

PROVIDING SUPPORT FOR POLICY DEVELOPMENT IN THE FIELD OF INTANGIBLE CULTURAL HERITAGE

GENERAL GUIDANCE NOTE

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WHY THIS NOTE?

Under the Convention for the Safeguarding of the Intangible Cultural Heritage (hereafter, the Convention), States Parties are encouraged to develop or modify intangible cultural heritage (ICH)-related policy and legislation, to assist in implementing the Convention (Article 13; ODs 103–105). States Parties need to create an enabling environment at the national level within which (a) ICH is valued and respected, (b) communities, groups and individuals concerned¹ can be assisted where necessary in safeguarding² their ICH, and (c) community stewardship over that ICH can be recognized and protected.

Many States have already developed ICH-related policies. This may include modifying existing policy and legislation, expanding the mandates of existing institutions, or developing new policies and laws, and establishing new institutions and initiatives. Indeed, it may sometimes be more important to identify where existing regulations may impede the continued transmission and practice of ICH and then take action accordingly, rather than focus on new regulations. Some States are still in the process of deciding what modifications or additions to legal and policy frameworks, if any, might be appropriate to support the implementation of the Convention. UNESCO is therefore sometimes approached for advice about policy and legislation relating to the implementation of the Convention. Hence, the development of this guidance note.

The term ‘policy’ can have many meanings but it is used in this context to describe a system of courses of action, guiding principles and procedures considered beneficial for the specific purpose of safeguarding intangible cultural heritage. When we speak of ICH-related policy we include policies that aim specifically at supporting the safeguarding of ICH as well as those policies that can affect the safeguarding of ICH although their aims may be rather different. Therefore, ICH-related policy concerns culture and other policies, such as education, health, food security, migration etc. State policies are commonly expressed in constitutions, policy documents, legislative acts and regulatory measures.³ State policies may not always be formally written down but are expressed through decision-making procedures, institution building, laws and funding priorities, for example. Policy-making is a complex process that involves much more than drafting a document; due attention has to be paid to the ability to implement proposed actions including political and stakeholder support, resources and incentives for implementation.

ICH is a relatively new area for policy development on which the Convention and its ODs provide some suggestions of possible policy measures, but no guidance is given to advising experts on how to provide policy advice. This Guidance Note provides broad conceptual and practical advice to experts undertaking country needs assessments regarding policy for ICH safeguarding in the context of the Convention. It aims to help advising experts to ask questions to better understand the broader picture and help the country to reflect on the implications of different policy options, as well as to identify challenges and needs in the relevant State and suggest areas where capacity could be further developed. More detailed material can be found in the associated Information Sheets, which delve into specific policy areas such as constitutional provisions, the ICH policy development process, policies in the culture and education sectors, as well as a variety of other policy areas that intersect with ICH (e.g. economic development, environmental sustainability, gender equality, social cohesion and peace, etc.). In addition to providing a reflection on issues to consider in each of these areas, the information sheets provide references to the Convention and its texts, and share specific examples and experiences of policy-making in other countries.

The Guidance Note takes the Convention and its Operational Directives as a starting point, draws on documents relating to the work of the Organs of the Convention, on periodic reports of States Parties to the Convention, papers commissioned for this project by the Capacity Building Unit of the Intangible Cultural Heritage Section at UNESCO Headquarters in Paris, and on other relevant literature.

1. Hereafter, communities concerned.

2. Article 2.3 of the Convention defines safeguarding as ‘measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.’

3. There are of course other groups or organizations (such as traditional leaders) that make policy relating to ICH that may affect its safeguarding.

CONCEPTUAL GUIDANCE

A HIERARCHY OF POLICIES AND LAWS

Given the diversity of arrangements in States, it is difficult to provide an overview of policies and laws that would cover all systems. However, here we make a few general comments about the relationship between different kinds of legal instruments.

Policies, laws and regulations exist in a hierarchical relationship to each other. In terms of national documents, a *constitution* is generally at the top of the legal hierarchy in a State. *Regulations* are documents drafted by Ministries, State agencies or other authorized bodies explaining how a law will be implemented, for example explaining what various stakeholders should do to comply with the law. *Legislation* is another term for statutory law enacted by a legislature or other competent authority in a country. *Policy Documents* are drafted under the auspices of government that set out the broad aims, methods and principles that a government will use to guide actions including but not restricted to, the development of more specific legislation and regulations.

In addition to national documents, states usually ratify hundreds of *international instruments*, including international human rights instruments. They may also be members of international bodies like the World Trade Organization, Organization of Petroleum-Exporting Countries or International Monetary Fund that commit them to taking certain policy approaches. At the time of ratification of international instruments (or at some later date) States may be allowed to make declarations or reservations in respect of these instruments, stating that they do not accept some of the obligations or wordings in them. Once an international instrument is ratified, it does not automatically become law in a State. In so-called 'dualist'⁴ States, it is necessary for international instruments to be incorporated into national law to take effect even after they have been ratified, and States are sometimes slow to do this. In some States a lot has happened since the ratification of the Intangible Heritage Convention, while in others little.

ICH-related provisions can be located in a variety of places within a legal system: a constitution, customary law, policy and legislation about a wide range of subjects, as well as in general culture policies, or subsidiary policies and legislation in the culture sector. National development strategies, which provide the national framework for external development aid or state budget allocations, also need to be considered.

Many States devolve policy-making about culture to subordinate levels of administration or governance, and some have plural legal systems that accommodate certain forms of customary law, and thus have different provisions applicable to different communities in the State.

The most common kind of devolution⁵ (which we have called territorial devolution) can be found in a federal system of some kind. For example, in Argentina, the State is responsible for promoting federal policies on ICH, but each of the 24 autonomous provinces is responsible for implementing them within its territory. The second kind of devolution to consider – non-territorial devolution – can usually be ascribed to the existence of indigenous or minority groups in a State whose needs or governance systems are not limited to a specific area.

