussions. Finally, Section III provides an illustrative list of possible issues that Member States may wish to discuss within such a body.

I. BACKGROUND

4. Since the 1998-99 biennium, issues related to intellectual property and genetic resources have been addressed in regular activities under WIPO's exploratory Subprogram 11.2 on "Biological Diversity and Biotechnology." The activities on intellectual property and genetic resources began with a study on the role of intellectual property rights in the sharing of benefits arising from the use of biological resources and associated traditional knowledge. The study was commissioned jointly with the United Nations Environment Programme (UNEP) and resulted in three case studies, which provide lessons as to how the effective protection of intellectual property rights can support the sharing of benefits arising from the use of genetic resources.

5. Issues related to intellectual property and genetic resources were also discussed by Member States at the third session of the Standing Committee on the Law of Patents (SCP), which took place in Geneva from September 6 to 14, 1999. The SCP requested the International Bureau to include the issue of protection of biological and genetic resources on the agenda of a Working Group on Biotechnological Inventions, to be convened at WIPO in November 1999. The SCP further invited the International Bureau to take steps to convene a separate meeting involving a larger number of Member States early in 2000, to consider that issue (see document SCP/3/11, paragraph 208).

6. The Working Group on Biotechnology, at its meeting on November 8 and 9, 1999, recommended the establishment of nine projects related to the protection of inventions in the field of biotechnology. The Working Group decided to establish a questionnaire for the purpose of gathering information about the protection of biotechnological inventions, including certain aspects regarding intellectual property and genetic resources, in the Member States of WIPO. The Secretariat of WIPO is in the process of compiling the responses to the questionnaire.

7. In response to the invitation issued by the SCP, WIPO organized a Meeting on Intellectual Property and Genetic Resources on April 17 and 18, 2000. The Meeting addressed issues that generally are raised in the context of access to, and *in situ* preservation of, genetic resources in their direct or indirect relationship with intellectual property. The Chairman's Conclusions from the Meeting state that the exchange of views that took place at the Meeting produced a clear consensus that:

"WIPO should facilitate the continuation of consultations among Member States in coordination with the other concerned international organizations, through the conduct

of appropriate legal and technical studies, and through the setting up of an appropriate forum within WIPO for future work.”

8. At the same meeting, it was agreed that the WIPO Secretariat should prepare and issue an additional questionnaire in the field of intellectual property and genetic resources, which would be based on submissions by Member States. To date, no such submissions have been received.

9. During the Diplomatic Conference for the Adoption of the Patent Law Treaty from May 11 to June 2, 2000, the Director General conducted consultations concerning formalities in relation to the question of genetic resources. As the outcome of the consultations, a statement was agreed upon among the groups and read out by the Director General, the relevant part of which is as follows:

“Member State discussions concerning genetic resources will continue at WIPO. The format of such discussions will be left to the Director General’s discretion, in consultation with WIPO Member States.”

10. Following the Diplomatic Conference, consultations with Member States took place regarding the format and content of such discussions. As a result of the consultations, it is proposed that a distinct body should be established within WIPO to facilitate such discussions and that, in addition to the issue of genetic resources, the discussions should also include the results of WIPO’s previous work on the related fields of traditional knowledge and expressions of folklore.

11. WIPO began its work on “traditional knowledge, innovations and creativity” (traditional knowledge) in the 1998-99 biennium. Two Roundtables were convened regarding the protection of traditional knowledge and a series of nine fact-finding missions on traditional knowledge, innovations and creativity (FFMs) were undertaken. The objective of the FFMs was “to identify and explore the intellectual property needs and expectations of new beneficiaries, including the holders of indigenous knowledge and innovations.” A draft Report on all the fact-finding missions has been proposed and made available for public comments until October 30, 2000, on the WIPO website (<www.wipo.int/traditionalknowledge/report>). Comments received will be taken into account in producing a final report, which will be published later in 2000.

12. WIPO’s work on “expressions of folklore,” which are a subset of traditional knowledge, began as early as 1978 in cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO). It has thus progressed to a more advanced stage than the work on traditional knowledge in general. A concrete product of this work was the adoption in 1982 of the “Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions” (the Model Provisions). Most recently, WIPO and UNESCO conducted four Regional Consultations on the Protection of Expressions of Folklore, each of which adopted resolutions or recommendations with proposals for future work. Three of the four consultations recommended the establishment within WIPO of a separate committee on folklore and traditional knowledge to facilitate future work in this area (see documents WIPO-UNESCO/FOLK/ASIA/99/1, page 4, paragraph 4; WIPO-UNESCO/FOLK/ARAB/99/1, paragraph II(b)6; WIPO-UNESCO/FOLK/LAC/99/1, page 3). In addition, it is worth noting

that the WIPO Performances and Phonograms Treaty (WPPT) already makes explicit reference to expressions of folklore.

