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How should foreign impact and commercial use of traditional design, with the intent to promote development in indigenous communities, be considered in relation to the *lege de ferenda* legal protection stipulated in the DPs?; A minor field study in Guatemala 2006.

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# Summary

The rich Mayan weaving tradition in Guatemala has survived even though the indigenous population has been subject to centuries of hardship and oppression. After conducting a field study and scrutinising the commercialisation process of the traditional designs in five different producer cooperatives of which, for the purpose of this thesis, some are characterised as weaving cooperatives and others as international projects, I found that there has been and still is a large degree of foreign influence in the structure, organisation and the commercialisation process of traditional textile crafts. The commercial use of traditional Mayan designs by foreign volunteers or designers, often without explicit consent or benefit-sharing agreements, have been explained or justified by the overall development agenda and poverty reduction purposes of the projects.

The purpose of this thesis is therefore to scrutinise how the foreign impact and commercial use of traditional Mayan design, with the intention to promote development in the indigenous communities, could be considered as a misuse in relation to the *lege de ferenda* legal protection formulated in the Draft Provisions (DPs).<sup>1</sup> In relation to this question, following issues needs to be addressed. Firstly, how has the traditional Mayan designs been affected by the colonisation, the over 30 year war in Guatemala and the following international aid efforts from Non-Governmental (NGO:s) and international organisations and can the Mayan designs commercialised today be characterised as such traditional designs covered by the DPs?

Secondly, what does the foreign impact in the commercialisation of traditional designs entail and what are the attitudes regarding custodianship/ownership of traditional designs amongst the foreign designers in the internationally initiated projects, the people working for the weaving cooperatives and weavers working independently?

Thirdly, does the scope of protection in DPs address the issue of use of Traditional Cultural Expressions (TCEs) in a commercial context with a specific agenda to promote development, and finally, would addressing such an issue likely make any difference to the *de facto* protection of traditional designs for the indigenous communities in Guatemala?

After conducting a field study and scrutinising international conventions, domestic legislation, working documents from the World Intellectual Property Organisation (WIPO) and literature in the field it can be concluded,

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<sup>1</sup> WIPO/GRTKF/IC/11/INF/2 p 2. The DPs, which is one of the two processes on which the international protection of TCEs currently is considered, is being drafted internationally within the World Intellectual Property Organisation (WIPO) framework. The work on international protection of TCEs was initiated in 1996 as a reaction from some countries to the perception of TCEs belonging to the public domain and therefore not protected by the existing IP regime.

in relation to the objectives posed, that the Mayan traditional designs are not static and due to e.g. colonisation and the armed conflict, some of the traditional designs have been changed and lost. However, the ancient Mayan weaving traditions as such has survived and the designs today still contain traditional elements and symbolism and are therefore covered by the DPs. In regard to the ongoing controversy whether the traditional designs in the Mayan weavings have originated from Pre-colonial Mayan communities or if they have been adopted after being introduced by the Spanish colonisers, it can be concluded to have little relevance for the assessment of the *lege de ferenda* legal protection of traditional designs in the DPs. As stated in the commentary to article 1 DPs, the notion “heritage” is used to capture the inter-generational quality of TCEs. TCEs maintained and passed between three or even two generations has generally by experts been considered to form part of a “heritage”. According to that definition, the traditional designs made in the different Mayan communities, regardless of the initial origin, have characteristics of such a heritage and are to be characterised as a form of TCE.

When it comes to what the foreign impact in the commercialisation of traditional designs entail it can be concluded that there in general seems to be a difference between the foreign impact in the weaving cooperatives and in the international projects scrutinised. The foreign impact in the commercialisation process of traditional designs in the weaving cooperatives started in the 1960s and foremost consisted of international volunteers selecting which traditional designs and products that should be commercialised. However, all the profit went to the indigenous weavers. The foreign impact in the current international projects scrutinised on the other hand is characterised by foreign designers that use some of the traditional Mayan designs, incorporate and re-contextualise them in different contemporary products. Although the designs are used and commercialised with the best intentions, providing the indigenous weavers with working opportunities and vocational weaving education, the indigenous weavers lack possibilities to influence the final product outcome.

When it comes to attitudes regarding exclusivity or ownership of traditional design, it can be concluded that it in general seems to be widespread and accepted that Mayan communities copy designs from each other. There is a general conception, that traditional designs belongs to the public domain, amongst indigenous weavers, international designers and volunteers alike and there is no traditional Mayan legislation protecting traditional designs. In addition, the indigenous weavers in question depend on the extra income that the textile commercialisation generates and subsequently there seems to be no general protests against the use and commercialisation of the traditional designs by non-indigenous parties. However, during the interview sessions some have argued that the copying and adaptations of traditional community designs give rise to anger amongst some of the indigenous weavers. There has also been some conflicts in the producer cooperatives relating to the copying of community designs which indicates

the frustration and fear of reduced income when products and designs are being copied.<sup>2</sup>

When deciding if the foreign impact and commercial use of traditional design could be considered as a misuse in relation to the DPs it can be concluded that neither the provisions of the DPs, nor the commentary distinguishes TCEs used for development purposes from other types of uses. Moreover, use of TCEs for development or poverty reduction purposes is not explicitly exempted from the scope of protection stipulated in article 3.

The DPs contains a three level protection, registered TCEs, non-registered TCEs and secret TCEs. Even though the traditional Mayan design in general must be considered to be of particular “cultural and spiritual” value, which is a requirement to obtain the stronger protection through prior and informed consent (PIC), there is scarce documentation of traditional design in Guatemala. With the lack of information concerning registration possibilities as well and the non-existence of a independent Mayan organisation with the resources to assist the various indigenous communities, the assessment of misuse has to be considered in the light of the weaker form of protection as a non-registered TCE. It can be concluded, after assessing the foreign impact and use of traditional design in the producer cooperatives scrutinised, that the mere selection of which traditional designs shall be subject to commercialisation cannot, according to the wording of the provisions and the commentary to the DPs at this stage, be considered as a misuse. The use of traditional designs in the international projects on the other hand could be considered as a misuse. Not on the ground of lacked PIC but do to the fact that the products with traditional designs are sold without acknowledging the source, i.e. from which indigenous community the design derives. The commentary to the DPs also stipulates that there should be a benefit-sharing agreement even when non-registered TCEs are used. What benefit-sharing shall entail has so far not been expressed in the DPs. The international projects scrutinised rarely negotiated agreements of benefit-sharing with the indigenous communities in question. Instead salaries were paid to the indigenous weavers for their work. Hence, the lack of such benefit-sharing agreements could be another ground for misuse of traditional designs in a DPs context.

The fact that the use of traditional design, or any form of TCEs, for development purposes is not exempted from the scope of protection in the DPs could lead to discouragement of similar international projects. Even if much is left to desire when it comes to the scrutinised international projects way of handling and using traditional Mayan designs the projects still contributes with beneficial elements, like working opportunities for the indigenous population and in a way provides possibilities for the Mayan weaving heritage to develop. However, a precondition for such an exemption to the scope of protection is that DPs also contained guidelines as

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<sup>2</sup> During the interview sessions some weavers have held that they rather see their community designs copied by weavers from other communities than enterprises.

to what a “development purpose” or “poverty reduction purpose” needs to entail.

It is impossible to predict what addressing the issue of commercialisation of TCEs for development purposes in a DPs context in practice would result in for the *de facto* protection of traditional designs in the indigenous communities in Guatemala. There are in my view some circumstances that indicates that the inclusion of such a perspective merely would lead to insignificant effects in practice, even if the DPs becomes a fully fledged legally binding international convention. There will most likely arise problems in relation to implementation as well as enforcement of the legal protection of traditional designs due to the vast social differences, lack of information and financial resources in the indigenous communities. Moreover, the strongest protection of TCEs presupposes registration possibilities and subsequently also a certain structure and awareness within the indigenous community. However, there are also circumstances that indicate the importance of addressing the use of traditional designs in a developments context in the DPs. The consideration of human rights in a business context has in recent times developed from being a “soft issue” to a competition advantage. Therefore, one of the greatest advantages of addressing the issue of protection of TCEs in relation to projects using TCEs for development purposes is that international development organisations, fair trade organisations and others that finance similar projects become aware and start to consider TCE as an important part of the development agenda and fair trade movement as such.

# Preface

“Indigenous artists no longer paint codices and murals,  
But their weavings gathered up the countryside.  
They draped themselves with it. Clothing themselves in sunsets,  
Birds flowers, hillsides and butterflies.”

*Luis Cardoza y Aragón*

Before I left for Guatemala, my plan was to scrutinise the protection of traditional designs in a broader copyrights perspective. I had a clear idea of which questions to ask and what the likely responses would be. However, now looking back I realise that during the process of writing this thesis I have dealt with several practical and theoretical obstacles and I have had reasons to rethink my project and change my initial plan on more than one occasion. For the most part, people I interviewed were not familiar with the copyright concept and found the whole idea of exclusive ownership of traditional designs strange. I got unexpected answers and had no idea how to use them in a legal context. Initially, it was frustrating when my questions lead to unstructured discussion about various non-related matters. However, I came to realise that it often was the detour discussions that provided me with the most useful information, especially concerning the context in which my study should be understood.

I want to thank SIDA and the Raoul Wallenberg Institute for providing me with the opportunity to conduct a minor field study in Guatemala. The entire process has been an amazing and unforgettable learning experience. I have an abundance of people to thank for taken an interest in my project; First of all my supervisors Gao Hang and Silvia Lucia Santizo for valuable advice and encouragement and without whom this project and thesis never would have become a reality. Moreover, I owe endless gratitude to each and everyone who patiently participated in my interviews for sharing their stories and thoughts with me.

Finally, I would like to thank my family for all their love and never failing support.



# Abbreviations

ATSIC	National Aboriginal and Torres Strait Islander Cultural Industry Strategy
BC	Berne Convention
CEH	Commission for historical clarification
DPs	Draft Provisions
EoF	Expressions of Folklore
FPIC	Free, prior and informed consent
PIC	Prior and informed consent
IFAT	The International Fair Trade Association
IGC	The Intergovernmental Committee
ILO	International Labour Organization
IP	Intellectual Property
NGO	Non Governmental Organization
NIAAA	National Indigenous Arts Advocacy Association
NIR	Nordic Intellectual Property Review
SIDA	Swedish International Development Co-operation Agency
TCEs	Traditional Cultural Expressions
UNESCO	United Nations Educational, Scientific and Cultural Organization
WIPO	World Intellectual Property Organization
Xela	Quetzaltenango

# 1 Introduction

## 1.1 General

Guatemala's textile heritage has evolved over more than two millennia.<sup>3</sup> According to tradition, every village has their own sets of motifs.<sup>4</sup> However, Mayan weavings are diverse and constantly changing even within a single community.<sup>5</sup> The designs and colours differ in relation to various factors such as age, social position, custom, occupation, the occasion and personal and /or family preferences.<sup>6</sup>

The income from the textile production is a vast part of the economy in Guatemala.<sup>7</sup> Traditionally, Mayan women have wove garments for family use and for the community needs. Very few women wove commercially and sold the garments for a living.<sup>8</sup> Today, hand woven textiles play a dual role in community life. Besides serving as a local costume, they also represent a significant source of cash income.<sup>9</sup> Thus, for the indigenous villages, often suffering from poverty, the textile production and commerce to tourists is vital for the livelihood of the families.<sup>10</sup>

During the second half of 20<sup>th</sup> century, the textile production in Guatemala received international attention. Volunteers from various countries became important in the process of commercialising the textile products on the domestic but foremost on the global market. In order to enable development for the indigenous people, who had endured discrimination and hardship for several centuries and additionally were subject to the mass killings during the 36-year armed conflict, the international volunteers helped the communities by starting textile cooperatives and made use of and created

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<sup>3</sup> Barbara Knoke de Arathoon, Nancie L González, John M. Willemsen Devlin, *Mayan Clothing and weaving through the ages*, Guatemala 1999, p 119.

<sup>4</sup> Elisabet Ehrnst\_Bäckstrand, Ragnhild Johansson, *Maya-textiler från Guatemala*, Kumla 1990 p 11 and 13.

<sup>5</sup> Edward F Fisher and R. McKenna Brown, *Maya Cultural Activism in Guatemala*, University of Texas Press 1996, p 148.

<sup>6</sup> Ibid.

<sup>7</sup> Salka Hallström, U-design, Stockholm 2006, p 15.

<sup>8</sup> Rosario Miralbés de Polanco, Eugenia Sáenz de Tejada, Idalma Mejía de Rodas, *Zunil Costume and Economy* -revised edition, Guatemala 1996, p 133. See also Barbara Knoke de Arathoon, Nancie L González, John M. Willemsen Devlin, *Mayan Clothing and weaving through the ages*, p 7. Women has historically been recognised as the producers of woven cloth, thus the strong link between weaving and female social and gender identity is clear.

<sup>9</sup> Barbara Knoke de Arathoon, Nancie L González, John M. Willemsen Devlin, *Mayan Clothing and weaving through the ages*, p 199.

<sup>10</sup> Rosario Miralbés de Polanco, Eugenia Sáenz de Tejada, Idalma Mejía de Rodas, *Zunil Costume and Economy* -revised edition p 55. See also Barbara Knoke de Arathoon, Nancie L González, John M. Willemsen Devlin, *Mayan Clothing and weaving through the ages* p 161.

new contacts on the international market. The volunteers also contributed in the process of developing new products using the traditional designs in different colour schemes in order to suit western tourists and consumers on the global market. Today, foreign impact still plays a vast role in the commercialisation of textile products as well as the use, adaptation and re-contextualisation of traditional designs in different ways.<sup>11</sup>

Some, but far from all countries have national legislation protecting traditional design as a TCE.<sup>12</sup> In general, traditional design is difficult to protect through domestic copyright regimes. One reason is the lack of information concerning the identity of the initial designer as well as the time of which a specific design was created. Hence, traditional design has been considered as a part of the public domain and subject to free use by anyone.<sup>13</sup>

In the Guatemalan official legal system,<sup>14</sup> there are several international obligations as well as national legislation, which touches on the protection of cultural heritage.<sup>15</sup> There are even provisions dealing with the issue of

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<sup>11</sup> Karin E Tice, *Kuna crafts, gender and the global economy*, University of Texas press, 1995 p 103. Compare with the mola commercialisation on the autonomous islands of San Blas, Panama.

<sup>12</sup> WIPO/GRTKF/IC/3/10 pp 35. See also Erica Irene Daes, *Intellectual property and Indigenous peoples*, American society of International law, Washington 2001 p 4 referring to Paul Kuruk, *Protecting Folklore under modern Intellectual Property Regimes: A Reappraisal of the tension between individual and communal rights in Africa and the US*, 48 AM. U.L Rev 769 (1999). See also Henry Olsson, *Det internationella skyddet för folklore*, NIR Stockholm 1997, p 240 The countries that have a national legislation protecting folklore are all developing countries. Practical no industrialised countries have such rules.

<sup>13</sup> WIPO/GRTKF/IC/10/4 p 40. The requirements set forth in the Berne Convention, as well as in national Copyrights Acts, regarding originality, determination of the copyright owner and term of protection, can due to the nature of a traditional design not always be applied. Previous WIPO documents like WIPO/GRTKF/IC/5/3 have pointed out that a clearer understanding of the role and boundaries of the public domain is vital in the development of an appropriate policy framework for an IP protection of TCEs. Committee participants have stated that public domain was not a concept recognised by indigenous peoples and /or as an expression of folklore *strict sensu* never had been subject to IP protection they could not be said to have entered into the public domain.