Even where traditional leaders, or other traditional community leadership structures, have no territorially-based administrative authority, central government may recognize their role in alternative dispute resolution processes, for example, or devolve some tasks to them through customary law.⁶ Traditional authorities such as elders or chiefs, and traditional governance structures, may play a central role in representing communities, in transmitting, safeguarding and managing ICH and managing natural spaces and resources related to ICH practice. Traditional leadership structures have always of course changed over time and are sometimes contested by the community. State recognition of such structures can fluctuate depending on the political

4. See http://en.wikipedia.org/wiki/Monism_and_dualism_in_international_law

5. Devolution is the statutory delegation of powers from the central government of a sovereign state to govern at a subnational level, such as a regional or local level. It is a form of administrative decentralization.

6. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 11.

context. State recognition of certain kinds of leaders, appointment of traditional leaders and codification of customary law can completely reinvent traditional leadership structures.

Where a State chooses to devolve some authority to traditional leadership structures, it may make provision for a plural legal system. Plural legal systems are not all alike: it is possible to distinguish between ‘weak’ and ‘deep’ pluralism. In systems characterized by weak legal pluralism, customary law is subsumed within, and validated through, the dominant legal system: customary norms are ‘removed from their institutional context and applied by the state system’. In systems characterized by deep legal pluralism, the State takes the view that the principles underlying customary law may be incompatible with those underlying the dominant legal system, and the relevant customary institutions are thus given the space to operate independently from State structures.⁷ Whether a State opts for ‘weak’ or ‘deep’ pluralism affects how much authority is given to traditional leaders, and what the scope of their power is. There is a close conceptual relationship between the principles underlying customary law, forms of traditional authority, social systems within communities and ICH practice.⁸ In looking at the effects of non-territorial devolution on matters relating to ICH safeguarding, it is therefore important to consider the legal, administrative and conceptual relationship between State and traditional sources of authority and power, and the implications of this for ICH-related policy development.

ICH-related policy-making thus does not always take the form of a stand-alone ICH policy in the culture sector. ICH-related provisions can be included in legislation on heritage management, institutional mandates, regulations and so on. Some policies explicitly mention ICH; others may simply affect its safeguarding indirectly.

POLICY-MAKING IN THE CONTEXT OF THE CONVENTION AND ITS OPERATIONAL DIRECTIVES

The two main obligations of States Parties under the Convention are to take the ‘necessary measures’ to safeguard the ICH present in their territory (Article 11(a)); and to identify and inventory the ICH present in their territory, with the full involvement of the communities concerned, and to update these inventories regularly (Articles 11(b) and 12.1).⁹ The Convention imposes few clearly binding obligations on States Parties, and although Article 13 encourages the development of policy and legislation for ICH safeguarding, it does not impose an explicit obligation to do so.¹⁰ In the spirit of the Convention, the general role of States Parties, and other stakeholders in ICH safeguarding (such as researchers and NGOs), is to assist communities in safeguarding their ICH, either by providing specific practical assistance in safeguarding an element, or by contributing to more general measures that create an enabling environment for safeguarding.

Although most actions for safeguarding specific ICH will happen at the local level, within communities or groups concerned, the Convention and its ODs thus encourage States to create a supportive institutional and professional environment for safeguarding by, for example:

- Developing ICH-related policy, regulations and legislation or modifying existing policies (Article 13; ODs 103–105);
- Integrating the safeguarding of intangible cultural heritage into development plans, policies and programmes at all levels (OD 170);
- Establishing or designating bodies to assist in safeguarding the ICH (Article 13(b); OD 109);
- Creating or strengthening documentation centres for management of, and enabling appropriate access to, information about the ICH (Article 13(d); OD 109), sharing expertise and information internationally (Articles 1(d) and 19; ODs 86–88);

7. Forsyth, M. 2012, ‘Do You Want it Giftwrapped? Protecting Traditional Knowledge in the Pacific Island Countries’, in Peter Drahos and Susy Frankel (ed.), *Indigenous peoples’ innovation: Intellectual Property Pathways to Development*, ANU ePress, Canberra, pp. 189–214.

8. Forsyth, ‘Do You Want it Giftwrapped?’ See also Forsyth, M. 2009. *A Bird that Flies with Two Wings* (ANU Press).

9. States Parties also have to make contributions to the ICH Fund (Article 26.1) and periodically report on their activities under the Convention (Article 29).

10. Article 13 uses encouraging but non-obligatory language: ‘each State Party shall endeavour to’ develop policies.

- Building capacity for safeguarding among all stakeholders, including communities concerned (Article 13(d)(i), 14; OD 82, 86 and 107(k));
- Setting up financial measures to assist in ICH safeguarding (Article 13(d)) and creating tax incentives for contributions to the ICH Fund (OD 78);
- Creating consultative bodies or coordination mechanisms for the identification of ICH, inventorying, implementing programmes, etc. (OD 80); and
- Encouraging cooperation and networking between communities, experts, centres of expertise and research institutes and international networks of ICH-related institutions and Category II centres (ODs 79–80, 86 and 88).

When working towards creating an infrastructure to support safeguarding activities, the Convention also strongly encourages, and under Article 11(b) in fact requires, that States Parties should take the interests and rights of the communities concerned into account.¹¹

The Convention, and its ODs, promote the widest possible participation of communities concerned in all activities relating to their ICH (Articles 11(b) and 15), including developing and implementing safeguarding plans/measures for their ICH (Article 15; ODs 1–2, 7 and 29); and preparing nomination files concerning their ICH to the Lists and Register of the Convention (ODs 1–2 and 7). In encouraging community involvement and consent for activities concerning their ICH, the Convention specifically wishes to avoid the misappropriation and decontextualization of ICH (OD 102). Intangible heritage should not become a property of the State (or of other stakeholders such as research institutions) through inventorying, nomination or safeguarding processes (see also Article 3(b)). The State should try to ensure that the rights of the communities concerned over their ICH are protected (OD 104). Community control over access to their ICH should be protected as far as possible (Article 13(d)(ii)). In doing so it is important to remember that neither ICH elements nor the communities concerned are ‘frozen’ in time; they are not fixed and bounded entities. Communities and groups are not homogenous, and may show internal conflict and stratification.

