National Plan for the Protection of Traditional Cultural Expressions in Colombia

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SCHOOL OF ECONOMICS, BUSINESS ADMINISTRATION & LEGAL STUDIES
A thesis submitted for the degree of Master of Arts (MA) in Art, Law and Economy

February 2018
Thessaloniki – Greece
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February 2018
Thessaloniki - Greece
Abstract

This dissertation was written as part of the MSc in Art, Law and Economy at the International Hellenic University.

The increasingly concern of the countries for providing an effective protection to the Traditional Cultural Expressions of Indigenous Peoples and Local Communities, has led them to draft together an International Instrument at the World Intellectual Property Organization’s context that may reinforce the systems of protection that certain countries have embraced and to enlighten those who have not adopted any adequate strategy of protection yet.

In such a way, this paper suggests the adoption of a Sui Generis system for the protection of Traditional Cultural Expressions in Colombia and provides the outline of a National Plan that might enable the Indigenous Peoples and Local Communities to be recognized as the beneficiaries of the rights related to their Traditional Cultural Expressions from an Intellectual Property perspective.

In the frame of the aforementioned Plan, the creation of a National Museum will be suggested as a way to enhance the proposed protection.

Keywords: Traditional Cultural Expressions, Sui Generis Protection, Indigenous Peoples, Local Communities, Intellectual Property, Colombia, Tangible and Intangible Heritage, World Intellectual Property Organization (WIPO).

Yarlemis Cohen Rodriguez
February 2018
Preface

The interest of embracing this tesis arose from my personal experience as a Colombian living abroad, who self-indentifies with many cultural expressions present in our daily life that have been misued or misappropriated by national and foreigners.

I thank the supervisor, Prof. Athanasios Kaissis for his continuouos support throughout my studies at the International Hellenic University and his enlightening contribution to this dissertation.

I also acknowledge the role of the moderator, Dr. Themis Veleni, which has been crucial to both the supporting study and the construction of the final document.

I thank Dr. Irini Stamatoudi and Dr. Anna Chrysohoidou for their gracious help and their precious remarks regarding the legal parts of the paper.

I would also like to extend my gratitude to the Colombian Institutions who provided me with the information required to the effects of this dissertation, namely: Ministry of Culture, Ministry of Foreign Affairs and Museo del Oro Tairona.

Ad maiorem Dei gloriam
# Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABSTRACT</td>
<td>III</td>
</tr>
<tr>
<td>PREFACE</td>
<td>IV</td>
</tr>
<tr>
<td>CONTENTS</td>
<td>V</td>
</tr>
<tr>
<td>INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>TRADITIONAL CULTURAL EXPRESSIONS (TCES) AT WIPO CONTEXT</td>
<td>3</td>
</tr>
<tr>
<td>Model Provisions</td>
<td>3</td>
</tr>
<tr>
<td>Thirty-Third and Thirty Fourth Session of IGC: Toward an International Instrument</td>
<td>3</td>
</tr>
<tr>
<td>The issue of the Subject Matter</td>
<td>4</td>
</tr>
<tr>
<td>Beneficiaries</td>
<td>5</td>
</tr>
<tr>
<td>Scope of Protection</td>
<td>7</td>
</tr>
<tr>
<td>Exceptions and limitations</td>
<td>9</td>
</tr>
<tr>
<td>LEGAL CONSIDERATIONS FOR THE PROTECTION OF TCES IN COLOMBIA</td>
<td>11</td>
</tr>
<tr>
<td>Colombian Copyright Act. The Problematic Article 189</td>
<td>11</td>
</tr>
<tr>
<td>Sui Generis Protection</td>
<td>13</td>
</tr>
<tr>
<td>Prior Informed Consent (PIC)</td>
<td>15</td>
</tr>
<tr>
<td>Mutually Agreed Terms (MAT)</td>
<td>17</td>
</tr>
<tr>
<td>Access and Benefit-Sharing</td>
<td>18</td>
</tr>
<tr>
<td>Domaine Public Payant</td>
<td>18</td>
</tr>
<tr>
<td>NATIONAL PLAN FOR THE PROTECTION OF TCES IN COLOMBIA</td>
<td>20</td>
</tr>
<tr>
<td>Why a National Plan?</td>
<td>20</td>
</tr>
<tr>
<td>Outline of the Plan</td>
<td>28</td>
</tr>
<tr>
<td>Legal framework</td>
<td>28</td>
</tr>
<tr>
<td>The Museum as a way to enhance the protection</td>
<td>31</td>
</tr>
<tr>
<td>CONCLUSIONS</td>
<td>39</td>
</tr>
<tr>
<td>GLOSSARY</td>
<td>41</td>
</tr>
</tbody>
</table>
Introduction

Since the enactment of the Colombian Political Constitution in 1991, the indigenous peoples are not longer regarded as wild individuals of relative incapacity. On the contrary, they were acknowledged by the Constitutional Court ruling C-139 of 1996 as cultural communities holding values, goals and traditions different to the ones stamped with the blessing of the West. [...] Their members are integral cultural subjects.¹

During the last decades, the Indigenous Art and the Local Communities’ Art have become significant elements in the construction process of a national cultural identity in Colombia, to the extent that they represent the ethnic and cultural diversity as recognized and protected by the State.²

Hence, many of their Traditional Cultural Expressions (henceforth TCEs), both tangible and intangible, have been often used far beyond the cultural context that they belong to, in spite of the widening concern of most of the countries about providing an Intellectual Property form of protection to the aforesaid expressions.

However, the evolving and dynamic nature of this kind of expressions has evidenced that the conventional Intellectual Property regimes are not capable of procuring the protection that the holders communities are looking for. Because of that, a tailor-made system of protection has been deemed to be a possible solution by several countries.

The Comments of the Government of Colombia about Traditional Knowledge and Traditional Cultural Expressions issues, submitted to the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in 2007 illustrate the Government’s position concerning the need of implementation of a Sui Generis system that satisfies the particular interests of the holders of such expressions. This posture was replicated by the Government of Colombia during the 33th and 34th Sessions of the Intergovernmental Committee.

Notwithstanding, the Colombian Copyright Act has not been modified in relation with the definition of the Indigenous Art as belonging to the cultural heritage of the Nation, which entails that the Indigenous Peoples and Local Communities remain excluded from the profits derived from the exploitation of their TCEs.

This and other legal aspects will be examined in the first and second part of the present dissertation, including the study of the implementation of a Sui Generis system of protection, which have been taken into account to help answering the research questions What is the current situation of protection of TCEs in Colombia? And What alternatives could be suggested in order to enhance the protection of TCEs in Colombia?

Since the subject of the study is still being discussed at different levels and in Colombia it is not well-known, the selected research approach was the qualitative one and action research was chosen as research design. By virtue of that, the reader will be provided with factual data that supports the need for the implementation of a legal framework for the protection of TCEs.

¹ M.P Carlos Gaviria, Constitutional Court ruling C-139, 1996.
Pursuant to Stringer’s work, three essential phases may be distinguished in implementing this sort of design, as applied to this study, namely: a. To build up a sketch of the research problem followed by a collection of data; b. To analyze and interpret it and; c. To suggest a possible solution to the problem.\(^3\)

Therefore, in the third part, attention will be drawn to the reasoning of the adoption of a National Plan based on the Official answers received from certain Colombian cultural institutions regarding the nonexistence of any legislative or administrative measures that would protect the TCEs of the Indigenous Peoples and Local Communities spread out in the National territory.

The same part will present some critical cases of misappropriation and misuse that justify the setting up of a Plan like the one suggested in this paper, and then, a drafted outline of a National Plan for the protection of TCEs in Colombia will be presented.

The other initiative that will be suggested at the end of the third part is the creation of a National Museum of Traditional Cultural Expressions as a way to enhance the pretended protection by reinforcing the legal measures already proposed. In the frame of such an initiative, the Indigenous Peoples and Local Communities might act and decide as the actual right-holders of the expressions that identify them and they have maintained over generations.

The Museum will aim to embody the essence and complex meaning of a multicultural Nation.

Nonetheless, the aforementioned design fosters the execution of the proposed solution of the problem, about which, further researches and feedback will be strongly encouraged.

\(^3\) Stringer in Hernández, et al., 2006, p. 708.
Traditional Cultural Expressions (TCEs) at the World Intellectual Property Organization (WIPO) context

The active international concern about the more suitable Traditional Cultural Expressions (henceforth TCEs) system of protection, has found on the World Intellectual Property Organization’s (henceforth WIPO) boards an adequate place to be examined and worked out.

**Model Provisions**

Since the United Nations Educational, Scientific and Cultural Organization (henceforth UNESCO) and WIPO came up with the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions in 1985, the agenda has been continuously adjusted to direct efforts toward the actual interests of the parties involved. Thus, the early definition of Expressions of Folklore placed on the Model Provisions comprised “productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community.”

Certain authors like Valsala remarked that the mention of “artistic heritage” and not “cultural heritage” was consistent with the idea of ensuring such a protection for the prevention of the material to be misused. The latter constituted an essential aspect of the scope of application provided in the Model Provisions.

**Thirty-Third and Thirty Fourth Session of IGC: toward an International Instrument**

Since a text emerged from the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (henceforth IGC) meeting in March 2014, there had been kind of silence on TCEs aspects until the mandate set by the General Assembly in October 2015. Hence, this analysis corresponds to the understandings shared by the Delegations during ICG 33 and 34.