<sup>14</sup> Interview with Aparicio Zunum Cux, law student and intern at the Defensoria Maya Huehuetenango, Xela 2/7 2006. In some parts in the country there are three parallel legal systems, namely the *Mayan customary legal system* (derecho maya), which is used to solve conflicts in all of the 22 different Mayan groups, the *indigenous legal system* (derecho indigena), which is used in solving legal matters between the four groups Xinxa, Maya, Garifuna and Ladino, and finally the *national legal system* that is officially recognised.

<sup>15</sup> Article 66 in the Guatemalan Constitution (Constitucion politica de la republica de Guatemala) stipulates that there is a diversity of ethnic groups in Guatemala and that the state recognises and respects the customs, traditions, the traditional cloths, languages and dialects in the indigenous communities. Guatemala has ratified the ILO Convention No 169 and Agreement on Identity and Rights of Indigenous Peoples. Also the Peace Accords from 1996 contains articles about the identity and rights of the indigenous communities. However, the Agreement on Identity and Rights of Indigenous Peoples has the lowest rate of compliance and few legal or political measures have been taken to implement ILO Convention No. 169. Thus, discrimination and racism has impeded recognition and enjoyment of identity and collective rights of indigenous people. See E/CN.4/2006/10

reproductions of Mayan textiles as well as registration possibilities of Mayan designs and motifs.<sup>16</sup> However, according to the critics the issue is not that the Guatemalan laws are insufficient but the weak *de facto* implementation and enforcement of the same.<sup>17</sup>

The need for a general international legal protection of expressions of folklore (EoF) or traditional cultural expression (TCE) from an IP point of view was first recognised in the late 1960s. However, there has been a revival of the matter and in the last decade a number of policy issues have been raised on the international arena related to the protection, promotion and preservation of the elements of cultural heritage.<sup>18</sup>

The international negotiations of a legal protection of TCEs have not always been running smoothly and the problem remains, i. e. that TCEs are being commercialised by others than the community from which they derive. As a result, the community in question can suffer economically and culturally.<sup>19</sup>

Today, the World Intellectual Property Organisation (WIPO) are discussing the so-called draft provisions (DPs), which are suggested to serve as a *sui generis* protection for TCEs.<sup>20</sup>

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/Add.1 Feb 2006. *Report of the High Commissioner for Human Rights on the situation of Human Rights in Guatemala*, p 13. According to article 14 of the Guatemalan Copyrights Act, expressions of folklore is a part of the cultural patrimony and is subject to a specific legislation. See *Ley para la Protección del Patrimonio Cultural de la Nación*, which includes rules on protection and conservation of national cultural heritage.

<sup>16</sup> WIPO/GRTKF/IC/10/INF/3 p 10 refers to article 5 in Acuerdo Gubernativo 778-2003 and Acuerdo 379-2005 del Ministerio de Cultura y Deportes, which includes provisions on control and established tariffs concerning reproductions of Mayan textiles, designs and motifs. The provisions especially refer to the moral rights and the intellectual property rights of the communities. WIPO/GRTKF/IC/11/4 (b) Annex p 3 and WIPO/GRTKF/IC/10/INF/3 p 10 refers to article 7 in El Decreto 426 Ley de Protección de la Producción Textil Indígena. It is also possible to register designs and motifs used in the weavings of a specific community free of charge in a special register administrated by the National Indigenous Institute (el Instituto Indigenista Nacional). By registration the community would acquire a exclusive right to use the design. See also WIPO/GRTKF/IC/3/10 p 44.

<sup>17</sup> Interview with Jorge Mario Privaral Ortiz, executive director for Guatemalan project on global initiatives for sustainable development, Xela 1/6 2006. See also E/CN.4/2006/10/Add.1 Feb 2006. *Report of the High Commissioner for Human Rights on the situation of Human Rights in Guatemala*, p 11. In general Guatemala has established a comprehensive framework guaranteeing economic, social and cultural rights, but the legislation is not adequately implemented. See also interview with Aparicio Zunum Cux, law student and intern at the Defensoria Maya Huehuetenango, Xela 2/7 2006 and interview with Julio España, Law student at the University Rafael Landivar, Xela 20/6 2006. One problem is the widespread illiteracy within the indigenous communities as well as inadequate information about the legal process. Another problem is that the legal system is centralised and in order to register a design or take part in a proceeding the individual in question has to get to the capital to participate.

<sup>18</sup> Dr. Silke von Lewinski, *The Protection of Folklore*, Nordic Intellectual Property Rights Law Review, Stockholm 2004. p 215.

<sup>19</sup> WIPO/GRTKF/IC/3/10 p 13

<sup>20</sup> WIPO/GRTKF/IC/10/4 p 9.

## 1.2 The objective

During the WIPO sessions, different examples of commercial exploitation of TCEs have been presented based on national experiences, some of which even have been subject to national court proceedings.<sup>21</sup> For instance, the Australian Federal Court has assessed the issue in relation to national copyrights law in various cases.<sup>22</sup> In the case *M\* v Indofurn* the court came to the conclusion that the reproduction of aboriginal art on imported carpets from Vietnam constituted a infringement of the aboriginal artists' copyright.<sup>23</sup> In the case *Yumbulul v Reserve Bank of Australia Ltd*

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<sup>21</sup> Wend Wendland, Safeguarding Cultural Heritage, Protecting Intellectual Property and Respecting the Rights and Interests of Indigenous Communities: *What role for Museums, Archives and Libraries?*, Paper presented for the conference "Can Oral History Make Objects Speak?" Nafplion, Greece. October 18-21 2005. Like indigenous art copied onto T-shirts and carpets, hand woven carpets copied and sold as authentic, indigenous words and names trademarked and used commercially and lack of indigenous control over research, documentation and presentation of indigenous cultures. See also WIPO/GRTKF/IC/5/3, Annex p 30. In order to be associated with the Olympics in Sydney 2000 the Olympic museum in Lausanne without consent published and encouraged downloading of three post cards illustrating aboriginal paintings. After negotiations the pictures were removed and the artists received a written apology, which later was published on the webpage of the museum. See also Terri Janke, *Case studies on intellectual property and Traditional cultural expressions*, p 9, 11-14 and pp 20.

<sup>22</sup> Australian courts have assessed the issues e.g. in the cases *Bulun Bulun v Nejlam Pty Ltd* (1989), *Bulun Bulun v R & T Textiles Pty Ltd* (1998), *M\* v Indofurn and Others and Terry Yumbulul v Reserve Bank of Australia*. See also Terri Janke, *Case studies on intellectual property and Traditional cultural expressions*, p 51- 60 and *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 41 IPR 513 at 530- 531. In the *Bulun Bulun* case, where the work of the aboriginal artist Mr Bulun Bulun was altered and copied onto fabric by R & T Textiles, the court found that the Ganalbingu community as such did not have copyright title of communal character to Mr Bulun Bulun's work based on a claim of "joint ownership" even if the elders consent was a precondition for Mr Bulun Bulun to create the work in the first place. However, the court found a fiduciary relationship between the artist Mr Bulun Bulun and the clan. The fiduciary relationship consisted of an obligation not to exploit the artistic work in a way contrary to the laws and customs of the Ganalbingu people and secondly, in event of infringement by a third party, the obligation to take reasonable and appropriate action to restrain and remedy the infringement of the copyright in the artistic work. The right of the Ganalbingu clan is a right to bring an action against the fiduciary to enforce the obligation. *Yumbulul v Reserve Bank of Australia Ltd* (1991) 21 IPR at 490.

<sup>23</sup> *M\* v Indofurn* is a landmark decision, representing a significant development towards an accommodation and greater protection under Australian copyrights laws for indigenous art and cultural expression. The reproductions were discovered by the National Indigenous Arts Advocacy Association (NIAAA) when they were contacted by a salesperson from a Sydney carpet store interested in knowing whether the "Aboriginal carpets" for sale in the store were authentic. During the court proceeding one of the three indigenous artists Banduk Marika explained that she intended for her work to be displayed in a reputable art gallery and not for it to be commercially exploited. The image in question in was central for the cultural heritage of her people, the Rirratjingu clan. The reproduction of the work on carpets had caused the artist great distress because it desecrated the mythology of the Djankwau creation story the work illustrated. She dreaded that her community as a result would decided not to entrust her with important clan images, which would threaten her artistic and economic livelihood as well as her possibilities to participate in the clan's social

concerning the reproduction of the artist Terry Yumbulul's Morning Star Pole on the Bicentennial A \$ 10 note, the federal court argued that Australia's copyright law did not provide adequate recognition of Aboriginal community claims to regulate the reproduction and the use of works which are essentially communal in origin.<sup>24</sup>

The examples given during the WIPO sessions have foremost consisted of various TCEs being exploited by a third party for commercial purposes. The Australian case law also illustrates situations where indigenous artists' claims that a third party infringed their copyright by using their work containing elements of TCE.

In Guatemala, indigenous weavers are rarely perceived as individual artists.<sup>25</sup> Some of the producer cooperatives and international initiated projects using the traditional designs have commercial intentions as well as a desire to promote development and reduce poverty, expressed in different ways.<sup>26</sup>

The purpose of this thesis is therefore to scrutinise if the previous and current foreign impact in the commercialisation of traditional design, and the uses of the same can be considered as a misuse of TCEs in a *lege de ferenda* context according to the DPs, even if the intention is to promote development in the indigenous communities. In relation to this question, following issues needs to be addressed. Firstly, how has the traditional designs, previously being used as a decorating symbolic element on traditional clothing made primarily for the local community today used on contemporary products, been affected by the colonisation and the over 30 year war as well as the following international assistance efforts from NGO:s and aid organisations and can the Mayan designs commercialised today be characterised as such traditional designs covered by the DPs?.

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and cultural life. Under customary Aboriginal law the right to create artworks depicting creation, dreaming stories and to use pre-existing designs of the clan resides with the traditional owners and as custodians of the images they give explicit permission to use traditional designs for artistic purposes. The federal court addressed whether or not the work incorporating pre-existing traditional designs and images was original enough to meet the criteria for protection put forth in the Australian Copyrights Act. The judge was of the opinion that even if the artworks follow traditional Aboriginal form and are based on dreaming themes, each art work was of intricate detail and complexity reflecting great skill and originality. The court also addressed the communal aspect of the work and the Perth based company, Indofurn, was obliged to pay damages, not only due to the artists' personal hurt but also due to cultural harm. The fact that the artists' standing within the community could have been affected given the nature of the reproduction and the lack of formal permission was also considered.

<sup>24</sup> *Yumbulul v Reserve Bank of Australia Ltd* (1991) 21 IPR at 490

<sup>25</sup> Moreover, there is a lack of artistic education opportunities, see interview with Maria Del Carmen Barrios, writer, Xela 28/6 2006. In contrast to Australia, Guatemala has not experienced a development and upgrading of indigenous art.

<sup>26</sup> Summary of Amnesty Business Rating 2007

[http://www.amnestybusinessgroup.se/Filer/Seminariereferat1feb\\_10332.pdf](http://www.amnestybusinessgroup.se/Filer/Seminariereferat1feb_10332.pdf). Recently, consideration of human right in a business context has developed from being a "soft issue" to becoming a trademark issue and a competition advantage.

Secondly, what does the foreign impact in the commercialisation entail and what are the attitudes regarding exclusive ownership of traditional designs amongst the foreign designers, the people working for the weaving cooperatives and weavers working independently?

Thirdly, does the scope of protection in DPs address the issue of use of TCEs in a commercial context with a specific agenda to promote development? would addressing such an issue likely make any difference to the *de facto* protection of traditional designs for the indigenous communities in Guatemala?

Finally, would addressing such an issue likely make any difference to the *de facto* protection of traditional designs for the indigenous communities in Guatemala?

### 1.3 Delimitations

This thesis is based on the findings from a minor field study conducted in Guatemala during the summer 2006. I have chosen to focus on traditional design partly because of the rich weaving tradition and variety of designs in the country.<sup>27</sup> Handicrafts as such has also had a special position amongst the TCEs in the efforts to draft a *sui generis* legal protection for TCEs.<sup>28</sup> Since the traditional designs have a substantial commercial value internationally as well as on the domestic market in Guatemala and at the same time have a cultural and spiritual value to the Mayan community, it can be argued that traditional designs in particular need legal protection.<sup>29</sup>

The different producer cooperatives scrutinised for the purpose of this thesis have been divided in two categories, namely weaving cooperatives and

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<sup>27</sup> Barbara Knoke de Arathoon, Nancie L González, John M. Willemsen Devlin, *Mayan Clothing and weaving through the ages*, Guatemala 1999, p 151. In Guatemala there are 21 Mayan groups as well as the Xinka, Garifuna and Ladino group. Each Mayan group has, aside from its language, traditions and customs, a great variety of regional dress with unique characteristics.

<sup>28</sup> WO/GA/26/6 p 7, WIPO/GRTKF/IC/1/3, WIPO/GRTKF/IC/5/3, Annex p 30. See also Isabella Alexander, *White law, black art*, International Journal of Cultural Property, Vol 10, No 2, 2001p 189. In 1997, National Aboriginal and Torres Strait Islander Cultural Industry Strategy (ATSIC) estimated the indigenous arts and crafts market to be worth almost \$ 200 million per year. Traditional crafts have also been produced on a large scale and subsequently sold on the lucrative market for souvenirs in other parts of the world, ie. carpets from Egypt and Iran, saris from south Asia, textiles from Peru and traditional Appalachi blankets produced and imported to the USA and sold to a lower price than the original blankets. In general, the indigenous peoples perceive such counterfeiting and reproduction as an economic disadvantage as well as a threat to the sustainability of their designs and textile tradition. Therefore, the indigenous peoples have during the WIPO sessions expressed a concern and need to protect handmade textiles and clothes against reproduction and commercialisation.

<sup>29</sup> Patricia B. Altman and Caroline D. West, *Threads of identity: Maya costumes of the 1960s in highland Guatemala*, Regents of the University of California, p 26.

internationally initiated projects. Even though the majority of textile producers are indigenous women that earn a living by producing and selling textile products without being part or going through a producer cooperative, this thesis will mainly deal with the textile production and use of traditional designs within a weaving cooperative or internationally initiated project context.<sup>30</sup>

In order to scrutinise the scope of misuse in relation to the utilization of TCEs this thesis will deal with the protection of traditional design mainly from a TCE protection perspective and focus primarily on the work of WIPO.<sup>31</sup>

Finally, it is not possible from the small scale study conducted to come up with any general solutions regarding the scope of TCE protection. My aspiration is merely to shed light on the specific situation in Guatemala, and hopefully experiences from this study can contribute to the general discussion in the field.

