

**Standing Committee on Intellectual Property and Traditional Knowledge,  
Genetic Resources and Traditional Cultural Expressions**

**Questionnaire on**

**Intersection of Intellectual Property Traditional Knowledge, Genetic Resources  
and Traditional Cultural Expressions**

By

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**Introduction**

The development of intercultural societies deeply communicated and the combination of tradition and modernity have increased the importance and economic value of the Traditional Knowledge (TK) related to Genetic Resources (GR) and Traditional Cultural Expressions (TCEs) in which innovation and creativity have a fundamental roll so there is an important interaction with Intellectual Property.

Experts have been discussing whether and how to protect the TK/GR/TCE and if it could be recognized as a form of Intellectual Property or should be provided a special system, but there is not consensus at the international level. Nevertheless, there have been recent and important developments to be considered in the study or analysis of the subject.

The Standing Committee on Intellectual Property on Genetic Resources, Traditional Cultural Expressions and Traditional Knowledge (IP and GRTCETK) of AIPPI has been studied issues related to the intersection of IP with the framework that has been established around the use of Genetic Resources (GR) as it will be explained but has not been studying issues related to the Traditional Knowledge (TK) in connection with Traditional Cultural Expression (TCE).

### **Previous work of AIPPI in connection with TK/GR**

- 1) **Special Committee Q166** (Gothenburg 2006) (Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore) monitored, studied, and advised on the development on IP on GRTKF
- 2) **Resolution of Special Committee Q166.** Through a Questionnaire distributed in 2006, special Committee Q166 collected information and opinions concerning National legal Requirements for indicating the country of origin or the source for Genetic Resources and TK in patent applications involving Genetic Resources. The AIPPI Gothenburg Congress 2006 passed a resolution on the bases on the result from the 2006 questionnaire. The 2006 Resolution of Special Committee Q166 to this Working Guidelines as Annexure A for ease of reference.
- 3) **2010 Questionnaire.** In February 2010, special Committee (WTO/TRIP's) and Q166 jointly distributed a Questionnaire to update information collected for the 2006 Questionnaire and to collect information and practical experience with the application of any relevant laws and regulations. Thirty-four Groups responded, of which twelve reported a legal requirement in their country the source and/or country of origin of biological/resources and TK must be indicated in patent applications for inventions base on biological/genetic resources or TK.
- 4) **Resolution Q232** "The Relevance of Traditional Knowledge to Intellectual Property Law" Seoul 2012. It resolved that: Adoption of harmonized definition of TK 1) is desirable, 2) Should take into account the word of IGC relating to TK, 3) Should be compatible with definitions of IP, Genetic Resources and TCEs, 4) International and National Laws covering TK should include provisions promoting a comprehensive regime for TK that provides legal certainty for all state holders in relation to TK, and that is aligned with the principles exciting IP system. Such laws make provide sui-generis treatments of TK. The 2012 Resolution as Annexure B for ease of reference.
- 5) **Standing Committees IP-GR/TK/TCE and TRIPs (October 2018).** Questionnaire on the Requirement of Indicating the Source and/or Country of Origin of GR/TK in Patent Applications. The questionnaire was sent out in September 2016 to update information collected from the National and Regional Groups and Independent Members on provisions and existing laws and draft bills and to collect information on practical experience with the

application on such laws and regulation. This study also provides definitions of TK, explain existing means of protections as well as the positive and defensive protection of TK holders' legal rights over the TK, likewise the defensively protection, to prevent third parties from obtaining or exercising illegitimate IP rights over TK, some indication of the impact of Nagoya Protocol on patent application. The questionnaire was responded by 23 National Groups. The summary report with the outcome of the responses was distributed in October 2018. The 2018 Questionnaire, as Annexure C for ease of reference.

### **No Previous work of AIPPI in connection with TK/Traditional Cultural Expressions (TCE).**

As it was explained the IP and GRTKTCE Committee has conducted an intensive and comprehensive analysis as well as monitored and studied complex issues and discussions at the international level in connection with TK/Genetic Resources, but not in connection with TK related to Traditional Cultural Expressions (TCE), that have increasing attention, not only from governments, cultural institutions, indigenous people and local community but also from policy makers, industry (such as pharmaceutical, entertainment, cultural, fashion, tourism, etc.) an international organizations like WIPO an International Associations such as AIPPI and Intellectual Property experts.

Considering the increasing importance of the TCEs and the complaints of the indigenous communities in different jurisdictions about the use of TCEs, the IP and GRTKTCE Committee continues to study GR/TK issues but now is also concentrated on the analysis and discussion about TCE associated to TK at the international level.

