CHAPTER V

PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS
THROUGH NON-IP MEASURES

I. Introduction

A crucial understanding that has developed in the ongoing debate on protection of TK and TCEs is that a uniform approach is not appropriate or desirable. In fact the Commission on Intellectual Property Rights (CIPR 2002: 78) has observed that “a single solution can hardly be expected to meet a wide range of concerns and objectives.” Furthermore, on the appropriateness of WIPO as a body contemplating the protection of TK, the Commission stated:

“[w]e believe that no single body is likely to have the capacity, expertise or resources to handle all aspects of TK. Indeed, it is our view that a multiplicity of measures, only some of them IP-related will be necessary to protect, preserve and promote TK” (Ibid., 78).

WIPO has detailed the solutions available in current IP systems, including appropriate adaptations of the same to include copyright and industrial design laws; copyright protection for unpublished works of unknown author (Berne Convention, Article 15.4); use of public domain payment (Bangui Agreement, Article 59); resale right in copyright allowing authors right to benefit from economic profits made upon successive sales of work (Dietz 1990: 19-20); protection of performances in the 1996 WPPT; and trademark protection for traditional signs, symbols and other marks like Canada’s Snuneymuxw First Nation and New Zealand’s Maori trademark (WIPO/GRTKF/IC/5/7, 2003: 8). As in the 1999 US Indian Arts and Crafts Act, countries may also have in place legislation that could address the distinctiveness and reputation associated with traditional goods and services under unfair competition laws. Traditional geographical names and appellations of origin can also be registered as geographical indications.

Participants in WIPO’s work have supported a wide-ranging, flexible and comprehensive approach to resolving the issues relating to the protection of traditional cultural expressions. Protection should combine proprietary, non-proprietary and non-IP
measures, and use existing IP rights, *sui generis* adaptations of IP rights, and specially-created *sui generis* IP measures, including both defensive and positive measures (WIPO, Indigenous Workshop, Information Note, 2005: para. 16). While the IP-like protection of TK and TCEs raises some complex questions, it is the subject of active and determined examination within WIPO by a diverse range of stakeholders, including indigenous peoples and traditional communities. Examination of these questions has already yielded tangible and positive results. For example, draft *sui generis* instruments, based on extensive consultations and an open commenting process, have been prepared and are being discussed; geographical indications have been registered with respect to handicrafts in India, Mexico, Portugal and the Russian Federation; Maoris in New Zealand have recently registered a certification trademark to assure the authenticity and quality of Maori arts and crafts; and, Australia is preparing a draft amendment to the Copyright Act for the creation of communal moral rights in indigenous cultural materials.

There have also been other tangible and no less valuable benefits so far. The aspirations and concerns of indigenous and other cultural communities are now being represented at the WIPO, owing to initiatives such as WIPO's Voluntary Fund. Other organizations such as the UNESCO have also made worthwhile contributions to conceptualizing and taking practical initiatives to safeguard and preserve both tangible and intangible cultural "property" and expressions. UNESCO's recent conventions make way for the explicit mention of the importance of traditional cultural expressions as a means to express the knowledge and shared experience of social groups and individuals [UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage, 2003: Preamble, para. 13, Article 2 (1); UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005: Preamble, para. 15, Article 4(3)]. Under UNESCO's mandate, inventories are envisaged as the major means of protecting intangible cultural heritage both at the international and national levels. However, despite these elements of limited progress at the level of policy and to some extent practical initiatives begun in certain developing countries to protect TCEs, it is imperative to look at other options- non-IP and non-proprietary remain for a number of reasons.

A strict resort to IP protection for TCEs has produced mixed results in countries. Copyright protection by far, for pre-existing TCEs is not only conceptually challenging
but practically difficult owing to problems of tracing ownership and concerns over access and potential impact on “creativity.” Commodification of all TCEs is believed to be inimical to the interests of a majority of indigenous communities that are said to hold their traditional knowledge in bundles of relation and trust. UNESCO’s measures are also believed by some to not wholly support the interests and expectations of traditional and indigenous communities. Documentation and inventorying of TCEs for purposes of safeguarding and preserving are believed by others to further exacerbate the problems of “reification” of culture; involve problems of identification of cultural groups and their related expressions and possibly decontextualize certain religious and cultural expressions. Bearing these limitations in current IP law, a search for alternatives in international law would help in bridging the gap in the ongoing attempts in policy-making to protecting traditional cultural expressions.

In the light of the limitations in IP law to protect TK and TCEs, this chapter seeks to identify some non-IP measures in international law that may prove useful within the repertoire of options available for the protection of TCEs. Some of these options may help in addressing the increasing fragmentation that has arisen in the international debate concerning the protection of traditional knowledge in general whilst others may be considered as legal options more familiar within the contours of domestic law. Some of the non-IP approaches that may be relevant in the protection of TCEs (WIPO/GRTKF/IC/11/4(c), 2007, Annex: 34) include trade practices and marketing laws; laws of privacy and rights of publicity; law of defamation; contractual arrangements; cultural heritage registers; inventories and databases; customary, indigenous laws and protocols; cultural heritage preservation and promotion laws and programmes; and handicrafts promotion and development programmes. The relevance of human rights in challenging the underlying premises of IPRs and its failure to protect indigenous and traditional knowledge has also been mooted.

II. Contractual Arrangements

Bearing in mind that the playing field for indigenous people and traditional communities is more often than not, unequal, contractual arrangements may be drawn with circumspection between concerned parties in transactions involving use, transfer or
commercialization of TCEs. An interesting interplay between cultural sensitivity and commercial reality was demonstrated in the New Zealand experience, wherein in 1998, a New Zealand swimwear manufacturer, Moontide launched a new range of women's swim suits made from material patterned with interlocking “koru” designs of the Maori people. The firm developed the swimwear line with a Maori entrepreneur and it negotiated the use of the “koru” motif with an elder in the community. Two concerns governed the design element’s use: commercial viability and cultural respect. The income thus generated was shared partly with the Pirirakau hapu, a sub tribe of the Ngati Ranginui people (Shand 2002: 25-6; WIPO TCE Booklet: 14).

III. Marketing Arrangements

It has been suggested that “[e]xcept in a museum setting, no traditional craft skill can be sustained unless it has a viable market” (Liebl and Roy 2004: 67). Two basic types of solution can be envisaged in this regard. One is to increase the income of crafts producers, through adaptation of skills and products to meet new market requirements and improvement in market access and supply. The other solution is to sustain the traditional skill base and protect the artisans’ traditional knowledge resources, through an emphasis on development and implementation of appropriate IPR legislation.