## 1.4 Method

Even though a lot of literature has been written on the traditional Mayan dress, to my knowledge the issue of commercialisation of contemporary products with traditional designs distributed to tourists and the global market has yet not received a lot of attention. Furthermore, for obvious reasons, there is not an abundance of literature written from a legal point of view when it comes to the actual scope of protection of TCE. Thus, for the most part I have used literature written from an anthropologist perspective

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<sup>30</sup> Interview with Carlos Porres, Argente general Artexco, Xela, 18/7 2006. See also interview with Maria from Nahualá, Xela 30/6 2006, Nicolasa from San Antonio Palopó, Panajachel 16/6 2006 and Catarina Cuc tzep, Nahualá, Xela 4/7-2006. Some of the indigenous work alone, with family members or with friends and then sell the products to the tourists on the streets or at the markets. Various reasons were given for not belonging to a cooperative like no vacancies in nearby cooperatives (see interview with weaver and vendor Maria from Totonicapán, Panajachel 17/6 2006), and fear of products being copied by other women in the cooperative, which would lead to the weaver in question selling less of her own things (see interview with weaver and vendor Maria from Nahualá, Xela 30/6 2006). A third reason stated were potential problems and disagreements amongst members of a cooperative. Working independently means not having to depend on other people in the cooperative to work as hard (see interview with Telma and Luis from Momostenango, Xela 29/6 2006). However, there are several advantages for the weavers to belong to a producer cooperative. For instance, the women are able to continue to weave at home while having a place to sell the products. Moreover, the cooperative is a forum where knowledge is shared as well as a platform from which the production is coordinated concerning quality thread and colours. Thus, the weavers can get started right away without saving money in advance to buy the raw materials. See interview with Pascuala Aju Tambriz, ex-president of TRAMA, weaver and group representative, Xela 4/7 2006.

<sup>31</sup> However, in a broader sense TCE protection is not the only form of protection for traditional designs. Provisions on protection, preservation and safeguarding of cultural heritage are to be found in various human rights documents, e.g. UNESCO's convention on safeguarding intangible heritage, Convention ILO 169, Convention on economic, cultural and social rights.



on weaving in Guatemala as well as the legal documents from the WIPO sessions.

In order to meet the objectives, I have employed a traditional legal dogmatic method when dealing with the legal sources. Moreover, I have made an effort to apply the legal criteria to the factual situation regarding the use of traditional designs in different producer cooperatives in the city of Quetzaltenango (Xela) and its surroundings. Data from the minor field study was collected through qualitative interviews with women and men involved in the process of weaving and commercialising the products with traditional designs, representatives from producer cooperatives, anthropologists, traditional Mayan leaders, lawyers, political representatives as well as a representative from UNESCO. However, the majority of the interviews were conducted in Xela.<sup>32</sup>

## 1.5 Terminology

For the purpose of comprehension, some of the terms frequently used in this thesis need further clarification. *Traditional cultural expressions* (TCE) and *expressions of folklore* (EoF) are interchangeable and are both concepts used in the international debate and legislation. In this thesis, the term TCE will be used for the most part due to the reservations some communities have expressed in the international debate about negative connotations of the word “folklore”.<sup>33</sup>

Article 1 of the DPs contains a comprehensive definition of TCE.<sup>34</sup> However, the general characteristics of TCEs are the following; TCEs are handed down from one generation to another, either orally or by imitation, and they reflect the community’s cultural and social identity. They consist of characteristic elements of a community’s heritage and are made by “authors unknown” and/or by communities and/or by individuals communally recognised as having the permission, right or responsibility to do so. TCEs are usually not created for commercial purposes, but as vehicles for cultural and religious expressions and are constantly evolving, developing and being recreated within the community.<sup>35</sup>

According to the TCE definition in the DPs a *traditional design* must represent a linkage with a community’s social identity and cultural heritage. It has generally been considered by experts that an expression, which has been maintained and passed between three or perhaps even two generations

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<sup>32</sup> However, some of the interviews were conducted in Guatemala City, San Jose- Costa Rica and the islands of San Blas- Panama.

<sup>33</sup> Intellectual Property and Traditional Cultural Expressions/Folklore, Booklet nr 1, WIPO Publications No 913 (E) p 2.

<sup>34</sup> See Supplement A.

<sup>35</sup> Intellectual Property and Traditional Cultural Expressions/Folklore, Booklet nr 1, WIPO Publications No 913 (E) p 5. See also DPs article 1.

form part of “heritage”. According to this definition designs transferred from the traditional Mayan dress to contemporary products are representing a cultural heritage and therefore considered as traditional designs. Moreover, a design, which does not derive from the traditional clothes can still be characterised as a traditional design if there is a linkage to a specific community’s cultural and social identity for more than two generations.<sup>36</sup>

During WIPO’s work a distinction was made between *traditional culture* (or folklore *strict sensu*), which can be described as pre-existing, underlying cultural heritage, and *contemporary artistic productions*, deriving from pre-existing cultural heritage and created by current generations. The latter category usually meets the traditional copyrights requirements and therefore in general protected by existing laws for which they are sufficiently new and original.<sup>37</sup>

In the beginning of the WIPO negotiations, the general connection between Human Rights and Intellectual property rights law, stipulated in various International Human Right conventions, was recognised.<sup>38</sup> Several international legal instruments address different aspects of TCE and therefore within a holistic policy context the term *protection* could be defined in different complementary ways.<sup>39</sup>

The term protection may include safeguarding against loss of TCEs through e.g. documenting, archiving, recording and capacity building to support TCEs, TCE holders and the social structures that sustain and express them. Protection can also entail the acknowledgement of the broader range of individual and collective rights that are linked to TCEs and their legal and cultural environment. Finally, protection can focus on the utilisation and be defined as protecting TCE against illegitimate use or misappropriation by

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<sup>36</sup> Draft provisions formulated by the IGC, April 24-28, 2006 pp 12.

<sup>37</sup> WIPO/GRTKF/IC/5/3 pp 4. Some participants argued that existing IP rights were sufficient to protect TCEs, while other participants called for the establishment of legal protection for pre-existing TCEs, which are presently in the public domain.

<sup>38</sup> See article 27.2 Universal declaration of Human Rights. See also General Comments No 17 to article 15 International Covenant on Economic, Social and Cultural Rights. An author’s right to protection of the moral and material interests resulting from any literary, scientific or artistic production is a human right, which derives from the inherent dignity and worth of all persons. This right safeguards the personal link between authors and their creations and between peoples, communities or other groups and their collective cultural heritage, as well as their basic material interest. In contrast to human rights, intellectual property rights are generally of a temporary nature and can be revoked, licensed or assigned to someone else while human rights are timeless expressions of fundamental entitlements of the human person.

<sup>39</sup> See article 27.2 Universal declaration of Human Rights, article 15.1 International Covenant on Economic, Social and Cultural Rights and article 29 Declaration on the Rights of Indigenous Peoples WIPO/GRTKF/IC/10/4 p 5 and WIPO/GRTKF/IC/5/3 p 3. See also the UNESCO convention on safeguarding of intangible cultural heritage (2003) and UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions (2005).

third parties, including commercial misappropriation and misuse that is derogatory or offensive.<sup>40</sup>

The DPs most directly concern is the protection against misappropriation and illicit uses that IP protection usually addresses, taken into account the particular nature and characteristics of traditional creativity and cultural expression, including its communal quality.<sup>41</sup> The DPs however intends to complement and work together with laws and measures for the safeguarding and preservation of cultural heritage.<sup>42</sup>

Hence, a legal protection in relation to traditional design in Guatemala as it should be understood in this thesis aims at the economic rights eg. the communal and individual legal ground to prevent or authorise utilisation of the traditional design, as well as the moral rights in accordance with the requirements set out in the DPs.<sup>43</sup>

## 1.6 Outline

Initially, the historical development of the traditional designs will be touch upon briefly as well as the impact on traditional designs deriving from the phases of colonisation, industrialisation and the armed conflict in Guatemala. Secondly, the foreign influences in the producer cooperatives and in the commercialisation of the traditional designs will be scrutinised. Thirdly, the development of a substantial international legal framework and the current provisions in the DPs for protection of TCEs will be presented.

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<sup>40</sup> WIPO/GRTKF/IC/10/4 p 5. See also WIPO/GRTKF/IC/5/3 Annex p 6. Traditionally, IP protection has been distinguished from “preservation” and “safeguarding”. IP protection is characterised by an exclusive right for the IP holder to prevent or authorise certain uses of the protected product, while the latter category in contrast usually refers to the identification, transmission, revitalisation and promotion of cultural heritage in order to ensure the maintenance or viability.

<sup>41</sup> WIPO/GRTKF/IC/5/3 p 3 and WIPO/GRTKF/IC/10/4 pp 5 In this sense “protection” , distinguishable from “safeguarding” or “preservation” of cultural expressions and heritage, but complements them with the broader policy and legal environment.

<sup>42</sup> WIPO/GRTKF/IC/10/4 pp 5. See guiding principles like *the principle of respect for rights of and obligations towards indigenous peoples or other traditional communities*, which suggests that TCE protection should respect international human rights and not prejudice further elaboration of such rights or obligations. See also *the principle of respect for and consistency with international and regional agreements and instruments*, that expresses that the protection for TCE should not infringe human rights guaranteed by international law or to limit the scope of the existing human rights protection.

<sup>43</sup> However, another way of defining protection could be promotion of the design outside the community in order for people to learn about the origin of the design and gain a greater understanding and respect for the culture of the community in question. Depending on the expectations of the TCE holder measures for preservation and safeguarding or intellectual property rights protection can meet those expectations in the most appropriate way. See *Intellectual Property and Traditional Cultural Expressions/Folklore*, Booklet nr 1, WIPO Publications No 913 (E) p 11.

Finally, the concluding chapter will contain an analysis and discussion concerning the scope of protection of TCEs and if a use of traditional design with a development agenda should be explicitly touched upon in the DPs.

# 2 The development of the traditional designs in Guatemala – a historical background

## 2.1 Pre-hispanic times and colonisation

The Mayan people of Guatemala and the surrounding regions had one of the most advanced civilisations of the ancient world. Their cities flourished with remarkable temples, pyramids and libraries and their scholars produced works of literature, philosophy and art. However, due to the invasion by the Spanish Conquistadores in early 1500s, the world of the Mayans, as it was known, came to an end.<sup>44</sup>

In 1523, the Spanish leader Pedro de Alvarado was ordered into Guatemala to convert the Mayan tribes to Christianity. He swiftly by force defeated one tribe after another.<sup>45</sup> Christianity and colonisation affected the structure of the indigenous population. Scattered tribes were relocated into new Spanish-style towns with a church in the centre. The new structure removed the last traces of the old tribal fractions, allowed better control and was favourable for various indoctrination activities.<sup>46</sup> The Mayans became slaves and were deprived of their lands, rights, religion and culture.<sup>47</sup> Yet, despite several centuries of aggression and hardship, Guatemala still possesses one of few living craft traditions, which has survived centuries of change.<sup>48</sup>

One of the great mysteries in the history of Maya dress is the origin of distinct clothing in each community.<sup>49</sup> Some studies suggest that the

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<sup>44</sup> <http://www.globalexchange.org/countries/americas/guatemala/history.html>

<sup>45</sup> Regis Bertrand and Danielle Magne, *The Textiles of Guatemala*, London 1991, pp 15.

After the bloody massacre of the main body of the Quiché warriors, Alvarado's troops defeated the Tzutujiles, Pipiles, Mames, Zaculeu and Pokomans. After repeated attempts Alvarado managed to subdue the Rabinal and Kekchi Indians. However, after preaching activities 1540-1543 the Spanish conquistadors managed to convert the tribes to Christianity and Spanish Rule without any bloodshed.

<sup>46</sup> Regis Bertrand and Danielle Magne, *The Textiles of Guatemala* p 18.

<sup>47</sup> <http://www.globalexchange.org/countries/americas/guatemala/history.html>

<sup>48</sup> Regis Bertrand and Danielle Magne, *The Textiles of Guatemala* p 30 The community differentiation in Mayan clothing was illustrated by the different decorative motifs, styles and colour schemes. Even if aspects of it have sometimes been lost, its core remains strongly expressed in the crafts. See also Patricia B. Altman and Caroline D. West, *Threads of Identity, Mayan Costume of the 1960s in Highland Guatemala*, Los Angeles 1992, p 21.

<sup>49</sup> Barbara Knocke de Arathoon and Rosario Miralbés de Polanco *Guide to the Ixchel Museum of indigenous dress*, Foundation for the Development of the Ixchel Museum,

Spaniards imposed a policy of standardizing the Mayan population's clothing for religious conversion purposes and as a tool to exercise control over the communities.<sup>50</sup>

Still there are different views debated amongst scholars regarding the impact of colonisation in relation to the specific designs on the traditional dress.

Some say that initially the traditional Mayan blouse (*huipil*) scarcely had any decorations at all and that merely a limited range of colours existed produced by the available natural dyes. According to this theory, the Spaniards introduced an Arabic influenced new repertoire of symbols and decorative motifs which the Mayan weavers imitated, like the double headed eagle, the tree of life, horses, lions, dogs, cats, rabbits, turkeys, doves, hens and chickens.<sup>51</sup> Others say that such a view is ethnocentric, unfounded and it portrays the Mayan people as culturally incapable of independent creation and therefore adopting Spanish weaving technology, motifs and styles. The opponents hold that caution should be taken when defining a particular motif as coming from a Spanish or non- Mayan source. Even if the Mayan people did borrow a design like the bicephalous bird, found in a large number of Mayan textiles, there is no evidence that the symbolism of this motif is indeed Spanish and it is likely that the motif was adopted because it already fitted in the system of Maya metaphors.<sup>52</sup> Currently, the bicephalous bird acts as a symbol of Mayan ancestors and at the same time as a symbol of cultural and physical survival after the contact with the Spaniards. Thus, it is the incorporation of new symbols into the Mayan system, that permits textiles to serve as a dynamic expression of Mayan experience.<sup>53</sup>

The climate in Guatemala is unfavourable to textile conservation and therefore the physical evidence of the development of the traditional design is scarce.<sup>54</sup> However, it is clear that the backstrap loom, used to make the

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Guatemala 2006 p 33. However, there is no solid evidence proving that it in fact were the conquistadores who created the distinct community differences in clothing.

See also Barbara Knoke de Arathoon, Nancie L González, John M. Willemsen Devlin, *Mayan Clothing and weaving through the ages*, p 70 referring to Martínez Peláez, Servero, *La Patria del Criollo*. Costa Rica: EDUCA, 1973. At the latter part of the Colonial period, the indigenous people still had not adopted the vast variety of traditional designs in the costumes seen today.

<sup>50</sup> Edward F Fisher and R. McKenna Brown, *Maya Cultural Activism in Guatemala*, p 142.

<sup>51</sup> Barbara Knoke de Arathoon and Rosario Miralbés de Polanco *Guide to the Ixchel Museum of indigenous dress*, p 33. See also Regis Bertrand and Danielle Magne, *The textiles of Guatemala*, Great Britain 1991, p 30. See also Edward F Fisher and R. McKenna Brown, *Maya Cultural Activism in Guatemala* p 143.

<sup>52</sup> Edward F Fisher and R. McKenna Brown, *Maya Cultural Activism in Guatemala* pp 143. The bicephalous bird motif is found in pre-columbian art throughout the Americas and was a common motif in the Hittite Empire art.

<sup>53</sup> *Ibid.*, The critics say that the Ladino interpretation of the Mayan dress as a colonial creation, have in recent times been put forward in order to discourage the Mayan population from weaving and wearing the Mayan dress.

