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SAFEGUARDING OF FOLKLORE: REPORT BY THE DIRECTOR-GENERAL

SUMMARY

The Director-General reports to the General Conference on the work carried out by the Secretariat in pursuance of 21 C/Resolution 5/03, adopted by the Conference at its last session, and informs it of the decisions taken by the Executive Board on this subject.

I. Decision of the General Conference at its twenty-first session

1. At its twenty-first session, the General Conference adopted resolution 5/03 in which, after referring to 'the considerable importance attaching to folklore as an element in identifying membership in an ethnic group and in a national community and as the dominant factor in a cultural heritage', it considered it desirable 'that measures designed to safeguard the existence and development of folklore and to protect it against the risk of distortion should be laid down in international regulations' and invited the Director-General 'to prepare a preliminary study on the technical and legal aspects of this question...'.
 2. The work plan relating to this resolution (21 C/5 Approved, para. 5024) provided for the following measures: 'Two committees of governmental experts (category II) will be convened. The first will be held at Headquarters in 1981, with a view to defining measures to safeguard the existence, development and authenticity of folklore and traditional popular culture and to protect them against the risk of distortion; the second, preceded by a committee meeting (category VI), will be organized jointly with WIPO in 1982 and will be responsible for drawing up proposals for regulating the 'intellectual property' aspects of the protection of folklore and traditional popular culture. Three working groups will be convened jointly with WIPO in 1981, 1982 and 1983, in Latin America and the Caribbean, Africa, and Asia and the Pacific respectively, to seek means of applying such regulations at the regional level, taking account of the characteristics of this cultural heritage in each region as factors in identifying an ethnic group or a national community... In the light of the findings of the 1981 and 1982 committees of governmental experts, and in pursuance of 21 C/Resolution 5/03, a preliminary study will be made for submission to the Executive Board in 1983, and possibly to the General Conference at its twenty-second session, to enable it to decide whether it would be advisable to adopt a recommendation to Member States on this question'.

II. Previous work on this subject

(a) Background

3. Activities for the safeguarding of folklore were included in Unesco's programme in 1973 as the result of a communication addressed to the Director-General by the Government of Bolivia, asking that consideration might be given to the possibility of drawing up a new annexed Protocol to the Universal Copyright Convention which would govern 'the conservation, the promotion and the diffusion of folklore'.

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4. This matter having been referred to it at its December 1973 session, the Intergovernmental Copyright Committee, which is the body responsible for dealing with questions concerning the application and operation of the Universal Copyright Convention and for preparing for any revisions of that instrument, asked the Unesco Secretariat to carry out a study on this subject and to report to it and to the Executive Committee of the Berne Union at their 1975 sessions, in so far as the protection of folklore might involve copyright.
5. In the light of the studies thus undertaken, and following the deliberations of the Committee of Experts on the Legal Protection of Folklore, which met in Tunis in July 1977 pursuant to resolution 6.121 adopted by the General Conference at its nineteenth session, it emerged that a system of protection for folklore required not only the examination in depth of the actual concept of folklore, but also rules for identifying the elements constituting each of the categories of expression forming part of this cultural heritage, and for its conservation, its preservation and its protection against misuse.
6. At this stage in the proceedings, the Committees of the Copyright Conventions recommended that studies on this subject should be pursued by Unesco on an interdisciplinary basis within the framework of an overall approach, and that the World Intellectual Property Organization (WIPO) should be associated in the examination of any copyright aspects involved in the legal protection of folklore.
7. The General Conference, at its twentieth session, having noted the work plan for resolution 5/9.2/1 (I) which gave effect to the aforementioned recommendations of the Committees of the Copyright Conventions, the Secretariat has since then carried out its studies at two levels: firstly, a comprehensive study of the protection of folklore which, if it is to be complete, requires an interdisciplinary approach and the adoption of measures within an integrated framework and, secondly, a study of the 'intellectual property' aspects involved, which is being carried out jointly with WIPO.