Furthermore, in the spirit of the Convention, ICH policy can play an active role in promoting not only principles of peace, but also inclusive social and economic development, and environmental sustainability. To this regard, the entire Chapter VI of the Operational Directives is devoted to the theme of safeguarding intangible cultural heritage and sustainable development. It calls upon States Parties to:

- Recognize the importance of and strengthen the role of intangible cultural heritage as a driver and guarantee of sustainable development; and
- Integrate the safeguarding of intangible cultural heritage into their development plans, policies and programmes at all levels (OD 170).

In the spirit of the Convention, ICH policy development should thus generally be aimed at:

- Assisting communities concerned (where required) in safeguarding their ICH, for example through capacity building, rather than giving this task to external experts or State agencies (Articles 1, 3, 13, 15; OD 80);
- Promoting awareness about, respect for, and recognition of the diversity and value of ICH in the territory of the States (Article 1, Preamble), rather than focusing on the ICH of only one group or introducing hierarchies between different elements of ICH;
- Promoting continued community involvement in the management of their ICH and ensuring their rights are protected (Article 15),¹² rather than enabling appropriation of it by others (OD 104);
- Ensuring active participation of a diversity of voices in policy-making processes and in ICH safeguarding policies (Article 15, Article 11(b)), rather than leaving this task to a few community members, outside experts or State agencies (OD 79-99);

11. Because it is an agreement between States, the Convention imposes no obligations on communities, or other stakeholders.

12. It is important to recall here that there are often many differences of opinion and power imbalances within communities and groups.

- Promoting ways to foster the principles of human rights, sustainable development and mutual respect in the safeguarding of ICH (Article 2.1), rather than promoting disrespectful, discriminatory or environmentally damaging traditions and customs (OD 102) and;
- Promoting ways in which States can cooperate with other States and develop intercultural understanding through safeguarding cross-border ICH (Articles 19-20), rather than promoting 'ownership' of ICH practices by specific communities or territories (OD 104).¹³

POLICY-MAKING IN THE CONTEXT OF OTHER INTERNATIONAL INSTRUMENTS RELATING TO ICH

The aims and objectives of ICH safeguarding under the Convention are closely related to those of a number of other international and regional legal instruments.¹⁴ These include:

- Other UNESCO Conventions in the field of culture, including the Convention concerning the Protection of the World Cultural and Natural Heritage (1972)¹⁵ and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005),¹⁶ as well as the UNESCO Declaration on Cultural Diversity of 2001;¹⁷
- International human rights treaties such as the Universal Declaration of Human Rights of 1948,¹⁸ and the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR) of 1966;¹⁹
- International instruments relating to minority and indigenous rights such as the United Nations Declaration on the Rights of Indigenous Peoples (2007), United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the International Labour Organization (ILO) Convention No.169 (1989);²⁰
- International instruments relating to gender equality, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) and its Optional Protocol (2000);²¹
- International instruments for the protection of community rights over their ICH. The Convention for Biological Diversity (CBD) article 8(j) recognized community rights over their traditional knowledge and the need for them to enjoy benefits from its commercial exploitation,²² and the Nagoya Protocol set out guidelines for the fair and equitable sharing of benefits arising out of the utilization of genetic resources.²³ See also the World Intellectual Property Organization (WIPO)'s work on the Protection of Traditional Knowledge and those for the Protection of Traditional Cultural Expressions;²⁴

13. See for example, Background Paper for UNESCO Meeting, 'Intangible Heritage Beyond Borders: Safeguarding Through International Cooperation', Bangkok, 20 and 21 July 2010.

14. For an explanation of the differences between conventions, treaties, declarations and other international legal instruments see https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml

15. Convention concerning the Protection of the World Cultural and Natural Heritage, http://portal.unesco.org/en/ev.php-URL_ID=13055&URL_DO=DO_TOPIC&URL_SECTION=201.html

16. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html

17. UNESCO Universal Declaration on Cultural Diversity, http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html

18. Universal Declaration of Human Rights, <http://www.un.org/en/documents/udhr/>

19. International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/cescr.aspx>

20. United Nations Declaration on the Rights of Indigenous Peoples, www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf; United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/Minorities.aspx>

International Labour Organization (ILO) Convention No.169, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

21. See Convention on the Elimination of All Forms of Discrimination Against Women and other instruments at <http://www.unesco.org/new/en/unesco/themes/gender-equality/resources/conventions-and-declarations/>

22. The Convention for Biological Diversity (CBD), article 8(j), <http://www.cbd.int/traditional/>

23. The Nagoya Protocol, <http://www.cbd.int/abs/text/default.shtml>

24. WIPO, Draft Articles for the Protection of Traditional Knowledge, and Traditional Cultural Expressions, http://www.wipo.int/tk/en/igc/draft_provisions.html

- Regional instruments relating to culture and heritage such as the Framework Convention on the Value of Cultural Heritage for Society (Faro, 2005) and the Framework Convention for the Protection of National Minorities (Council of Europe 157),²⁵ the Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture (2002)²⁶ and the ASEAN Declaration on Cultural Heritage (2000),²⁷ the Cultural Charter for Africa (1976)²⁸ and the Charter for African Cultural Renaissance (African Renaissance Charter),²⁹ the Draft American Declaration on the Rights of Indigenous Peoples.³⁰
- International policy statements on the link between culture and sustainable development including Resolutions on Culture and Development adopted by the UN General Assembly in 2010 and 2013.³¹

In ICH-related policy-making it is important to consider these international and regional instruments and discussions because, even where States have not formally ratified such instruments, they can affect how ICH and its safeguarding is perceived and undertaken. It should be noted that policy environments inspired by different international instruments can also be in tension with one another.³² This presents both constraints and opportunities for policy-making relating to its safeguarding and to other areas of government activity affecting ICH.