Given the difficulties of implementing IPR structures, Liebl and Roy suggest that the market adaptation and access problems are more manageable. Accordingly, they suggest two promising ways to improve livelihoods while saving skills and knowledge (Liebl and Roy 2004: 68). The first is to adapt traditional skills to new products for changing markets. This adaptation can be accomplished in many areas, including fashion, home furnishings design, and tourism. The second approach to preserve traditional arts and make them sustainable would be to reposition skills and products for upscale markets that appreciate and are willing to pay premiums for handcrafted quality and character. The potential of this type of adaptation and repositioning is demonstrated by many of the best fashion designers in India, who are increasingly using the exquisite handwork skills of traditional textile artists to produce Indian and fusion clothing that is finding an international market.
It must be highlighted here that by themselves, producer groups of crafts and handloom in developing countries like India face major impediments in entering the mainstream markets. These include (Nanavaty 2005: 14):

1. Lack of market intelligence needed to produce goods of acceptable quality to meet demands in domestic and national export markets;
2. Inadequate information on where markets and potential buyers for their products exist;
3. Lack of access to the latest technology available;
4. Scattered nature of production base;
5. Skill levels and small size of operation that lead to low productivity and failure to benefit from economies of scale etc.

Some of these inherent weaknesses that were sought to be addressed earlier through governmental support of cooperatives have failed owing to factors such as lack of transparency in organization, lack of timely credit etc. In fact, a recent research report by the All India Artisans and Craftsworkers Association has documented the failure of credit sanction process in handloom cooperatives in India (Kumar 2007: 31). While artisans have expressed gratitude for governmental help in accessing foreign markets, the need for cash advances remains crucial (Maharana, personal interview, 28 September 2008).

The success of marketing arrangements to some extent appears to be affected by the level of relational engagement and commitment between producers and suppliers. For instance, community-based organizations like the Self-Employed Women’s Association (SEWA), involving craftspeople have helped convert traditional skill into a major livelihood activity in drought prone areas of Gujarat (Nanavaty 2005: 14-5). Here again the emphasis has been to increase the ability of the producers to understand changing demands of the market and handle short product cycles; use new fabrics and designs and inculcate adherence to delivery schedules.

These instances show the relevance of few committed and selfless individuals focusing their efforts and energies to obtain a mutually beneficial marketing arrangement for poor craftspeople. There are also successful commercial firms of long standing, like
the Delhi-based Fab India and the Jaipur-based Anokhi which exercise good business practices in the form of frequent and scheduled interaction with producers to help them understand market requirements (Kumar 2007: 25) and also maintain active health, education, and other social programs in their artisan communities (Liebl and Roy 2004). The above-mentioned marketing arrangements can also yield products catering to the tastes of different types of clientele.

A desire to market folkloric expressions, especially handicrafts, requires an understanding of the skill sets of artisans and the dynamics of markets—both domestic and international. Interaction with few craftsmen in India, show the readiness to create products that may not be in keeping with the strict demands of traditional rules, if markets are available for the same (Maharana, personal interview, 2008). The need to innovate in traditional skills may also be required to meet with practical needs of a buyer, such as the desire for low-weighted traditional crafts for the international traveler (Sripathy, personal interview, September 28, 2008).

Furthermore, the success of marketing arrangements is also impacted by the level of design intervention and understanding of market conditions and consumer trends. The role of design intervention and training has been also been reflected in recent times in a number of Indian experiences in the handicrafts sector. These interventions have taken place at the behest of the government or purely guided by private interests. For instance, the Rajasthan government’s Rural Non-Farm Development Agency (RUDA) was set up to promote micro enterprises in the state, with the primary mandate to create alternate avenues of employment and generate alternate income with focus on certain sectors inter alia comprising of handicrafts, khadi and village industries (Dubashi 2005: 43). RUDA’s intervention in the “Mojari” cluster groups in Udaipur, Rajasthan persuaded the producers of these ethnic footwear to seriously consider the standardization of size and fittings in their products, adapt alternate stitching patterns and materials to provide better fits and comfort levels as also adopt a wider canvass of colours, patterns and textures that would cater to the tastes of international buyers. These interventions by RUDA were reported to have reaped the benefits of community mobilization, with an average artisan not only turning out more number of products but also earning fair wages that have helped not only daily living but also induced the revival of a dying art (Ibid.,
44). Of those involved in product designing in traditional crafts, some have mentioned the importance of retaining the “identity” of the creators, with choices to be made of whether products should be of purely decorative elements or of a more utilitarian value so as to assure repeat purchase (Balasubramaniam, Crafts Revival).

However, although marketing arrangements for poor producers of traditional folkloric expressions, especially handlooms and handicrafts help in accessing markets with greater understanding and returns, the presence of intermediaries and the lack of clear understanding of the extent to which an artisan receives comparable wages for product requires rethinking of the principles of business operation. Of the few studies conducted in India, one done in Jaipur suggests that while “[h]andicraft export is certainly a profitable business... little of the profit reaches the hands of the creator” (Liebl and Roy 2004: 72).

IV. Fair Trade

As noted earlier, while the markets for handicrafts and related expressions of folklore are substantial, the earnings of producers are relatively low. Small ventures in developing countries trying to earn international revenue from IP face the following difficulties: lack of knowledge about how trading systems operate for IP; lack of access to a distribution chain and to the means to package IP; unpredictable prices and demand for their IP and weakness in negotiations (Layton 2004: 87). Under such circumstances, the concept of “fair trade” assumes relevance. Fair trade in physical goods refers to the process of building direct relationships between importers in developed markets and the poorest and most marginalized producers, thus sharing the benefits of market opportunities and making this shortened supply chain endure so that poverty alleviation benefits are gained. Fair trade or alternative trade advocates seek to change the actions of conventional companies to allow more income to reach the producers at the bottom of the supply chain (Layton 2004:75-76).

IP exports differ from exports of physical products in many ways. Layton (2004: 76) points out some of these differences. In general, IP products do not require large investments in energy and transport infrastructure. Furthermore, relative prices can vary
radically, even for similar IP products with apparently identical factors of production. In the case of IP products, unlike physical property, distribution chains are generally not as limited by capacity constraints, being more expandable in volume.

Given the expandability of distribution capability, an important opportunity exists to change the behavior of conventional companies currently acquiring developing country IP. Most small-scale sellers of physical goods in developing countries cannot secure business partners who are prepared to share the returns from market opportunities because there are not enough fair trade companies with capacity to handle the volume of physical trade. In contrast, a single substantial IP company operating on principles of greater sharing of developed market opportunities can act as an agent for IP products for a large number of developing country clients. A small number of “fair trade IP” companies could then become perceived to be available to all or most IP owners in developing countries, creating a continuing competitive alternative to existing IP acquirers. Such availability will create pressure on conventional IP importers to adjust their acquisition policies toward more fair terms. According to Layton (2004: 77), this potential result alone is a worthwhile motivation to consider fair trade in IP products.