### **Definitions**

#### **Traditional Knowledge (TK)**

In the Working Guidelines of Q232 it is mentioned that TK is not static. The content of TK, as it relates at any even group develops and changes overtime. It was discussed if in the context of the legal protection of the TK it is possible or desirable to develop a definition of the term TK. In such documents provides various samples definitions but it was not possible to develop a precise one. As one of the sample definitions is stated; "Content or substance of knowledge, resulting from intellectual activity in a traditional context, including the know-how, skills, innovations, practices and learning that form part of Traditional Knowledge systems and knowledge embodying traditional lifestyles of indigenous and local communities, all contain in a

codify knowledge systems passed between generations”  
(WIPO/GRTKF/IC/19/IMF/8).

In the Working Guidelines of Q232, is mentioned that a singular definition might not be necessary to delimit the scope of the subject matter of TK for which IP protection is sought. Definitions in many national IP systems function satisfactorily on the basis of inclusive definitions. This appreciation still valid since there is not yet accepted a definition of TK at the international level.

### **Genetic Resources (GR)**

There are several international instruments, such as the Convention on Biological Diversity (Art. 2) 1992, that defines “Genetic Resources” as “Genetic Material of Actual or Potential Value”. Decision 391 on Access to Genetic Resources of Andean Community (1996) as all biological material that contains genetic information of value or of potential value. The FAO International Treaty on Plant Genetic Resources for Food and Agriculture (2001) defines plant genetic resources as “any material of plant origin, including reproductive and vegetative propagating material and containing functional units of heredity” (WIPO Glossary of key terms related to IP and GR, TK and TCE).

### **Traditional Cultural Expressions (TCE)**

Although there is no consensus at the international level of a definition WIPO uses the terms “Traditional Cultural Expressions” to refer tangible and intangible or mix forms in which traditional knowledge cultures are expressed communicated or manifested. Examples includes traditional music, performances, narratives, names and symbols, designs and architectural forms (WIPO Glossary of key terms related to IP and GR, TK and TCE). Are handed down from generation to generation either orally or by imitation. Reflects a community’s cultural and social identity. They normally belong to a community under customary laws and from unknown author.

There is no consensus at the international level, about the options for protection and promoting TCEs with IP. It has not been set an agreement if it can be under the framework of the IP system, or develop a sui generis protection in which TCEs could be recognized as a form of Intellectual Property. Whether it could include property rights and non-property rights and how to prevent misappropriation and misuse, as

opposed to preservation and safeguarding (WIPO/AIPPI Webinar “How to Protect and Promote Traditional Cultural Expressions”).

From the perspective of the copyright principles, for some jurisdictions TCEs are in the public domain, for others they form part of the cultural heritage of the indigenous communities and the use or exploitation for commercial purposes requires either their authorization or a permit granted by a government authority. The exploitation without an authorization, are sanctioned by local law.

Examples of complaints by indigenous communities due to unauthorized use of the TCE could be mentioned:

- 1) Australia Aboriginal flag  
<https://www.managingip.com/article/b1p0mzvdx55nzy/opinion-sensitivity-crucial-as-australia-seeks-to-resolve-aboriginal-copyright-row>
  
- 2) Japan- Victoria & Albert Museum (V&A) in London opened "Kimono: Kyoto to Catwalk"  
<https://edition.cnn.com/style/article/kimono-fashion-history-cultural-appropriation/index.html>
  
- 3) Malaysia  
<https://www.therakyatpost.com/2020/08/21/the-fine-line-between-cultural-appropriation-cultural-appreciation/>
  
- 4) Mexico - Isabel Marant and the Mixe Huipil  
<https://www.theguardian.com/global-development-professionals-network/2015/jun/17/mexican-mixe-blouse-isabel-marant>  
  
Voladores de Papantla vs. Beer Marketing Campaign  
<https://desinformemonos.org/voladores-papantla-denuncian-la-cervecera-cua-uhtemoc-moctezuma-profana-ceremonia-ritual/>
  
- 5) Somalia Social Media Users Accuse Zara of Culturally Appropriating Somali Baati

ZARA <https://www.allure.com/story/zara-accused-cultural-appropriation-somali-baati>

- 6) US - United States Cherokee  
Chief of Cherokee Nation asks Jeep to stop using tribe's name

<https://edition.cnn.com/2021/02/22/business/jeep-cherokee-name-trnd/index.html>

Chief of Cherokee Nation Says 'It's Time'  
for Jeep to Stop Using Name  
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<https://www.caranddriver.com/news/a35568468/cherokee-nation-jeep-stop-using-name/>

## Discussion

The scope of this questionnaire is different from the previous work of AIPPI described above. First, it focuses not only on TK/GR, it also includes TK/TCE and its relevance to IP law. Second, it considers broader issues than those discussed in previous questionnaires and resolutions related on TK/GR. Third, it also includes specific issues in connection with TK/TCE. Considering the essential intersection between TK and GR and TCE, with IP, the questionnaire is divided in three sections,

the first one, General Traditional Knowledge (TK), the second one Genetic Resources (GR) and the third one Traditional Cultural Expressions (TCE).