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The issue of the Subject Matter

With the establishment of the IGC, in the 26th Session of the General Assembly of WIPO, the definition of Expressions of Folklore was updated and the term ‘Traditional Cultural Expressions’ was preferred instead of that one, although they have been used as interchangeable synonyms both in further WIPO documents and the academic literature.

Such definition was included in the Glossary of the document presented at the Twenty-eighth session of the IGC as follows:

[Traditional cultural expressions means any form of artistic and literary, creative and other spiritual expression, tangible or intangible, or a combination thereof, such as actions, materials, music and sound, verbal and written and their adaptations, regardless the form in which it is embodied, expressed or illustrated, which may subsist in written, oral or other forms.]

6

This definition served as a starting point during at the Thirty-Fourth session of the IGC which took place in Geneva from 12 to 16 June 2017 where Delegations of the Member States gathered to examine the drafted articles of a pretended International Instrument dealing with Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions. There, the Delegation of the EU declared that they agreed that TCEs should be artistic and literary, as well as creative, and it supported that an eligibility criteria of protection should be necessarily cumulative so that it ties up the Indigenous and Local Communities to the TCEs.

7

On the other hand, the Delegation of the United States appreciated the living and dynamic nature of TCEs but it opposed to safeguarding such dynamic given certain factors that could turn out to be problematic, such as the place of origin of specific TCEs when they are claimed by different communities as their own.

As to it, the Delegations of Japan and Ghana remarked that the notion of dynamic and evolving should not be requested as an objective eligibility criteria for TCEs to be protected, due to that is just inherent, fundamental and critical to the definitions of the subject matter.

8

So, the draft Article 2 presents itself as follows:

7 WIPO/GRTKF/IC/33/7, 2017.
8 Ibid.
ARTICLE 2 USE OF TERM

For the purposes of this instrument:

Traditional cultural expression means any form of [artistic and literary], [other creative, and spiritual,] [creative and literary or artistic] expression, tangible or intangible, or a combination thereof, such as actions, materials, music and sound, verbal and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms], that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities; that are the unique product of and/or directly linked with and the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities; and that are transmitted from generation to generation, whether consecutively or not. Traditional cultural expressions may be dynamic and evolving.9

And its corresponding alternative, which was not a subject of active discussion, states the following

Alternative

Traditional cultural expressions comprise the various dynamic forms which are created, expressed, or manifested in traditional cultures and are integral to the collective cultural and social identities of the indigenous local communities and other beneficiaries.10

According to the Report of the Thirty-Fourth Session of the IGC, the majority of the Delegations seemed to prefer the first option rather than the Alternative in considering that one more comprehensive and detailed.

Beneficiaries

It is a copyright principle, to recognize the author of a work, generally, as the first owner of it, who must be also identifiable in the terms of the Article 7(3) of the Berne Convention. However, with respect to TCEs, most of them are the result of a collective activity, dynamic and evolving as referred before, which, over time, will hinder the identification of specific individuals, groups or communities as the author(s) of such works.

In spite of that, Zografos pointed out the will of traditional communities to be attributed for their TCEs, and to be entitled to object any false attribution.11

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9 WIPO/GRTKF/IC/34/8, 2017.
10 Ibid.
Although very relevant, the Delegations cannot deal with the issue of ownership, which is a matter of national laws implementation.

Nevertheless, in a WIPO paper, Torsen & Anderson highlighted the importance of the principle of Copyright ownership when cultural institutions and material collections are involved.\textsuperscript{12}

Additionally, the authors noted that Indigenous Peoples and Local Communities have not been recognized as right holders of certain works when these are collected and/or exhibited by cultural institutions in spite of the acknowledgement granted by the Universal Declaration on the Rights of Indigenous Peoples (henceforth UNDRIP), which states in its Article 11 that Indigenous Peoples have the right to maintain, protect, develop the past, present and future manifestation of their cultures, including visual, performing arts and literature.

Likewise, the Article 31 recognizes that Indigenous Peoples have the right to maintain, control, protect and develop their traditional cultural expressions and the intellectual property arising from such expressions.

In that sense, the Delegations shared the understanding that Indigenous and Local Communities should be the beneficiaries from the protection of TCEs. However, the Delegation of Indonesia drew attention to the circumstances that could make difficult to attribute TCEs to a particular Indigenous or Local Community, because of which, it would be up to the national laws to define what other beneficiaries have a part in such protection.\textsuperscript{13}

With regards to this aspect, Torsen & Anderson had already pointed out that the existing relationship between TCEs, cultural practices, as well as the history and the way Indigenous Peoples and Local Communities see and relate to the world should be also taken into account.\textsuperscript{14}

On the basis of the call for a National Law definition, supported by delegations such as the Russian Federation, Brazil, the Islamic Republic of Iran, the drafted Alternatives 3 and 4 for the Article 4 are the following, respectively.

\textit{Alternative 3}

\textsuperscript{12} Torsen & Anderson for WIPO, 2010, p. 47.
\textsuperscript{13} WIPO/GRTKF/IC/33/7, 2017.
\textsuperscript{14} Torsen & Anderson for WIPO, 2010, p. 19.
The beneficiaries of this instrument are indigenous [peoples], local communities, and other beneficiaries as may be determined under national law.

Alternative 4
The beneficiaries of this instrument are indigenous [peoples], as well as local communities and other beneficiaries, as may be determined by national law, [who hold, express, create, maintain, use, and develop [protected] traditional cultural expressions].

The Alternative 2 corresponded to the proposal of the Delegation of China, supported by the Delegation of Colombia and Algeria, which showed concern about those countries where the notion of Indigenous Peoples does not exist or it is not applicable, so that Nations and/or States could be taken into account as beneficiaries as well.

Alternative 2
The beneficiaries of this instrument are indigenous [peoples], local communities, [and][and where there is no notion of indigenous [peoples]], other beneficiaries as may be determined under national law.

On the other hand, the Delegation of the EU supported the Alternative 1, which would grant protection as beneficiaries only to those Indigenous and Local Communities who create, maintain, express, use and develop TCEs. In this way, it did not agree with the inclusion of Nations or States as possible beneficiaries, given that it is not clear to what extent they could fulfil the eligibility criteria discussed above.

Scope of Protection

As recognized by the Delegations, this aspect always represents a key point to be discussed and agreed. In such a way, it served to clarify certain terms that turned out to be confusing to the Delegations either for ambiguous or inaccurate and at the same time, to define the course that the protection derived from the concerned International Instrument will have.

Delegations like Islamic Republic of Iran’s and Indonesia’s showed their support to the Alternative 1, which states

Alternative 1

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15 WIPO/GRTKF/IC/34/8, 2017.
16 Ibid.
17 WIPO/GRTKF/IC/33/7, 2017.
[Member States]/[Contracting Parties] [should]/[shall] safeguard the economic and moral interests of the beneficiaries concerning their [protected] traditional cultural expressions, as defined in this [instrument], as appropriate and in accordance with national law, in a reasonable and balanced manner.

Protection under this instrument does not extend to traditional cultural expressions that are widely known or used outside the community of the beneficiaries as defined in this [instrument], [for a reasonable period of time], in the public domain, or protected by an intellectual property right.

On the contrary, Japan’s, the EU’s and the USA’s Delegations preferred the Alternative 2 in considering it was measures-based rather than right-based and it would give the Member States the chance to protect TCE in different ways, although at the same time, Hardison stated at the WIPO’s Seminar on Intellectual Property and Traditional Cultural Expressions that rights-based and measures-based approaches are not mutually exclusive.

Certainly, the Alternative 2 provides more careful terms, which facilitated some Delegations agreed to it more easily in comparison with the other alternatives. Instead of safeguard[ing] the economic and moral interest of the beneficiaries, this Alternative suggests protecting the economic and moral rights and interests, at the same time that proposes that beneficiaries of such a protection shall enjoy the exclusive rights of authorizing the use of such traditional cultural expressions, what is at least more accurate than the Alternative 1.

The second paragraph of the Alternative 2 seems to cover the issue of public domain in case of TCEs being still used, held and maintained in a collective context. In this regard, Member States should provide on the one hand, certain measures either administrative, legislative or policy measures aimed to protect TCEs against false, misleading or offensive use, and on the other hand, the right to attribution, which was observed by the EU’s Delegation as a possible threat to the legal certainty of society at large.

In congruence with this, D’Alessandro exposed during the WIPO’s Seminar on Intellectual Property and Traditional Cultural Expressions the use of that kind of

18 Ibid.
20 WIPO/GRTKF/IC/34/8, 2017.
21 Ibid.
22 WIPO/GRTKF/IC/33/7, 2017.
expressions without benefit-sharing as false, derogatory, offensive or misleading, adding that the use beyond traditional-customary context falls within the *misuse* concept as well.

Moreover, in the core of the protection the concept of misappropriation appears as well, which is tied up to unlawful appropriation, violation of national or customary law or the access to TCEs without Prior Informed Consent or/and Mutually Agreed Terms.\(^{23}\)

Zografos had already indicated that since IGC started working on the draft objectives and principles, misappropriation and misuse were the part that an effective protection should aim to avoid.\(^{24}\)

These terms shall be analytically examined in the chapter *Legal Considerations for the Protection of TCEs in Colombia.*

**Exceptions and limitations**

Placed at Article 7 of the draft instrument, the exceptions and limitations somehow found general acquiescence among the Delegations to be addressed to Copyright Law.