<sup>54</sup> Barbara Knoke de Arathoon and Rosario Miralbés de Polanco, *Guide to the Ixchel Museum of indigenous dress*, pp 28 Essentially the physical evidence is made up of a limited number of garments and small textile fragments found in funerary contexts.

elaborate textiles, is of pre-Colombian origin.<sup>55</sup> Additionally, Spanish narratives from the colonial period reported that Mayan textiles existed before their arrival. Further evidence for the creativity, complexity and indigenous origin of Maya textiles is to be found in pre-Colombian texts, the holy book of the Quiché people *Popol Wuj* and fragments of pre-Colombian textiles found in archaeological sites.<sup>56</sup>

## 2.2 Industrialisation

The colonial rule gave rise to dissatisfaction not only among the different tribes but also among the growing numbers of creols and people of mixed blood known as mestizos (or ladinos). A liberal constitution was imposed on Spain after Napoleon's invasion. Years of political struggle between the liberals and the conservatives followed which culminated in a war and Guatemala becoming an independent state in 1847.

After the independence, the situation for the indigenous people remained difficult. The coffee boom in the country led to big plantations being developed by German immigrants. The foreign interventions, the government's policy of confiscating land to expand the coffee production and the following uprisings resulted in indigenous communities losing their pieces of land and were forced to take refuge on higher less fertile ground.<sup>57</sup>

Photographs dated back to late 19<sup>th</sup> century/ early 20<sup>th</sup> century illustrates a diversity of clothing in the different highland communities in ceremonial and everyday garments. The *huipils* were particularly varied in the design.

Industrially spun thread was introduced during the mid 19<sup>th</sup> century. Hence, many indigenous communities started to substitute hand-spun white cotton thread with industrially-spun thread either imported or produced by the

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However, there are other sources like murals, painted ceramic vessels and figurines can provide information about the variety of Mayan weaving.

<sup>55</sup> Barbara Knoke de Arathoon, Nancie L González, John M. Willemsen Devlin, *Mayan Clothing and weaving through the ages*, p 82. Women weaving on backstrap looms are illustrated in some of the Aztec codices. See also Barbara Knoke de Arathoon, *Símbolos que se siembran*, Guatemala 2005 p 4 The European influence and the religious conversion were two factors that had an impact on the symbolism in the Mayan culture reflected in the designs. However, there are designs still used today with pre-hispanic origin like the snake. See also Patricia B. Altman and Caroline D. West, *Threads of identity: Maya costumes of the 1960s in highland Guatemala*, pp 94.

<sup>56</sup> Edward F Fisher and R. McKenna Brown, *Maya Cultural Activism in Guatemala* pp 143. See also Interview with Linda Barrios, Licenciada Antropologi, Xela, 3/7-2006 and Francis Polo Sifontes, *Historia de Guatemala*, Guatemala 2001 p 148. Nevertheless, it is still taught at the Guatemalan universities and written in the history books a non-nuanced version of how the Spaniards brought cloths to the Mayan people.

<sup>57</sup> Regis Bertrand and Danielle Magne, *The Textiles of Guatemala*, p 21.

textile factory Cantel, established in Xela 1880. The chemical dyes used resulted in a significant change in the range of available colours of thread. Red thread became especially popular as a decorative element in many cloth items. However, the decorative motifs from this period are generally less abundant and smaller than those seen today.

The first man-made fiber was introduced in Guatemala in the 1930:s and became a popular material. However, old-fashioned weaving practices prevailed during this period such as weaving with a backstrap or treadle loom and the use of hand spinning thread.<sup>58</sup>

## 2.3 Armed Conflict and current situation

Apart from the decade 1944-1954, the so-called “ten years of spring”, Guatemala’s history of violence and oppression against the indigenous population continued.<sup>59</sup>

The slow down of the coffee trade made way for the emergence of the United Fruit Company, which was to impact Central American power for more than 50 years with the profit from the banana trade. Under the control of Jorge Ubico 90 % of all exports went to the United States and the growing relationship between the two states forced Ubico to expel most of the German plantation owners. By 1944 social unrest took to the streets and Ubico was overthrown in what became known as the 1944 revolution.

Soon afterwards, a general election was held in Guatemala. The expulsion of the German immigrants resulted in many large plantations falling into the hands of the government. In the Law of Agrarian Reform, passed by the government of Jacobo Arbenz in 1952, the state owned land was sold for a fraction of its market value to 100 000 landless families. The wealthy land owners were outraged and the United Fruit Company lost about half of its farming capacity. The communist party was recognised in 1951 and even if Arbenz government did not consider itself communist, President Eisenhower feared that Guatemala represented the door through which communism would invade Central America. In 1953, it was decided to overthrow the Guatemalan Government by force.

A series of military- backed governments quickly undid any hope of genuine social reform, which struck hardest on the indigenous population. Death squads killed peasant leaders, unionists and academics and an endless string of military leaders continued to grab control with the backing of the US president.

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<sup>58</sup> Barbara Knocke de Arathoon and Rosario Miralbés de Polanco *Guide to the Ixchel Museum of indigenous dress*, pp 34.

<sup>59</sup> <http://www.globalexchange.org/countries/americas/guatemala/history.html>



In 1977, President Jimmy Carter stopped all military aid to Guatemala on account of the country's horrific human rights record. However, the violence did not stop.<sup>60</sup> The Guatemalan military death squads wiped 440 Mayan villages from the map and the 36 year armed conflict resulted in the death of 200 000 people, mostly indigenous people, 45 000 Guatemalan refugees in Mexico and 200 000 internal refugees.<sup>61</sup>

The United Nations Truth Commission, or Commission for historical clarification (CEH), found that the Guatemalan army had committed 93% of the total war crimes, and had carried out over 600 massacres.<sup>62</sup> The former President Alfonso Portillo has admitted state responsibility for past violations.<sup>63</sup> However, there has been and still exists a widespread impunity for the grave violations committed against the indigenous communities during the war.<sup>64</sup>

The signing of the Peace accords brought an end to decades of systematic violations of human rights by the Guatemalan state. However, there has been a change from political violence to social violence in recent years.<sup>65</sup> The main victims are members of various organisations, like trade unions and development organisations, engaged in the defence of economic, cultural and social rights.<sup>66</sup> The Guatemalan state has been criticised for its ineffectiveness in preventing, investigating and punishing acts of violence as well as embarking on public policies to reduce poverty, discrimination and lack of opportunity.<sup>67</sup>

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<sup>60</sup> Regis Bertrand and Danielle Magne, *The Textiles of Guatemala* p 21. General Efraín Ríos Montt is one of the worst human rights offender responsible for destroying 440 villages at the cost of 100,000 lives.

<sup>61</sup> <http://www.globalexchange.org/countries/americas/guatemala/history.html>  
<http://www.jmk.su.se/global99/conflicts/america/guatemala.htm>

<sup>62</sup> <http://shr.aas.org/guatemala/ceh/report/english/conc2.html>, Guatemala memory of silence, report of the commission for historical clarification, conclusions and recommendations, paragraph 82. See also E/CN.4/2006/10/Add.1 Feb 2006. *Report of the High Commissioner for Human Rights on the situation of Human Rights in Guatemala*, p 10. The Ministry of Defence has systematically declined to declassify the information needed in order for these crimes to be investigated, arguing that they entail national security issues.

<sup>63</sup> <http://www.hrw.org/wr2kl/americas/guatemala.html> Human Rights Watch World Report 2001: Guatemala: Human Rights Development p 1.

<sup>64</sup> <http://www.amnestyusa.org/countries/guatemala/document.do?id=ar&yr=2006> Amnesty International's annual report 2006. See also E/CN.4/2006/10/Add.1 Feb 2006. *Report of the High Commissioner for Human Rights on the situation of Human Rights in Guatemala*, p 7.

<sup>65</sup> *Report of the High Commissioner for Human Rights on the situation of Human Rights in Guatemala*, Feb 2006 (E/CN.4/2006/10/Add.1) p 2

<sup>66</sup> *Ibid.*, p 9. The situation has worsened since there has been little progress in prevention or in the investigation and punishment of those responsible. See also *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*, 2006 (E/CN.4/2006/78/Add.1), p 15.

<sup>67</sup> *Report of the High Commissioner for Human Rights on the situation of Human Rights in Guatemala*, Feb 2006 (E/CN.4/2006/10/Add.1) p 2. In recent years a high number of judges, prosecutors and defenders have been assassinated. See *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, March 2006 (E/CN.4/2006/78/Add.1), p 45. Guatemala is currently one of the most unequal countries in

During the war, traditional designs on the Mayan dress became a community sign. Hence, it was dangerous for the indigenous men and woman to wear their traditional clothes since the designs revealed which community they belonged to. The killings and displacements of indigenous people resulted in the loss of some of the traditional designs.<sup>68</sup> The amount of weaving cooperatives decreased since the producers were cut off from the rest of the world and the contacts with trade organisations were lost.<sup>69</sup> After the war, many Mayan women who had lost their men turned to commercialisation of textile products for extra income, which became essential for the survival.<sup>70</sup>

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the world. Although the country generates 30% of the wealth of Central America, there is an unequal distribution of assets- land, capital, education and technology and 21% of the population suffers from extreme poverty. The particular vulnerable groups are the rural population, indigenous people and women, which is illustrated by the fact that 71,9 % of the indigenous population is poor, 48% is illiterate and 69,5 % is affected by chronic malnutrition. See also *Report of the High Commissioner for Human Rights on the situation of Human Rights in Guatemala*, Feb 2006 (E/CN.4/2006/10/Add.1) p 11.

<sup>68</sup> Interview with Maejolein Keijsper, textile designer working for the Dutch organisation ICCO Xela 7/7 2006

<sup>69</sup> Elisabeth Ehrnst-Bäckstrand, Ragnhild Johansson, *Mayatextiler från Guatemala*, Kumla 1990 p 9.

<sup>70</sup> Interview with Maejolein Keijsper, Xela 7/7 2006.

[http://www.mayalan.net/comunidades\\_eng.htm](http://www.mayalan.net/comunidades_eng.htm). During the time of displacement the people of Chamaque lost their weaving skills and therefore had to learn again in an other community.

# 3 Foreign impact in the commercialisation of traditional designs in the Western highlands of Guatemala

## 3.1 Traditional design and textileproduction in transition

Even before the era of colonisation, there was a commerce with textiles. The trade then consisted of pieces of clothing, like ponchos and *huipils*.<sup>71</sup> However, in the past, the indigenous communities produced textiles mainly to meet local needs.<sup>72</sup>

Today, the traditional clothes are expensive in comparison to the factory made clothes, and therefore the indigenous weavers cannot afford to weave clothes for themselves anymore. Instead, the products are made for commercialisation purposes and are sold at various markets.<sup>73</sup> Currently, tourism and exports of non-traditional products including textiles, are the second and third largest income generating factors in Guatemala.<sup>74</sup>

In the market places, the traditional designs are still found on pieces of the traditional Mayan clothing. However, for the most part, the same designs decorates other types of products like tablecloths, handbags, scarfs, make-up bags, carpets, blankets and cell phone covers.

International aid was given to the traditional textile production in Guatemala as an act of solidarity in order to promote development in the country. In the 1960:s the Swedish project assistance to self-help (*hjälp till självhjälp*) established different weaving cooperatives with the main aim to safeguard, develop and market the Mayan traditional textile handicrafts. Swedish volunteers were engaged in establishing the cooperatives and the products were subsequently sold in Sweden on the terms and conditions of the producers. Exhibitions were held in Sweden and the Guatemalan crafts became very popular. More cooperatives were established and in Europe similar alternative trade organisations started to sell traditional crafts from Guatemala.<sup>75</sup>

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<sup>71</sup> Carmen Neutze de Rugg, *Diseños en los tejidos indigenas de Guatemala*, Guatemala city 1986, p 31.

<sup>72</sup> Elisabeth Ehrnst-Bäckstrand, *Mayatextiler från Guatemala*, p 9.

<sup>73</sup> Ibid. See also interview with Telma and Luis, Momostenango, Xela 29/6-2006. A huipil cost about 2500 Quetzales (about 360 US \$).

<sup>74</sup> See interview with Jorge Mario Pivaral Ortíz, executive director for Guatemalan project on global initiatives for sustainable development, Xela 1/6-2006.

<sup>75</sup> Elisabeth Ehrnst-Bäckstrand, Ragnhild Johansson, *Mayatextiler från Guatemala*, p 9.

The exports of the Guatemalan textile products flourished between 1986 and 1994. However, the exported products did not always meet the quality standards at the international market. Problems with non-water resistant colours gave the Guatemalan textiles a bad reputation.<sup>76</sup> The solidarity movement lacked experts in the area of design and it has been argued that the volunteers, despite their good will, are partly to blame for the lack of quality.<sup>77</sup>

Nevertheless, the idea to use textile products and traditional designs as a tool to promote development has had a revival in recent years. In the end of 2006 the Swedish Institute presented a book, which was the final part of a project held during the year of 2005 (the Swedish design year), called U-design. The main aim with the project was to scrutinise if design can be used as a tool to enhance democracy and reduce poverty in developing countries.<sup>78</sup> Also in other countries, development organisations promote the idea of using design for poverty reduction purposes.<sup>79</sup>

## 3.2 Foreign impact in the initial phase of establishing producer cooperatives

### 3.2.1 Weaving cooperatives

In the 1960s, Father Siegfried Fleiner came to the Guatemalan village Zunil as a parish priest.<sup>80</sup> When he saw how poor the village was he started to organise working groups and sent for German missionaries in various fields of work. One of them was Anni Wagner. In 1970, she initiated a weaving group consisting of indigenous women, now known as the *Santa Ana cooperative*.<sup>81</sup> She helped the women to get started by buying and

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<sup>76</sup> Interview with Carlos Porres, Argente general Artexco, Xela, 18/7 2006.

<sup>77</sup> Salka Hallström, *U-design*, Stockholm 2006 p 18.

<sup>78</sup> *Ibid.*, pp 4. In the book four case studies were presented. One of them is the Miramaya project.

<sup>79</sup> <http://www.icco.nl/documents/pdf/Katoen%20-%20Engels,%20Time%20for%20change%20in%20the%20world%20of%20coton.pdf>  
There are similar international projects, like the Chilam-Balám business, which is financed by the Dutch organisation ICCO, with the intention to contribute to the economic growth as well as bring attention to local weaving traditions by producing products suited for an international market and that way with the help of the indigenous weaving skills.

<sup>80</sup> Rosario Miralbés de Polanco, Eugenia Sáenz de Tejada, Idalma Mejía de Rodas, *Zunil Costume and Economy* -revised edition, Guatemala 1996 p 114.

<sup>81</sup> [http://www.xelapages.com/santa\\_ana/english/background.htm](http://www.xelapages.com/santa_ana/english/background.htm)

Cooperativa Integral de Produccion Artesanal Santa Ana R. L, Zunil, Quetzaltenango, Factsheet 060613. One of the problems in the beginning was the fact that the women were forbidden by their husbands to leave the house to join the weaving group. However, little

distributing the raw materials. In order to extend the market beyond the village of Zunil, Anni Wagner established national and international trade contacts. She brought the finished products to different shops in Guatemala City, she met with various American clients interested in the products and she sent product samples to Germany.

The Santa Ana cooperative exported textile products during a couple of decades.<sup>82</sup> Between the years 1988 to 1996, the Santa Ana cooperative had plenty of clients from USA, Italy, Holland, Finland and Germany.