NATIONAL CONTEXTS FOR POLICY-MAKING FOR ICH SAFEGUARDING

Policy-making about ICH can be a useful tool in helping States to create a general enabling environment for ICH safeguarding in the spirit of the Convention. It can justify, establish, coordinate and ensure funding for efforts to support ICH safeguarding in a State. It can clarify and deepen the relationship between ICH safeguarding and other policy objectives (e.g. education, health, economic development), and between the implementation of the Convention and other international or regional legal instruments that affect ICH safeguarding. It can also identify and possibly mitigate negative effects where existing legislation impedes the practice and transmission of ICH.

Many States Parties have developed policies and laws to support the implementation of the Convention and ensure the safeguarding of the ICH on their territory. There are also many examples of ICH-related safeguarding activities that have taken place in States that have not (yet) ratified the Convention. However, States Parties to the Convention are not obliged to develop laws and policies relating to ICH safeguarding, nor, in encouraging them to do so, do the Convention (Article 13) or its ODs prescribe the form such legal or administrative frameworks might take. Formal legal and policy frameworks are also not always required to support ICH safeguarding: sometimes communities can proceed with safeguarding strategies perfectly well without them. Some States (such as Norway and Switzerland) do not feel the need to develop specific legislation for supporting ICH safeguarding.

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25. Framework Convention on the Value of Cultural Heritage for Society, http://www.coe.int/t/dg4/cultureheritage/heritage/Identities/default_en.asp; Framework Convention for the Protection of National Minorities, <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>;
26. Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture <http://www.forumsec.org.fj/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprssnsOfCulture20021.pdf>; See also 'Guidelines for developing national legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Model Law 2002' at <http://www.wipo.int/edocs/lexdocs/laws/en/spc/spc001en.pdf>
27. See <http://cultureandinformation.asean.org/wp-content/uploads/2013/11/ASEAN-Declaration-on-Cultural-Heritage.pdf>
28. Cultural Charter for Africa, <http://www.au.int/en/treaties/cultural-charter-africa>
29. Charter for African Cultural Renaissance (African Renaissance Charter). See <http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Dakar/pdf/CharterAfricanCulturalRenaissance.PDF> In regard to African regional instruments see also Máté Kovács, 2009. Cultural Policies in Africa, a Compendium of reference documents (OCPA, Madrid).
30. On the Draft American Declaration on the Rights of Indigenous Peoples see http://www.oas.org/dil/indigenous_peoples_supporting_preparation_draft_declaration.htm; Lixinski (2013) suggests that regional instruments in the Americas such as the Draft American Declaration on the Rights of Indigenous Peoples conceive of ICH as a reservoir of the 'pure commonly-shared culture' of the continent (part of a project to emphasize a pan-American identity), and its safeguarding as part of a broader process of recognizing and protecting the rights of indigenous peoples.
31. For these documents and other relevant texts see the UNESCO website on the MDGs: <http://www.unesco.org/new/en/culture/achieving-the-millennium-development-goals/resources/culture-and-development-resources/#c326924>
32. M. Forsyth, 2012, 'Lifting the Lid on 'the Community': Who has the Right to Control Access to Traditional Knowledge and Expressions of Culture?' *International Journal of Cultural Property*, 19, pp.1-31.

The literature on ICH-related policy-making³³ and reviews of the periodic reports³⁴ suggest that there is considerable diversity in existing legal and administrative provisions for ICH safeguarding both between States and also, where federal or devolved governance systems are in place, in different administrative regions within a State. Furthermore, ICH-related provisions are sometimes included in overall culture policies and heritage legislation while in other cases specific ICH-related policies and laws are developed, either focused on safeguarding ICH in general, or tailored to the safeguarding of specific ICH.

PRACTICAL GUIDANCE

A DIVERSITY OF APPROACHES

The process of ICH-related policy-making is thus highly diverse, and may be influenced both by the specific reasons and social, political and economic context for ICH-related policy development, as well as the standard processes of policy-making in the State. In other words, there is no one specific approach when it comes to the actual practice of policy development. Policies relating to ICH safeguarding are relatively new and take a variety of forms, although countries such as Japan and the Republic of Korea have had ICH-related laws for decades prior to the Convention coming into force. Moreover, ICH-related policy-making is not just about the writing of good policy documents and laws, but about creating the conditions for its effective implementation by the relevant stakeholders.

- Some States have developed (or are developing) policies and legislation specifically for ICH safeguarding (e.g. Japan, China, Georgia, Niger), while others have integrated (or are integrating) ICH into their overall culture legislation (e.g. France, Morocco, Serbia, Viet Nam);
- In some States, policies and legislation regarding ICH are promulgated and enforced at the sub-national level (such as in provinces or counties in a federal structure) and may thus differ between administrative regions within a country (e.g. Austria, Brazil, Belgium, India, Italy, Mongolia, Switzerland, Spain, UAE);
- Some States have established (or are establishing) new institutions or directorates responsible for ICH (e.g. the Dominican Republic, Gabon, India), others have expanded the mandates of existing institutions (e.g. Burkina Faso);
- Some States have legal instruments aimed at protecting particular ICH elements inscribed on their national ICH inventory/register and/or the Representative List (e.g. Portugal);
- A number of States make provision for support to key ICH practitioners, sometimes called Living Human Treasures (e.g. Cambodia, Morocco, Senegal); and
- Some States link their ICH policies to provisions for specific communities, whether these are minority or indigenous groups, or majority groups.

These different approaches within States can also partly be ascribed to: different regional and international influences; different socio-political, historical and economic contexts in each State; and different interpretations of, and reasons for ratifying, the Convention.

Experts undertaking country needs assessments regarding policy for ICH safeguarding in the context of the Convention can draw on this range of experiences, using a variety of information sources. Perhaps one of the

33. See for example Lixinski, L., *Intangible Cultural Heritage in International Law* (Oxford University Press 2013); Miyata, S. 2013. *Intangible Cultural Heritage Policy in Japan*. In L. Arizpe & C. Amescua (Eds.), *Anthropological Perspectives on Intangible Cultural Heritage* (Berlin, Heidelberg: Springer Verlag, Springer Briefs in Environment, Security, Development and Peace (ESDP) Vol. 46); Carvalho, A. 2008. Portuguese legislation on intangible cultural heritage and inventories. In *El patrimonio cultural inmaterial. Definición y sistemas de catalogación: actas del seminario internacional*, Murcia, 15 -16 Feb. 2007, ed. Inma García Simo, pp.173-184. Murcia: Comunidad Autónoma de la Región de Murcia. Deacon, H.J. et al., 2004. The subtle power of intangible heritage: Legal and financial instruments for safeguarding intangible heritage, Human Sciences Research Council. Available at <http://www.hsrapress.ac.za/product.php?productid=2044>.