Although the Alternatives conferred a wide margin of action to national laws in establishing what exceptions and limitations should be provided by taking into account incorporated customary law, some of them were specifically listed in Alternative 2 as follows

*Alternative 2*  
[...]

2. Regardless of whether such acts are already permitted under paragraph (1) Member States [shall/should] [may] have exceptions [, such as] for:
   (a) Learning teaching and research;
   (b) Preservation, display, research, and presentation in archives, libraries, museums or other cultural institutions;
   (c) The creation of literary, artistic, or creative works inspired by, based on, or borrowed from traditional cultural expressions.

3. A Member State may provide for exceptions and limitations other than those permitted under paragraph (2).

\(^{24}\) Zografos, 2010, p. 11.
According to Torsen & Anderson, the intended protection should allow recordings or other reproductions for purposes of cultural heritage safeguarding, to the extent that cultural professionals can, for instance, make copies of TCEs to be included in an archive or an inventory as derived from the literal b above.\textsuperscript{25}

In turn, the Delegation of Senegal helped to bear in mind that those exceptions and limitations should not be in conflict, neither with the interests of the beneficiaries nor the implementation of the instrument as included in the Option 1.\textsuperscript{26}

Delegations such as Colombia, the Islamic Republic of Iran, Egypt, Ghana, Malaysia and others supported that Option 1, which was found appropriate within the frame of the Berne Convention and the consequent application of the three step test. In fact, the Delegation of Ghana highlighted that provisions like that one had become an effective mean to prevent excesses in the application of exceptions and limitations in treaties.\textsuperscript{27}

\textsuperscript{25} Torsen & Anderson for WIPO, 2010, p. 17.
\textsuperscript{26} WIPO/GRTKF/IC/33/7, 2017.
\textsuperscript{27} Ibid.
Legal considerations for the protection of TCEs in Colombia

Colombian Copyright Act. The problematic Article 189.

Despite the concept of TCEs, or what is the same, folklore, was not placed in the Law, The Colombian Copyright Act indicated through its Article 187 that folk and traditional works of unknown authors fall under the public domain. Even further, Moreno, representative from the Government of Colombia, indicated during the WIPO Seminar celebrated in Geneva that TCEs are part of the Intangible Cultural Heritage.28

Additionally, not using the term folklore, the Article 189 of the same Act established that "indigenous art, in any form, including dances, song, crafts, drawings and sculptures, belongs to the cultural heritage"29

In this sense, the State comes to be the right-holder of any indigenous art, which at the same time limits the exercise of economic rights derived from Indigenous Peoples’ artworks. So, the Nation itself authorizes and prohibits everything that is related to the exploitation of the cultural expressions, both traditional and modern, of the indigenous peoples without requesting the permission of the authors, even when they, the heirs or the community who holds and maintain such expressions, are identifiable and still alive.

As referred in the previous chapter, the UNDRIP, through the Articles 11, 12, 13 and 31, recognizes the rights of indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, including those that are linked to their spiritual and religious traditions which could be accessed in privacy for the community members.

However, it is necessary to point out that Colombia abstained from voting such Declaration, which does not preclude the possibility of adjusting the national law according to the principles of the approved instrument.

What Colombia did ratify was the ILO Convention 169 of 1989, which states in its Article 2 (2,a) that Governments have to ensure that members of indigenous and tribal peoples benefit on an equal footing from the rights and opportunities which

national laws confer to other members of the population. This Convention was translated into internal legislation through the Law 21 of 1991.

Furthermore, it is necessary to remark that these limitations do not apply to the cultural expressions of other peoples and communities existing in Colombia but only to the indigenous ones. Because of that, the Article 189 of the Copyright Act infringes the fundamental right to equality established in the Article 13, which states that all individuals are born free and equal before the law and they will be treated with no discrimination on account of gender, race, national or family origin, language, religion inter alia.

In the words of Semper “the proclamation of the rights of indigenous people is one aspect, its implementation and concretion, another,” and given such an infringement, the mentioned article should be submitted for constitutional review executed by the Corte Constitucional de Colombia.

The Article 189 comes to be also inappropriate given that governments have recognized during the WIPO meetings and seminars, that Indigenous Peoples and Local Communities should be the beneficiaries of the protection of TCEs in the terms of Intellectual Property rights as suggested by Erry Wahyu, academic from Indonesia.

As regards to the single Copyright issues, the Colombian Act grants no moral rights to indigenous peoples either, but fortunately the minimum established by the Berne Convention, ratified by Colombia through the Law 33 of 1987 is applicable. That is to say, the right of paternity and integrity may be also infringed by not knowing the prerogatives of their authors.

Additionally, the Article 189 contravenes the Article Four of the Colombian Law of Culture to the extent that it includes, in an automatic way, the indigenous artworks into the National Cultural Heritage, in prejudice of the Ministry of Culture’s authority to examine and decide about such incorporation.

Hence, the nature of TCEs goes away from the line of thought that locates Intellectual Property and specifically Copyright under the Private Property principle,

because it is more complex to determine the ownership over the cultural heritage works due to their economic, symbolic and political value.\footnote{Guevara, 2011, p. 158.}

According to Moreno, the current protection of TCEs in Colombia is handled by the Organism named “Artesanías de Colombia,” which belong to the Ministry of Trade. It offers the Denomination of Origin as a form of intellectual property protection over the indigenous communities’ creations. Therefore, given that WIPO IGC pointed out that some TCEs when tangible, such as productions of art -including handicrafts-, could be deemed as goods,\footnote{WIPO/GRTKF/IC/5/3, p. 52.} a Denomination of Origin protection could be granted as long as the necessary requirements are met.

However, this constitutes a limitation in itself, despite the fact that the Decree No 2291 of 2013 assigned to Artesanías de Colombia as one of its main functions, “to contribute to the preservation of the intangible heritage and the diversity of the craft sector through research, knowledge management and the protection of intellectual property rights,” because in practice, only tangible Traditional Cultural Expressions enjoy an effective protection through the Denomination of Origin regime.

Yet, regarding a Copyright protection, the Colombian role is still passive if not regressive, given that its inclination is toward the creation of a Sui Generis System.

\textit{Sui Generis Protection}

Beside Copyright, the “neighboring rights” protection had been considered as another legal way to protect indirectly TCEs by protecting the rights of performers, phonograms producers and broadcasting organizations. However, this system is insufficient in order to achieve the pretended protection, for it cannot prevent the copying of TCEs outside the performances. Furthermore, the rights duration is even less favorable than that of Copyright.\footnote{UNESCO & WIPO, 1985, p. 6.}

Because of the above, countries like Colombia and Bolivia have been working on the development of a special TCEs’ protection system, considering their value for the Nations’ cultural diversity.
The problem arising from the TCEs of indigenous peoples has to do with the nature and scope of those expressions. It should be taken into account that they are meant to be enjoyed mainly by the communities themselves, while the copyright protection seeks to allow the exploitation of the original works in such a fair and equitable manner as much as possible.\(^{35}\)

Besides, the issue resulting from the fact that TCEs are often shared by more than one community becomes very important in the Colombia’s scenario, where about 3,43% of population corresponds to indigenous people and 10,62% corresponds to Afro-Colombians.\(^{36}\) This aspect renders difficult the Copyright methods’s application, to the extent that each community has its own authorities and rules.

Thus, the *Sui Generis* system of protection turns out to be an effective strategy in order to cover the needs of TCEs while the Copyright regime is not enough to do so. Therefore, that system should take into consideration the particular needs of the TCEs holders by paying heed to their special features.

Following the Tunis Model, the *Sui Generis* protection must require no criteria for the protection of the expressions of folklore, neither fixation nor originality. The granted economic rights are the right of reproduction, translation, adaptation, arrangement, transformation, communication to the public and broadcasting. As to moral rights, only paternity and integrity are recognized.

The Government of Colombia sent comments to the IGC in 2007 where it stated that though the Colombian Copyright Law provided no kind of protection to the TCEs, a national *Sui Generis* system should grant the relevant rights to communities rather than individuals, in order to ensure the exercise of the Prior Informed Consent (henceforth PIC), which would allow the communities to make a joint decision on the pretended use or exploitation, as well as the expected profits or retribution.\(^{37}\)

With regards to the moral rights, the Government of Colombia indicated that the right of paternity should be recognized on behalf of the communities. Nevertheless, the right of integrity was not recognized and not even mentioned, which

\(^{35}\) WIPO/GRTKF/IC/13/4(b), 2008, p. 12  
\(^{37}\) Comentarios del Gobierno de Colombia frente a las cuestiones de conocimientos tradicionales y expresiones culturales tradicionales/ expresiones de folclore, 2007, p. 9.
reduces the possibilities of protecting TCEs from being used by other actors that oppose to the communities’ values.