However, during the armed conflict and in the mid 1990:s sales dropped domestically and internationally, due to a decreasing amount of visiting tourists and due to the increased competition from producer cooperatives in Guatemala and similar businesses in Asia.<sup>83</sup>

Today, there are no international volunteers working in the Santa Ana cooperative and no products are being exported. The cooperative does not receive any financial assistance. Hence, the only income generated derives from the domestically sold products.<sup>84</sup>

*The cooperative CENAT*, later renamed *TRAMA*, was initiated in 1982-83 after the most critical years of the war in order for the indigenous women who lost their husbands and children to survive.<sup>85</sup> During the approximate period of 1988-1994 TRAMA received financial aid from the Dutch government. Volunteers from Belgium and Mexico helped to administrate the financial assistance and to prepare for the legal registration of the organisation, which was finalised in 1994.<sup>86</sup>

In the past, TRAMA also exported products on a small scale. Currently, there is a surplus of participants in TRAMA producing more than the demand. Efforts are therefore being made to find new contacts and markets in order to sell more products, export again and provide more women with work.<sup>87</sup>

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by little with the information provided by the missionaries, the people in the village started to understand that men and women alike had the right to work to support their children. The Santa Ana cooperative was legally registered in the late 1970s.

<sup>82</sup>The cooperative was one of the founders of the federation of the artisan cooperatives, ARTEXCO in 1973 in order to facilitate exportation. Hence, it became easier to receive orders and send products abroad.

<sup>83</sup> Cooperativa Integral de Produccion Artesanal Santa Ana R. L, Zunil, Quetzaltenango, Factsheet 13/6 2006. During these times the cooperative had to produce and sell other products than textiles, like corn and beans, in order to survive. Presently, the cooperative also sells thread, notebooks, pens and has started a savings and credit business to the citizens of Zunil.

<sup>84</sup> Interview with Directora Candelaria Ramos Cehay, Cooperativa de Zunil 060613.

<sup>85</sup> <http://www.xelapages.com/asotrampa/history.htm>.

<sup>86</sup> Interview with president Amparo de León de Rubio and vice president Orelia Chopen TRAMA, Xela 060612, TRAMA also started giving weaving classes in 1995.

<sup>87</sup> Interview with Amparo de Leon de Rubio, Xela 14/6 2006. There are women that ask if they can join TRAMA. If quality meets the standards the products offered can still not be

### 3.2.2 Internationally initiated projects

*Chilam Balám* is a traditional textile company in Xela, which started 10-15 years ago.<sup>88</sup> The products are sold under the name Balám on the European and North American market.<sup>89</sup>

Chilam Balám is owned by some private investors and the Guatemalan NGO Chilam, established in 1987.<sup>90</sup> Not until recently, Chilam Balám's only income was the money the products generated.<sup>91</sup> Today, both the company and the NGO receive financial support from the Dutch organisation ICCO.<sup>92</sup>

ICCO argues that even though Guatemala has an interesting textile history there is no textile training institute where professionals can be trained in the field of weaving, presentation and design, which are vital skills to have in order to secure a position on the world market.<sup>93</sup> Therefore, ICCO also provides personnel support in the form of a Dutch designer, who offers assistance in the design of the products for the European market and the training of local people.<sup>94</sup>

Chilam Balám describes the company as being a development business. The company contributes to economic growth but also renews appreciation for local weaving traditions, which will strengthen the indigenous population in their process of emancipation. According to ICCO other organisations consider the Chilam Balám company as a model project and as a blue print for similar initiatives.<sup>95</sup>

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the same as the ones already sold by other groups of TRAMA (see interview with Marie-Juliet Chaput, volunteer in TRAMA, Xela 4/7 2006).

<sup>88</sup> <http://www.chilam-balam.org/infoen.htm>

<sup>89</sup> [http://www.icco.eu/delivery/projectenboek/2004/continenten\\_projecten/GT054011.html](http://www.icco.eu/delivery/projectenboek/2004/continenten_projecten/GT054011.html).

See also interview with Marjolein Keijsper, textile designer working for the Dutch organisation ICCO, Xela 7/7 2006. Balám has also started to sell products through the Internet.

<sup>90</sup> [http://www.icco.eu/delivery/projectenboek/2004/continenten\\_projecten/GT054011.html](http://www.icco.eu/delivery/projectenboek/2004/continenten_projecten/GT054011.html)

<sup>91</sup> Interview with Marjolein Keijsper, Xela 7/7 2006.

<sup>92</sup> <http://www.icco.nl/delivery/icco/en/doc.phtml?p=About+ICCO>. ICCO is an interchurch organisation for development cooperation working towards structural poverty alleviation. ICCO is one of the six Dutch co-financed organisations which, with funds from the Dutch government and European Union organisations, supports projects and programmes in developing countries. ICCO helps to ensure that the NGO Chilam is in a position to strengthen the affiliated producer organisation and that Chilam Balám is able to expand its production capacity. The demand for textile products is growing on both the internal and external market, which means that it will be necessary to increase production capacity in the short term.

<sup>93</sup> [http://www.icco.eu/delivery/projectenboek/2004/continenten\\_projecten/GT054011.html](http://www.icco.eu/delivery/projectenboek/2004/continenten_projecten/GT054011.html)

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

*Miramaya* is a Swedish project initiated by Tania Alyhr, a textile artist and lecturer at University College of Arts, Crafts and Design, Stockholm, Sweden.<sup>96</sup> The goal of the *Miramaya* project was to create handmade high quality products with top range design, which would sell on the Scandinavian market.<sup>97</sup>

In the spring of 2000, Tania Alyhr brought eight of her textile students to Guatemala to make modern designs of the Mayan traditional craft and project was encouraged and financed by the Swedish International Development Co-operation Agency (SIDA). The students presented the results of the project together with the partner and distributor Afroart at the trade fair Formex in January 2001. The *Miramaya* project has developed from being an aid project to becoming a commercial success and the products are currently sold by 15-20 retailers in Scandinavia and England.<sup>98</sup>

*Weaving for the future* is a project of the Guatemalan NGO ICAmigos. The project was initiated a few years ago by Dutch volunteers.<sup>99</sup> The volunteers visited women living in different villages, collected information, and created a webpage with information about the weavers and products. Geriette van Oenen, coordinator for the project, started with the main tasks to improve the webpage, develop new products and create a sufficient product catalogue. Moreover, the project needed to be registered in order for the products to be exported.

Currently, the products can be purchased through the internet. However, the goal for the weaving for the future project is to obtain a more stable market by selling the products mainly to retailers like fair trade shops.<sup>100</sup> Primarily, the weaving for the future project aims to position itself on the US market and that all the profit will go directly to the participating villages without any intermediaries.<sup>101</sup>

### **3.3 Working forms and organisation**

#### **3.3.1 Weaving cooperatives**

At the moment, 580 women are working for the *Santa Ana* cooperative. The majority of the participating women live in the village of Zunil but some come from the surrounding villages. The board, which consists of five indigenous women, supplies the women with material like thread and

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<sup>96</sup> The *Miramaya* project was originally to take place in the western parts of India. When India conducted nuclear weapon tests in 1998 the project was moved to Guatemala, which was another of SIDA's culture development countries.

<sup>97</sup> Salka Hallström, *U-design*, Stockholm 2006, p15.

<sup>98</sup> *Ibid.*, Today, six of the eight students have taken over Afroart, including the Afroart shop in Stockholm where *Miramaya* products are sold.

<sup>99</sup> Interview with Geriette Van Oenen, Coordinator for the weaving for the future project, 25/5 2006. See also <http://www.guatemalaspainish.com/weavingthefuture/index.html>.

<sup>100</sup> Interview with Geriette Van Oenen, 25/5 2006.

<sup>101</sup> *Ibid.*

patterns. The women work in their homes and bring the finished products to be sold in the shop of the cooperative. The women get paid individually depending on how much of the actual product is sold and once a month meetings are held where the women can get information and improve their weaving skills.

The *TRAMA* cooperative consists of 17 member groups, which originates from various regions in Guatemala like Quetzaltenango, Quiche, Huehuetenango, Solola and Sacatepequez.<sup>102</sup> Since different Mayan languages are spoken from region to region, two representatives, who can speak Spanish, read and write, from each group have been selected. The representatives are in charge of picking up the materials and distribute them to the rest of the group, leave the products when they are ready and collect the money on behalf of the group when the products have been sold in the *TRAMA* store. Like the Santa Ana cooperative, the money is subsequently divided amongst the women depending on who made the sold product.<sup>103</sup>

The representatives have the authority on behalf of their group to elect the board of *TRAMA*, which consists of seven women. Every other year the representatives gather for a meeting to elect the president.<sup>104</sup>

### 3.3.2 Internationally initiated projects

*The Chilam Balám business* organises the trade of products made by 300 textile producers working in 10- 15 different groups.<sup>105</sup> The structure and composition of the producer groups varies and the people working in the producer groups have other jobs on the side in order to make a living. The producers state the amount of time they have been working on the products and *Chilam Balám* pays accordingly.<sup>106</sup>

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<sup>102</sup> <http://www.xelapages.com/asotrama/leadership.htm>

<sup>103</sup> Interview med Amparo de Leon de Rubio, *TRAMA*, Xela 14/6 2006. Thus, there is no equal division of the money, regardless of work put in to the products.

<sup>104</sup> <http://www.xelapages.com/asotrama/leadership.htm> and interview med Amparo de Leon de Rubio, *TRAMA*, Xela 14/6 2006. The president's task is to co-ordinate the work and divide the orders among the different member groups, check the quality of the products (usually the women working for *TRAMA* are aware of what quality is expected), run the *TRAMA* shop, work as a weaving instructor, handle administrative issues and keep the representatives informed of the sales and problems that might arise at the monthly meetings.

<sup>105</sup> [http://www.icco.eu/delivery/projectenboek/2004/continenten\\_projecten/GT054011.html](http://www.icco.eu/delivery/projectenboek/2004/continenten_projecten/GT054011.html). Also see interview with Marjolein Keijsper, Xela 7/7 2006. The weavers are primarily indigenous women and work according to their weaving traditions. Aside from the producers there are 15-16 people working for *Chilam Balám*. Some groups consist only of women while other groups are mixed.

<sup>106</sup> Interview with Maejolein Keijsper, textile designer working for the Dutch organisation *ICCO*, Xela 7/7 2006. However, the working hours are checked by the company since it is



The quality of the products does not always meet the company's requirements. Merely the work of five or six of the producer groups meets the requirements necessary to market and sell the products on the international market.<sup>107</sup> However, since Chilam Balám works in close cooperation with the NGO Chilam, there is a development aspect to the textile production, like supporting the producers by providing weaving classes.<sup>108</sup>

*The Miramaya project* started off by working with 15 cooperatives. Over time there has been a selection and at the moment only 4 cooperatives are working for Miramaya.<sup>109</sup> One of the reasons for reducing the amount of cooperatives was that some of the groups did not want to change their way of working. They wanted to make the same products and use the same designs as they always had done and therefore those groups were considered difficult to work with. Another reason was that the original collection initially was too extensive.<sup>110</sup>

Since the representatives from Afroart in Sweden do not have the opportunity to visit the cooperatives working for the Miramaya project on a regular basis and conduct the work by giving face to face instructions, the contact with the cooperatives is handled through a coordinator.<sup>111</sup>

Afroart sends their order, containing information of quantity, quality, design and the delivery schedule, to the coordinator who buys and provides the producers with thread and material necessary for the production as well as explains the order to the different cooperatives.<sup>112</sup>

When the project *weaving for the future* started, the deal was that people from different villages could come and sell their products to the foreign students at the ICA Spanish School once a week. In the beginning, there were more villages involved. Some communities stopped coming to the school to sell their products for various reasons and the ICA Spanish School

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not possible to pay the producers differently for the same type of products depending on individual pace.

<sup>107</sup> Interview with Marjolein Keijsper, Xela 7/7 2006.

<sup>108</sup> Ibid., For instance, weaving classes are provided in order for the producer to improve their weaving skills.

<sup>109</sup> Salka Hallström, *U-design*, p 16. The four cooperatives are all situated around the Atitlan Lake. The cooperative in San Juan La Laguna makes bags, the cooperative in San Antonio Palopó makes fabrics and carpets on a footloom and the cooperative in Churacruz make pillowcases.

<sup>110</sup> Interview with Arlindo Velasquez, coordinator for *Miramaya*, Xela 23/6 2006. The first collection consisted of 500 products, which proved to be too much.

<sup>111</sup> Salka Hallström, *U-design*, p16.

<sup>112</sup> Interview with Arlindo Velasquez, Xela 23/6 2006. Usually, Arlindo visits the cooperatives in person to explain the order to everyone so the instructions are clear. Most of the women cannot speak Spanish, read or write. The cooperatives also lacks access to cell phones or faxes.

decided to make a selection of which villages that could come to the school and sell products.<sup>113</sup>

At the moment, there are about 70 people working in the project. If there is an order, the work as well as the money is divided equally among the people in the cooperative. There are no established hourly wages.<sup>114</sup> Geriette Van Oenen, has invested money of her own in order to provide the women with necessary material to get the production started. The production is done on the terms of the members of the cooperative. If the producers for some reason do not want to participate in a certain order, the order must be renegotiated.<sup>115</sup>

### **3.4 Foreign impact on the selection of products and use of traditional designs**

#### **3.4.1 Weaving cooperatives**

In most of the producer cooperatives scrutinised there is or has been a large degree of foreign influence when it comes to the selection of products and designs for the purpose of commercialisation.

The Santa Ana cooperative, which only work with traditional designs from the Zunil area, has not only received financial help in the past from German volunteers, but also help with ideas of new products, designs and colours. However, today it is up to the board to decide the product collection, including colours and designs. Hence, the indigenous women of the board give instructions and materials to each of the participating members of the cooperative.

Also in the *TRAMA cooperative* the international volunteers played a vital role in deciding what type of products and designs were to be commercialised. As an initial step, the volunteers requested that each member group of TRAMA make samples of the range of designs that they knew. Subsequently, the volunteers selected the designs they liked the most to be part of the production. Each group was designated a certain product

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<sup>113</sup> One of the communities was chosen because they were well organised and the other two villages were chosen due to the fact that a lot of men had been killed in those villages during the war and the women needed help to sell their textile products.

<sup>114</sup> Interview with Geriette Van Oenen, Coordinator for the weaving for the future project, 25/5 2006.

<sup>115</sup> Ibid.

with a specific design, and in general, the original selection still prevails.<sup>116</sup> Today, the work is divided within the cooperative by the president depending on which product and design are ordered.<sup>117</sup>

The workers in the cooperatives has not in the past nor present objected or otherwise found it problematic to change the colour scheme and use traditional designs in a different context for commercial purposes due to the fact that people needed money to survive after the war.<sup>118</sup> Today, the customers of TRAMA are mostly tourists and rich Guatemalans. TRAMA displays traditional clothing in the shop but those products do not sell. The customer wants products that they can use.<sup>119</sup> Therefore, the president of TRAMA explains at the meetings with the representatives that the traditional designs are necessary but that the finished product needs to be modified in order for it to meet the demand. Some argue that it does not matter to the weavers what the finished product will look like. The members of the cooperative need work and will therefore take the president's advice.<sup>120</sup>

When it comes to the previous small scale exporting the international volunteers working at TRAMA has had a lot of influence. The president and vice-president carefully listen to the volunteers' suggestions concerning products, colours and designs because the volunteers have better knowledge of the demand on the international market.<sup>121</sup>

### 3.4.2 Internationally initiated projects

In the *weaving for the future project* efforts are made to modify the products to meet the demand at the international market. First of all the project is working on making the products consistent in size and colour. Secondly, efforts are made to come up with ideas of new products. The plan is to start a clothing line and use traditional designs on basic modern clothing. However, the indigenous women are not involved in the designing process. Geriette is the one that comes up with ideas for things that she thinks would sell on an international market. Then Lesley, a designer from the USA, makes the patterns. Lesley and Geriette subsequently work with two of the women in the cooperative that understand the idea, and when the quality is suffice, the two women will teach the others.