(b) Comprehensive study of the protection of folklore

8. Paragraph 5022 of the work plan for resolution 5/9.2/1 adopted by the General Conference at its twentieth session provided that studies should be carried out by the Secretariat 'to identify ways of providing protection for folklore at the international level'. In pursuance of this provision, the Director-General sent out a questionnaire to Member States regarding the five points that had been singled out by the Tunis Committee of Experts referred to in paragraph 5 above. These five points were the following: the definition, identification, conservation, preservation and exploitation of folklore.
9. The survey thus carried out, to which seventy-one Member States replied, achieved the objective of obtaining accurate and detailed information about the present situation with regard to the protection of folklore in those Member States.
10. In fact, the preservation of folklore presents considerable difficulties, as the traditional cultural heritage, besides being protected as intellectual property, needs to be protected for its own sake, or even against itself, for it is unstable, vulnerable, exposed to attack by time and by people, and in danger of withering away or becoming distorted.
11. Regarded from this point of view, the preservation of folklore certainly depends on law, but also on folklore as a science and, accessorially, on sociology, ethnology, museology, etc.

(c) Study of the 'intellectual property' aspects of the protection of expressions of folklore, carried out jointly with WIPO

12. In accordance with the decisions of the Intergovernmental Committee of the Universal Copyright Convention and the Executive Committee of the Berne Union at their 1979 sessions, parallel with the activities carried out by Unesco within the framework of an overall interdisciplinary approach, Unesco and WIPO went more deeply into the question of the 'intellectual property' aspects of the protection of folklore.
13. A working group to study this question met at WIPO Headquarters in Geneva from 7 to 9 January 1980. This working group agreed that adequate legal protection of folklore was desirable and that such protection could be promoted at the national level by model provisions for legislation.
14. At the conclusion of its deliberations, the working group recommended that the Unesco Secretariat and the International Bureau of WIPO should prepare a revised draft of the

model provisions for national laws and a commentary thereon, taking into consideration the ideas put forward during the debates, and that the draft and commentary should be presented for further consideration at a subsequent meeting of the working group. This meeting was held at Unesco's Headquarters from 9 to 13 February 1981 and adopted 'Model Provisions for National Laws on the Protection of Expressions of Folklore' so that they might be submitted to a Committee of Governmental Experts for further examination.

III. Work carried out by the Secretariat in pursuance of 21 C/Resolution 5/03

(a) Comprehensive study of the protection of folklore

15. In accordance with the Work Plan relating to 21 C/Resolution 5/03, set out in Section I above, a Committee of Governmental Experts met at Unesco House from 22 to 26 February 1982. The purpose of this meeting was to analyse various aspects of folklore on an interdisciplinary basis, in an endeavour to cover all aspects of the problem, with a view to defining measures to safeguard the existence, development and authenticity of folklore and to protect it against the risks of distortion, including the definition of folklore, its identification, its conservation, its preservation and its utilization.
 16. After the participants had unanimously emphasized the difficulty, not to say impossibility, of reaching a consensus on the concept of folklore, the Committee confined itself, as far as the definition of folklore was concerned, to distinguishing certain parameters. The importance of the identification of folklore was also noted, and it was suggested that appropriate institutions should be established for the collection and protection of folklore. In addition, since folklore was recognized to be a form of culture with ethical implications, playing a part in social identification, which contributed to the overcoming of prejudices and the assertion of freedom, emphasis was placed on its conservation. The Committee further emphasized the need to ensure that folklore retained its dynamic character, in so far as the concept of a process was included in that of folklore. Attention was accordingly drawn to the dangers of using folklore out of its original context, and to the need to ensure the continuation of tradition and to avoid sacrificing the cultural heritage it represented for the sake of commercial gain or exploitation for the benefit of the tourist industry, since harmful effects such as plagiarism, imitation and caricature might ensue.
 17. Upon concluding its deliberations, the Committee of Governmental Experts adopted a series of recommendations concerning (i) the definition, (ii) the identification, (iii) the conservation and analysis of folklore, (iv) its preservation, enhancement and reactivation and (v) its utilization. Furthermore, on account of the complexity of the various problems to be solved, this Committee, while endorsing the idea that Unesco should continue 'its studies and deliberations aimed at formulating an international recommendation . . . in accordance with resolution 5/03 adopted by the General Conference . . . at its twenty-first session', also recommended 'that, in order to facilitate the programming of the implementation' of all the matters involved, 'Unesco set up a task force of experts in documentation, archives and classification of material relating to traditional culture'.
- (b) Study of the 'intellectual property' aspects of the protection of expressions of folklore, carried out jointly with WIPO
18. In accordance with the Work Plan for the above-mentioned 21 C/Resolution 5/03, and in pursuance of the decision taken by the governing bodies of WIPO at their sessions in November 1981, a Committee of Governmental Experts on the intellectual property aspects of the protection of expressions of folklore was jointly convened by the Directors-General of the two Organizations at the WIPO Headquarters in Geneva from 28 June to 2 July 1982. After making certain amendments to the draft of model provisions submitted to it, this Committee finally adopted the 'Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions'. It also discussed the advisability of establishing international regulations concerning the protection of expressions of folklore.
 19. The Committee was informed by the representative of Unesco that, by 21 C/Resolution 5/03, the General Conference had considered it desirable that measures designed to safeguard the existence and development of folklore and to protect it against the risk of distortion should be laid down in international regulations, and had invited the Director-General to prepare a preliminary study on the technical and legal aspects of this question.
 20. With regard to the intellectual property aspects of the protection of folklore, most of the delegations were of the opinion that the Model Provisions should be conceived so as to serve

