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**REPORT ON THE PRELIMINARY STUDY
ON THE ADVISABILITY OF REGULATING INTERNATIONALLY,
THROUGH A NEW STANDARD-SETTING INSTRUMENT,
THE PROTECTION OF TRADITIONAL CULTURE AND FOLKLORE**

SUMMARY

In accordance with 30 C/Resolution 25 (Section B, para. 2(a)(iii)) and 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, the Director-General submits to the Executive Board the report on the preliminary study on the advisability of regulating internationally, through a new standard-setting instrument, the protection of traditional culture and folklore, so as to enable the Executive Board to decide whether this matter should be included in the provisional agenda for the 31st session of the General Conference.

Decision required: paragraph 28.

I. INTRODUCTION

1. In paragraph 2(a)(iii) of 30 C/Resolution 25 the General Conference invited the Director-General to study “the advisability of regulating internationally, through a new standard-setting instrument, the protection of traditional culture and folklore”.

2. Pursuant to that resolution the Director-General submits this document, which does not claim to offer an exhaustive analysis of all the problems raised. It takes account, in particular, of three studies (scientific, legal and historical), on the preparation and application of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore, the results of the eight regional seminars held between 1995 and 1999 on its application, and the conclusions of the international conference organized jointly by UNESCO and the Smithsonian Institution entitled “A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Cooperation” which took place in Washington from 27 to 30 June 1999. In addition, this document draws on a “Preliminary Study into the Advisability of Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage (‘traditional culture and folklore’)” prepared by Ms Janet Blake, Honorary Research Fellow, University of Glasgow. Copies of this study are available in the Secretariat. The study was examined at an international experts meeting on “Intangible cultural heritage – Working definitions” which UNESCO organized from 14 to 17 March 2001 in Turin (Italy) and whose conclusions are annexed to this report.

II. UNESCO’S ANTECEDENT ACTIVITIES IN THE FIELD OF INTANGIBLE CULTURAL HERITAGE

3. In UNESCO normative action relating to the intangible cultural heritage began in 1973 with the proposal of the Government of Bolivia that a Protocol be added to the Universal Copyright Convention in order to protect folklore. During a meeting organized in 1976 with the assistance of UNESCO and WIPO, a committee of governmental experts adopted the Tunis Model Law, which refers to the protection of folklore. UNESCO jointly issued with the World Intellectual Property Organization (WIPO) Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions in 1982. Based on this text, a draft treaty was prepared by the two organizations in 1984 (which did not, however, come into force).

4. The general protection of folklore was left to UNESCO and resulted in 1989 in the Recommendation on the Protection of Traditional Culture and Folklore which set an important precedent for recognition of the heritage aspects of “traditional culture and folklore”, encouraged international collaboration, and considered measures to be taken for its identification, conservation, preservation, dissemination and protection. However, the assessments conducted in regional seminars and culminating in the Washington International Conference held in June 1999¹ have concluded that several aspects would need to be addressed in any new or revised instrument, in particular, questions of terminology, the breadth of subject matter, the type of definition used. The Conference underlined the necessity to place an emphasis on tradition-bearers rather than scholars, the need to be more inclusive, encompassing not only artistic products such as tales, songs, etc., but also knowledge and values enabling their production, the creative processes that bring the products into existence and the modes of interaction by which these products are appropriately received and appreciatively acknowledged.

¹ See paragraph 2 above.

5. UNESCO and WIPO jointly organized a World Forum on the Protection of Folklore in Phuket (Thailand) in April 1997. In accordance with the plan of action adopted by that Forum, UNESCO organized a Symposium on the protection of traditional knowledge and expressions of indigenous cultures in the Pacific Islands, in Noumea (New Caledonia) in February 1999. Following the World Forum in Phuket, four other regional consultations were also organized in conjunction with WIPO.