II. PROPOSAL FOR THE ESTABLISHMENT OF A WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE¹

13. Following the recommendations of the regional consultations on folklore, the consensus achieved at the Meeting on Intellectual Property and Genetic Resources, the commitment reached in the context of the Diplomatic Conference for the Adoption of the Patent Law Treaty and subsequent consultations with Member States, the Member States might wish to consider the establishment of an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore for the purpose of discussions on these subjects.

14. The Intergovernmental Committee would constitute a forum in which discussions could proceed among Member States on the three primary themes which they identified during the consultations: intellectual property issues that arise in the context of (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore.

15. Each one of these themes cuts across the conventional branches of intellectual property law and does therefore not fit into existing WIPO bodies, such as the SCP, the Standing Committee on Copyright and Related Rights (SCCR), the Standing Committee on Trademarks, Industrial Designs and Geographical Indications (SCT), and the Standing Committee on Information Technologies (SCIT). At the same time, the three themes are closely interrelated, and none can be addressed effectively without considering aspects of the others.

16. It is proposed that the Intergovernmental Committee be open to all Member States of WIPO. In conformity with the budgetary allocations available under the Program and Budget and previous WIPO practice, WIPO would facilitate the participation of representatives of developing countries and of certain countries in Europe and Asia. As is usual in WIPO bodies, it is proposed that relevant intergovernmental organizations and accredited international and regional non-governmental organizations be invited to participate in an observer capacity. It is proposed that the Committee would hold its first session in the Spring of 2001 and that the next draft Program and Budget would provide for the Committee to meet twice a year in the 2002-2003 biennium. The Committee would report any recommendations for action that it might formulate to the WIPO General Assembly.

¹ The title given to the proposed body in this document is provisional and subject to approval by the Member States. The title suggested in this document reflects the three primary themes identified by Member States during recent consultations on the subject (see paragraph 14, below). Accordingly, the substantive issues listed in Section III of the present document are organized under these three themes.

17. At its first session, it is proposed that the Committee determine, within its sphere of competence, and in accordance with the Program and Budget, the agenda of items on which work should proceed. It would also determine the priority accorded to these various items. It is proposed that the draft agenda for the first session of the Committee include the items set out in the Annex to this document. It is also suggested that Member States be invited to submit proposals for issues to be considered at the first session of the Committee and documents to be prepared by the WIPO Secretariat for that first session. Section III, below, identifies issues that Member States may consider appropriate and which may form the basis for proposals for issues to be considered at the first session of the Committee.

18. It is proposed not to establish separate rules of procedure for the Intergovernmental Committee, but rather that the general rules of procedure adopted for WIPO bodies, namely the WIPO General Rules of Procedure (publication No. 399 Rev.3) should apply, subject to any special rules of procedure that the Intergovernmental Committee may wish to adopt.²

19. The WIPO General Assembly is invited to approve the establishment of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore proposed in paragraph 13 and the administrative matters proposed in paragraphs 16 to 18, above.

III. ISSUES FOR CONSIDERATION BY THE PROPOSED INTERGOVERNMENTAL COMMITTEE

20. In the course of the informal consultations described in paragraphs 9 and 10, above, the Member States identified three primary themes which require further discussion. These themes consist of intellectual property issues that arise in the context of: (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, innovations and creativity, whether or not associated with those resources; and (iii) the protection of expressions of folklore, including handicrafts. This Section provides a list of issues for each theme which the Member States identified for discussion. The present document merely catalogs these issues in a non-exhaustive list, without elaborating on them substantively.

A. Access to Genetic Resources and Benefit-Sharing

21. Intellectual property questions related to access to genetic resources and benefit-sharing arise in four main contexts. These contexts rely upon a shared understanding of the meaning of certain terms, such as “genetic resources,” which should accordingly be the subject of definitions to which attention should be given at the outset. The four main contexts concern the role of intellectual property rights in:

² The SCCR, SCT and SCIT have adopted a special Rule of procedure extending membership (without the right to vote) to the European Communities (see documents SCCR/1/2, paragraphs 8 to 10; SCT/1/6, paragraph 16; and SCIT/1/7, paragraph 11 and Annex III, Appendix 1, respectively).

(i) *Contractual agreements for access to genetic resources.* Access agreements for genetic resources, such as material transfer agreements (MTAs), raise questions on the role of intellectual property rights (IPRs) in respect of: ensuring control over *ex-situ* use of genetic resources; technology transfer and joint research and development; the exploration of the possibility of joint ownership of IPRs; ensuring continued customary use of genetic resources, etc. Member States may wish to consider the development of “best contractual practices,” guidelines and model intellectual property clauses for MTAs and other access agreements.

(ii) *Legislative, administrative and policy measures to regulate access to genetic resources and benefit-sharing.* Issues arising in the development of national and regional access legislation include the role of intellectual property rights regarding: prior informed consent procedures; ensuring the recording of ownership interests in inventions that arise from access to or use of genetic resources; transfer of and access to technology in the context of benefit-sharing; and joint research and development as a form of non-monetary benefit-sharing.