Fair trade evolved from the recognition that trade was not alleviating poverty for the poorest and least empowered producers because of their weak negotiating positions. The key element of fair trade is the development of respectful long-term relationships with marginalized producers, incorporating: contracts for annual supply; fair prices; advances against future production; training for producer skill development; and provision of market information to producers (Layton 2004: 78). The new fair trade importers, also known as the alternative trading organizations (ATOs), recognized that controlling sales outlets in developed markets meant controlling the allocation of rents from the differential between market prices in rich and poor countries. Northern ATOs were formed to provide disempowered producers with direct sales outlets into developed markets. The Northern ATOs have been focused on fairer supply chain solutions for over fifty years now. These companies were intended to operate at sufficient profit levels to sustain their presence while sharing the rents with poor producers. Ten Thousand Villages (U.S.) and SERRV International (U.S.) serve as examples of such Northern ATOs.
"Fair trade" support for poor producers of handicrafts and related folkloric expressions however tends to encounter its share of hurdles. Though supply possibilities are large, yet growth in the market may be hindered by lack of stores, access to capital and finding adequate staff, buyers and retailers sharing the value of "fair trade".\(^1\) My interaction with Doug Dirks, former Public Relations Officer of Ten Thousand Villages,\(^2\) in Akron, Pennsylvania helped clarify some of the finer nuances to fair trade in handicrafts made by craftspeople from the developing countries. As a fair trade organization and member of the International Fair Trade Association (IFAT), TTY is not always about "sound" business management and growth. For example, in the year 2001, when India is estimated to have made US $1.9-2.4 billion in exports (Liebl and Roy, 2004:54), TTV bought only around US $1 million in handicrafts from India. India is the country from which TTV purchases the most handicrafts (TTY FAQs, 2002: 4). However, when asked if these numbers would significantly increase over time, Doug Dirks, replied:

"India has been one of the easiest places to work in, with its wide variety of handicrafts, long tradition of fairly organized handicrafts communities and its exporting procedures pretty much worked out. But as a fair trade organization, Ten Thousand Villages would like not to spend all the money in India. We need to spread the money around ..."

Furthermore, TTV also buys "from people who need work, not necessarily the people who can do the work the most efficiently and at the least cost" (TTY, FAQs 2002:2). Though "fair wages" are hard to define and are necessarily subjective and contextual to producers of each developing country, fair trade organizations like TTV discern the well-being of their partner producers by comparing lives with other members of their communities and relying on reports of non-partisan third persons or groups (Dirks, personal interview, 27 May 2006).

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\(^1\) Doug Dirks, former Public Relations Officer, Ten Thousand Villages, Akron, Pennsylvania, Personal Interview on file, 27 May 2006.

\(^2\) Ten Thousand Villages (TTY) is one of the world’s oldest and largest fair trade organizations with over hundred and fifty retail outlets in the United States and Canada. TTV is a retail outlet for handcrafted jewellery, home décor and gifts and works with over 130 artisan groups in more than 38 countries in Asia, Africa, Latin America and the Middle East.
The European Fair Trade Association (EFTA) in its recent impact evaluations (2002) of fair trade has concluded (Layton citing EFTA, 2004: 80) that prices paid to producers are generally but not always above local market rates. The return on labor is above opportunity cost, and the income received is additional. Another conclusion drawn by the EFTA is that “fair” prices are naturally subjective, but producers generally regard their partners as acting fairly. It has also been noted that cash advances against future production and promptness of payment are superior under fair trade. Fair trade also helps poor producers secure superior supply chains to industrial country markets. A vital component of fair trade, i.e. long-term relationships, are highly valued by producers and allow wider social impacts, such as the ability to budget in order to send children to school for longer periods. Thus, fair trade seems to improve the chances of empowering the poor.

Considering the advantages in fair trade for marketing traditional skills one would imagine that there are immense opportunities of expanding the volume of business handled by fair trade organizations. However, certain limitations brought on by difficulties in competing on price and production capacity reduce these opportunities. In handicrafts trade, it is common for fair trade importers to be unable to manage successful products by preventing copying of their successful designs. Most fair trade companies have not yet acquired the ability to utilize IP elements such as brand development and brand expansion, design and style recognition, and patenting of designs to limit unlicensed copying and secure higher sales. For instance, inquiries with the International Fair Trade Association revealed an inability on the part of the association to employ IP tools to protect the “works” of artisans they are involved with. David Claribel, Vice-President, IFAT and closely associated with its Asian operations, identified some of the problems in this regard:³

development), there is a proposed standard which states: "Before commissioning production of design copies, the organization shall provide its producer groups with evidence of permission from the original designer or producer group for this work." Whether this will and can be implemented at grassroots level remains to be seen. Whether this can effectively protect craft designs also remains to be seen."

In conclusion, the fair trading network in handicrafts is constrained in its reach owing to a number of reasons, both at the level of principle and praxis. Its impact in helping poor producers of developing countries, albeit limited, cannot be easily discounted.

V. Human Rights and Protection of TCEs

An analysis of the political and academic discussion of the protection of TCEs reveals a certain level of oversight in considering the relevance of human rights in the conceptual matrix. Recent efforts to address the legal fragmentation in the debate on the protection of TCEs have led scholars (Coombe 1998a; Graber 2008) to urge an exploration of human rights to supplement and offer a theoretical framework for the protection of traditional or indigenous knowledge. Drahos (1998: unpaginated) suggests that:

"[L]inking intellectual property to human rights discourse is a crucial step in the project of articulating theories and policies that will guide us in the adjustment of existing intellectual property rights and the creation of new ones. Human rights in its present state of development offers us at least a common vocabulary with which to begin this project, even if, for the time being, not a common language".

Some of the key human rights instruments relevant to the protection of TCEs are the 1948 Universal Declaration of Human Rights (UDHR); the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Political Rights (ICESCR). With regard to the rights of indigenous communities, in the protection of their TCEs, the recently adopted 2007 UN Declaration on the Rights of Indigenous People (DRIP) is also relevant.

a) UDHR

Although the UDHR is a non-binding instrument of international law, it has strongly influenced the ICCPR and the ICESCR, which are both binding upon Parties. Adopted as
a unanimous resolution of the UN General Assembly in 1948, the UDHR is considered part of customary international law today. The UDHR, in Article 27(1), states that everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Furthermore, the UDHR also states that: "[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" [UDHR, Article 27(2)].

b) ICESCR

Similar cultural rights are provided in the ICESCR [Article 15(1) (c)], which uses a literal reproduction of the text of Article 27(2) of the UDHR. It may be noted that the non-justiciability of the provisions of the ICESCR that have often been highlighted in comparison to the ICCPR is a debate which has to some extent been laid to rest by the works of scholars who have argued that difficulties pertaining to the "justiciability" of social, economic and cultural rights do "not relate to their validity but rather to their applicability" (Scheinin 2001: 29). The accountability of governments and other entities and the availability of remedies upon violation, are indispensable elements of international human rights law (Steiner and Alston, 2000: 275). Article 2 of the ICESCR describes the nature of the general legal obligations undertaken by States Parties to the Covenant. These include the "undertaking to guarantee", that relevant rights "will be exercised without discrimination..." and also "to take steps" [ICESCR, article 2(1)] that would be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant" (ICESCR, General Comment no. 3, 1990, para. 2). Furthermore, the ICESCR also entails the duty of the States Parties to give effect to the rights recognized therein, "by all appropriate means", thus, providing a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations to be taken into account (ICESCR, General Comment no.9, 1998, para.1). This means that the problems States may encounter owing to the limitations in their financial means to the protect rights under the ICESCR do not alter their obligations under the said instrument. Furthermore, the 1993 Vienna Declaration and Programme of Action on Human Rights states that "all human
rights are universal, indivisible and interdependent and interrelated” (Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, Part I, at paragraph 5).