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<sup>116</sup> Interview with president Amparo de León de Rubio and vice president Orelia Chopen TRAMA, Xela 12/6 2006.

<sup>117</sup> Interview med Amparo de Leon de Rubio, TRAMA, Xela 14/6 2006.

<sup>118</sup> Interview with Amparo de León de Rubio and Orelia Chopen TRAMA, Xela 12/6 2006.

<sup>119</sup> Interview with Marie- Juliet Chaput, volunteer in TRAMA, Xela 15/6-2006.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid. However, regarding products sold in the TRAMA shop the president and the vice president of TRAMA are able to place products orders without depending on the advice from volunteers since they from experience know what will sell.

Ideally, the weaving for the future project will sell a product as well as a relating story. In the process of developing new products, Geriette therefore tries to investigate the different meaning and symbolism behind the traditional designs. However, finding out what the designs means is a difficult task she finds since not even the weavers always know the significance. Furthermore, it is difficult to distinguish which design belongs to which community because the villages have been copying designs from each other for a long time.<sup>122</sup>

*Chilam Balám and Miramaya* has the same main concept, namely to combine traditional Mayan weaving with modern European respectively Scandinavian trends.<sup>123</sup> The two companies also produce the same type of products, namely interior products like tablecloths and pillowcases, make-up bags, carpets, curtains and bags.<sup>124</sup>

The Chilam Balám company launches an annual collection and it is Marjolein Keijsper, a Dutch textile designer working for ICCO, who is responsible for the designs of the Balám products. She also handles the contact with the producer groups. The tradition of hand woven fabrics and the different designs in the different region, serves as rich source of inspiration for the new textiles of Chilam Balám.<sup>125</sup>

In practice, the new designs of Chilam Balám are developed on the foot looms in the office of Balám. Then Marjolein Keijsper visits the producers in different regions like the Atitlan Lake and Coban, explains the new design by showing drawings and then she sees what the producers can do.<sup>126</sup>

In the Miramaya project it is the Swedish group of designers who creates the designs and decides what products to order. During the project there has been a discussion concerning the risks of an extensive adaptation in relation to a craft tradition, which has evolved for a thousand years, to suit the Swedish market. The designers have also reflected on if it would be more democratic to involve the weavers in the designing process. However, they have come to the conclusion that without a foreign influenced in the process the products will not sell, which can lead to the indigenous people in Guatemala losing their culture even faster. If the weavers would be involved in the designing process one of the main ideas of the project will

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<sup>122</sup> Interview with Geriette Van Oenen, Xela 25/5 2006.

<sup>123</sup> Interview with Marjolein Keijsper, Xela 7/7 2006. See also Salka Hallström, *U-design*, pp 16. See examples in supplement 2.

<sup>124</sup> Interview with Marjolein Keijsper, Xela 7/7 2006. See also Salka Hallström, *U-design*, pp 16.

<sup>125</sup> Interview with Marjolein Keijsper, Xela 7/7 2006. See supplement B for examples of Chilam Balam designs.

<sup>126</sup> <http://www.chilam-balam.org/infoen.htm>. See also interview with Marjolein Keijsper, Xela 7/7 2006. In some of the groups Marjolein Keijsper works with all the members, while in others she foremost have contact with the men. Women are often prohibited by their men to travel and lack abilities to read and write. However, the designs are made on the backstrap looms, which are only operated by women and therefore it is the women in the different producer groups who actually makes the designs illustrated to them.

be circumvented; namely the contribution of Swedish knowledge of design to the project.<sup>127</sup>

### 3.5 Attitudes in relation to exclusivity of traditional designs

The traditional designs in Guatemala exist due to an oral tradition transmitted from one generation to the other. The designs often symbolises the Mayan cosmovision and elements from the surrounding nature.<sup>128</sup> If the same traditional design is used on a huipil and a handbag the symbolic meaning will remain the same.<sup>129</sup>

There is no customary law within the Mayan community that addresses copyright in relation to cultural heritage.<sup>130</sup> Neither does there exist an autonomous Mayan organisation or official institution that could be in charge of assisting the weaving cooperatives in the registration process or help initiating a legal proceeding concerning unauthorised use of traditional designs.<sup>131</sup>

It seems widespread and accepted that a weavers from one indigenous community copy a traditional design deriving from another village and incorporates them in their products.<sup>132</sup> Many weavers argue that they are

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<sup>127</sup> Salka Hallström Bornold, *U-design*, p 18. See supplement B for illustration of Miramaya products.

<sup>128</sup> Patricia B. Altman and Caroline D. West, *Threads of identity: Maya costumes of the 1960s in highland Guatemala*, pp 94. See also Interview with Jorge Mario Privaral Ortiz, Xela 1/6 2006.

<sup>129</sup> Interview with Catarina Cuc tzep, Nauhula, Xela 4/7-2006. See also interview with Telma and Luis, Momostenango, Xela 29/6-2006. However, some indigenous weavers say that the huipils have more sentimental value to them than the products with the same designs. The reason given for the distinction is the fact that the huipils are worn everyday and require so much work to make.

<sup>130</sup> El sistema jurídico Maya, una aproximación, Universidad Rafael Landívar IDIES, Guatemala 1998, pp 45. See also interview with Aparicio Zunum Cux, law student and intern at the Defensoría Maya Huehuetenango, Xela 2/7 2006.

<sup>131</sup> Guisela Mayén de Castellanos, *Tzute and hierarchy in Solola*, Guatemala 1988 p 91 and 103 Even though there is no autonomous Mayan organisation unifying and representing the Mayan interests in Guatemala the structure of the traditional organisation and the Mayan political participation varies from region to region. In some regions, like Solola, the double municipal system, the official or Ladino and the Indian, is preserved and the Indian alcadia is a relatively autonomous political administrative system. There are different opinions whether there is a general sense of belonging amongst the different Mayan communities or not. As a result of the war there is still tension between the indigenous communities that supported the guerrilla, and subsequently suffered great losses and the communities that did not. See Juan Alberto González Jacobo, *Formas de organización y participación política en comunidades Maya*, Proyecto NEXUS Municipal, Guatemala 2000. Interview with Audelino Sac Coyoy, Mayan Priest, Xela 3/7 2006 and interview with Aparicio Zunum Cux, Xela 2/7 2006.

<sup>132</sup> See the observations of Carol Hendrickson, *Weaving Identities*, Texas Press, Austin 1995. People from the village of Tecpán upholds a notion that when someone tries

able to and will copy designs from other villages if they like the design and several say that they are not bothered when they see people from another village using and selling traditional designs from their communities.<sup>133</sup> However, some weavers emphasise that they would get more upset if companies copy their traditional designs and products than if another village or producer cooperatives copy their work. Hence, copying activities of traditional designs by weavers from different indigenous communities does not seem to give rise to problems in the relationships between the different villages.<sup>134</sup>

The Santa Ana cooperative has not had problems with other cooperatives copying their designs nor problems with women participating in the cooperative copying designs from each other. The reason for that is, first of all, the fact that a vast majority of the weavers are women from the Zunil village and all the designs used in the cooperative are traditional designs from the Zunil area. Secondly, the women on the board decide which member shall make which product and therefore such problems can be avoided.<sup>135</sup>

However, the situation can be different when the member groups in a weaving cooperative come from different villages and there are examples when copying of traditional designs can give rise to conflicts within a weaving cooperative. A few years back the TRAMA cooperative experienced a situation when one member group started to make the same products and designs as another member group in TRAMA. The member group which initially made the product in question, lost money when the other group started making the same product, and subsequently stopped coming to TRAMAs meetings.<sup>136</sup>

When it comes to the internationally initiated projects the international volunteers and designers in general use traditional design without seeking any formal consent from traditional authorities. One reason given for that is the fact that it is difficult for a person outside an indigenous community to know who to ask for a formal permission to use a specific traditional design. Another reason for perceiving the traditional designs to be part of the public domain and subject to free unrestricted use is that all the products seen on

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something new and gets a favorable response, others will copy it. Efforts are therefore made by some in the community to work in the privacy of the home and avoid that others copy the design.

<sup>133</sup> Interview with Telma and Luis, Momostenango, Xela 29/6-2006. When the products are copied some weavers feel like their work is taken away from them but argue that even if the designs are copied the products will still not be the same.

<sup>134</sup> Interview with Maria from Nahualá, Xela 30/6 2006. See also Interview with Catarina Cuc tzep, Nahualá, Xela 4/7-2006 and interview with Telma and Luis, Momostenango, Xela 29/6-2006.

<sup>135</sup> Interview with Directora Candelaria Ramos Cehay, Cooperativa de Zunil 13/6 2006.

<sup>136</sup> Interview with Amparo de Leon de Rubio, TRAMA, Xela 14/6 2006. The situation of two member groups making the same design was possible because the villages the groups came from were geographically close to each other. Copying of traditional designs does not occur between member groups that live in regions geographically far away from each other, because the women in those regions are not able to copy the products and designs.

the market today, except the huipils and traditional skirts, have been modified and traditional designs are already decorating an abundance of different products.<sup>137</sup> The widespread copying amongst the villages is a third reason given for why a formal permission is unnecessary prior to the use of a traditional design.<sup>138</sup>

When asking indigenous weavers and representatives no negative feelings are expressed in relation to the fact that traditional designs are being commercialised.<sup>139</sup> Some emphasise the risk that such commercialisation might change the designs. It is argued that since the traditional designs are not static it is not possible to avoid changes, but in order to prevent commercialisation from damaging the cultural heritage, the knowledge of the cultural heritage needs to be strengthened through education.<sup>140</sup>

Currently there is not a lot of documentation of traditional designs.<sup>141</sup> Private owned museums has documented some of the traditional designs but lacks financial resources to publish an exhaustive inventory of all traditional design originating from the various regions in the country.<sup>142</sup> However, such documentation could serve as evidence of the community ownership of a certain design and enhance the cultural heritage.<sup>143</sup>

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<sup>137</sup> Interview with Geriette Van Oenen, Xela 31/5 2006. If the traditional designs only decorated huipils and traditional clothing then it would be natural to ask for permission to put the designs on other things.

<sup>138</sup> Interview with Geriette Van Oenen, Xela 31/5 2006.

<sup>139</sup> Interview with Marjolein Keijsper, Xela 7/7 2006. However, there are situations when people from the indigenous communities refrains from giving information about weaving and traditional designs to foreign designers or international volunteers, which could indicate that there is a certain hesitancy and resistance. For instance when Marjolein Keijsper has done research to develop the textiles of Chilam Balám she found that the indigenous weavers can be reluctant to share their knowledge, which she believes has a lot to do with the war. When she asks indigenous people what their parents wore they will get suspicious and not see the value of giving that information.

<sup>140</sup> Interview with Raquel Garcia Macario, Administrator at the Ixkik museum, Xela 3/7 2006. Besides from the fact that the traditional design is a part of the Mayan identity the indigenous people need to make a living. See also Interview with Lina Barrios, Lic. in Anthropology, Xela 3/7 2006 and interview with Barbara Knock, Ixchel Museum Guatemala city 20/6 2006 Since the indigenous weavers produce the products in accordance with the market demand, there is a risk that they will forget the traditional patterns.

<sup>141</sup> Patricia B. Altman and Caroline D. West, *Threads of identity: Maya costumes of the 1960s in highland Guatemala*, p 94.

<sup>142</sup> Interview with Barbara Knock, Ixchel Museum Guatemala city 20/6 2006.

<sup>143</sup> Interview with Lina Barrios, Lic. in Anthropology, Xela 3/7 2006.

# 4 The international legal protection of TCE

## 4.1 The genesis of international legal protection of TCE

The initial step in providing a legal protection for TCE was the introduction of article 15.4 in the Berne Convention (BC) in Stockholm 1967. The amendment introduced a possibility for a country to appoint a competent authority to represent an unknown author to an unpublished work.<sup>144</sup> Article 15.4 BC did however not prove to be an efficient protection in practice since no member state since then has established such a competent authority.<sup>145</sup>

UNESCO has worked with TCE matters since the early 1970s and after collaboration with WIPO, the Tunis Model Copyright Law (“Tunis Model Law”) was presented in 1976. The idea was that the Tunis Model Law, which contained rules protecting TCE and works that derived from TCE, should serve as a guideline in the development of national copyright legislation.<sup>146</sup>

The next step was to try to create a *sui generis* protection of TCE, which resulted 1982 in the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (Model Provisions). The intention with the Model Provisions was to pave the way for regional and international protection. However, the majority of the participants at the time considered it premature to establish a international treaty in the field.<sup>147</sup> Therefore, the Model Provisions were, like the Tunis Model Law, merely used as a guideline in the drafting process of national legislation. When the Model Provisions failed to have the impact expected the idea to create an international treaty in the field was put on the future.<sup>148</sup>

The technological development was one element that opened the door for new ways of exploiting TCE and in December 1996, at a conference on the

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<sup>144</sup> WIPO/GRTKF/IC/3/10 p 9.

<sup>145</sup> Dionyssia Kallinikou, *Protection of traditional cultural expressions or expressions of folklore*, Nafplion, Greece 2005, p 3.

<sup>146</sup> Paul Kuruk, *International Intellectual Property Law Cases and Materials*, New York 2001, pp 92. The Tunis Model Law has influenced the national copyrights legislation in African countries like Ghana, Cameroon, The Ivory Coast, Congo and Mali.

<sup>147</sup> WIPO/GRTKF/IC/1/3 p 36.

<sup>148</sup> WIPO/GRTKF/IC/3/10 p 11 and WIPO/GRTKF/IC/5/3 p 24.



WIPO treaties, several developing countries requested that TCE related issues should be put back on the agenda. Subsequently, a program of action was formulated.

During the late 1990:s WIPO conducted so-called “fact finding missions”, in which indigenous people, NGO:s, state officials, academics, and representatives from the private sector participated. The purpose was to investigate the IP needs. Two main categories were established: firstly, the need to gain from the commercialisation of TCE and secondly, the need to prevent the social, psychological and cultural damage, which a commercialisation of TCE without the consent from the indigenous group in question could result in.

In 1999, WIPO and UNESCO arranged regional meetings where various IP recommendations were adopted. The member states were recommended to formulate legal mechanisms for the protection of TCE on an international level and to prepare a list of the types of TCE for which the protection was considered vital.<sup>149</sup> WIPO and UNESCO were also given the mission to work towards a broad consensus amongst the member states to support an international convention in the field and initiating steps should be taken to develop a *sui generis* form of a legal protection on a national and international level with the Model Provision in mind. Finally, it was recommended that a Standing Committee on Traditional Knowledge and Folklore” should be set up to facilitate the process.<sup>150</sup> In October 2000, the Intergovernmental Committee (IGC) was appointed by WIPO’s general assembly.<sup>151</sup>

#### **4.1.1 The step by step process towards the DPs**

The Committee held its first session in April 2001.<sup>152</sup> Over time, the Committee has experienced successes as well as setbacks.<sup>153</sup> The work has at times been difficult due to the controversial matters the Committee

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<sup>149</sup>WIPO/GRTKF/IC/3/10 pp 12. The recommendations given to WIPO and UNESCO contained regulations concerning legal, technical and financial assistance to the national projects for identification, classification, conservation and dissemination of TCE. Furthermore, it was recommended that studies should be carried out and pilot projects launched on the administration of TCE.