34. These can be found at <https://ich.unesco.org/en/committee-documents-and-in-depth-studies-00862>

most useful sources are the periodic reports received by the Committee from States Parties to the Convention. UNESCO also hosts a database of national cultural heritage laws, which can be consulted for a broader range of ICH policies; over 250 entries, according to the database classification system, are ICH-related laws.³⁵ The World Intellectual Property Organization (WIPO) maintains a database of legislation that can be filtered for entries pertaining to Traditional Cultural Expressions (over a thousand entries)³⁶ and Traditional Knowledge (around 2,000 entries).³⁷ Although the WIPO database focuses on intellectual property (IP) law relating to what would be considered ICH under the Convention, it also includes many heritage-related laws.

Policy, law and administrative measures to support ICH safeguarding are not always to be found within specific ICH-related policies and legislation but located in, and profoundly affected by provisions in, constitutions, education and culture policies and heritage legislation, IP regimes, and in policies and legislation for other sectors of government intervention, such as development, health, and tourism and education. However, it should be noted that policy and legislation in these other areas does not necessarily take account of ICH in ways that promote its safeguarding. In some cases, it may actively impede such efforts. It is thus not always easy (or even possible) to amend or develop policies in other sectors than culture in order to integrate ICH safeguarding concerns. Ministries and government departments or agencies other than culture have many different perspectives and concerns, and their list of priority policy questions may not include ICH. In such cases, States could develop coherent ICH policies and approaches in the field of culture first, and then identify key areas outside culture where policies and laws actively hamper ICH safeguarding, and find ways of addressing this problem. Where ICH safeguarding is considered a priority in government, and for example where mention of ICH is made in the constitution or at the highest levels of government, it may be easier to ensure that ICH safeguarding issues are integrated into policies in a wide range of areas outside the field of culture.

Other policy sectors that can also relate to ICH safeguarding are listed below, but not discussed in detail:

- equal opportunities legislation (e.g. where provision is made for equal participation in cultural life);
- diplomacy and foreign policy (e.g. where provision is made for international cooperation mechanisms for ICH);
- urban/town planning (e.g. where provision of spaces/facilities for ICH practice is enabled);
- land and land tenure systems (e.g. where traditional land tenure systems, or access to land for community building are enabled);
- agriculture (e.g. where traditional skills and practices are recognized and supported);
- food security (e.g. where community development promotes ICH practice);
- environmental conservation, biodiversity and climate change (e.g. where environmental resources for ICH practice are assured);
- disaster management and displaced persons (e.g. where the importance of ICH for community cohesion is recognized);
- security and peace building (e.g. where the importance of ICH for community cohesion is recognized);
- trade (e.g. where these policies control the trade in ritual or cultural objects required for ICH practice, or promote cultural products);
- mining (e.g. where these policies control access to and protection of sacred sites);
- youth and children (e.g. where these policies facilitate transmission of ICH, protect children's rights during ICH practice); and
- media and communication (e.g. where these policies promote awareness raising about ICH).

A patchwork of legislation can also influence safeguarding activities. For example, in the United States, the American Folklife Center, under the American Folklife Preservation Act, 'recommended that ICH be taken into account in the implementation of all legislation on cultural resources and cultural heritage'. A range of laws,

35. <http://www.unesco.org/culture/natlaws/index.php>

36. http://www.wipo.int/wipolex/en/results.jsp?countries=&cat_id=16

37. http://www.wipo.int/wipolex/en/results.jsp?countries=&cat_id=18

such as the National Environmental Policy Act, the Endangered Species Act, the Religious Freedom Restoration Act, Executive Order 12898 (on environmental justice concerning minority populations), the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act (NAGPRA), and the Federal Records Act all affect ICH safeguarding.³⁸

International instruments, as well as regional instruments on ICH, indigenous peoples and minority rights among other things, can also be very important in framing problems and solutions, and even providing concepts and definitions for ICH-related policy-making. This can assist in the development of effective policy; consistency of terminology and approach can assist in fostering international cooperation.

KEY ISSUES THAT ARISE IN ICH-RELATED POLICY-MAKING

States can face similar issues and experience some common challenges in developing ICH-related policy and legislation. These may include:

- what subject matter should be covered in ICH-related policies and how ICH should be defined to cover the widest possible variety of ICH elements;
- how community participation in, and benefit from, ICH safeguarding can be supported while promoting equity and reducing potential conflict within communities;
- how the State can help to create an enabling environment that supports communities concerned in safeguarding their ICH while avoiding misappropriation and misrepresentation thereof;
- how specific institutions can support ICH safeguarding, and if so how their amended mandates should be incorporated into policies, laws or regulations;
- how ICH-related provisions could be incorporated into other policies and laws within and beyond the culture sector, promoting synergies between ICH safeguarding and other policy aims;
- how existing policy that impedes the practice and safeguarding of ICH can be amended, and/or tensions between different policy aims can be mitigated;
- low political priority given to culture (and correspondingly low budgets);
- poor communication between ministries and/or other agencies;
- weak communication and collaboration between central government and decentralized administrative levels (if such exist), and between these decentralized administrative levels on cultural matters;
- insufficient consultation of communities and their representatives, and more generally, poor communication between institutions, communities and other stakeholders; and
- weak institutional and human resource capacities.