According to a recent interpretation, Article 15(1) (c) of the ICESCR provides for a linkage between copyright and indigenous cultural expressions. This follows from General Comment No. 17 on Article 15(1) (c) of the ICESCR, which the Committee on Economic, Social and Cultural Rights (ICESCR Committee) adopted in November 2005. Paragraph 32 of the General Comment No. 17 on Article 15(1) (c) of the ICESCR reads as follows:

“With regard to the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of indigenous peoples, States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. In adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into account their preferences. Such protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties. In implementing these protection measures, States parties should respect the principle of free, prior and informed consent of the indigenous authors concerned, the oral or other customary forms of transmission of scientific, literary or artistic production and, where appropriate, they should provide for the collective administration by indigenous peoples’ of the benefits derived from their productions.”

General Comments of the ICESCR Committee (and the Human Rights Committee-HRC) are an important means to provide the States Parties to the Covenant with guidance as to the Covenant’s meaning and the nature of the obligations resulting from it. The above General Comment of the ICESCR Committee emphasizes the obligation of States to ensure the effective protection of the literary, scientific and artistic productions of indigenous peoples. A reading of General Comment No. 17 on Article 15(1) (c) of the ICESCR clearly affirms the collective nature of the knowledge of indigenous and traditional communities; proscribes commercialization of such knowledge without the free, prior and informed consent of the concerned communities and requires
the State to facilitate the administration of benefits derived from the use of the “productions” of indigenous peoples.

c) ICCPR

Further provisions with potential importance to the subject of protection of TCEs are Article 27 of the ICCPR relating to minority rights; Article 19 of the ICCPR, embodying the freedom of expression; and Article 1 of ICCPR and Article 1 of the ICESCR, referring to the right to self-determination of peoples (Graber, 2008: 59). Article 1 of the ICCPR, which is formulated in language identical to that of Article 1 of the ICESCR, guarantees self-determination of peoples including cultural self determination. Article 1, ICCPR reads as follows: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development . . .” (emphasis added). Self-determination of peoples also appears in the purposes and principles of the Charter of the United Nations [Article 1 (2)]. With regard to cultural expressions of indigenous peoples, however, several obstacles hinder the application of this provision. Firstly, it is still not clear whether Article 1 is merely a vague political principle or a genuine right (Musgrave, 1997: 90). Secondly, it is disputed whether the concept of ‘peoples’ would also include minorities, such as indigenous communities. In this regard, the HRC has insisted on a clear distinction between Article 1 and Article 27 ICCPR, which explicitly protects minority rights (HRC, General Comment 23 on Article 27 of the ICCPR, at paragraph 2).

Cultural issues have been addressed by the HRC in relation to the ICCPR (article 27), safeguarding the rights of persons belonging to ethnic, religious or linguistic minorities. Article 27 of the ICCPR reads as follows:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language” (emphasis added).

The HRC has used Article 27 as the basis for protecting the “cultural identity” of individuals in their capacity as members of an indigenous people (Anaya 2004: 134). The safeguard of indigenous peoples’ cultural identity “may make it necessary that they
control their land and other resources and to ensure their standard of living in ways which correspond to their own traditions” (Eide, 2001: 20). Accordingly, the HRC applies a broad definition of culture that also includes land use patterns such as fishing or hunting (HRC, General Comment 23 on Article 27 ICCPR, at paragraph 7).

d) ILO Conventions

Added to the above-said human rights instruments, is the International Labour Organization (ILO) Convention on Indigenous and Tribal Peoples, Convention No. 169 of 1989, which is today perhaps the most prominent and specific international affirmation of indigenous cultural integrity and group identity. The ILO Convention No. 169, which has been ratified by several Latin American countries, as well as Denmark, Fiji, Norway, and The Netherlands, is a revision of the ILO’s earlier Convention No. 107 of 1957, and represents a marked departure in the policy of the world community from the philosophy of integration or assimilation underlying the earlier convention. The basic theme of Convention No. 169 is indicated by the Convention’s Preamble, which recognizes “the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they lie” (ILO Convention 169, 1989, Preamble: para. 5). Upon this premise, the Convention includes provisions advancing indigenous cultural integrity, (ILO Convention 169, 1989, Article 5) land and resource rights, and non-discrimination in social welfare spheres. The ILO Convention 169 generally enjoins States to respect indigenous peoples’ aspirations in all decisions affecting them [ILO Convention 169, 1989, Article 7(1)].

e) UN Declaration on Rights of Indigenous People

Furthermore, a reference to the recently adopted UN Declaration on the Rights of Indigenous People (DRIP) is also pertinent. The DRIP proclaims that all indigenous

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4 Article 2(1) of ILO Convention 107 called on governments to develop “co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.” A group of 15 experts convened by the ILO recommended substantial changes in ILO Convention 107 and concluded that the Convention’s emphasis on integration could no longer be considered reflecting “current thinking.” Instead, the group of experts suggested that indigenous peoples be afforded “as much control as possible over their own economic, social and cultural development.” See ILO Doc. APPL/MER/107/1986/D.7, at 32.
peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the UDHR and international human rights law (DRIP, 2007, Article 1). Article 3 of the Declaration contains the right to self-determination of indigenous peoples as regards their political status, economic, social and cultural development. The DRIP also recognizes the right of indigenous peoples to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature [DRIP, 2007, Article 11 (1)]. The role of the State in this regard is to provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs [DRIP, 2007, Article 11(2)]. The Declaration also recognizes the strong spiritual and religious element in the lifeways of indigenous people and asserts the right of these peoples to inter alia “manifest, practice, develop, and teach their spiritual and religious traditions;” “maintain, protect, and have privacy to their cultural sites” and use and control their ceremonial objects (DRIP, 2007, Article 12). Clearly, these rights bear a direct relevance to the ongoing efforts to protect traditional cultural expressions and their bearers, custodians and creators of these traditions.

The UN Declaration on the Rights of Indigenous Peoples also recognizes the right of the indigenous peoples to their systems of traditional medicine and health practices as also a right to their traditional owned lands and resources (Article 24 & 26 respectively). The corresponding obligations of the State in relation to some of the above-said rights include the duty of the State to legally recognize and protect the traditional lands, territories and resources of indigenous people, with “due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned” [Article 26(3)]. According to the DRIP, the State shall also establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to
their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Another explicit reference to the cultural right of the indigenous people is found in Article 31 of the DRIP, whereby indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. In conjunction with indigenous peoples, States are required to take effective measures to recognize and protect the exercise of these rights.

The growing international acceptance of indigenous rights to land reflected in UN DRIP, the ILO Convention No. 169, and related developments, coincides with the jurisprudence of the U.N. Human Rights Committee and the Inter-American Commission on Human Right regarding the implications of the cultural integrity norm (Anaya 2004: 42). It also coincides with the interpretations of the general human right to property that has been promoted by the Inter-American Commission and adopted by the Inter-American Court of Human Rights in the Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua (2001). In this case, the Court held that the concept of property articulated in the American Convention on Human Rights (article 21) includes the communal property of indigenous peoples, even if that property is not held under a deed or title or is not otherwise specifically recognized by the State.