as a basis for the elaboration of any international regulations on the protection of expressions of folklore. Some delegations considered that, while they were in favour of examining the possibility of adopting such regulations, priority should be given to national and regional considerations. One delegation declared that it was not in favour of international measures.

21. Still in accordance with the Work Plan for resolution 5/03 adopted by the General Conference of Unesco at its twenty-first session, and in pursuance of the deliberations of the Intergovernmental Committee of the Universal Copyright Convention and the Executive Committee of the Berne Union, Unesco and WIPO convened expert committees, respectively in Bogotá (October 1981), in New Delhi (January-February 1983) and in Dakar (February 1983), on the means of applying at the regional level the model provisions for national laws on the intellectual property aspects of the protection of folklore. Subject to the decisions to be taken in 1983 by the General Conference of Unesco and the governing bodies of WIPO, an Arab Regional Committee will be convened in 1984.

22. The expert committee of Bogotá underlined in particular the following points: (i) special emphasis should be laid on the protection of folklore by way of some kind of international instrument, in addition to the adoption of a model national law; (ii) the fact that manifestations of folklore did not correspond to the geographical frontiers of nations should be taken into consideration; the expert committee of New Delhi expressed the unanimous opinion that the protection of folklore against illicit exploitation and other prejudicial actions should be ensured by means of a specific international treaty; the expert committee of Dakar also stressed the interest of formulating at international level an instrument for protecting expressions of folklore against illicit exploitation and other prejudicial actions.

IV. Preliminary study on the technical and legal aspects of the safeguarding of folklore

23. In the light of the work already carried out and in pursuance of 21 C/Resolution 5/03, the Secretariat drew up a preliminary study on the technical and legal aspects of the safeguarding of folklore.

24. It emerges from this study that all the work so far done leads to the conclusion that it is not only desirable but a matter of urgency that measures be taken at the international level to preserve folklore.

25. According to this study, 'two approaches emerge from the work undertaken concerning the method to be selected for establishing regulations on folklore. According to the first approach, the preservation of folklore could take place within the framework of instruments of a specialized nature such as, for instance, the adoption of international regulations on the "intellectual property" aspects of the protection of folklore, as called for by the expert committees of Bogotá, New Delhi and Dakar. This would be one of a series of specific projects designed to develop the safeguarding of folklore step by step. The second approach considers that, since the different constituents of the preservation of folklore are closely interlinked, it is only in the framework of a consistent body of precepts and rules encompassing all the disciplines that folklore is liable to draw on that the preservation of this cultural heritage can be ensured'.