Drafting and implementation of policies to support ICH safeguarding may also encounter some specific challenges, including:

- misunderstandings about the purpose and principles of the Convention, illustrated for example by some States making claims to 'ownership' of specific ICH elements inscribed or to be inscribed on the Representative List;
- methodological, organizational and financial difficulties integrating approaches to ICH safeguarding within the field of culture, for example where the focus historically has been on conserving tangible heritage (such as World Heritage sites under the UNESCO 1972 Convention), or where new policies are developed to promote cultural products (informed by the work of the UNESCO Convention on the Diversity of Cultural Expressions [2005]);
- difficulties integrating ICH-related policy into legislation and policies in other sectors outside the culture sector, illustrated for example by insufficient synergy between national policies regarding ICH safeguarding, and those relating to intellectual property or sustainable development;

38. Lixinski, L. *Intangible Cultural Heritage in International Law* (Oxford University Press 2013), p.139.

- weak public and community consultation mechanisms in ICH-related policy-making, conflicts between States, civil society organizations and communities, and the lack of incentives for the implementation of participative and consultative mechanisms; and
- devolution of ICH-related policy-making to sub-national levels of administration within a country, which typically creates opportunities to cater to local needs and situations, but may also negatively affect coordination between policies within a State.

Such challenges concern countries across the globe. Many countries devolve policy-making initiatives to different administrative levels without ensuring that the required capacity exists locally. Many countries, furthermore, face challenges in formulating new approaches for ICH-related policies in contexts where institutional arrangements for heritage conservation or archival documentation are very well established and not always focused on enabling maximum community participation.

The development of policy and legislation within a State can be assisted by:

- clear identification of the local situation, with the assistance of technical and legal advice and reflection on other country experiences, to focus policy-making appropriately on areas of greatest need and opportunity in accordance with the identified goals of policy-making, and to build on existing initiatives;
- open and broad consultation with relevant stakeholders, including the communities concerned, the public, NGOs, political parties, government agencies and ministries to build a sense of ownership and buy-in and thereby ensure effective implementation;
- strong political will to drive the process forward and overcome any obstacles; and
- strong capacities in communities and institutions for inter-sectoral and multi-stakeholder communication, collaboration and implementation of policies (including resources and incentives, where needed).

The thematic Information Sheets linked with this Guidance Note provide some more specific suggestions to guide policy advice with regard to these, and other, issues by discussing the experiences of a wide range of States, including in the following areas:

- developing ICH policies within the framework of general constitutional provisions and governance frameworks, and provisions for minorities or indigenous groups;
- the process itself of developing ICH policy, from encouraging community engagement, to policy provisions for identification and inventorying, and for ICH practitioners and elements.
- developing specific ICH-related policies and legislation and/or integrating them into broader cultural or heritage policies and legislation; and
- integrating ICH policies into other policy and legislation areas, from health and environmental sustainability to (among others) policy provisions for social cohesion and peace, gender equality, human rights, and economic development.

THE ROLE OF ADVISING EXPERTS IN PROVIDING EFFECTIVE POLICY SUPPORT

How can UNESCO effectively provide support to States Parties to the Convention who request policy-related advice? What is the role of experts appointed to assist in this process, and what are the limitations of this role?

The role of advising experts is to assist country counterparts in States to make locally-appropriate, informed choices about how best to support ICH safeguarding in the spirit of the Convention through policy-making. UNESCO's approach aims at combining expertise in the field of cultural policies with expertise on ICH, which means that ideally experts will work in pairs to provide integrated analysis and recommendations. They would undertake an analysis of the country context, governance structure and policy frameworks with relevance to ICH, policy challenges, available human and institutional resources and challenges for ICH safeguarding. This analysis would inform suggestions on capacity-building interventions, which may include policy advice, collaborative reflection on policy, facilitation of stakeholder consultations on policy, and training on policy-making.

The intervention aims to help country counterparts to determine to what extent, and in what ways policies and legislation, or institutional provisions, can support ICH safeguarding activities and the implementation of the Convention. If new policies and laws are drafted, they will need to be tailored to local situations, challenges and priorities. Existing policies, legislation and regulations can be modified or amended. In some situations, establishing formal institutions, or drafting specific legislation and policy for ICH, may not be optimal (or even possible), and other solutions may be required.

UNESCO has had considerable experience in providing policy advice to States in the field of culture, and has also been reflecting on the opportunities and challenges faced in doing so. In 2011, the Division of Cultural Policies and Intercultural Dialogue in UNESCO discussed the principles and processes for the formulation and implementation of cultural policies.³⁹ Policy advice missions have been carried out under the 2005 Convention. The Policy Advice workshop in 2014 summarized the experiences of the ICH Section and various other UNESCO Sectors including the UNESCO Education Sector and UNESCO International Institute for Educational Planning (IIEP), and agencies like the United Nations Environment Programme (UNEP) in providing policy advice to States.⁴⁰

From these experiences one can identify a number of favourable conditions under which support for policy development relating to ICH safeguarding could be most effective:

- policy support should only be provided on country request (an index of political will for policy-making) and predicated on country commitments to take account of the process and its results;
- policy support should be based on a clear understanding of the general goal of the policy to be formulated, as identified by a range of country stakeholders, and aligned with the local governance system and country priorities;
- policy support should be focused on the local situation, based on an identification of ICH-related challenges, needs and priorities, and an analysis of possible solutions (including solutions that do not involve the development of policy and legislation); and
- policy support should not be focused on helping country counterparts to write a policy document as a stand-alone intervention: it needs to ensure that country counterparts take ownership of the process. It should be accompanied by human and financial resources for analysis, stakeholder involvement, and follow-up.

The role of the advising expert is thus not to suggest model solutions or write policy documents for States but, at their request, to provide analysis, information and other support for an endogenous and consultative process of policy development. The advising expert would be guided by consultations with local stakeholders and legal experts in the relevant State, relevant national counterparts and knowledgeable UNESCO specialists working in the State concerned. Advising experts may offer relevant examples of policy-making content and processes from other countries and ask questions that focus and/or expand the frame of reference for policy-making. Much of the work of advising experts will be focused on facilitation and consensus building in engaging with country stakeholders, and acting as a sounding board for ideas during their discussions. Advising experts should make every effort to address barriers to participation for individuals (e.g. women) and social groups (e.g. persons belonging to minorities and indigenous peoples) in this process. They may thereby promote a participatory and inclusive process of policy development.