The legal effect of the UN Declaration on Rights of Indigenous Peoples is however not easy to assess. Certain countries have gone on record to state the reservations they have to some provisions of the Declaration. For instance, the Assembly of Heads of State and Government (AHSG) of the African Union (AU), meeting in Addis Ababa in January 2007, took a decision aimed at requesting the deferment of the
consideration by the UN General Assembly of the adoption of the DRIP with a view to opening negotiations for making amendments. Some of the fundamental concerns of the African countries can be summarized as follows, namely:

i. The definition of indigenous peoples;
ii. The issue of self-determination;
iii. The issue of land ownership and the exploitation of resources;
iv. The establishment of distinct political and economic institutions; and
v. The issue of national and territorial integrity.

With reference to this matter, the African Commission on Human and Peoples’ Rights (ACHPR) subsequently gave an advisory opinion. The African Commission inter alia observed that there was no need to have a universal definition of indigenous populations and instead suggested that it would suffice to indicate the main characteristics that would need to be met (ACHPR, Advisory Opinion 2007, para. 10). The ACHPR also highlighted the importance of construing the right to self-determination as that which is in conformity with the UN Charter, with an emphasis on sovereignty, inviolability of borders acquired upon independence and respect for the territorial integrity of the State (ACHPR, Advisory Opinion 2007, paras 17 & 18). Furthermore, the emphasis laid by the DRIP on the right of indigenous peoples to control developments affecting their lands, territories and resources and the concomitant right to maintain and preserve cultures and traditions in pursuance of their aspirations and needs (DRIP, Preamble) has also been viewed with some skepticism. For instance, in the comment relating to the provision contained in the draft aide-memoire of November 2006 by the African Group, it is stated that the said provision “is impracticable within the context of the countries concerned. In accordance with the constitutional provisions of these countries, the control of land and natural resources is the obligation of the State” (ACHPR, Advisory Opinion 2007, para. 33).

V.I. Individual Human Rights vs. Group Rights

Though the rights provided by the International Bill of Rights (comprising of the UDHR, ICESCR and ICCPR) relate to individual rights, it has been argued that the collective nature of these rights cannot be denied. Given that culture is a product of, and is
manifested through group dynamics, the enjoyment of rights connected with culture is mostly meaningful in a group context (Anaya 2004: 22). This understanding, according to Anaya, is implicit in Article 27 itself, which upholds rights of persons to enjoy their culture “in community with other members of their group” (Ibid.). The HRC has upheld the individual [Lovelace vs. Canada, Communication No. R.6/24 (1977), U.N. Doc. N36/40] as the beneficiary of the right to cultural integrity and also allowed group interest in cultural survival to sometimes assume priority [Kitok vs. Sweden, Communication No. 197/1985, U.N. Doc. A/43/40 (1988)]. The Human Rights Committee, however, has also instructed that rights of cultural integrity are not absolute when confronted with the interests of society as a whole (Lansmänn and others vs. Finland, Communication No. 511/1992, Hum. Rts. Comm., U.N. Doc. CCPR/C/52/D/511/1992).

Nonetheless, scholars have also stressed the importance of avoiding the conflation of individual and group rights, owing to the potential of power play in group rights to subjugate and undermine individual rights. Familiar examples in this regard can be found in the realm of women’s rights to autonomy and reproductive health as dictated by social mores and customs. Instead, it has been suggested that a more pragmatic understanding may lie in accepting that most individual rights have a collective dimension without themselves becoming collective rights. It is vital to recall that TCEs involve rituals and other sacred practices, which are “central to a social and symbolic system that links individuals, families and communities in ongoing relationships” (Coombe 2005: 601). The production of contemporary TCEs presupposes the transfer of traditional cultural heritage from one generation of a certain local community to the next.

Thus, going back to the ICESCR General Comment No. 17, paragraph 32, it may be pointed out that the Contracting States are invited to not only recognize individual but also cultural authorship of the expressions of the traditional knowledge of indigenous peoples. Collective authorship is a familiar concept in municipal copyright law wherein recognition and protection is offered to joint authors in the realm of the arts, like films, songs etc. In these cases, the “works” are subject to use in accordance with the prior consent of the authors. Similarly, a human rights understanding would help in the protection of the cultural expressions of indigenous and traditional communities.
However, as previously highlighted in the course of this thesis, the inter-generational character of TCEs may inhibit a ready resort to the idea of “co-production” in copyright law (Ficsor 2002). Nonetheless, the close relationship between the recognition of individual rights and their impact on collective interests and rights requires further elaboration.

The ICESCR in its General Comment No. 17 (2005), paragraph 35, clarified that the rights provided by Article 15 (1) (c) of the ICESCR “cannot be isolated from other rights recognized in the Covenant.” The Committee stressed therewith that Contracting States must strike a balance between the various rights at issue. “In striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration.” Furthermore, scholars have pointed out that limitations in the rights of individual authors may require taking into account the specific social relationship within an indigenous community (Graber 2008: 69). This indeed seems to have been the point of emphasis in the indigenous-copyright related cases in Australia wherein the indigenous author was enjoined to keep in conformity with the trust relationship and customary rules of usage by his community [Milpururru vs. Indofurn, (1994), 130 A.L.R. 659].

V.2. Indigenous Human Rights and the “Implementation Gap”

The Awas Tingni decision of the Inter-American Court [Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001)] though hailed as a landmark case in the struggle for recognition and protection of indigenous rights in communal property, has encountered problems in implementation owing to inter-communal conflict and lack of political clarity (Alvarado 2007: 626-32). Decisions of international human rights bodies, though binding in themselves, are subject to domestic implementation. It is widely accepted that human rights institutions heavily rely upon the willingness of States to comply with their rulings, urged by its moral force and other forces of influence that States may chose to exert (Bilder 2004: 11). Rodolfo Stavenhagen, the UN Special Rapporteur on the human rights situation of indigenous people has pointed out that recent national advances in the protection of indigenous human rights have faced an “implementation gap” between legal principle and state practice (Stavenhagen 2006). Stavenhagen further opines that the implementation of
international decisions will be delayed owing to the generally slow reaction of domestic public administration and state bureaucracies in recognizing and accommodating notions of multiculturalism and rights of indigenous people. It must also be borne in mind that the success of the fight for justice and rights by indigenous peoples is dependant not only on their recognition within the State but also lies in their capacity to organize and access systems of justice. Some experts and indigenous activists have suggested that the relative lack of experience of indigenous people with access to international human rights bodies could be supplemented with a resort to human rights machinery within the State, such as the National Human Rights Commissions set up in certain countries like India (Chakma 2002: 30-31).