6. After the end of the Cold War, and more particularly in the era of globalization, increased interest for intangible cultural heritage as a source of cultural identity, creativity and diversity was expressed by Member States through the General Conference and the Executive Board. The importance of intangible cultural heritage was highlighted by the launching of two programmes: the Human Living Treasures system (1993) and the Proclamation of Masterpieces of Oral and Intangible Heritage of Humanity (1997). The first set of nominations for proclamations of “Masterpieces of Oral and Intangible Heritage” was received at the end of 2000 and provides a useful indication on the type of intangible heritage that different Member States wish to safeguard.

7. Other activities for the preservation and promotion of intangible cultural heritage were undertaken to promote the 1989 Recommendation, among others: organization of training courses; assistance for the establishment of inventories, the drafting of plans for the safeguarding, revitalization and dissemination of the intangible heritage of minority and indigenous groups, and the organization of a number of festivals of traditional cultures; organization of an Intergovernmental Conference on African Language Policies (1997); establishment of a network of folklore archives; publication of CDs of the “UNESCO Collection of Traditional Music of the World”, “Handbook for collecting musical heritage”, “Atlas of the World’s languages in danger of disappearing”, “Methodological manual on the protection of traditional culture and folklore against inappropriate commercial exploitation”, and “Ethics and traditional culture”.

III. ACTIVITIES DEVELOPED BY INTERGOVERNMENTAL ORGANIZATIONS

8. Other specialized agencies within the United Nations system have undertaken work on some aspects of the intangible cultural heritage to try to meet some of the issues raised by those concerned with its safeguarding. They do not all use the same terminology, although their work often overlaps.

9. During 1998 and 1999, WIPO conducted nine fact-finding missions to identify, as far as possible, the intellectual property needs and expectations of the holders of traditional knowledge. At the WIPO General Assembly in 2000, an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was created.

10. In the field of traditional knowledge, the World Health Organization (WHO) has been active in relation to the regulation, recording and intellectual property-related aspects of traditional medicinal and botanical knowledge. The Food and Agriculture Organization (FAO) has carried out work on farmers’ and breeders’ rights, many of whom are indigenous farmers. The United Nations Environment Programme (UNEP) is working on preservation of traditional knowledge, with particular focus on indigenous knowledge in the context of preserving the natural environment, subsistence resources and biological diversity, and on the preservation of languages threatened with disappearance. The United Nations Conference on Trade and Development (UNCTAD) recently held an Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices

(October-November 2000) to identify issues with potential benefits to developing countries and to study ways of protecting traditional knowledge, innovations and practices.

11. Traditional knowledge has also been referred to in several international texts concerning particularly issues relevant to indigenous heritage. ILO adopted a Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989). The United Nations Convention on Biological Diversity 1992 (CBD) requires each State Party to the Convention “subject to its national legislation, [to] respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustained use of biological diversity ...” (Article 8(j)). A Working Group on the implementation of Article 8(j) and related provisions has been established by the CBD Secretariat with the assistance of WIPO to assist Parties to develop legislation to implement these provisions and to define the key concepts in that article and the related provisions that recognize and safeguard the rights of indigenous and local communities over their traditional knowledge. ECOSOC has developed two texts of significance for indigenous intangible heritage: the United Nations Draft Declaration on the Rights of Indigenous Peoples and the Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples (both not yet adopted by Member States).

IV. EXISTING LEGAL FRAMEWORK

12. Concerning the existing intellectual property rights system, the Universal Copyright Convention (1952) and the Berne Convention for the Protection of Literary and Artistic Works (1971) provide international standards for harmonizing copyright rules of States Parties and can grant legal protection to many forms of artistic expression such as music, dance, painting and sculpture. The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961) sets out minimum standards to protect performers and producers of phonograms. The obligation imposed by the Agreement on Trade-Related Intellectual Property Rights (TRIPS) 1994 has placed pressure on countries to accept these Conventions if they wish to become Members of the World Trade Organization. Moreover, in the field of industrial property, there are also a number of texts which could be referred to.²

13. However, recent meetings (the World Forum on the Protection of Folklore organized by UNESCO and WIPO in Phuket (Thailand) in 1997, followed by four regional meetings in 1999) came to the conclusion that intellectual property does not give appropriate protection to expressions of folklore and a *sui generis* regime specific to this purpose needs to be developed.