The role of advising experts is to be ‘friends of all, but allies of none’, helping national counterparts to think strategically about opportunities, challenges and possible strategies for policy-making. Once a relationship of trust has been developed with national counterparts, they may raise sensitive issues that could create problems for implementation of the Convention at national or international level, and help national counterparts to explore possible strategies to address them. However, they should not be judgmental about issues that fall under the sovereign authority of the State or outside the scope of the Convention.

39. Division of Cultural Policies and Intercultural Dialogue UNESCO Culture Sector, 2011 ‘Operational processes for the formulation and implementation of cultural policies’.

40. UNESCO ICH Section, Workshop report, ‘How to provide policy advice effectively?’

POSSIBLE STEPS IN A NEEDS ASSESSMENT

There are a number of possible steps that could be undertaken in consultation with national counterparts within a consultation process, and in the development of policy thereafter.⁴¹ These steps are supported by the information in annexes 2-4.

- Undertake a desk review of the country context relevant to ICH safeguarding, including:
 - the historical, current socio-economic, political and cultural context;
 - the demographic trends in the country, including recent migration and immigration, and the range of and relationship between different communities in the country;
 - the relevant national, regional and international legal and policy context that affects ICH safeguarding (not just in culture, but education, health, intellectual property, etc.), including the goals of policy-making in the area of culture, and
 - the institutional framework and relevant mandates.
- Identify diverse stakeholders (e.g. communities, NGOs, government ministries and agencies, institutions, and research centres) and set up consultations with their representatives, to:
 - identify the policy goals, issues and challenges relevant to ICH safeguarding in the country (whether in the field of culture or more generally),
 - evaluate existing interventions and policies that support ICH safeguarding,
 - review institutional capacities to fulfil their current mandates,
 - prioritize needs and opportunities relating to ICH safeguarding, and
 - identify possible areas in which policy-making or revision, and institutional support, may assist ICH safeguarding.
- Draft an initial analysis and needs assessment for both general capacity building and policy-making;
- Consult with relevant stakeholders about the initial analysis and needs assessment; and
- Write the final needs assessment report including a country assessment and suggestions for further advisory or capacity-building assistance.

41. The following documents contain some similar steps: UNESCO Section on the Diversity of Cultural Expressions, 'Methodological Guide for technical assistance missions'; Division of Cultural Policies and Intercultural Dialogue (UNESCO Culture Sector), 2011 'Operational processes for the formulation and implementation of cultural policies'.

ANNEXES TO THE GUIDANCE NOTE

ANNEX 1: ABBREVIATIONS

ASEAN	Association of Southeast Asian Nations
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
Committee	Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage
Communities	Unless indicated otherwise this covers the terms communities, groups and individuals as understood in the Convention
Convention	Unless indicated otherwise, this refers to the UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage (2003), and any reference to 'Article' without other indications refers also to this Convention.
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICH	Intangible (cultural) heritage
IP	Intellectual property
IPR	Intellectual property rights
IOS report	The Internal Oversight Service (IOS) report on UNESCO's standard-setting work of the Culture Sector, document IOS/EVS/PI/129 REV. (October 2013).
LHT	Living Human Treasures
OAPI	African Intellectual Property Organization
OD(s)	Operational Directive(s) of the Convention
Ratification	This covers various terms denoting processes by which States can adhere to the Convention: ratification, acceptance, approval and accession
Ratify	This covers the terms ratify, accept, approve and accede
Register	Register of Best Safeguarding Practices
RL	Representative List
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHRC	United Nations Human Rights Committee
UNTWO	World Tourism Organization
USL	Urgent Safeguarding List
WHC	World Heritage Convention
WIPO	World Intellectual Property Organization

ANNEX 2: TIPS FOR EXPERTS PROVIDING POLICY ADVICE⁴²

1. **Understand strategic vision.** Do preparatory research to understand the specific social, economic and political dynamics in each State that will affect ICH-related policy-making, including the place of ICH within the strategic vision of the country. Also seek to understand the legal environment within which ICH policy will be drafted.
2. **Request primary contact person.** Ask for a person permanently employed within the responsible State agency to be appointed as a contact point at the beginning of the process. Policy advice can simply be shelved where States have ratified the Convention but not appointed a responsible person or contact point, and have no existing experience or programmes in the field of ICH.
3. **Request a technical team.** This team should be appointed and briefed before your arrival on mission and should accompany you to engage with stakeholders, make contributions and record proceedings throughout the process, and be tasked with carrying forward recommendations from the report afterwards.
4. **Share background information.** Ensure that information about your own background and experience is shared with country counterparts early on in the process to ensure that they can benefit from your expertise as much as possible.
5. **Help to identify stakeholders.** Ensure that you are consulted on the question of identifying stakeholders, before you arrive in the country on mission, so that you can give inputs to improve the depth and breadth of consultation (if necessary).
6. **Manage government expectations.** As already stated, the role of the advising expert is not to suggest model solutions or write policy documents for States. Experts need to therefore manage such expectations from governments wanting a quick fix by clarifying their role to assist them to make locally-appropriate, informed choices about how best to support ICH safeguarding in the spirit of the Convention through policy-making.
7. **Build on existing expertise.** Network and share information with NGOs and other civil society stakeholders early on in the process, so that they better understand how they can support ICH safeguarding in communities. Oftentimes, these organisations have undergone similar consultative processes and mechanism that can provide valuable input or recommendations to move things along smoothly.
8. **Ensure post-consultation follow up.** Stakeholders will wish to contribute ideas and suggestions after your mission, once the recommendations have been made to the State, and during the policy-making process. Ensure that provision is made to receive and process such contributions.
9. **Read between the lines.** Refer to contradictions between local practices and existing equality or non-discrimination provisions in national policies and laws as far as possible. Tread sensitively on difficult issues: do not act in a judgmental way, and respect national sovereignty.
10. **Build trust with all stakeholders.** Wait until you have built trust with the technical team and stakeholders in the State, and have fully understood the local context, before raising difficult issues such as questions of human rights, for example in cases where an ICH practice seems discriminatory.
11. **Use the 'report' as a tool.** Explain in your report what additional steps could have been taken, or what other stakeholders consulted, and what reasons (such as time or budget constraints) prevented you from including these steps. Sometimes, State agencies are reluctant to engage with certain communities or NGOs, so it is difficult to get a full picture of the situation. Understand and explain these limitations in perspective, do not hide gaps.
12. **Share report findings.** Reports from your mission will be sent to UNESCO and country counterparts. Make every effort to also present the findings to technical officers in government, civil society or community stakeholders. In addition, present the recommendations directly in the form of a briefing to political leaders in the sector responsible for implementing the Convention (usually the culture sector).