Colombia also presented its slant to join the group that has granted no time limitation to the protection of TCEs and suggested that a limit should be established on those whose spiritual and sacred nature puts them outside the commercialization. 38

A good example of this kind of protection is the case of Panama’s national laws, which exemplifies the purpose of several countries to protect TCEs through setting up a Sui Generis system. In that way, the Law No 20 of 2000 concerning the Special System for Registering the Collective Rights of Indigenous Peoples recognizes intellectual property rights over creations and customs, beliefs and any other form of traditional expressions of indigenous peoples39 during unlimited time, while customary law and provisions regarding collective marks are included into such regime.

Prior Informed Consent (PIC)

WIPO’s glossary defined it as the principle under which, holders should be fully consulted before their expression-resource is acceded or used by third parties, being rightly informed about the consequences of the intended use40.

The implementation of such a PIC varies in practice from country to country and even within the same country depending on the communities involved by taking into account their customary laws and rules.

At the same time, it is deemed by Irigoyen as a right seeking to ensure the consent of indigenous peoples either as an objective right of prior consultation or a right of requirement for the State to take a decision.41

The term has been referred in the Article 19 of the UNDRIP as the result of a process of consultation and cooperation in good faith with the indigenous peoples concerned through their own institutions, in order to adopt and implement administrative or even legislative measures that may affect them when it comes to

40 WIPO Glossary.
41 Irigoyen in Clavero, n.d, p. 2.
relocation of a community from their land, deprivation of cultural property, intellectual, religious or spiritual works, land, territory and resources.\footnote{Charris, 2014, n.p.}

PIC has also a place in the Convention on Biological Diversity (henceforth CBD), where is related to the access to Genetic Resources held by Indigenous and Local Communities.

In the frame of that Convention, PIC is also applied to Traditional Knowledge’s uses, given that it is seen as a product owned by the Indigenous Peoples and Local Communities that conserves a narrow relation with their identity and way of life. Therefore, the communities’ interests prevail over national sovereignty\footnote{Lenzerini in Morgera, Tsioumani & Buck, 2015, p. 7.}.

In Colombia, the prior consultation has found case-law recognition as a fundamental right coinciding with the call for going forward from a simply formal consultation to a material one where communities involved are to be granted of a timely, complete and truthful knowledge of the implications of the pretended project or use.\footnote{Charris, 2014, n.p.} In that regard, the decision of the Colombian Constitutional Court T-129 of 2011 ruled on the Prior Informed Consent as the final purpose of the prior consultation in every case and not only in those of great impact.

This figure has been proposed by many authors and experts in general to integrate a Sui Generis system of protection of TCEs and in the same way has been adopted within the WIPO context aiming to set up an international instrument. The absence of PIC is considered –in the words of D’Alessandro- as an objective criterion to determine the occurrence of misappropriation.\footnote{D’Alessandro, WIPO Seminar on Intellectual Property and Traditional Cultural Expressions, 2017.}

However, within the Colombia legislation and case law, the final decision remains in the State’s hands, even when the communities had not agreed with the intervention that they considered as affecting or threatening their continuity and identity.

On this matter, the expertise of Colombia in applying the prior consultation and the Prior Informed Consent as the final purpose of that one over issues other than TCEs, make its integration into a Sui Generis system somewhat difficult, because the preeminence of the State as decision-maker needs to be assessed and therefore,
adapted to the acknowledgement of the Indigenous Peoples and Local Communities as the right-holders over their TCEs.

**Mutually Agreed Terms (MAT)**

The CBD and the Nagoya Protocol, have also included this figure into the elements to protect the Access to Genetic Resources and the Traditional Knowledge associated with genetic resources held by indigenous peoples and local communities, especially noting that it is to be covered: *a) the jurisdiction to which they will subject any dispute resolution processes; b) the applicable law and/or; c) options for alternative dispute resolution, such as mediation or arbitration,*\(^{46}\) which can be usually set out through a contract governed by Private Law.

Moreover, Mutually Agreed Terms (henceforth MAT) seeks to set written conditions for the cases of both benefit-sharing, third party use and change of intent, which becomes crucial when an agreement for non-commercial use turns into a commercial one.

Regarding the protection of TCEs, MAT embraces the Indigenous Peoples and Local Communities’ concern for maintaining their cultural values and identity, thence the use of TCEs without MAT between the intended users and the Indigenous Peoples or Local Communities, could lead to misappropriation.

Although during the WIPO Seminar D’Alessandro referred to the Nagoya Protocol as an inspiration for TCEs system of protection, Colombia has not ratified it yet, but only the CBD, because of which, the quoted Article 18 of the Nagoya Protocol is not enforceable under the Colombian legislation.

Nevertheless, the Bonn Guidelines emerges to assist the States Parties to the CBD in defining and clarifying the conditions to get access to Genetic Resources and Traditional Knowledge under benefit sharing strategies. Furthermore, according to Morgera’s commentary, this Guidelines is more detailed than the Nagoya Protocol itself and in that sense, its application, though non-binding, is strongly recommended to the CBD’s parties.\(^{47}\)

\(^{46}\) Art. 18, para. 1, Nagoya Protocol, 2010.
\(^{47}\) Morgera, Tsioumani & Buck, 2015, p. 286.
Access and Benefit-Sharing (ABS)

The Article 15, paragraphs 3 and 7 deals with one of the concepts called to serve as an inspiration for the international system of protection of TCEs, which, at the same time, stands for the essential matter of the CBD and the Nagoya Protocol. However, the latter shall not be widely covered in this sub-chapter due to the fact that Colombia has not ratified the aforementioned instrument.

The Access and Benefit Sharing (henceforth ABS) seeks to draw up the way in which the genetic resources may be accessed on and how the benefits arising from such a use are to be shared between the users and the providers.48

Despite of that, there are no regulations in the Colombian legislation neither dealing with the access to traditional knowledge associated with genetic resources, nor does it with MAT conditions, because of which, the TCEs and Traditional Knowledge of Indigenous Peoples and Local Communities have been treated as free-access resources without any compensation back from national and foreign users.49

While the PIC may be deemed as a condition sine qua non for the access to genetic resources and traditional knowledge associated with them, the benefit sharing is a necessary consequence of the mentioned access under the MAT. What is more, D’Alessandro asseverated that the use without ABS is, in fact, misuse.50

So, it could be said that those components, also existing in the private property thought-line, would fit well into the pretended Sui Generis system of protection of TCEs in Colombia, to the extent that they may lead to articulate the particular demands of the indigenous peoples and local communities, namely, their socio-political organization, customary rules, educational methods and so on.

Domaine Public Payant

In spite of “most of what is referred to as TCEs is unprotected and part of the public domain,”51 one of the interesting contributions of the proposed Sui Generis system is the figure of Domaine Public Payant, already implemented in Argentine

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Copyright Law, which requests users of works of national folklore the payment of a percentage for specified purposes.

In principle, the regime only applies to works which the Copyright has expired on, but it has been applied to TCEs in countries such as Algeria, Brazil, Mexico, Italy and others by way of exception. They adopted the regime of Domaine Public Payant since it was investigated by WIPO and UNESCO in the 80’s.52

However, this doctrine has become outdated due to its conflict with the free use and access to the public domain. Still, such doctrine would be suitable in the Colombian Law, where the lack of a clear and enforceable regulation turns into violations of the rights of Indigenous Peoples and Local Communities.

Although Colombia stated in the *Comments of Colombian Government about Traditional Cultural Expressions issues*, submitted to WIPO in 2007, that there is a need to adjust the national legislation for the best protection of TCEs, to this day, nothing in the Colombian provisions reflects any advance towards the adoption of a *Sui Generis* system that covers what cannot be covered by Copyright Law. Meanwhile, The Copyright Act still applies to the indigenous art, despite the fact that its Article 189 turns out to be improper and arbitrary.

52 Ibid.
National Plan for the Protection of TCEs in Colombia

Why a National Plan?

The justification for the National Plan intended to be presented in this paper, may be traced to the same grounds that the Delegations have been taking into account to draft an International Instrument on the Protection of TCEs at WIPO context, as seen in the recent meetings’ documents referred in the first chapter.

During the WIPO’s Seminar on Intellectual Property and Traditional Cultural Expressions, Wahyu elucidated and remarked that many creations of Indigenous Peoples and Local Communities have been made long before the modern Intellectual Property system was established, because of which, the said system has not faced the issue of the protection of TCEs.  

On November 12 2017, the Ministry of Culture of Colombia was requested through the institutional channels disposed to do so, to state about the existence of a Plan for the Protection of TCEs, whether it was already enacted or pending in the Agenda for the next years of the Government period.

The response from the Ministry of Culture was received on November 16 2017, where it was recommended to raise query to the Ministry of Foreign Affairs given that they are officially in charge of these topics by mandate of the National Government (see Appendix 1).

In turn, the Ministry of Foreign Affairs issued an answer confirming that “there is not policy or legislation allowing the direct protection of TCEs, principally from an Intellectual Property perspective,” yet the Denomination of Origin regime has been presented by this Ministry as a successful way to prevent the copy or reproduction without the consent of the right holders (see Appendix 2).

In the Colombia’s scene, more than a million of Colombian traditional hats came into the national territory from China during 2013. The price difference in the public market was about 100% as announced by one of the news channels of the country. As regards to this event, it is relevant to point out that the traditional hat,

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better called, *sombrero vueltiao*, is manufactured by the Indigenous *Zenus* and it has been used to represent not only the community itself, but the whole Colombian identity, because of which it is protected as a collective mark, while the Weaving Zenu got Geographical Indication protection under the Resolution 71097 of 2011.