14. The fact is that the system for the protection of intellectual property rights has been found to have limitations. *Copyright, neighbouring rights and industrial property rights* (patents, trademarks, designs and models, appellations of origin, unfair competition, protection of know-how and trade secrets, etc.) have proved to be unsuitable for proper and effective protection of the intangible cultural heritage.

15. *The system of copyright and neighbouring rights* serves a different purpose from that sought by the codification of regulations governing the intangible cultural heritage. It has in

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Paris Convention for the Protection of Industrial Property (1883), Madrid Agreement concerning the International Registration of Marks (1891), Hague Agreement concerning the International Deposit of Industrial Designs (1925), Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1958).

the end proved to be inadequate and unable to guarantee the necessary protection for the intangible cultural heritage on account of its incompatibility with certain criteria and requirements (relating in particular to the originality of the work, the final artistic form of the work and its fixation, the identification of an author, the duration of the protection, etc.).

16. With regard to *industrial property rights*, the patents system, which is mainly concerned with innovation, the limitation of the length of protection and the dissemination of the invention, cannot provide effective protection for the intangible cultural heritage. The same is true of *legislation on designs and models*, which is characterized by its emphasis on originality, innovation and the length of protection, which are incompatible with the nature of the intangible cultural heritage. Protection through the use of trademark law is also unsatisfactory on account of the fact that trademarks are principally of a commercial nature. *Appellations of origin* are intended to protect the consumer. The *unfair competition system* is very flexible, having as its corollary legal action to obtain damages to compensate for harm done, but it also has drawbacks. Consequently, all these legal mechanisms can be expected to do is to provide partial protection for certain expressions of the intangible cultural heritage.

17. Reference may also be made to a number of instruments that have been adopted in the field of the protection of the cultural heritage. They include the Convention for the Protection of the World Cultural and Natural Heritage (1972); the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970); the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954); the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995); and the Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property (1964). However, since these instruments are principally concerned with the tangible cultural heritage and do not refer specifically to the intangible cultural heritage, they cannot provide a satisfactory framework for protection, partly on account of the very nature of the intangible cultural heritage.

18. Finally, the 1989 Recommendation on the Protection of Traditional Culture and Folklore, which is at present the only international legal instrument concerning the intangible cultural heritage, has not attracted enough attention from Member States, since by its very nature it does not contain any obligations that concern them.

19. At the national level, some Member States have legislation relating to the protection of intangible cultural heritage, in particular on the promotion and teaching of crafts and the collection of information, while in several Member States national copyright legislation may also affect it directly or indirectly. There is, however, a paucity of legal precedent to deal with the integrated protection required by intangible cultural heritage.

V. DEVELOPING A NEW INTERNATIONAL NORMATIVE INSTRUMENT

A. Objectives and basic principles of a new instrument

20. A new instrument should facilitate one of UNESCO's missions in promoting awareness of the significance of safeguarding intangible cultural heritage, mobilizing solidarity of the international community as well as encouraging Member States to take necessary measures to safeguard this heritage after the manner of the successful 1972 World Heritage Convention. The instrument should encourage best practices for safeguarding intangible cultural heritage that have been generated by or involve members of the community, demonstrate the capacity to reach goals, are exemplary for communities within the country or in other countries,

involve women to the maximum extent and enhance the social and ecological sustainability of the group and region.

21. A new instrument should be effective in countering adverse impacts of globalization which threaten the survival of much intangible cultural heritage, particularly that of indigenous and minority people. This heritage helps to affirm cultural identity, promote creativity and enhance diversity worldwide. A new instrument would need to consider the best use of positive aspects of globalization through the constructive application of information and communication technology in safeguarding and promotion actions.