<sup>150</sup>Ibid.

<sup>151</sup> WO/GA/26/6, p 7. Concerning the protection of folklore it had been recommended that WIPO should intensify its work and develop a *sui generis* form of legal protection with the UNESCO-WIPO model provisions as an adequate starting point. It was furthermore recommended that special attention should be given to the protection of handicrafts.

<sup>152</sup> Henry Olsson, *WIPOs mellanstatliga komitte för Genetiska resurser, traditionell kunskap och folklore; andra sessionen 10-14 december 2001*. Försök att samordna med vad som sker inom FAO, CBD och WTO, NIR, Stockholm 2002 p 140.

<sup>153</sup> Henry Olsson, *Den internationella utvecklingen- växande kritik mot immaterialrättssystemet*, NIR Stockholm 2004 pp 546.

discusses and the strong established interests in the field.<sup>154</sup> The EU member states, as well as many other industrialised countries have traditionally perceived TCEs as belonging to the public domain and has therefore not been enthusiastic about a new binding legal protection for TCEs.<sup>155</sup> An additionally complicating factor is that the interests of the representatives from the indigenous populations participating in the sessions have not been coherent with interests of their governments.<sup>156</sup> Nevertheless, the Committee has taken substantial steps towards a *sui generis* protection for TCEs during its eleven sessions.

At the first session, the Committee decided that national experiences of TCEs were to be collected and analysed. This was done through a questionnaire submitted to all the member states. The results were subsequently discussed and during the third session a comprehensive Final report on National Experiences with the Protection of Expressions of Folklore was addressed. The Committee formulated a systematic and analytical document on national experiences of protection of folklore by means of traditional IP or by a *sui generis* legislation, and the implementation of such legislative frameworks, including the role of customary law and forms of interaction with other legal systems in other countries.<sup>157</sup> At the fourth session, the document was presented and a panel discussion was held concerning the experience of national and regional authorities.<sup>158</sup>

The Committee decided to develop a first overview of policy objectives and core principles for the protection of TCE based on the range of national experiences presented. At the eighth, ninth, tenth and eleventh sessions, after receiving comments from a wide range of member states and Committee observers, the Committee reviewed the DPs including the objectives, principles and substantial provisions.<sup>159</sup> WIPO General Assembly will assess the DPs at its meeting in September 2007.<sup>160</sup>

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<sup>154</sup> Henry Olsson, *Den internationella utvecklingen- växande kritik mot immaterialrättssystemet*, NIR Stockholm 2004 pp 546.

<sup>155</sup> WIPO/GRTKF/IC/11/4(b), annex p 25. The official Guatemalan view is that the indigenous population should be encouraged to use existing IP systems instead of creating a new separate system. However, other countries with large indigenous populations, like Canada and Australia, have expressed a different position in the matter.

<sup>156</sup> Henry Olsson, *Den internationella utvecklingen- växande kritik mot immaterialrättssystemet*, NIR, Stockholm 2004 pp 546.

<sup>157</sup> WIPO/GRTKF/IC/9/INF/4.

<sup>158</sup> WIPO/GRTKF/IC/10/4 pp 10.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid., p 13.

## 4.1.2 The objectives and general guiding principles of the DPs

The Committee has stated several times that the protection of TCE should not be undertaken as an end in itself, but as a tool for achieving the goals and aspirations of relevant peoples and communities and for promoting national, regional and international policy objectives.<sup>161</sup>

There are currently 13 objectives and 9 general guiding principles stated in the DPs, shedding light on the substantive provisions.<sup>162</sup> From the wording of the vast majority of the objectives and guiding principles, there seems to be a clear focus on the rights of the indigenous peoples. Like the *principle of responsiveness to aspirations and expectations of relevant communities* and the *principle of effectiveness and accessibility of measures for protection*. The former principle states that the TCE protection shall recognise and apply customary law as far as possible and promote cooperation and not competition or conflict among the communities. Moreover, the TCE protection shall enable effective participation by the communities in the implementation and development of protection system. Measures for the legal protection shall also be seen as voluntary from the indigenous communities point of view.<sup>163</sup> The latter principle emphasises that measures for the acquisition, management, and exercise of rights should be effective, appropriate and accessible, and take account of the cultural, political, social and economic context of indigenous peoples and traditional and other communities.<sup>164</sup>

However, some of the guidelines presented in the DPs might not have the same indigenous interest orientated focus. For instance, *the principle of flexibility and comprehensiveness*, which argues that since there is unlikely any one-size-fits-all solution that suits national priorities, legal and cultural environment and needs of the traditional communities in all countries the DPs are broad and give maximum flexibility to national, regional authorities and communities. The precise legal mechanism to achieve or implement the provisions at the national or regional level is subsequently left to national discretion.<sup>165</sup>

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<sup>161</sup> WIPO/GRTKF/IC/10/4 p 5.

<sup>162</sup> WIPO/GRTKF/IC/10/4 Annex p 5 and 7.

<sup>163</sup> Communities shall always be entitled to rely exclusively or in addition upon their own customary and traditional forms of protection against unwanted use or access to their TCE. In this aspect external legal protection should be subsidiary to the traditional systems.

<sup>164</sup> WIPO/GRTKF/IC/10/4 Annex pp 8. See also WIPO/GRTKF/IC/10/4 Annex p 3. The first three objectives states that the protection of TCEs should aim to; *recognise the value* that the indigenous peoples, traditional and other cultural communities consider their cultural heritage to have cultural, educational, spiritual, intellectual and commercial. *Promote the respect* for traditional cultures and folklore as well as *meet the actual needs* and expectations expressed by the indigenous peoples, traditional and cultural communities, and respecting their rights under national and international law.

<sup>165</sup> WIPO/GRTKF/IC/11/4(b) Annex p 8 See the federation of Maori authorities reasoning that guidelines that are subject to national laws and regulations there is an eminent risk of a

### 4.1.3 The form or status of the DPs

Different opinions regarding the status of DP have been argued throughout the Committee's work. In general, the developing countries want to work on a draft which will lead to an international legally binding instrument while the industrialised countries prefer other solutions like recommendations or soft-law mechanisms.<sup>166</sup> Some of the possible approaches were discussed during the Committee's sixth session concerning the form or status of an outcome as follows;<sup>167</sup>

- A binding international instrument or instruments;
- A non-binding statement or recommendation;
- Guidelines or model provisions;
- Authoritative or persuasive interpretations of existing legal instruments; and
- An international political declaration espousing core principles and establishing the expectations and needs of TCE/TK holders as a political priority.

However, the form or status of the DPs is yet to be decided.<sup>168</sup>

## 4.2 The scope of protection of misappropriation and misuse of TCE

When it comes to the scope of protection, the commentary to the DPs frequently refers to other national and regional *sui generis* protection of TCEs.<sup>169</sup> However, the scope of protection in the DPs is formulated in a more nuanced wording than for instance the scope of protection in the

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de facto no or limited protection for the indigenous community in the country due to the reliance of the national laws as such being just and fair. See also WIPO/GRTKF/IC/10/4 Annex pp 7 Moreover, *the principle of balance* emphasises the need for a balance between the rights and interests of those who develop, preserve and sustain TCE and those who benefit from them. The need for specific protection measures shall also be proportionate to the objectives of protection, actual experiences and needs.

<sup>166</sup> Henry Olsson, *Den internationella immaterialrättsliga utvecklingen under första halvåret 2006. Kriser och framgångar, mest kriser*, NIR Stockholm 2006, p 361.

<sup>167</sup> WIPO/GRTKF/IC/6/6 paragraph 34. See also the different options and practical means presented to give effect to the international dimension of the Committee's work in WIPO/GRTKF/IC/10/6.

<sup>168</sup> WIPO/GRTKF/IC/10/4 Annex p 9.

<sup>169</sup> WIPO/GRTKF/IC10/4 Annex p 28. See for instance the Model Provisions (1982), the Pacific Island Model Law (2002) and Bangui Accord, OAPI (1999).

Model Provisions.<sup>170</sup> As a point of departure, article 7 DPs stipulates that TCEs are protected from the moment of creation and should as a general principle not be subject to any formalities.<sup>171</sup> Moreover, it is suggested in the DPs to provide a three “layer” protection tailored to different forms of cultural expressions, namely TCEs of particular “cultural or spiritual value”, non-registered TCEs and secret TCEs.<sup>172</sup>

The first category, *TCEs of particular “cultural or spiritual” value* to a community, shall be subject to free, prior and informed consent (FPIC) of the community concerned. The right to FPIC, akin to an exclusive IP right, would grant a community the right to either prevent, license or otherwise authorise the use of TCEs, on agreed terms including benefit-sharing.<sup>173</sup>

This layer of protection would be subject to prior notification or registration in a public register, with a competent office, organisation or Agency acting on the request of and on the behalf of the indigenous community.<sup>174</sup> However, indigenous and other traditional communities have expressed concern regarding documenting activities, which at times fail to take adequate account of their interests and rights, and that displaying TCEs can make them vulnerable to misuse and misappropriation.<sup>175</sup> The registration

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<sup>170</sup> <http://www.wipo.int/tk/en/documents/pdf/1982-folklore-model-provisions.pdf> p 17. In the Model Provisions the scope of protection is defined by a general authorisation requirement when members and non-members of the community alike, utilise expressions of folklore outside their traditional context and with a gainful intent.

<sup>171</sup> According to article 6 the protection would continue for as long as TCEs continue to meet the criteria for protection, including the required linkage with an eligible community. Specific provisions on term could be put in place for registered TCE and secret TCEs.

<sup>172</sup> WIPO/GRTKF/IC/10/4 Annex p 21. This three layer protection has been subject for criticism, see eg. the comment of Brazil holding that the duty to obtain a PIC from a indigenous community shall not be conditioned upon registration and that PIC must be sustained as a general principle irrespectively of the status granted to the cultural expression in question see WIPO/GRTKF/IC/11/4 (b) annex p 2.

<sup>173</sup> WIPO/GRTKF/IC/10/4 pp 21. Thus, a community could obtain both a positive and defensive protection and subsequently can prevent any use, exploitation and acquisition of IP rights over them. There are no guidelines formulated in the DPs concerning what benefit-sharing in practice shall entail. However, in some national *sui generis* legislations a specific definition of what benefit-sharing shall include can be found. For instance, in Panama it is established that use of TCEs shall include a royalty consisting of a initial payment or some form of intermediate, direct compensation to the indigenous people in question and a percentage of the value of sales resulting from the marketing of products developed on the basis of collective rights. See also article 18, Panama Ministry of trade and industries executive decree No. 12, March 2001, p 12.

<sup>174</sup> The agency, which could be an existing office or authority, would also have additional educational, awareness-raising advisory functions. According to article 7 DPs the office receiving applications for registration should seek to resolve disputes as to which communities are entitled to register which TCEs/EoF.

According to the DPs commentary it will be left to national discretion whether prior authorisations should be obtained directly from the community concerned or from an agency acting at the request of and on the behalf of the community.

<sup>175</sup> Wendland Wend, Safeguarding Cultural Heritage, Protecting Intellectual Property and Respecting the Rights and Interests of Indigenous Communities: *What role for Museums, Archives and Libraries?*, Paper presented for the conference “Can Oral History Make Objects Speak?” Nafplion, 2005, p 2.

or notification requirement in the DPs is therefore optional and for decision by relevant communities.<sup>176</sup>

The second category, non-registered TCEs, does not receive as strong protection as registered or notified TCEs. TCEs in this category would not be subject to prior authorisation but the protection would instead concern *how* the TCEs were to be used. For example, non-registered TCEs could be used as a source of creative inspiration, without the need for prior authorisation. The regulation of how the TCEs in this category are used would mainly draw upon moral rights and unfair competition principles and would include the payment of equitable remuneration or equitable benefit-sharing, determined by a competent authority.<sup>177</sup>

When it comes to derivative works, there is a suggested adaptation right in the respect of TCEs of particular “cultural and spiritual” value, subject to prior registration or notification. In respect of other TCEs there would be no adaptation right as such, nor prevention of the obtaining of the IP rights in the derivative work by its creator. Neither, would mere “inspiration” be prevented in accordance with the idea/expression dichotomy in general copyrights law.<sup>178</sup>

The scope of protection of registered and non-registered TCEs in the DPs also includes the protection against failure to acknowledge the source of the TCE.<sup>179</sup> The two categories of TCEs are furthermore protected against distortion, mutilation, adaptations, other modification or derogatory action as well as the acquisition or exercise of IP rights over TCEs. Protection would also be available against the use that creates a false, confusing, misleading or disparaging link with the concerned community.<sup>180</sup>

In the Model Provisions the offenses in relation to TCEs are conditioned on willfull action. However, regarding non-compliance with the requirement of

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<sup>176</sup> The registration option is only applicable in cases where communities wish to obtain strict prior informed consent protection for TCEs already known and publicly available, since secret TCEs are protected in article 3c DPs. When registration or notification involves recording or other fixation of TCEs/EoF, the resulting IP rights would be held by the relevant community.

<sup>177</sup> WIPO/GRTKF/IC/10/4 Annex p 22. This approach is akin to perhaps to a compulsory license or equitable remuneration approach, found in national *sui generis* laws like the Bangui Accord, as well as in conventional copyright regimes concerning musical works fixed in sound recordings.

<sup>178</sup> WIPO/GRTKF/IC/10/4 pp 21 However, there is suggested that there shall be a regulation concerning how derivative works may be exploited, following the general approach of the Pacific Model Law, 2002.

<sup>179</sup> <http://www.wipo.int/tk/en/documents/pdf/1982-folklore-model-provisions.pdf> p 21. In the Model Provisions it also is stipulated that there should be an acknowledgement of source in connection with any communication to the public of an expression of folklore. Thus, the source must be indicated by mentioning in an appropriate manner, the community and/or the geographic place from which the expression utilised had been derived.

<sup>180</sup> Regarding past and ongoing uses of TCEs, these should be brought into conformity with the provisions within a reasonable time, subject to respect for acquired rights (see draft Article 9). National and regional protection would be achieved on the basis of a “national treatment” approach (see draft Article 11).

acknowledgement of source and the need to obtain authorization to use the expression of folklore, the Model Provisions also provides punishment of acts committed negligently. This takes account of the nature of the offenses concerned and the difficulties in proving willfulness in a case of omission.<sup>181</sup> However, similar intent requirements are not to be found in the substantive provisions or the commentary to the DPs.

### 4.3 Limitations

The protection of TCE in the DPs is subject to certain exceptions and limitations to ensure the continuing customary use, exchange and development of TCEs within the traditional and customary context by members of the relevant community.

Stakeholders have expressed that such limitations are necessary in order to prevent a too rigid protection, which would impede creativity and artistic freedom and at the same time be difficult to implement and enforce.<sup>182</sup>

The limitations and exceptions to the TCE protection are formulated in article 5 DPs. They would apply to the use of TCEs for the purpose of illustration for teaching and learning; non-commercial research and private studies; criticism or review, reporting news or current events; use in the course of legal proceedings; making of recordings and other reproductions for archives or inventory for non-commercial cultural heritage safeguarding; and incidental uses.<sup>183</sup>

In national *sui generis* protections of TCEs non-indigenous artists have been explicitly exempted from the authorisation requirement when they use TCEs in a commercial context. However, the obligation to acknowledge the identity of the work and its place of origin has remained.<sup>184</sup> The issue of formulating a specific exemption for certain non-indigenous artist in a country using TCEs in a commercial context has not been mentioned in the DPs.