(iii) *Multilateral systems for facilitated access to genetic resources and benefit-sharing.* Multilateral systems, such as the system currently being developed for plant genetic resources for food and agriculture, raise numerous intellectual property issues, including: possible intellectual property-based benefits-sharing mechanisms; acquisition of intellectual property rights over genetic resources placed in the multilateral system; access under the multilateral system to genetic resources covered by intellectual property rights; transfer of and access to technology under the multilateral system; and the rights of holders of traditional knowledge associated with genetic resources placed in the multilateral system.

(iv) *The protection of biotechnological inventions, including certain related administrative and procedural issues.* Intellectual property issues in the field of biotechnology include: licensing and other issues related to the use of rights in biotechnological inventions; administrative and procedural issues related to the examination of patent applications directed at biotechnological inventions; the relationship between patents and other forms of intellectual property protection for biotechnological inventions; and certain aspects, related to ethical and environmental issues, animal and human health.

22. In each of these four contexts intellectual property issues arise regarding the protection of traditional knowledge related to genetic resources. These issues are dealt with separately under the next heading.

B. Protection of Traditional Knowledge

23. Based on WIPO’s previous work, intellectual property issues regarding the protection of traditional knowledge related to genetic resources, and traditional knowledge, innovations and creativity in general, can be grouped in four categories:

(i) *Terminological and conceptual issues.* Issues to be discussed in this category include: the selection of appropriate terms to describe the subject matter for which protection is sought; a clear definition or description of what is meant (and not meant) for intellectual property purposes by the selected terms; study of customary laws and regulatory

systems that apply to traditional knowledge in local and traditional communities; examination of certain conceptual issues, such as collectivity of creation, innovation and ownership and cultural understandings of property rights.

(ii) *Standards concerning the availability, scope and use of intellectual property rights in traditional knowledge.* Issues include: in the short term, facilitating access to the intellectual property system to enable traditional knowledge holders to acquire and use intellectual property rights where available under current standards; in the longer term, the possible development of new standards to protect traditional knowledge not protected by existing intellectual property tools, the elaboration of an international framework for traditional knowledge protection, and the development of a system of “community” or “collective” rights to protect traditional knowledge.

(iii) *Certain criteria for the application of technical elements of standards, namely legal criteria for the definition of prior art and administrative and procedural issues related to the examination of patent applications.* Issues in this category include: the integration of traditional knowledge into the procedures of IP offices for filing, examination, publication and granting of industrial property titles through the documentation and publication of traditional knowledge as searchable prior art, where so desired by the relevant traditional knowledge holders; an analysis of how prior art is established for purposes of patent examinations in the context of traditional knowledge; and the provision of legal assistance with traditional knowledge documentation.

(iv) *The enforcement of rights in traditional knowledge.* This involves facilitating access to the intellectual property system, to enable traditional knowledge holders to use and enforce rights under the intellectual property system.

C. Protection of Expressions of Folklore

24. The four regional consultations on the protection of folklore, mentioned in paragraph 12, above, recommended that WIPO should increase and intensify its work in the field of folklore protection. Recommendations for the legal protection of folklore focused on the development of a *sui generis* form of legal protection at the international level (Asia/Pacific, Arab, LAC Recommendations). Three of four consultation meetings considered the UNESCO-WIPO Model Provisions (1982) to be an adequate starting point and relevant groundwork for future work in this direction. One consultation recommended “to develop, in the shortest possible time, a broad consensus among States in favor of an international regime” (African Recommendation). Such a consensus among States seems to require detailed Member State discussions on issues such as those referred to in paragraph 23, above, insofar as they are relevant also to folklore, which might be facilitated by the establishment of a distinct body for this purpose, as referred to in Section II. Furthermore, discussions at the Thirty-Fourth Series of Meetings of the Assemblies of the Member States of WIPO, held from September 20 to 29, 1999, specified that special attention in this context should be given to the protection of handicrafts (see document A/34/16, paragraphs 29, 113 and 142).

25. The WIPO General Assembly is invited to note the foregoing enumeration of issues for further discussion regarding intellectual property in relation to genetic resources, traditional knowledge and folklore.

[Annex D follows]

ANNEX D

**Intergovernmental Committee on Intellectual Property and
Genetic Resources, Traditional Knowledge and Folklore**

First Session

Geneva, Spring 2001

DRAFT AGENDA

prepared by the Director General

1. Opening of the session
2. Election of a Chair and two Vice-Chairs
3. Adoption of the Agenda
4. Issues to be considered by the Intergovernmental Committee
 - 4.1 Access to Genetic Resources and Benefit-Sharing
 - 4.2 Protection of Traditional Knowledge
 - 4.3 Protection of Expressions of Folklore
5. Future work
6. Adoption of the Report
7. Closing of the session

[End of Annexes and document]