22. The fundamental basis of such a normative instrument should be the Universal Declaration of Human Rights (United Nations, 1948), equity and sustainability and respect for all cultures that also have respect for other cultures.

23. It would be necessary for a new instrument to primarily address creators and custodial communities, and, in addition, scholars, researchers and cultural workers; to respect the dignity and relevant rights of creators and practitioners of intangible cultural heritage, and to ensure that the creators and practitioners safeguard and promote intangible cultural heritage so that they will continue to fully enjoy freedom of creation, expression and transmission of their cultures. It would also be significant for the elaboration of a new standard-setting instrument to be carried out with the full participation of all parties concerned, more particularly at the grass-roots level (cultural practitioners and custodial communities or communities at the national, regional and international level) and for further actions to be taken to support their socio-economic well-being.

24. More specifically:

Major objectives to be considered for such an international instrument are:

- (a) to conserve human creations that may disappear for ever;
- (b) to give world recognition;
- (c) to strengthen identity;
- (d) to enable social cooperation within and between groups;
- (e) to provide historical continuity;
- (f) to enhance the creative diversity of humanity;
- (g) to foster enjoyment.

The basic principles of such a new instrument might be:

- (a) that intangible cultural heritage be fundamentally safeguarded through creativity and enactment by the agents of the communities that produce and maintain it;
- (b) that the loss of intangible cultural heritage can only be prevented by ensuring that the meanings, enabling conditions and skills involved in its creation, enactment and transmission can be reproduced;
- (c) that any instrument dealing with intangible cultural heritage facilitate, encourage and protect the right and capacity of communities to continue to enact their

intangible cultural heritage through developing their own approaches to manage and sustain it;

- (d) that sharing one's culture and having a cultural dialogue foster greater overall creativity as long as recognition and equitable exchanges are ensured.

B. Definition of intangible cultural heritage and identifying the scope of its domains

25. For the 16 years of the 1989 UNESCO Recommendation's development the formulation of the definition was a matter of intense discussion. The term "folklore" is now felt as demeaning by some communities, as was made clear at the Washington Conference 1999. Furthermore, the definition given in the 1989 Recommendation applies mainly to final products instead of processes. Therefore, as recommended by the 1999 Washington Conference, the definition needs to be revisited.

26. "Intangible cultural heritage", the term which should be considered and might be retained for a new normative instrument, could be defined, as proposed by the international experts meeting held in Turin, as "peoples' learned processes along with the knowledge, skills and creativity that inform and are developed by them, the products they create, and the resources, spaces and other aspects of social and natural context necessary to their sustainability; these processes provide living communities with a sense of continuity with previous generations and are important to cultural identity, as well as to the safeguarding of cultural diversity and creativity of humanity".

27. The scope of the domains may cover the following: oral cultural heritage; languages; performing arts and festive events; rituals and social practices; cosmologies and knowledge systems; beliefs and practices about nature. The detailed elements within the domains of intangible cultural heritage to be covered by the normative instrument should be entrusted to a group of experts, in the process of preparation of this text.

VI. CONCLUSIONS

28. As recommended by the preliminary study commissioned by the Secretariat and by the experts meeting in Turin, the Director-General considers that the best way of protecting the intangible cultural heritage would be to continue the safeguarding and promotion of activities already carried out by the Organization, while proceeding with the preparation of a new standard-setting instrument. Bearing the above considerations in mind, the Executive Board may wish to adopt a decision worded as follows:

The Executive Board,

1. Considering 30 C/Resolution 25, Section B, para. 2(a)(iii),
2. Having examined the preliminary study on the advisability of regulating internationally, through a new standard-setting instrument, the protection of traditional culture and folklore (161 EX/15),
3. Decides to include the examination of this matter on the provisional agenda of the 31st session of the General Conference under the heading "International regulation, by a new standard-setting instrument, of the safeguarding of the intangible cultural heritage";

4. Invites the Director-General to submit to the General Conference the above-mentioned preliminary study together with the relevant observations of the Executive Board;
5. Recommends the General Conference to take a decision to continue action aimed at advancing the international regulation, through a new standard-setting instrument, of the safeguarding of the intangible cultural heritage.