VI. Customary Law and Protocols

Customary laws and protocols are central to the very identity of many indigenous, local and other traditional communities. These laws and protocols concern many aspects of their life as communities. They can define rights and responsibilities of community members on important aspects of their life, culture and world view. Customary laws can relate to the use of and access to natural resources, rights and obligations relating to land, inheritance and property, conduct of spiritual life, maintenance of cultural heritage and knowledge systems, and many other matters. Maintaining customary laws and protocols can be crucial for the continuing vitality of the intellectual, cultural and spiritual life and heritage of many communities. Therefore, the recognition of informal regimes and customary law is being presented by some as “a third approach” to addressing the intellectual property needs of TK holders: “[w]hat is now advocated by Indigenous communities is protection of traditional cultural expression by the application of customary intellectual property law on its own terms, as of right” (Australian Copyright Council, 1998: 11). It has been suggested that, for example, traditional forms of ownership be recognized and used within the context of the formal intellectual property system to determine who is the “author” of a cultural expression, or at least who is an owner and entitled to exercise control over it.

During previous WIPO activities, Member States and representatives of traditional knowledge holders have indicated that many traditional societies have
developed highly sophisticated and effective customary intellectual property systems. Some examples of these in relation to traditional designs, songs, dances and art are contained in the WIPO Report on the Fact-finding Missions conducted in 1998 and 1999. To a large extent these systems have, until now, remained invisible from the point of view of the formal intellectual property system. However, customary legal systems, including those pertaining to traditional knowledge, are referred to in many traditional knowledge-related declarations, such as the 1992 Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, the 1993 Julayinbul Statement on Indigenous Intellectual Property Rights and other international instruments (ILO Convention 169, Article 8; UN DRIP; Principles and Guidelines for the Protection of the Heritage of Indigenous People, Principle 4). Certain *sui generis* systems, such as that of the Philippines, refer to customary law (Philippines, Indigenous Rights Act, 1997, sections 2(b), 7(b) & (h), 35, 58 & 63). Hence, Member States have identified a need to further study the relationship between customary protection of traditional knowledge and the intellectual property system.

WIPO is currently studying the role of customary law and its relation to the IP system (documents WIPO/GRTKF/IC/3/10, 2002 and WIPO/GRTKF/IC/3/17, 2002). Numerous IGC documents discuss the role of customary law, and its role has been highlighted by many IGC participants for example, indigenous panel opening the ninth session of WIPO IGC. The Draft Objectives and Principles for protection of TK\(^5\) and TCEs\(^6\), currently under consideration by the IGC also make reference to customary law and protocols. This activity was also approved in past WIPO work programs, enabling work and consultations to be undertaken. Customary law issues have also been dealt with in studies such as those prepared by the indigenous Australian lawyer, Ms Terri Janke - the 'Minding Culture' Case Studies on Intellectual Property and Traditional Cultural Expressions.

However, the recognition and use of customary law in domestic jurisprudence shows no homogeneity and its application in a possible regime for protection of TK may

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\(^5\) See WIPO/GRTKF/IC/12/4(c), 2007, Draft Principles g, h and Draft Articles 5, 6(5).

\(^6\) See WIPO/GRTKF/IC/11/4(c), 2007, Draft Principles a, f, h and Draft Articles 1(iv)(cc), 2(1), 5 (a)(i)), 7(b)(iv).
not be easy. For instance, Lamer, CJ in the Supreme Court of Canada observed in *Delgamuukw vs. British Colombia*, ([1997]), 3 S.C.R. 1010 (Canada) that customary rights and obligations are not easily explicable and definable in terms of ordinary western jurisprudential analysis or common law concepts. In contrast, the Australian High Court's decision in *Mabo vs. Queensland (No. 2)* (1992), 175 CLR 1 shows that customary indigenous law has a role to play within the Australian legal system. Indeed the conclusion that native title survived the Crown's acquisition of sovereignty was dependent upon the Australian Court's acceptance of antecedent traditional laws and customs acknowledged and observed by the indigenous inhabitants of the land claimed. Thus, evidence of customary law may be used as a basis for the foundation of rights recognised within the Australian legal system. Native title is a clear example. In similar vein, in *Milpurrurru vs. Indofum*, the Australian Court took into account the effect of the unauthorised reproduction of artistic works under customary Aboriginal laws in quantifying the damage suffered.

Nonetheless, certain scholars have expressed skepticism on the use of customary law to address problems in the protection of expressions of intangible heritage. For instance, Brown points out that such an “explosion of legal diversity” would greatly burden the state administration. Brown (2005: 53) expresses serious reservations and questions:

“whether the world will be a better place if we replace one expansive, flawed, ethnocentric system by a thicket of small-scale, flawed, ethnocentric systems whose sole virtue is that local communities are familiar with them. Even sympathetic observers acknowledge that wholesale acceptance of customary law would force large multicultural states to deal with dozens or even hundreds of legal systems on a daily basis.”

However, the options available to policymakers in general need not totally denounce the relevance of customary law in domestic jurisprudence. It is possible to construct combined systems that amalgamate external legal structures with elements of customary law, drawn on variously as fact and as a source of law. In the context of protection of TCEs or TK, the options can be characterized as:

(i) Full and direct application as law;
(ii) Applying elements of customary law as substantive law;
(iii) Applying elements of customary law in legal procedures;
(iv) Drawing on elements of customary law to determine facts;
(v) Promoting customary law and practices within communities; and

Existing IP law systems have already acknowledged customary law, as a specific point of reference rather than as a complete legal system, in a number of practical contexts. These include reference to customary law: to establish legal standing\(^7\) of a collective entity (such as a tribe or community) recognized under customary law, even on the part of an unincorporated entity,\(^8\) or to establish other relevant legal capacity. The use of customary law to establish *locus standi* may be important where an IP or other law requires recognition of a collective or community as a 'legal person'. Furthermore, customary law can be applied to customary dispute settlement mechanisms to resolve or reconcile competing claims of ownership, and to resolve disputes more generally between or within traditional communities (the Philippines, Indigenous Peoples' Rights Act, 1997, Section 65). Customary law principles also help to assert an equitable interest (*in rem*) in IP that is nominally owned by another or a more general fiduciary relationship (*in personam*) between traditional owners and an individual IP right holder (*Bulun Bulun* vs. *R&T Textiles Pty Ltd.*, 41 I.P.R. 513 (1998)). Customary law has also been used to sustain a claim of breach of confidence relating to secret sacred material (*Foster* vs. *Mountford and Rigby*, (1976), 29 FLR 233), and to recognize customary law considerations as 'substantial concerns' in sustaining a claim of confidentiality.

Customary law also assumes relevance as the basis of a general right over biological resources and TK (African Model Legislation, Article 8), including specific rights to grant access to biological resources [African Model Legislation, Article 8(1)(ix)] and the application of prior informed consent for access, as well as general rights to

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\(^7\) *Onus* vs. *Alcoa of Australia Ltd.* [(1981) 149 CLR 27]: 'the members of the [Gournditichmara] community are the guardians of the relics according to their laws and customs and they use the relics. I agree ... that in these circumstances the applicants have a special interest in the preservation of these relics, sufficient to support *locus standi*,' *per* Mason J.