However, as warned by Moreno\(^5\) and Zografos,\(^6\) the Geographical Indication regime also presents some limitations in terms of adequate protection of TCEs, such as the impossibility of intangible TCEs to be protected under this regime and the sacred and secret nature of some expressions due to which not all communities are looking for selling or trading their works.

Thus, the absence of a policy, law or any other measure to defend the interest of the TCEs holders within the Colombian territory, represents the main motivation for considering to set up a National Plan for the protection of TCEs, as a response to the many cases of misappropriation and misuse emanated from such a lack, both in Colombia and the international fora.

For instance, the FIFA World Cup 2010 anthem was a song called *Waka Waka* performed by the Colombian Shakira, which sounds very familiar to the popular Cameroonian song, *Zangalewa*, preserved and passed on orally by the Cameroonians. As to it, the Colombian artist was quoted saying that her song represented an event that has the power to unite and integrate every country, race, religion around a single passion.\(^7\)

From other legislation, the Australian Case *Foster v. Mountford* revealed that without a proper frame of protection, the expressions of particular peoples or communities might be used beyond its cultural and customary context, which could mean an offense to the holders’ traditions. The latter are not able to oppose to such a use, seeing that even when there are some rules within the communities in this regard, they are not applicable but only over their members.

In the aforementioned case, the judge analyzed the work of an anthropologist, who collected and published in a book, information about sacred sites,

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\(^6\) Zografos, 2010, p. 188.
\(^7\) WIPO_IPTK_WDH_15_REPORT, 2015, p. 57.
secrets and other cultural expressions of the Aboriginal people of the Central Australian desert: Pitjantjatjara people.\textsuperscript{58}

Despite the fact that the book’s sale was prevented through an injunction granted by the Court, the issue of the Aboriginal designs which were already in the public domain, made the application of the law on the breach of confidence, inapplicable.\textsuperscript{59}

Utilizations such as those ones lead us to affirm that the TCEs of Indigenous Peoples and Local Communities are at risk of being misused and misappropriated and while a derivative work could benefit from a Copyright protection as long as it fulfills the criteria to do so, no rights are granted to the holders of the TCEs, especially in Colombia, where on the contrary, the public domain treatment is disposed to any sort of indigenous art.

The consequences derived from such a provision become more evident in cases like the \textit{Mochilas Wuayuu}, colorful bags, hand woven by the indigenous women of the Colombian northern department, La Guajira, of which the meaning is directly related to the way in which the Indigenous Wayuu conceive and interpret life by depicting animals, plants and other elements of everyday use.

Wayuus affirm that they received the art of weaving from the mythical spider Walekerü\textsuperscript{60} and the colors to be implemented are revealed in dreams to their women, who interpret, communicate and teach them. So, Wayuu women are the givers of life, both in bringing children into the world and in holding the traditions, which supports the fact of matriarchal organization within this ethnic group.\textsuperscript{61}

The \textit{Mochila Wayuu} is one of the first things the women within the community learn to do when they become teenagers while being locked in for two years. During that period, the young Wayuu woman (Majayut) is allowed to see only her mother, grandmother or maternal aunts who shall grant her the designs that have passed from one generation to another.\textsuperscript{62}

\textit{Picture 1} depicts a Majayut exhibiting her \textit{Mochilas Wayuu}.

\textsuperscript{58} Zografos, 2010, p. 32.
\textsuperscript{59} Ibid.
\textsuperscript{60} Rodriguez & Santibañez, n.d., p. 10.
\textsuperscript{61} Cortés for Radio Nacional, 2017, para. 1.
\textsuperscript{62} Rueda, 2013, p. 27.
Notwithstanding, these bags have been found within European designers’ collections like the Spanish designer Stella Rittwagen who manifested she imported the Colombian bags after an agreement with the indigenous involved.\(^{63}\)

The screenshot below was taken from the Stella Rittwagen’s Instagram, which depicts a Mochila Wayuu –recognized by any Colombian-, while she uses the hashtag #madeinspain.

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\(^{63}\) El Espectador, 31th of March, 2014.

\(^{64}\) Barragán, 2006, para. 7.
One of the issues arising from this situation, besides the presumed misappropriation, is that the price the designer could have paid for the Mochilas Wuayuu is an element of a private negotiation. Most likely the whole community, who holds and maintains that particular cultural expression, did not receive any profit from the implied arrangement.

A similar situation occurs in the case of the Mochilas Arhuacas, TCEs of the Indigenous of the Sierra Nevada de Santa Marta, which are for them a symbol of the life’s creation and simultaneously serve as a mechanism to indicate the membership of the community. Some of the traditional designs are represented in the following picture.

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64 Barragán, 2006, para. 7.
Every element constituting the Mochila communicates thoughts aiming to awaken the spectator’s artistic sensitivity through the representation of the age-old cultural symbology of the Indigenous Arhuacos as it will be illustrated in the following table.

Table 1. Mochilas Arhuacas: designs and meaning.⁶⁵

<table>
<thead>
<tr>
<th>Design</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Kaku Serankua</em></td>
<td>Father, creator of the Universe. This design is not very common since it contains religious connotation, because of which it seems to be not a commercial product.</td>
</tr>
<tr>
<td><em>Kutia o Peinu</em></td>
<td>It refers to nature shapes</td>
</tr>
<tr>
<td><em>Aku</em></td>
<td>Movement is the topic of this design</td>
</tr>
<tr>
<td><em>Kunsámana</em></td>
<td><em>a’ mia</em> to refer the women of the community and <em>cheirua</em> for the men.</td>
</tr>
<tr>
<td><em>Urúmu</em></td>
<td>It depicts the conception of the Arhuacos about the world, therefore, this design implies a great symbology complexity.</td>
</tr>
<tr>
<td><em>Guírkanu</em></td>
<td>It could translated as <em>paramo</em> where mountains stand for manhood while lakes represent the femininity.</td>
</tr>
<tr>
<td><em>Sariwuwu</em></td>
<td>It literally means: months of pregnancy. Arhuacas women must weave this mochila during her pregnancy by adding a strip each month.</td>
</tr>
</tbody>
</table>

According to Aroca in Lopez, the Mochila Arhuaca embodies a mathematical thought that impregnates rhythm and order at the same time that it shows geometry.

as a representative way of thinking of indigenous Archuacos. Such an affirmation is evidenced in *Picture 4* below

As these designs are already spread into the public domain, there are numerous cases of misrepresentation of the *Mochilas Arhuacas* both by national and international dealers. On the one hand, they are deemed by the Indigenous *Arhuacos* as an affront toward their cultural practices, since the bags are used beyond the proper cultural context without the consent of the holder-community. On the other hand, they are considered as a threat to their form of subsistence, because a great sector of their economy is based on the commercialization of the Mochilas.\(^{66}\)

The discontent of indigenous peoples in this regard has been summarized in the Professor Tsosie’s speech during the IGC Thirty-third Session, who pointed out that the underlying logic in the misappropriating conducts exists from the Doctrine of Discovery in the colonization period, when the indigenous lands were delineated as

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\(^{66}\) *Marquez, Caracol Television, 2013.*
available for European discovery given that their inhabitants were deemed to lack the capacity to hold *property* in comparison to the civilized European nations.67

Thence, Professor Tsosie argued that TCEs could best be protected by a treaty where the following three aspects would be covered: first, the recognition of the indigenous peoples’ unique legal and political status to the extent that their rights would be delinking from those of nations-states and from those of local communities.68

Secondly, recognizing that indigenous customary law governed what would constitute TCEs and the corresponding process to get PIC in front of a third-party use. The third aspect to be covered has to do with using a dialogic process among the indigenous governments, the nations-states that encompassed them, and the international community.

Thus, the adequate implementation of a National Plan for the protection of TCEs, adopted as a Colombian law, would prevent not only the misappropriation of such specific expressions, but also the offensive use and a misrepresentation of the right holders’ identity by embodying the aspirations of a *Sui Generis* system as discussed in the WIPO context.

Therefore, the National Plan shall provide a careful delimitation of its subject matter with the aim of offering to the recipients of the law a uniform understanding of what are the criteria to protect their cultural expressions.

The above may be recognized as an attempt to fulfil the principle of legality consecrated in the Article 29 of the Political Constitution of Colombia, which states that *no one may be judged except in accordance with previously written laws*. In this sense, a particular behavior towards TCEs might be expected only after the Law has been enacted, which must also describe the corresponding sanction in case of infringement.

Concerning the duration of protection, the National Plan shall provide an indefinite one, in accordance with the orientation of the Colombia’s Government to adopt a *Sui Generis* system.

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67 WIPO/GRTKF/IC/33/7, 2017.
68 Ibid.
In this regard, Tankoano exposed that TCEs are subject to evolution, developments and continual recreation within communities, so that the time-limited protection, granted by other Intellectual Property regimes such as Copyright or Patents Law, does not satisfy the needs and expectations derived from the nature of the expressions here concerned.

The Articles drafted during the recent intergovernmental meeting in Geneva constitute the inspiration for setting up the exceptions and limitations into the suggested National Plan, because therein they have been already examined under the light of the perspectives and interests of TCEs holders.

Other important elements to ensure the efficacy and effectiveness of the proposed National Plan are: the indication of the authorities in charge of the vigilance and execution of that law as well as the description of infringements and the corresponding sanctions.