42. With thanks to Stephen Chifunyise.

ANNEX 3: REPORTING TEMPLATE

Name of the State Party

Background information on the State

What are relevant aspects of the population, socio-economic and historical context, and demographics (including ethnic diversity) of the State?

How has the State and its communities or NGOs engaged with the Convention to date (nominations, international assistance requests, committee membership, public comments on nomination files, accredited NGOs, etc.)?

Scope and methodology of the needs assessment

What was the scope and purpose of the needs assessment?

How was the needs assessment compiled, and with what involvement from country counterparts, communities and other stakeholders?

Current provisions for ICH safeguarding in State policies and institutional mandates

Is ICH mentioned in any existing policies or institutional mandates? If so, how is it defined, and what provisions have been made for its safeguarding?

What regional and international legal instruments have been ratified or agreed to by the State Party and how can they inform policy-making relating to ICH safeguarding

How does the existing policy and institutional framework in the State Party assist in ICH safeguarding in the spirit of the Convention? In what ways, if at all, does it:

Encourage stakeholder awareness about the value and function of the diversity of ICH in the territory, the principles of the Convention, and the important role of communities concerned in safeguarding it (Articles 1,15);

Encourage the widest possible participation of communities concerned in all activities concerning their ICH, and consultation between them and other stakeholders in ICH management (where necessary) (Article 15);

Integrate ICH safeguarding into planning programmes and promote its function in society (Article 13(a)), for example by promoting mutual respect, human rights (including gender equality) and sustainable development (Article 2.1);

Support identification and inventorying of ICH in the territory with the full participation and consent of communities concerned, updating these inventories and making the information accessible to communities for safeguarding purposes (Articles 11-12);

Support other ways of safeguarding the ICH with the full participation and consent of communities concerned. This can include capacity building, research, information dissemination (appropriately managed) (Articles 13-14);

Encourage synergies between the implementation of the various UNESCO conventions in the field of culture, as well as synergies between the safeguarding of ICH, the promotion of cultural industries and the conservation of tangible heritage; and (depending on provisions in specific ICH policies) (Article 3);

Protect the rights and well-being of the communities concerned while safeguarding the ICH, promoting sustainable development, ensuring the ICH is not de-contextualized or over-commercialized, and that communities concerned are not misrepresented or abused (OD 102, 104);

Share expertise and information across international borders (Articles 1(d) and 19; ODs 86–88), including cooperation and networking between communities, experts, centres of expertise and research institutes and international networks of ICH-related institutions and Category II centres (ODs 79–80, 86 and 88)?

Key problems in ICH safeguarding

What are the key problems faced in safeguarding ICH and ensuring communities benefit from safeguarding processes, as indicated by communities concerned and other stakeholders?

Are there any additional issues identified by the advising expert?

Policy gaps in ICH safeguarding

Which of these problems can best be addressed through the development of policies?

What policy gaps have been identified by country counterparts and stakeholders? Are there any other policy gaps that could be indicated?

The policy process

What policy process will likely be adopted by the State? What recommendations can be made in this regard, if any, to assist in the planning for this process?

Capacity-building needs

What are the capacity-building needs identified by country counterparts, communities concerned and other stakeholders? What additional capacity-building needs might be relevant?

What examples of policy approaches might be relevant for country counterparts and stakeholders to explore?

What programme for capacity building would best meet these needs?

ANNEX 4: CHECKLIST

This is a checklist for the preparation of a needs assessment, mainly to guide budgeting.

Task	Actions
Development of scoping document	
<p>Advising expert produces a scoping document for the needs assessment based on consultation with country counterparts and UNESCO to identify a common understanding of:</p> <ul style="list-style-type: none"> the purpose behind the needs assessment, its scope, process and outcomes; the roles of the advising expert, country counterparts, community representatives and other stakeholders; and the relationship between the needs assessment and the process of policy development in the State. 	<p>Advising expert meets/exchanges with country counterparts and UNESCO (could be on email or skype)</p> <p>Identification of key stakeholders</p> <p>Output: scoping document (chapter 1 of the needs assessment)</p>
Development of draft desk review	
<p>Provision by country counterparts of information about:</p> <ul style="list-style-type: none"> key issues and challenges in ICH safeguarding; existing policy instruments that relate to ICH; and institutional mandates that relate to ICH. <p>Initial desk review of country background, key issues and challenges in ICH safeguarding, existing policy instruments that relate to ICH and institutional mandates that relate to ICH.</p>	<p>Country counterparts provide information</p> <p>Advising expert does desk research</p> <p>Output: draft desk review</p>
Consultation on draft desk review and development of policy analysis	
<p>Consultations to discuss and develop issues raised in the initial desk review and to identify possible policy gaps and solutions. Discussions on capacity-building needs in addressing these policy gaps.</p>	<p>Advising expert meets with country counterparts, community representatives and other stakeholders</p>
Development of draft needs assessment report	
<p>Advising expert develops draft report and circulates it for comments to country counterparts and UNESCO before amending and finalizing it.</p>	<p>Consultation on email or skype with country counterparts and key stakeholders as appropriate and with UNESCO</p>
Development of final needs assessment report	
<p>Advising expert develops and submits final report to UNESCO for approval and dissemination.</p>	<p>Output: final needs assessment submitted to UNESCO</p>