\(^8\) *Foster* vs. *Mountford and Rigby* (1976) 29 FLR 233, concerning the Pitjanatjatjara Council.
benefit from TK. Customary law also helps enshrine a distinct right for continuing customary use in spite of or in parallel with formally recognized rights in TK; as the basis for a claim against public order, cultural offence or vilification. For example, New Zealand’s Trade Marks Act 2002 [Section 17(1) (b)] establishes absolute grounds for refusal of a trade mark that would “offend a significant section of the community, including Maori.” Customary law may prove useful more specifically to determine entitlement for damages based on “personal and cultural hurt,” [Milpurruru vs. Indofurn, (1994), 130 A.L.R. 659] including establishing the basis for and quantum of damages; and to determine the status of a claimant as a member of an indigenous or other traditional community, to identify a community as being an eligible local or traditional community, or to establish a specific indigenous or aboriginal right. For example, the definition of ‘aboriginal right’ in R. vs. Van der Peet [(1996), 2 SCR 507] subsequently elaborated in Delgamuukw vs. British Columbia [(1997), 3 S.C.R. 1010 (Canada)] incorporates both common law and aboriginal perspectives, including prior aboriginal law.

These examples illustrate how customary law considerations can be acknowledged in practice within legal systems that are theoretically distinct. Customary law potentially has application in the operation of IP law on such matters as the legal identity of communities, ownership or inheritance of rights, equitable interests in an IP right, and a continuing right to use material covered by an IP right.

VI.1. Enhancing the Effect of Customary Law

Relevant practical and legal initiatives to enhance the effect of customary law may include: support for continuing customary law and practices within the actual life of a community and the appropriate recording or documentation of customary law and practice. Direct application of customary law as legally binding on the community, in effect continuing its customary legal effect and specific legal or other mechanisms to extend the legal scope of customary law obligations: (i) within domestic law or (ii) through international law to apply in other jurisdictions would also help. When applied beyond their original scope or customary jurisdiction, customary law may be applied as a source of law, for providing factual input to other laws, defining exceptions within other
legal systems, providing policy or administrative guidance to other legal systems, introducing customary procedures in other legal processes, or for the purpose of providing substantive norms and principles for broader application.

Alternative dispute resolution mechanisms (ADR) may also take direct account of customary law to provide direct guidance:

(i) Concerning the substantial issues in a dispute (such as custodianship over TK or TCEs, the sharing of TK and TCEs across national boundaries, and the interpretation of the principle of prior informed consent);

(ii) Concerning procedural questions, such as appropriate forms of consultation and community decision-making and consent); and

(iii) Concerning appropriate remedies, such as financial or non-financial forms of restitution and compensation, acknowledgement and expiation of cultural or spiritual offence).

VII. Alternative Dispute Resolution and Protection of TCEs

Alternative dispute resolution (ADR) refers to the settlement of disputes outside the formal judicial system. ADR procedures include mediation, which is a non-binding procedure in which a neutral intermediary, the mediator, assists the parties in reaching a settlement of the dispute.

Arbitration is a neutral procedure in which the dispute is submitted to one or more arbitrators who make a binding decision on the dispute. A single procedure may commence with mediation and, where the dispute is not settled through the mediation, may then proceed to arbitration.

Discussions within WIPO forums have continued to consider ADR as a possibility in the development of norms and practical legal mechanisms to deal with the protection of TK, TCEs and GR. Asian countries have called upon WIPO to explore the use of ADR in relation to TK/TCEs/GR, both in the context of a regional statement, and a “Position Paper of the Asian Group and China” (WIPO/GRTKF/IC/2/10, 2001) which called on WIPO to ‘study possibilities of offering alternative dispute resolution services,
including but not limited to arbitration and mediation, which are particularly appropriate for the problems involving intellectual property issues related to traditional knowledge and folklore.' This has also been supported by the Group of Latin American Countries (GRULAC) (WIPO/GRTKF/IC/115, 2001, Annex I: 9) and the African Group. A panel at the WIPO Asia-Pacific Regional Seminar on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, held in November, in Cochin, India, further explored this possibility.

Several characteristics of ADR procedures may assist in the recognition of customary law and protocols in disputes over TK and TCEs. ADR affords parties the opportunity to exercise greater control over the way their dispute is resolved than would be the case in court litigation. In contrast to court litigation, the parties themselves may select the most appropriate decision-makers for their dispute. In addition, they may choose the applicable law, place and language of the proceedings. This means that customary law and protocols can be incorporated into ADR proceedings. Through ADR, the parties can agree to resolve a dispute covering a number of different countries through a single procedure, thereby avoiding the expense and complexity of multi-jurisdictional litigation and the risk of inconsistent results. However, the legal recognition of customary law beyond its traditional community reach may be complex or problematic if it entails diverse forms of recognition in multiple jurisdictions, as this may require distinct application of customary law principles in different court cases. A single ADR process could enable all.

The United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958, known as the New York Convention, generally provides for the recognition of arbitral awards on par with domestic court judgments without review on the merits. This greatly facilitates the enforcement of awards across borders. However, ADR’s consensual nature makes it less appropriate if one of the two parties is extremely uncooperative, which may occur in the context of an extra-contractual infringement dispute. In addition, a court judgment will be preferable if, in order to clarify its rights, a party seeks to establish a public legal precedent rather than an award that is limited to the relationship between the parties. Thus, ADR is particularly relevant when those accessing TK, TCEs and GR, agree to comply with it as a condition to such access.
The WIPO draft provisions on protection of TK and TCEs [WIPO/GRTKF/IC/11/4(c), 2007, Draft Article 7(b) (iv)] both envisage ADR as an appropriate means of determining questions relating to:

(i) Ownership or custodial relationship with protected subject matter;
(ii) Appropriate nature of and distribution of benefits from protection;
(iii) Remedies for misuse and misappropriation; and
(iv) Application of customary law of custodian communities beyond its traditional legal reach.

Thus it is noted that for the purposes of dispute resolution in case of misappropriation and "illegitimate" use of TK and related TCEs, both ADR and customary laws may prove useful, especially in a transborder context.

VIII. Cultural Heritage Museums and Institutions

The activities of collectors, fieldworkers, museums, archives etc., are important for the preservation, conservation, maintenance and transmission to future generations of intangible and tangible forms of cultural heritage. Museums also play a valuable educational role and can sometimes help encourage traditional artisans to remember their roots and continue making their crafts. In this regard, the Crafts Museum in New Delhi illustrates the role of museums as sites for preservation and encouragement for rural and folk arts. The core collection of the Crafts Museum, New Delhi, was actually put together to serve as reference material for the craftsmen who were increasingly losing touch with their own traditions in terms of materials, techniques, designs and aesthetics of their arts and crafts due to the sudden changes caused by modern industrialization. It must be however pointed out that the role of such "living museums" as a development tool for associated artisan communities is unclear and contested (Avijit 2000, quoting Jyotindra Jain).