Outline of the Plan

The present chapter will suggest the outline for the National Plan according to the main aspects being examined at WIPO level, for it leads the process of greater connotation in this regard.

The terminology will be in accordance with the style of the legislation in Colombia and regarding the format, it will be fulfilled the technical indications of the Colombian Parliament. Nevertheless, as to the statement of reasons, they have been already covered in previous chapters.

Legal framework

Draft Law No ______

Which creates the National Plan for the Protection of Traditional Cultural Expressions

Article 1. Subject matter: to the effects of this Law, it shall be protected as Traditional Cultural Expressions (henceforth TCEs): any form of creative and literary or artistic expression, tangible or intangible, or a combination thereof, regardless of the form in which it is embodied, expressed or illustrated, that are expressed and

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maintained in a collective context by indigenous peoples and local communities. TCEs may be dynamic and evolving.\footnote{WIPO/GRTKF/IC/34/8, 2017.}

**Article 2. Beneficiaries:** beneficiaries of this law are indigenous peoples and local communities who hold, express, create, maintain, use and develop TCEs.

**Article 3. Scope of protection:** beneficiaries shall enjoy the right to authorizing the use of their Traditional Cultural Expressions according to their customary laws when existing.

In every case, the pretended use shall be preceded for the manifestation of the Prior Informed Consent by the community involved. The agreement between the community and the intended users shall content the description of the use to be given to the TCEs concerned, as well as the consequences and possible risks derived from such a use.

The agreement also will contain the economic compensation that the pretended users are to grant to the specific community as agreed by them.

**Article 4. Publicly available:** it will be considered that the TCEs are publicly available when they have lost its distinctive association with any indigenous or local community and that as such have become generic or meaningless expression, notwithstanding that its historic and cultural origin may be known to the public.

**Article 5. Moral rights:** beneficiaries shall enjoy the inalienable right

- To demand that the name of the community be recognized and mentioned as the holders of the concerned TCEs when they are used or exploited beyond their cultural context.

- To keep their TCEs in secret or unpublished out of the holder community.

- To object any distortion, mutilation or other modification of the TCEs when such action would be offensive or misrepresentative to the community’s interests.

**Article 6. Limitations and Exceptions:** the following exceptions and limitations shall not be unreasonably in conflict with the interests of beneficiaries and their customary laws, nor unduly prejudice the implementation of this law.
- Use for learning, teaching and research
- Utilization only for purposes of preservation, in the National Museum of Traditional Cultural Expressions, archives and libraries.
- Use for the creation of an original work inspired by, based on or borrowed from TCEs.

Paragraph. The protection of any TCEs does not prejudice with the protection under other intellectual property regime.

**Article 7. Term of protection:** the subject matter of this law shall be protected as long as the beneficiaries of protection continue to hold, maintain, create, use and develop the concerned Traditional Cultural Expressions.

**Article 8. Authority in charge:** the Ministry of Culture is the authority in charge of the administration and vigilance of the provisions of this law, for which it will dispose the necessary within its administrative structure to make its adoption feseable.

The Ministry of Culture will accompany, as demanded by any of the parties, the Prior Informed Consent process and the setting up of the agreement.

Paragraph. It is obligation of the Ministry of Culture, the identification and inclusion of the TCEs along the Colombian territory into the National System of Cultural Information (henceforth SINIC).

**Article 9. Sanctions:** the sanctions for the person (natural or legal) who infringes any provision contained in the present law shall include civil penalties such as: the entitlement up to the right-holders to demand the suppression of the infringement and its omission in the future; reparation for the moral damage caused by a person who culpably infringed the provisions here displayed.

**Article 10. Alternative Disputes Resolution:** the Ministry of Culture shall serve, at the requirement of the parties, as mediator or conciliator on the matters of this law.

**Article 11. Administrative Depositions:** the present Law creates the National Museum of TCEs which shall be in charge to conserve, preserve, research on, communicate and exhibit the tangible and intangible TCEs of the Indigenous Peoples

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71 Museo Nacional de Expresiones Culturales Tradicionales.
and Local Communities along the national territory upon authorization of the holders of such expressions in the terms of the provisions above.

The parameters displayed in the Program for the Strengthening of Museums will apply to the creation and management of the National Museum of the TCEs.

The Museum as a way to enhance the protection

Despite the fact that there is not a clear guideline within Colombian legislation on the management of the TCE’s under either the public domain or private sector, cultural institutions, including museums, have played an important role in indicating a basis of precise and specialized rules to be set in order to ensure the holders’ rights be duly protected and the peoples’ identity be properly safeguarded.

Since the creation of the National Museum at the request of the liberator himself, Simon Bolivar, a section with objects and other curiosités from the indigenous tribes was included, with the aim to preserve the historical memories of the independence of the new Nation after the period of Spanish Colonization.  

Over time, the National Museum also served to the local society’s awareness of the indigenous communities, by transforming the indigenous section into what came to be the Museo del Oro under the patronage of the Bank of the Republic, whose plan consisted of commissioning young representatives to receive instruction from the well known museums in the United States for the preservation, documentation and exhibition of the material.

Such project arose from the increasing interest that Colombians showed in the indigenous artworks as part of the heritage of the country. For instance, in 1939, a lady from the high society of Bogotá made available for sale a Poporo Quimbaya, a golden masterpiece used during the religious rituals of Quimbayas, which was acquired by the Bank of the Republic in order to prevent Europeans collectors from buying it, and therefore be forever lost for Colombians.

Picture 5 shows one of the varieties of the Poporo Quimbaya exhibited in the Museo del Oro in Bogotá.

72 Article 1, Law 34 of 1881.
74 Gold Museum, henceforth Museo del Oro
76 Ibid.
Currently, the Bank of the Republic supports the project of six regional branches of the Museo del Oro of Bogotá, which are spread out in the national territory and share the same lines of actions with the central Museo, namely: heritage, identity, diversity and coexistence.

Thus, the Museo del Oro Quimbaya in Armenia, Museo del Oro Zenu in Cartagena, Museo del Oro Calima in Cali, Museo del Oro Nariño in Pasto, Museo Etnográfico in Leticia and Museo del Oro Tairona in Santa Marta have collected, researched and displayed exhibitions as a way to preserve the art of indigenous peoples and local communities within the region where the museum is placed, but also to pay a tribute to them and rescue the traditions which the society has been built upon.

At the same time, these museums have fomented some collaborative programs such as the didactic pack headed by the Museo del Oro Quimbaya, which serves as a useful tool to introduce schools and communities to the collections of the Museum and the audiovisual workshops of the Museo del Oro Zenu for teachers and scholars.

77 Museo del Oro in Camelo, 2011, p. 220.
In turn, the Museo del Oro Tairona revealed through an official reply in September 2017, by virtue of a query raised up the same month to the effects of the research supporting this document, that one of the strategies to link up the communities with the ongoing work of the museum was the project *Mi objeto de museo*, under which, Indigenous Ette from the tribe of Issa Oristuna handed out objects of their own to be included into the exhibition the Museum was preparing for its opening in 2014 (See Appendix 3).

However, these museums are currently the sole institutions caring about the art of Indigenous Peoples and Local Communities, hence the intangible cultural expressions are excluded from their essence.

It is very telling that the Museo del Oro’s mission addresses to preserve, research, catalogue and make available collections of goldsmith, pottery and other materials. Yet, nothing is mentioned regarding the cultural expressions that are not fixated or embodied in any way though they belong to the cultural wealth of the communities and are intrinsically connected with their story, customs and traditions.

The International Council of Museums (henceforth ICOM) has led the discussion on the emerging role of the museums based on the challenges brought up by the UNESCO Convention on the Safeguarding of Intangible Cultural Heritage, so that the definition of museum as a non-profit, permanent institution in the service of society and its development, is no longer reduced to acquire, conserve, research, communicate and exhibit inanimate or dead things as let on by Kurin, but it also covers the intangible cultural heritage of humanity.

In this sense, the National Museum of Traditional Cultural Expressions (henceforth The Museum), proposed in the Article 11 of the Draft National Plan should serve to the interests of the Indigenous Peoples and Local Communities by displaying their TCEs both tangible and intangible.

Nonetheless, the challenge for The Museum shall be to articulate and integrate the customs and specific practices of the holders concerning their TCEs and the contemporary demands of the broad public, whose motivations to approach the

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78 Londoño, 2013, p. 159.
museums’s work have changed and in particular their relations with cultural products and services, as noticed by Mencarelli, Marteux and Pulh.\textsuperscript{81}

A successful example that could inspire similar actions is the Ainu Culture Cluster Project, planned by the curator of Nibutani Ainu Culture Museum\textsuperscript{82} and submitted to the Ministry of Health, Labour and Welfare in 2002 as a proposal to create immediate employment in the area.

This Project aimed to create a basis from which Ainu Culture would spread out whilst also promoting growth in the regional economy.\textsuperscript{83} One of the striking actions the Project undertook was to record song and dances of traditional Ainu Culture and training people to acquire and improve traditional skills, and planning their performance for the public\textsuperscript{84}

Another key point to be taken into consideration regarding The Museum’s challenge is the relationship between itself as a cultural institution and the Indigenous Peoples and Local Communities as suggested during the UNESCO Seminar on the Role of Museums Preserving Indigenous Cultures held in Adelaide in 1978.