In connection with the first section, National Groups are invited to indicate if there are general law or specific legislation related to General Traditional Knowledge TK, such as any environmental law. Regarding the second section GR, focused on the impact and update of the implementation of the Nagoya Protocol, as well as if there is any specific regulation related to academic research or traditional medicine. In the third section TCE, should be indicated if there any specific national law that protects TCEs, or are others like trademark law, copyright law, geographical indications law that protects them, if they provide positive and/or defensive regulation or registration and who are the beneficiaries of the protection.

## **I.- General**

### **Traditional Knowledge/TK**

1) Is there a legal frame either general law or specific legislation in your country that protects TK including at least Genetic Resources (GR) and Traditional Cultural Expression (TCE)?

- a) General law
- b) Environmental law
- c) Is there is a positive or defensive protection for TK in your jurisdiction

2) Is TK protected permanently or a limited time frame?

3) Is there any judicial, administrative, decision or case law protecting TK?

### **II Genetic Resources/GR**

4) Is there a legal frame either general law or specific legislation in your country that protects Genetic Resources (GR)?

5) Is there a legal frame either general law or specific legislation in your country that protects digital sequence information (DSI)\*

<https://www.cbd.int/dsi-gr/>

[https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_ip tk\\_ge\\_21/wipo\\_ip tk\\_ge\\_21\\_presentation\\_14\\_tsh\\_itwamulomoni.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_ip tk_ge_21/wipo_ip tk_ge_21_presentation_14_tsh_itwamulomoni.pdf)

6) The following questions relate specifically to the Nagoya Protocol.

- a) If your country has not (yet) implemented the Nagoya Protocol, please indicate this.
- b) The Nagoya protocol stipulates ABS ("access and benefit sharing"). In your country, is there any impact on intellectual property protection and/or enforcement if ABS is not satisfied?
- c) The Nagoya Protocol also stipulates PIC ("prior informed consent"). In your country, is there any impact on intellectual property protection and/or enforcement if there is any failure or defect in PIC?
- d) The Nagoya Protocol also stipulates MAT ("mutually agreed terms"). In your country, is there any impact on intellectual property protection and/or enforcement if there is any failure or defect in MAT?
- e) Has your country implemented the Cartagena Agreement

7) Academic research often involves GRTK. Are there any special regulations and/or measures for academics and/or academic institutions such as universities to protect and promote the protection and development of GRTK

8)"Traditional medicine" may fall within GRTK. Information relating to traditional medicine is generally not found in the literature or in other written form in the public domain. Does your country permit patent or any other form of intellectual property protection in relation to traditional medicine? If yes, does your country have any specific legislation or examination practice for the protection of traditional medicine? Please include links to websites dealing with these practices or legislation, if appropriate.

9) Have there been any authoritative studies in your country on the impact of the Nagoya Protocol? If yes, please provide author(s), title, and information where such studies can be found.



10) Is there any case law or court precedent that can be mentioned?

### **III- Traditional Cultural Expressions TCE**

1. Is your country member or has implemented on National law the:
  - a. Convention for the Safeguarding of Intangible Cultural Heritage of 2003
  - b. Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005
  
2. Is there any special statute regulating TK/TCE in your country? If yes, please identify the statute.
  
3. Are there any other laws regulating TK/TCE in your country, such as, Trademark Law, Copyright Law, Geographical Indications Law?  
If yes, please identify the laws.
  
4. Does your law provide a definition or description for TK/TCE?  
If yes, please provide the definition or description.
  
5. What are the objectives of the protection afforded to TK/TCE in your country?
  
6. Is there a term of protection for TK/TCE in your country?
  
7. Does your law provide a positive and/or defensive protection and/or a registration system of TK/TCE? Please explain.
  
8. Which are the government authorities in charge of the Registry of TK/TCE?
  
9. Who are the beneficiaries (indigenous communities) of the TK/TCE protection under your laws?

10. How is the commercial exploitation of TK/TCE regulated by your laws? Is it required to obtain an authorization, license or a previous and inform consent from an indigenous community.
  
11. How are TK/TCE rights enforced in your country and what are the penalties established for infringement of those rights in your country? Could you indicate any case law or court precedent in connection with TK/TCE?

National groups are invited to comments on any additional issue or proposal concerning the relevant of TK/GR/TCE to IP Law.

**NOTE:**

It will be helpful and appreciated in the following points could be taken into consideration when editing the Group Report:

- Kindly follow the order of the questions and use the questions and numbers for each answer.
  
- If possible, type your answers in a different colour.
  
- Please send in a word document.
  
- In case images, need to be included high resolution (not less than 300dpi) is required for good quality printing.