ANNEX

**Action plan for the safeguarding of the intangible cultural heritage
as approved by the international experts on the occasion of the International
Round Table on “Intangible Cultural Heritage - Working Definitions” organized
by UNESCO in Piedmont, Italy, from 14 to 17 March 2001**

1. *Taking into account* resolution 25 B. 2. (a) (iii) adopted by the General Conference of UNESCO at its 30th session (November 1999) which authorizes the Director-General to “... carry out a preliminary study on the advisability of regulating internationally, through a new standard-setting instrument, the protection of traditional culture and folklore”,
2. *Having examined and expressed favourable views* on the content of the preliminary study on the advisability of developing a standard-setting instrument for the protection of intangible cultural heritage,
3. *Recognizing* the effectiveness of the 1972 World Heritage Convention in promoting awareness of the significance of safeguarding cultural and natural heritage as well as in encouraging Member States to take necessary measures to protect their monuments and natural sites,
4. *Cognizant* of the impacts of globalization on intangible cultural heritage, with particular awareness of the need to counter aspects which threaten the diversity of peoples’ intangible cultural heritage, while taking full advantage of the technology associated with it,
5. *Bearing in mind* the fact that many intangible cultural heritage manifestations are threatened with disappearance mainly because the well-being of the creators of this heritage is endangered by economic, political and social forces such as socio-economic marginalization, a global entertainment industry, religious intolerance and ethnic wars,
6. *Recognizing* the impetus already given by the work achieved in the process of evaluating the implementation of the Recommendation on the Safeguarding of Traditional Culture and Folklore, and more particularly the Conference “A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Cooperation” held in Washington in 1999,
7. *Taking into account* that the aforementioned Washington Conference underlined that the term “folklore” is no longer appropriate, but emphasized “the importance of its definition as it stands in the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore”, and recommended a study of a more appropriate terminology [...]”,
8. *Acknowledging* the need to revisit the 1989 Recommendation to take due consideration of the agency of creators, audiences, NGOs and various actors of the private sector,
9. *Underlining* that the definition of “folklore” or “traditional and popular culture” given in the 1989 Recommendation needs to be modified so as to be more inclusive, encompassing not only artistic products such as tales, songs, etc., but also the

knowledge and values enabling their production, the creative processes that bring these products into existence, and the modes of interaction by which these products are appropriately received and appreciatively acknowledged,

10. *Recognizing* that grass-root practitioners, creators and their communities sustain and develop this heritage, and should therefore be recognized as primary agents in the formulation of cultural policy,
11. *Acknowledging* the different activities undertaken by UNESCO to raise awareness of Member States of the significance and urgency to safeguard intangible cultural heritage, for example through the Living Human Treasures system and the Programme entitled Proclamation of Masterpieces of Oral and Intangible Heritage of Humanity,
12. *Taking into account* the following conclusions of the round table:
 - (a) that international efforts to safeguard intangible cultural heritage must be founded on universally accepted human rights, equity and sustainability and on respect for all cultures that also have respect for other cultures;
 - (b) that intangible cultural heritage is fundamentally safeguarded through creativity and enactment by the agents of the communities that produce and maintain it;
 - (c) that any instrument dealing with intangible cultural heritage should facilitate, encourage and protect the right and capacity of communities to continue to enact their intangible cultural heritage through developing their own approaches to manage and sustain it;
 - (d) that sharing one's culture and having a cultural dialogue fosters greater overall creativity as long as recognition and equitable exchanges are ensured;
 - (e) that the loss of intangible cultural heritage can only be prevented by ensuring that the meanings, enabling conditions and skills involved in their creation, enactment and transmission can be reproduced.