26. The preliminary study also stated that: 'at the present stage of work on the question, it does not appear that the different constituents of the preservation of folklore--definition, identification, conservation, preservation, utilization--have been made sufficiently explicit for the General Conference to be able to consider adopting general regulations as things stand. However, as it seems certain that a satisfactory solution is conditional upon the integration and synthesis, within the framework of an overall and interdisciplinary approach, of all the elements required to ensure the preservation of folklore, the studies being carried out at this level should be pursued. Furthermore, taking into account the relatively urgent consideration that should be given to the adoption of specific international regulations on the intellectual property aspects of the preservation of folklore, inasmuch as this heritage suffers serious damage when used outside the communities that produced it, the necessary steps to formulate such regulations could be taken at the same time as work continued on the lines indicated above. As question of intellectual property also fall within the fields of competence of the World Intellectual Property Organization, all activities in this direction should be carried out jointly with the latter organization'.

27. Having regard to the foregoing, the preliminary study went on to say: 'Consequently the Executive Board could decide, in accordance with Article 4, subparagraph 2, of the Rules of Procedure concerning Recommendations to Member States and International Conventions covered by the terms of Article IV, paragraph 4, of the Constitution, to instruct a Committee

of Experts to carry out during the coming biennium a thorough study of the possible range and scope of general regulations on the preservation of folklore. It could also recommend to the General Conference that the requisite measures for developing specific regulations on the intellectual property aspects of the protection of folklore should be taken jointly by Unesco and WIPO. In the event of this happening, the Executive Board would submit a report to the twenty-second session of the General Conference on its decisions and their implication, which would be to postpone the submission of the preliminary study of the technical and legal aspects of this question which the Director-General was to have submitted to the General Conference at the above-mentioned session, in conformity with 21 C/Resolution 5/03'.

V. Decision of the Executive Board at its 116th session

28. Under the terms of Article 3 of the Rules of Procedure concerning Recommendations to Member States and International Conventions covered by the terms of Article IV, paragraph 4, of the Constitution, no new proposal for the regulation on an international basis of any question by the adoption by the General Conference of an international convention or a recommendation to Member States may be included in the provisional agenda of the General Conference unless a preliminary study of the technical and legal aspects of the problem under consideration has been submitted for prior examination by the Executive Board at least ninety days before the opening of the session of the General Conference. In accordance with this provision, the preliminary study mentioned above was submitted to the Executive Board at its 116th session (June 1983).

29. The Executive Board adopted the following decision:

'The Executive Board,

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1. Taking into account Articles 2, 3 and 4 of the Rules of Procedure concerning Recommendations to Member States and International Conventions covered by the terms of Article IV, paragraph 4, of the Constitution,
2. Having examined the report and preliminary study contained in document 116 EX/26.
3. Invites the Director-General to pursue, bearing in mind the observations and opinions expressed during the examination of this matter by the Executive Board, the preliminary study on the technical, legal and administrative aspects of general regulations concerning the preservation of folklore;
4. Decides to this end, in accordance with Article 4 (2) of the above-mentioned Rules of Procedure, that a Committee of Experts should carry out during the 1984-1985 biennium a thorough study of the possible range and scope of such regulations;

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5. Endorsing the conclusions of the Director-General with regard to the urgent consideration that should be given to the possible adoption of specific international regulations regarding the "intellectual property" aspects of the preservation of folklore.
6. Noting that questions of intellectual property also fall within the fields of competence of the World Intellectual Property Organization (WIPO).
7. Recommends the General Conference to invite the Director-General to take, jointly with the Director-General of WIPO, the requisite measures to look into the need for specific regulations of this kind and to prepare such regulations;
8. Requests the Director-General to submit to it a report on all these matters at its 121st session'.

30. Following this decision, the examination of the advisability of adopting international regulations on this question has not been included in the agenda of the present session of the General Conference, and the preliminary study has not been communicated to Member States nor submitted to the General Conference at its present session. An item on the safeguarding of folklore has, however, been included in the provisional agenda so that the General Conference may be informed about how the matter stands.