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<sup>181</sup> <http://www.wipo.int/tk/en/documents/pdf/1982-folklore-model-provisions.pdf> p 22.

<sup>182</sup> WIPO/GRTKF/IC/10/4, Annex p 27.

<sup>183</sup> WIPO/GRTKF/IC/10/4, Annex p 26. Article 5 also clarifies that measures for the protection of TCEs should extend only to utilizations of TCEs taking place outside the customary context whether or not for commercial gain.

<sup>184</sup> See article 23 and 24 of the Panaman Law No 20 of June 26, 2000 referred to in article 9, Ministry of trade and industries executive decree No. 12, March 2001, p 16 stipulating that small non-indigenous Panamanian artisans who were engaged in the reproduction and sale of products incorporating the “Mola Kuna Panama” and who were registered with the Directorate General of Handicraft of MICI can be exempted from authorisation by license for use. Non-indigenous artist were however obliged to, affix, print or otherwise show in a visible manner the identity of the work and its place of origin.

## 5 Concluding remarks

The purpose of this thesis is to scrutinise if the previous and foreign impact in the commercialisation of traditional designs in Guatemala, with the objective to promote development and reduce poverty in indigenous communities, can be considered as a misuse of TCEs according to the DPs. Such an assessment might seem unnecessary since the material content of the DPs and its status still is at a drafting stage. However, after coming across various weaving cooperatives and international projects during my field research in Guatemala it nevertheless is a relevant issue. It can be argued, that if such an aspect is not addressed when deciding the final scope of protection in the DPs it can result in the discouragement of similar international projects, which could deprive the indigenous weavers working opportunities and impede development in the communities. However, at the same time there needs to be a discussion concerning how the commercial use of traditional design for development purposes, without taking IP issues into account, should be dealt with in the DPs.<sup>185</sup>

Despite the odds, the ancient Mayan weaving traditions has survived even in times of critical political and social unrest in Guatemala. The designs still contain traditional elements and symbolism. However, the traditional designs are not static and due to e.g. colonisation and the over 30 year armed conflict some of the traditional designs have been changed and lost. In regard to the controversy of whether the traditional designs in the Mayan weavings have originated from Pre-colonial Mayan communities or if they have been adopted after being introduced by the Spanish colonisers, it can be concluded to have little relevance for the *lege de ferenda* assessment of the legal protection of traditional designs. As stated in the commentary to article 1 DPs, the notion “heritage” is used to capture the inter-generational quality of TCEs. TCEs maintained and passed between three or even two generations has generally by experts been considered to form part of a “heritage”. According to that definition, the traditional designs made in the different Mayan communities, regardless of the initial origin, have characteristics of such a heritage and are to be characterised as a form of TCE.<sup>186</sup>

The transition of the use of traditional design however, from being a decorating symbolic element on traditional clothing made primarily for the local community to becoming commercialised and part of contemporary

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<sup>185</sup> See the According to Amnesty Business Group’s rating from 2007 <http://www.amnestybusinessgroup.se/default.aspx>. Human rights are no longer to be considered as a “soft law” issue, but rather a competition advantage. Yet, fair trade organisations has not included IP rights in their general standards. [http://www.ifat.org/index.php?option=com\\_content&task=view&id=2&Itemid=14](http://www.ifat.org/index.php?option=com_content&task=view&id=2&Itemid=14). See IFAT’s ten standards of fair trade.

<sup>186</sup> WIPO/GRTKF/IC/10/4 p Annex 13. Nor the fact that the traditional designs in Guatemala has developed and changed over time is a hindrance for legal protection according to the DPs.



products at the international and tourist market, is of greater importance for the *lege de ferenda* assessment of the scope of TCE protection. International NGO:s as well as aid organisations has been part of the commercialisation process and in general, weaving cooperatives and internationally initiated projects scrutinised have had a large degree of foreign influence in the initial phase of their activities. Moreover, there seems to be a clear connection between the presence of international volunteers and the possibilities for the producer cooperatives to export the products internationally. When it comes to structure and organisation there are similar features amongst the weaving cooperative on the one hand and internationally initiated projects on the other. In this context, the foreign impact as such has come in different shapes and sizes and has *de facto* influenced the organisation of the work, selection of products but also the designs in various ways.

In the weaving cooperatives the foreign impact has foremost consisted of international volunteers selecting the range of traditional designs, colours and products subject to commercialisation. For instance, in the TRAMA cooperative the different member groups brought samples of traditional designs from their respective community and the international volunteers subsequently selected and designated a specific design to be produced by each group. Also in the Santa Ana cooperative the international volunteers influenced the selection of products and designs, even though all the designs were from the Zunil area. Thus, in both cases the foreign impact was an integrated part of the cooperatives. The cooperatives sold the products and received the profit. Both cooperatives have developed to self-sufficient businesses with established organisation structures. Nowadays, the boards of both the cooperatives consist of indigenous women, who are in charge of deciding the products and designs as well as setting the quality standards.

The internationally initiated Miramaya, Balám and the Weaving for the future projects all have in common that foreign designers are in charge of the designs and products. The designers use traditional designs by re-contextualise and incorporate them in new colour schemes. Even though the use of traditional designs is done with the best intentions as a way of helping indigenous communities to earn a living, develop their communities and sustain the traditional ways, it is often done without formal consent or benefit-sharing agreements with the relevant community. Miramaya has developed from being a project financed by SIDA to becoming a commercial success and are currently selling the products to several European countries. Balám also exports their annual collection to European and the North American market but receive additional financing from the Dutch organisation ICCO.

The indigenous weavers working in the international projects receive orders and get instructions of which products to make and subsequently get paid for their work. Since Balám collaborates with the Guatemalan NGO Chilam there is also a development aspect and the weavers can participate in vocational activities like weaving classes. Neither Balám nor Miramaya

have negotiated agreements regarding use of traditional designs or royalties with the indigenous communities they are working with.

The weaving for the future project also intends to re-contextualise traditional designs by incorporating them on basic pieces of clothing. The project wishes to sell the products over the internet and to export to fair trade retailers to a larger degree. The idea of the project is not only to sell a product but also a story, and the symbolism of the different designs are researched. However, all the orders the project receives are followed through on the conditions of the indigenous weavers and the aim is that all the profit will go to the weavers without intermediaries. In that aspect, the weaving for the future project has characteristics from both weaving cooperatives and internationally initiated projects.

When it comes to attitudes regarding exclusivity or ownership of traditional design it can be concluded that it in general seems to be widespread and accepted that the indigenous weavers from different communities copy designs from each other and there seems to be a more reluctant attitude towards companies that copy traditional designs. Yet, TRAMA is an example of conflict within a cooperative due to one member group starting to copy the design and product of another member group. Some say that they would change their design if someone started to copy them, and copying of design and product has also been a reason given for not participating in a weaving cooperative. Thus, it is clear that the vendors and weavers experience that sales drop if someone else starts to make the same product with the same design.

Since the DPs is still at a drafting stage the assessment, of whether the use of traditional designs scrutinised can be considered as a *lege de ferenda* misuse according to the DPs, can merely be done on the bases of the current wording of the DPs, objectives, general guidelines as well as thoughts and comments from participants throughout the drafting process. It can be concluded that neither the DPs, nor the commentary distinguishes TCEs used for development purposes from other types of uses. Moreover, use of TCEs for development or poverty reduction purposes is not explicitly exempted from the scope of protection. Hence, the DPs as such does not give a lot of guidance.

If the uses scrutinised are to be assessed by the general criteria in article 3 DPs it can be concluded that many of the Mayan traditional designs must be considered as being of particular “cultural and spiritual” value to the indigenous communities. The mythical symbols of the designs are the same whether they are decorating a *huipil* or a cell phone cover. However, most of the traditional designs are not documented at all. There are some inventories of traditional designs published by private museums, but there is no exhaustive registration. It has been argued that there is widespread lack of resources and interest in Guatemala for preservation of the Mayan traditional designs. The indigenous people are still subject to discrimination and have little trust in public authorities. Moreover, there is no independent

Mayan organisation that can register or notify traditional designs on behalf of the various indigenous communities.

The effect of the non-registered Mayan traditional designs in Guatemala belonging to the second category of TCEs in article 3 DPs, is that the Mayan communities will not be able control the use of traditional designs through a FPIC, and thus obtain a weaker protection for their traditional designs.

It can be concluded, when comparing these five different weaving producer cooperatives, that the foreign influence in the TRAMA and Santa Ana cooperatives can probably not be considered as a *lege de ferenda* misuse of TCE according to the DPs. Foreign impact in merely the selection of traditional designs can not be considered as a utilisation by a third party, since the designs are used and sold by the indigenous weavers, who will also receive the profit. In the cases where the Balám and Miramaya projects' use traditional designs on their products could be considered as a misuse in relation to article 3 DPs. The misuse would consist of the fact that the foreign designers use various elements of traditional designs on contemporary products, without clearly acknowledging the source as well as not having clear benefit-sharing agreements. If the Weaving for the future business concept on the other hand, i.e. of selling a product as well as a story, is an example of use of TCE where the designs are researched. This, in combination with the fact that all the current orders are made on the terms of the weavers who receive all the profit, makes it likely to believe that if for instance the proposed clothing line becomes a reality the use of TCEs according to the wording of the DPs will be *lege de ferenda* lawful. However, a precondition would be that the information and story behind the product and traditional design also includes the acknowledgement of the community in question producing the design.

As emphasised in the preamble of the DPs there is no one-size-fits-all solution when it comes to the legal protection of the TCEs and as been pointed out in the international debate the real challenge for the future is how international regulations on TCE shall be enforced.<sup>187</sup> It is impossible to predict what addressing this issue in a DPs context in practice would result in for the *de facto* protection of traditional designs of the indigenous communities in Guatemala. The effect in practice of the DPs in general, even if it becomes a fully fledged binding international convention, will probably be insignificant. One of the reasons is that the actual effect and way of implementation, according to the guidelines, will be left up to national discretion. In this respect, the vast social differences, lack of information and financial resources in the indigenous communities in combination with lack of political influence will be difficult obstacles to surpass when it comes to the legal protection of traditional designs in a country like Guatemala.

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<sup>187</sup> Erica Irene Daes, Intellectual Property and Indigenous peoples, American Society of International Law. Proceedings of the annual meeting Washington 2001 p.143. Since the disputes are likely to cross international frontiers on a regular basis and generally involve parties with different levels of power, information and financial resources.

Moreover, the strongest protection of TCEs in article 3 DPs presupposes registration possibilities and also a certain structure and awareness within the indigenous community. The idea of making certain forms of utilization of TCEs subject to authorization is not an unfamiliar concept to creative communities in several countries.<sup>188</sup> However, in the traditional legal Mayan system there are no rules concerning use of traditional art and symbols. In a considerable amount of Mayan communities they have kept the traditional authorities. The traditional leaders are involved in the legal system by resolving legal conflicts and expedite documents proving ownership of land.<sup>189</sup> However, there seems not to be any general authority representing all the Mayan communities that is in charge of the cultural heritage. In order for the international protection of TCEs to have an effect on a national level, there needs to be a Mayan organisation supporting such efforts that can help to register, give FPIC and initiate proceedings on behalf all the indigenous groups.

All considered I believe that one of the greatest advantages of DPs addressing the issue of legal protection, in relation to projects using TCEs with for poverty reduction purposes, is that international development organisations, fair trade organisations and others that finance similar projects become aware and start to consider TCE as such as a part of a development agenda.

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<sup>188</sup> <http://www.wipo.int/tk/en/documents/pdf/1982-folklore-model-provisions.pdf> p 17. Eg. in Australia, Peter Banki reported to the Australian Copyright Council on October 3, 1978, that a “permission mechanism is well established among tribal Aboriginals in the Northern Territory”. In 1976, claims were made by Australian Aboriginal Tribal leaders that photographs contained in a book of anthropological studies depicted subjects that had secret and sacred significance to their community and stated that no proper permission had been given to publish them.

<sup>189</sup> El sistema jurídico Maya, Rafael Landívar , Guatemala 1998 p 96.

# Supplement A

Draft Provisions

ARTICLE 1:

SUBJECT MATTER OF PROTECTION

(a) “Traditional cultural expressions” or “expressions of folklore” are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

- (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
- (ii) musical expressions, such as songs and instrumental music;
- (iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances;

whether or not reduced to a material form; and

(iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;

which are:

- (aa) the products of creative intellectual activity, including individual and communal creativity;
- (bb) characteristic of a community’s cultural and social identity and cultural heritage; and
- (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

(b) The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.

ARTICLE 3:

ACTS OF MISAPPROPRIATION (SCOPE OF PROTECTION)

Traditional cultural expressions/expressions of folklore of particular value or significance

(a) In respect of traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance to a community, and which have been registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that the relevant community can prevent the following acts taking place without its free, prior and informed consent:

(i) in respect of such traditional cultural expressions/expressions of folklore other than words, signs, names and symbols:

the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography) of the traditional cultural expressions/expressions of folklore or derivatives thereof;

any use of the traditional cultural expressions/expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the community as the source of the traditional cultural expressions/expressions of folklore;

any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore; and

the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof;

(ii) in respect of words, signs, names and symbols which are such traditional cultural expressions/expressions of folklore, any use of the traditional cultural expressions/expressions of folklore or derivatives thereof, or the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or derivatives thereof, which disparages, offends or falsely suggests a connection with the community concerned, or brings the community into contempt or disrepute;

Other traditional cultural expressions/expressions of folklore

(b) In respect of the use and exploitation of other traditional cultural expressions/expressions of folklore not registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that:

(i) the relevant community is identified as the source of any work or other production adapted from the traditional cultural expression/expression of folklore;

(ii) any distortion, mutilation or other modification of, or other derogatory action in relation to, a traditional cultural expression/expression of folklore can be prevented and/or is subject to civil or criminal sanctions;

(iii) any false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the traditional cultural expression/expression of folklore of a community, suggest any endorsement by or linkage with that community, can be prevented and/or is subject to civil or criminal sanctions; and

(iv) where the use or exploitation is for gainful intent, there should be equitable remuneration or benefit sharing on terms determined by the Agency referred to in Article 4 in consultation with the relevant community; and

Secret traditional cultural expressions/expressions of folklore

(c) There shall be adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret traditional cultural expressions/expressions of folklore.

## Supplement B



Pictures above, taken by me, illustrate some of the products from Chilam Balám combining Indian weaving traditions with modern European trends. The picture to the left is a pillow case, in which the fabric from Huehuetenango has been mixed with the traditional birds of the Nebaj region. Moreover, the traditional colour scheme has been changed.<sup>190</sup> The picture to the right shows part of the product line sold under the name Balám.



The pictures, taken by me, illustrate some of the products sold at the TRAMA cooperative store, with traditional designs from various member groups.

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<sup>190</sup> Interview with Marjolein Keijsper, textile designer working for the Dutch organisation ICCO, Xela 7/7 2006.





Pictures above, taken by me, illustrate some of the products from the Afroart collection *Miramaya*.



Picture above, taken by me at the Santa Ana cooperative store, illustrate products with the traditional designs from the Zunil area.

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