We, the participants to the International Round Table on “Intangible Cultural Heritage - Working Definitions”, recommend UNESCO to:

1. *Undertake* early negotiations for the adoption of an international normative instrument in order to legally safeguard intangible cultural heritage and to facilitate UNESCO's mission in the domains specified in its mandate;
2. *Actively pursue* the ongoing process of regulating, through a new standard-setting instrument, the protection of intangible cultural heritage;
3. *Ensure* that the international legal instrument addresses primarily creators and custodian communities in addition to scholars, researchers and cultural workers, and that the dignity and relevant rights of creators and practitioners of intangible cultural heritage are respected and that further actions are taken to support their socio-economic well-being;
4. *Ensure* that the process of elaborating a new standard-setting instrument is carried out with the full participation of all parties concerned, more particularly at the grass-root

level, i.e. cultural practitioners and custodian communities or communities at the national, regional and international level;

5. The objectives of such an international legal instrument will be: (i) to conserve human creations that may disappear forever; (ii) to give world recognition; (iii) to strengthen identity; (iv) to enable social cooperation within and between groups; (v) to provide historical continuity; (vi) to enhance the creative diversity of humanity; (vii) to foster enjoyment;
6. *Use* the terminology and working definition proposed by the International Round Table as a basis for the process of studying the advisability of regulating the safeguarding of intangible cultural heritage;
7. *Define* intangible cultural heritage (the term retained) as “peoples’ learned processes along with the knowledge, skills and creativity that inform and are developed by them, the products they create, and the resources, spaces and other aspects of social and natural context necessary to their sustainability; these processes provide living communities with a sense of continuity with previous generations and are important to cultural identity, as well as to the safeguarding of cultural diversity and creativity of humanity”;
8. The suggested scope of the domains to be covered by this instrument should be entrusted to a group of experts, in the course of its elaboration, who will specify the elements in domains such as the following: oral cultural heritage; languages; performing arts and festive events; social rituals and practices; cosmologies and knowledge systems; beliefs and practices about Nature.
9. *Convene* other international experts meetings including creators and practitioners as well as other specialists supporting these activities on different specific themes during the process of elaboration of a new standard-setting instrument;
10. *Cooperate* with other relevant intergovernmental organizations in the elaboration of appropriate legal tools for the protection of intellectual rights and a means of fostering the continued practice and creativity of intangible cultural heritage;
11. *Ensure* that the safeguarding of intangible cultural heritage is not used to further religious, racial and ethnic intolerance or to foster any beliefs in cultural exclusivity which may lead to disrespect or destruction of other cultures’ heritage;
12. *Give importance* to safeguarding the intangible cultural heritage of indigenous peoples with a holistic perspective ensuring that their way of life is protected in the manner they themselves decide and as stipulated particularly in article 8(j) of the Convention on Biological Diversity;
13. *Ensure* that the safeguarding of the intangible cultural heritage be conducted by the creators and practitioners so that they will continue to fully enjoy freedom of creation, expression and transmission of their cultures;
14. *Encourage, disseminate and proclaim* best practices for safeguarding intangible cultural heritage that: (i) were generated or involve members of the community; (ii) have shown in concrete achievements that they can successfully reach their goals; (iii) are exemplary for communities within the country or in other countries of the world;

- (iv) involve women to the fullest extent of their potential participation; (v) enhance the social and ecological sustainability of the group and region;
15. *Update* the intellectual and operational elements proposed in the 1989 Recommendation and continue to promote the Proclamation of Masterpieces of Oral and Intangible Heritage of Humanity and the Living Human Treasures system;
 16. *Assist* Member States in adopting administrative and legal measures to safeguard intangible cultural heritage;
 17. *Encourage* the creation of a clearing house by an international system of universities and concerned parties to provide information in relation to different methods of identification, protection, revitalization and transmission of intangible cultural heritage.