Therefore, the essence of The Museum should reflect the spirit of the Political Constitution of Colombia which recognizes itself as a multicultural country, by calling out the Indigenous Peoples and Local Communities to be represented throughout collections, the senior management level and on the Board of Trustees.

The presence of the holders of TCEs shall be also decisive in order to settle upon the projects the communities are more interested in promoting and sponsoring from The Museum’s profits, to such an extent that every community from the different regions of the country get the chance to be benefited from The Museum’s work.

This permanent synergy will allow The Museum to protect also the TCEs already fallen under the public domain, both tangible and intangible, but also the particular ones that the holders have excluded from commercialization on a basis of sacred or religious grounds, with the aim of raising Colombian society’s awareness on the significance of Indigenous Peoples and Local Communities in the National identity construction.

\textsuperscript{81} Mencarelli, Marteux & Pulh, 2010, p. 1
\textsuperscript{82} Located in the town of Biratori, Hokkaido, Japan.
\textsuperscript{83} Nakamura, 2007, p.156.
\textsuperscript{84} Ibid.
Thus, The Museum will be engaged in the pursued of providing an immersive and interactive experience to its visitors where new technologies like Augmented Reality and Virtual Reality shall serve to enhance the understanding of The Museum’s exhibitions and performances of TCEs, for which it will be helpful to get some inspirations from successful examples such as the HTC Vive headset already experimented by The Metropolitan Museum of Art or the micro-computed tomography implemented by the same museum to introduce its visitors into a 16th century prayer bead.85

In this way, The Museum would be enhancing the protection proposed by the Draft Document to the extent that the dissemination of the aforementioned expressions would be preceded by the study, research and recording under the terms agreed between the Institution and the community involved, so that the risk of misuse, misappropriation or misrepresentation would be no longer left to chance, but on the contrary, both parties would be aware of their possibilities and limitations to face it.

As to it, WIPO exposed through its paper Managing Intellectual Property for Museums, that a license is the contractual instrument able to evidence that the required permission for the use of a work has been obtained.86 So, in the frame of the adoption of a Sui Generis system of protection of TCEs, the purpose of a license would be accomplished in the end result of the MAT process with the community involved, preceded by the corresponding PIC.

At the inspiration from the WIPO’s paper,87 the agreement should indicate:

- The parties involved;
- What rights are granted to The Museum;
- Authorized uses and in particular uses that may be prohibited;
- Any reporting and auditing requirements; The duration of the authorization;
- What happens upon default and breach and the indemnities that may flow as a result and;

85 The MET, n.d., para. 1.
86 Elster for WIPO, 2013, p. 18.
87 Ibid.
- Choice of law and jurisdiction as mentioned in the Chapter 2 above.

According to the Article 6 of the Draft National Plan, only the preservation of TCEs in The Museum is set up as an exception to the right of beneficiaries to authorize the use of their TCEs, but not so the exhibition or representation. Because of that, it might be also assumed that The Museum display TCEs already fallen under the public domain, which would generate the obligation of paying the corresponding fee to the authority in charge, pursuant the Article 4 of the same Draft Law.

Furthermore, The Museum is called upon to look after an adequate exhibition of the intangible TCEs in harmony with the world view of each community represented therein. Because of that, it is imperative for The Museum to establish a permanent dialogue with the holders of the TCEs in such a way that every performance reflects the actual dynamics and the living character of their practices, representations, expressions and skills.

In this sense, the Museum’s mission and vision could be suggested in the following terms:

**Mission Statement:** The National Museum of Traditional Cultural Expressions aims to collect, safeguard and promote, together with Indigenous Peoples and Local Communities spread out along the Colombian territory, their Traditional Cultural Expressions as a way to enhance the protection of the cultural diversity and national identity, as pursued by the National Laws.

**Vision:** every Indigenous and Local Community present in the Colombian territory is represented in the Museum through their Traditional Cultural Expressions, both tangible and intangible. Their delegates participate actively in the decision-making process and the construction of promotional and educational programs.

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88 Bauer, Carpenter & Erdogan, 2012, p. 150-152. “Mission and vision are statements from the organization that answer questions about who we are, what do we value, and where we’re going.” The mission statement communicates the reason of being of the Organization and how it aims to serve its stakeholders, while the vision is a future-oriented declaration of the organization’s purpose and aspirations.
The Museum is recognized as pioneer in the exhibition of intangible cultural expressions in the country as well as in the implementation of ultimate technology to articulate the past's contributions facing the future's challenges.

Subsequently, objectives and strategic goals\textsuperscript{89} are proposed for a period of three years as stated below:

Goal 1: providing access to the Traditional Cultural Expressions of the Indigenous Peoples and Local Communities present in the Colombian territory that have agreed in their exhibition in the Museum.

Objective: 8 out of 10 Indigenous Peoples and Local Communities recognized by the Colombian Authorities have been invited to join the Museum’s work.

Objective: 7 out of 10 Indigenous Peoples and Local Communities recognized by the Colombian Authorities have handout at least 1 tangible TCE to be exhibited in the Museum.

Objective: the Museum is open to the public 8 hours per day, from Monday to Thursday and 10 hours per day, from Friday to Sunday.

Objective: one of the permanent exhibitions of the Museum includes a performance of intangible Traditional Cultural Expression.

Goal 2: to appeal to all Colombians and visitors to get acquainted with the cultural diversity of the country as represented by the Traditional Cultural Expressions of Indigenous Peoples and Local Communities.

Objective: the public service broadcasting promotes to visit the Museum twice a week.

Objective: the Museum is included in Ministry of Culture’s list of cultural attractions in Colombia

Objective: the Museum carries out 2 promotional programs a year in Schools and Universities.

Goal 3: caring the collections.

Objective: the objects at risk of damage are repaired by experts.

\textsuperscript{89}Bauer, et. al., 2012, p. 263. “Goals are outcome statements that define what an organization is trying to accomplish, while objectives are very precise, time-based, measurable actions that support the completion of a goal.”
Objective the environmental conditions are according to the required parameters.

Goal 4: to promote the exhibition of Traditional Cultural Expressions in situ in the terms agreed with community involved

Objective: the Museum prepares demonstrations of intangible TCEs in the community’s territory.
Conclusions

As has been examined, the National Plan for the Protection of Traditional Cultural Expressions in Colombia arises as a response to the negative impact that the lack of an appropriate measure has generated within the Indigenous Peoples and Local Communities of such country.

Although the reports of the recent IGC meetings evidence the concern of most of the countries to reach a comprehensive international instrument for the protection of TCEs, Colombia still maintains a passive attitude toward the adoption of a *Sui Generis* system for the protection of TCEs as declared in the *Comments of Colombian Government about Traditional Cultural Expressions issues*.

As analyzed in the Chapter *Legal considerations for the protection of TCEs in Colombia* the Colombian Copyright Act has not been adjusted to meet the interests of Indigenous Peoples and Local Communities concerning their TCEs, and furthermore one of its provisions contradicts what the Delegation of Colombia has worked for during the WIPO IGC 33 and 34.

Such a provision, the Article 189 of the aforementioned Act, establishes that every kind of indigenous art belongs to the cultural heritage, which allows the State to act as the rightholder of all the indigenous art creations, including, naturally, TCEs, in authorizing or prohibiting all what would have to do with their exploitation, without requesting the permission of their authors, the heirs or the community who actually maintains and preserve the expressions here concerned.

The article 189 of the Colombian Copyright Act was found going against the fundamental right to equality according to the constitutional provisions, and it was also deemed inappropriate in regard to the agreement at WIPO context on that Indigenous Peoples and Local Communities should be the beneficiaries of the protection of TCEs in the terms of intellectual property rights.

Despite the fact that Colombia has boosted the protection of TCEs using the Geographical Indication regime, it is relevant to highlight that intangible TCEs go beyond the scope of such a regime, hence they remain unprotected.

In addition, the need for the adoption of a Sui Generis system for the protection of TCEs through enacting a National Plan like that here suggested, becomes
palpable. Such a system has been drawn up at the inspiration from the Draft Articles of an International Instrument for the protection of TCEs agreed during the WIPO IGC 33 and 34 and the experts’ presentations in the WIPO Seminar on Intellectual Property and Traditional Cultural Expressions.

Four elements distinguish the suggested National Plan from the other IP systems being applied over TCEs in Colombia, namely: the Prior Informed Consent principle, the Mutually Agreed Terms requirement, the Access and Benefit Sharing condition and the figure of Domaine Public Payant as have been established in the Article 3 of the Draft Plan.

In an attempt to suggest a comprehensive mechanism for the protection of TCEs in Colombia, the creation of a National Museum was also disposed as a way to enhance the pretended protection by harmonizing the interests of the holders and the expectations of the audience that approaches The Museum.

Thus, this dissertation might serve as a basis for a formal proposal to the Colombian Parliament on the adoption of any measure to better protect TCEs of Indigenous Peoples and Local Communities, who play a decisive role in thinking the country as a multicultural nation and a State that effectively guards the Social Rule of Law.
Glossary

**Access and Benefit- Sharing (ABS):** it was developed in the Convention on Biological Diversity, referring to the way in which genetic resources may be accessed, and how the benefits that result from their use are shared between the people or countries using the resources (users) and the people or countries that provide them (providers).  

**Public Domain:** it is most often used to refer to intellectual material in which no one can establish or maintain proprietary interests. It can be used by everyone without authorization, and without the obligation to pay remuneration.

**Intangible Cultural Heritage (ICH):** the article 2 of the 2003 UNESCO Convention establishes that it means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.

**Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC):** it is a forum where WIPO members states discuss the intellectual property issues and holds formal negotiations with the objective of reaching agreement on one or more international legal instruments that would ensure the effective protection on the matter of its concern.

**Misappropriation:** is the wrongful or dishonest use or borrowing of someone’s property as a form of unfair competition. The elements of misappropriation are: (1) the plaintiff must have invested time, money, or effort to extract the information, (2) the defendant must have taken the information with no similar investment, and (3) the plaintiff must have suffered a competitive injury because of the taking. D’ Alessandro points out that it may consist of unlawful appropriation, violation of national or customary law or access without PIC or MAT.

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91 Anderson & Torsen for WIPO, 2012, p. 33.
93 WIPO, 2015, p. 1.
94 Black’s Law Dictionary in WIPO Glossary.
**Misuse:** “improper use, in an unintended or unforeseeable manner.” Misuse may also refer to improper or excessive use, or to acts which change the inherent purpose or function of something.\(^96\) It may include: unauthorized, unfair, inequitable use; use without benefit-sharing; false, offensive, derogatory, misleading use or use beyond traditional/customary context.\(^97\)

**Museo del Oro de Colombia:** the Golden Museum of Colombia is defined as a non-for-profit organization that acquires, conserves, researches, communicates and exhibits for educational and entertainment purposes.\(^98\)

**Mutually Agreed Terms (MAT):** it is also a term present in the Convention on Biological Diversity which points out that an agreement between the providers of genetic resources and users has been reached on the conditions of access and use of the resources, and the benefits to be shared between both parties.\(^99\)

**Prior Informed Consent (PIC):** principle under which, holders should be fully consulted before their expression resource is acceded or used by third parties and an agreement should be reached on appropriate terms; they should also be fully informed about the consequences of the intended use.

Some domains through which ICH is manifested are oral traditions and expressions; performing arts; social practices, rituals and festive events; knowledge and practices concerning nature and the universe; traditional craftsmanship.\(^100\)

**Sui Generis:** it is used to describe a regime that has been specifically designed to protect rights that fall outside the conventional form of protection.\(^101\)

**Traditional Cultural Expressions (TCEs):** any form of artistic and literary, creative and other spiritual expression, tangible or intangible, or a combination thereof, such as actions, materials, music and sound, verbal and written and their adaptations, regardless the form in which it is embodied, expressed or illustrated, which may subsist in written, oral or other forms.\(^102\)

\(^96\) Black’s Law Dictionary in WIPO Glossary.
\(^98\) Camelo, 2011, p. 220.
\(^99\) Ibid.
\(^100\) Art. 2 and 3. 2003 Unesco Convention.
\(^101\) WIPO Glossary.
\(^102\) WIPO/GRTKF/IC/28/6 in Blakeney, Stamatoudi (ed.), 2016, p. 108.
World Intellectual Property Organization (WIPO): it was constituted by virtue of the WIPO Convention of 1967 as an Intergovernmental organization that became one the specialized agencies of the United Nations in 1974 to promote the protection of intellectual property worldwide and to ensure administrative cooperation among the intellectual property Unions established by the treaties that WIPO administers.\textsuperscript{103}
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International Instruments

Appendix 1

In the following document, the Director of the Ministry of Culture’s Heritage Department answered the solicitude of information regarding the existence of a Plan of Protection of TCEs in Colombia, recommending to raise the query to the Ministry of Foreign Affairs.
Appendix 2

Once the Ministry of Foreign Affairs was consulted as recommended by the Ministry of Culture, its answer aimed to inform that there is not policy or legislation that allows the direct protection of TCEs in Colombia. However, it mentioned, other Intellectual Property regimes, like the Denomination of Origin that attempt to do so.
Se comentó que la Unesco desde su marco normativo ha promovido normatividad para la protección del patrimonio inmaterial para el mundo, y este desarrollo ha permitido en Colombia la adaptación de algunas normas que complementan esa protección:

Ley 45 de 1983 por medio de la cual Colombia adhiere a la Convención de Patrimonio Mundial, Cultural y Natural.

Ley 63 de 1983 por medio de la cual Colombia adhiere a la Convención sobre las medidas que deben adoptarse para prohibir e impedir la importación, la exportación y la transferencia de propiedad ilícita de bienes culturales.

Ley 340 de 1996 por medio de la cual Colombia adhiere a la Convención para la protección de los bienes culturales en caso de conflicto armado

Ley 899 de 2004 por la cual se aprueba el 2º Protocolo de la Convención de la Haya de 1954 para la Protección de Bienes Culturales en Caso de Conflictio Armado.

Ley 1037 de 2006 por medio de la cual Colombia adhiere a la Convención para la Salvaguardia del Patrimonio Inmaterial

Ley 1304 de 2009 por medio de la cual se aprueba el Convenio de Unidroit sobre los Bienes Culturales Robados o Exportados Ilícitamente firmado en Roma el 24 de junio de 1995.

La política pública para la gestión, protección y salvaguarda del patrimonio cultural en virtud de la ley 1185 de 2008 "...fijará las políticas generales y dictará normas técnicas y administrativas, a las que deben sujeterse ..." Sin embargo, para mayor información sobre la gestión, protección y
salvaguarda del patrimonio cultural, le sugerimos que la misma sea solicitada al Ministerio de Cultura, ya que, es la Entidad competente en estos temas, y quienes cuentan con información completa y directa de los avances de la Entidad en este aspecto.

INFORMACIÓN MINISTERIO DE CULTURA

Dirección: Carrera 8 No. 8 – 55 - Bogotá D.C.
Teléfono: (571) 342 41 00
Correo electrónico: servicioalciudadano@mincultura.gov.co

Agradecemos su comunicación. Las solicitudes que usted desee interponer ante el Ministerio de Relaciones Exteriores, deberán hacerse exclusivamente a través del formulario único de registro de solicitudes que podrá encontrar en el siguiente enlace:
http://pqrs.cancilleria.gov.co/SolicitudPQRS.aspx

Ayúdenos a mejorar nuestro servicio. Haga clic en el siguiente enlace:

Atentamente,

Grupo Interno de Trabajo Centro Integral de Atención al Ciudadano
Ministerio de Relaciones Exteriores
Bogotá D.C., Colombia
Appendix 3

The following document contains the answer of the Museo del Oro Tairona’s Coordinator to the question *What procedure was carried out by the Museo del Oro to get the Indigenous Communities and Local Communities’ permission to exhibit their objects? In case that any procedure was carried out.* The Coordinator mentioned the collaborative work between the Museum and the communities which was significant in order to define the Museum’s content and to set the exhibitions.

Estimada (Name),

Recibí un saludo cordial,

De enterarnos queremos agradecerle por comunicar con nosotros y hacerlos este tipo de consultas que nos permite contar del trabajo que se ha realizado con ocasión a la renovación del Museo del Oro Tairona-Casa de la Aduana.

En el proyecto de renovación del Museo del Oro Tairona – Casa de la Aduana participaron numerosas personas en la construcción del guión de sus exhibiciones. Arqueólogos que han trabajado en la región, algunos miembros de las comunidades indígenas y de afrodescendientes, historiadores y académicos del Magdalena, los niños y jóvenes y una buena parte de ciudadanos participaron y siguieron muy de cerca la elaboración del guión en acompañamiento con el equipo interdisciplinario del Museo del Oro del Banco de la República.

A lo largo de los cuatro años que duró el proyecto de renovación del museo se realizaron diferentes programas y actividades para vincular este participación en la realización del guión. Mi objeto de museo, por ejemplo, invitó a samarios y residentes en la ciudad a traer sus objetos y sus historias que representaran su identidad y su propia historia. Así llegaron objetos e historias relacionados con la Unión de Cooperativas de Caja de Ahorros, al campamento de fútbol de 1968, los entes de las Llanuras del Caño, la música de los 70, entre muchos otros temas. Asimismo se realizaron grupos focales para dialogar sobre Simón Bolívar, las comunidades indígenas de la región y la presencia africana en Santa Marta y para la revisión y lectura en voz alta del guión preliminar, previo a la producción de las exhibiciones. Me permito contar dos historias sobre la presencia de objetos en el museo: un día llegó varios indígenas este del resguardo de Issa Orístuna y nos pidieron que nos entregáramos objetos de su comunidad, que ellos elaborarían especialmente para el Museo. De la misma forma se acercaron los indígenas Kankuamos para solicitar su participación en el nuevo montaje. Hicimos varios grupos focales en los que participaron los indígenas de la Sierra Nevada.

Este trabajo colaborativo fue un proyecto esencial para la renovación del Museo del Oro Tairona-Casa de la Aduana. Se buscó ante todo construir un museo de última generación que no solo vinculara la actualización de contenidos y de museografía contemporáneas, sino también espacio de diálogo, de participación y de encuentro necesario en el presente. Este museo fue hecho a muchas manos.


Atentamente,

[Signature]

ALEJANDRA
GARCÍAS VARGAS

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