Responses to the WIPO folklore questionnaire of 2001, the results of other WIPO activities and the WIPO Report on the FFMs are replete with examples of cultural heritage museums and other institutions. A few examples from different regions are cited here (WIPO/GRTKF/IC/5/3, 2003, Annex: 65):
(i) The Canadian Museum of Civilization collects tangible folkloric art as well as tapes of songs, languages, oral histories and personal narratives. The Museum’s Ethnology section restricts access to some collections of sacred Aboriginal materials to members of culturally affiliated groups, and does not make them available to members of the general public;

(ii) The Oman Center of Traditional Music in Muscat, Oman was created in 1983 to document, conserve and promote traditional Omani music. The Center has documented more than 80% of Oman’s musical traditions, including more than 23,000 photographs, 580 audiovisual recordings and a large number of sound recordings. The Center has also compiled digitized databases of these documentation materials. The Center takes a comprehensive approach to the documentation of musical traditions, which includes not only a recording of a particular musical work, but also of associated dances, social customs and gatherings, healing methods, planting and farming methods, fishing methods, handicrafts, etc.;

(iii) In China, national folk literature and arts are being recorded in the Ten Collections of the Chinese National Folk Literature and Arts (referred to as the “Great Wall of Civilization”). These Ten Collections comprise some 300 volumes of collections of Chinese songs, proverbs, operas, instrumental music, ballads, dances, and tales (Beijing Symposium, 2001);

(iv) The Archive of Folk Culture at the American Folklife Center, Library of Congress, US was established in 1928 and today maintains a multi-format, ethnographic collection that includes over two million photographs, manuscripts, audio recordings and moving images. The other major government repository for ethnographic material is the Center for Folklife and Cultural Heritage at the Smithsonian Institution. Established in 1967, its archive holds over 1.5 million photographs, manuscripts, audio recordings and moving images (WIPO GRTKF/IC/5/3, 2003, Annex: 66);

(v) In Ghana, the International Center for African Music and Dance (ICAMD), based at the University of Ghana in Legon aims at the promotion of international scholarship and creativity in African music and
dance. The center’s primary goal in this respect is to develop a unique library of oral texts (interviews, song texts, stories etc.), unpublished manuscripts and documentation of musical events (such as festivals, rituals and ceremonies), and the acquisition of manuscripts, books and audio-visual materials on African music, dance, drama as well as general works in the field of ethnomusicology and music education;

(vi) In Guatemala, efforts have been made to record and document certain expressions of traditional culture and folklore. A Registry of Archaeological, Historical and Artistic Property has been in operation since 1954, and its importance has grown in recent times. Its purpose is to record and thus maintain information on the historical origin, meaning and features of cultural expressions. The Registry records not only artifacts, monuments and other tangible objects of the national cultural heritage (including all pre-Hispanic, Mayan objects), but also intangible expressions of national culture such as traditional fiestas, oral traditions and legends;

(vii) In Laos, La Banque de Données Ethnographiques du Laos, containing 6000 digitized photographs of traditional dress, musical instruments, handicrafts and textiles (ibid.); and

(viii) In India, the National Museum, New Delhi, is the biggest Indian Museum which holds variety of articles ranging from pre-historic era to the modern work of art. It has 2,00,000 works of exquisite art, both of Indian and foreign origin covering more than 5,000 years of Indian cultural heritage. Its rich holdings of various creative traditions and disciplines, represents a unity amidst diversity and a rich blend of the past with the present.9

9 Other examples of museums in India preserving traditional and folk art include, the Museum of Folk and Tribal Art at Gurgaon, Haryana, established in 1984 by Mr. K.C. Aryan. The Museum contains various types of woodcraft objects, iron vessels, religious art objects like masks, “patakas” or paintings of Hindu deities etc., terracottas-both painted and unpainted, painted toys from Banaras, folk and tribal jewellery, murals from Himachal Pradesh, “phulkaris” (“flower working” embroidery technique) from Punjab, “kanthas” (running-stitch embroidery craft) from Bengal, hangings from Gujarat, shawls from Swat (North West Frontier Province) and lithographs from Amritsar. The aim of the museum “is to preserve art objects of rural and tribal flavour, to integrate scholarship with activism, aesthetic appreciation, create awareness amongst the masses as to the importance of these art objects.” Besides educational and cultural motives, it
Adding to the study and preservation of the cultural dimensions in India are other organizations like the Indian National Trust for Arts and Cultural Heritage (INTACH), the Indira Gandhi National Centre for the Arts (IGNCA) and the Archives of Ethnomusicology at New Delhi. Recognizing the need for preserving the ways of life of traditional communities and the close bond between development and culture, INTACH, an autonomous body instituted in 1984, has begun two pilot projects in India for the purpose of “sustainable heritage” through village development programmes.\(^\text{10}\)

The IGNCA, in turn, has undertaken a project entitled, “Kalamsampada”, in collaboration with the Ministry of Communication and Technology for the purpose of developing a data bank of Indian cultural heritage. “Kalasampada” seeks to facilitate access of scholars (users) to view materials including numerous manuscripts, slides, rare books, rare photographs, audio and video along with IGNCA research publications. Multimedia computer technology has been used for the development of a software package that integrates variety of cultural information accessible at one place. The facility is currently available only on intranet, for the very fact that these materials are priced possession and covered under Intellectual Property Rights, and copyright etc. Although, the partial information can be accessed from the IGNCA’s official website, uploaded with necessary approvals (IGNCA, Cultural Informatics).

The crucial role played by museums and archives is however called into question under certain circumstances. In the case of TCEs, these questions primarily concern copyright and related rights. For instance, if a fieldworker were to attempt the recording of a traditional song performance of the member of a traditional or indigenous group, distinct IPR claims will come to bear upon the situation. These could include “copyright” over the lyrics and related right over the performance, the rights of the fieldworker as one also seeks to “promote tourism and earn foreign exchange for the country.” The Folklore Museum in Mysore is also worthy of mention. Located in the Mysore University campus at Manasagangotri, the exhibits at the museum include an excellent collection of carved wooden figures from the different villages of Karnataka, rural costumes, utensils, ornaments, metal artifacts, implements and tools used in different rural professions. This Indian museum has 6500 folk art and folklore articles on display and the museum is celebrated as one of the largest of its kind in Asia.

\(^{10}\) These projects are underway in Raghurajpur, Orissa and Pragpur, Himachal Pradesh. INTACH has tried to revive mural paintings in Raghurajpur and provides avenues to artisans to showcase their skills in large business houses, hotels etc. These pilot projects are believed to have encouraged some artists to return to their crafts and by and large improved employment opportunities (Misra, INTACH, 2005).
who "fixes" the song in a medium etc. Another dimension of rights may emerge in the recording itself, in its material form, depending on the entity that claims the right to "own" or "license" access to its content. The issue concerning the recording could get further complicated if elements of the song sung have religious and tribal undertones that require limited and conditional access. Museums, libraries and archives often make further copies of such recordings for preservation purposes (many national copyright laws allow the making of "archival copies"). They also facilitate public access to and use of their recordings and collections for teaching, research and commercial purposes, and in the case of publicly-funded institutions they may even be under a statutory duty to do so. It is at this point that there is an opportunity for the rights and interests of performers and relevant communities to be protected – for example, as is common practice at least in some countries among public archives and museums, it may be required that copies of recordings only be released upon evidence of the consent of the performers or of good faith efforts to find their heirs. In this regard, the "public domain" status of cultural heritage and TCEs that are not protected by IP, challenges efforts to protect the related interests of indigenous and local communities (WIPO/GRTKF/IC/5/3, 2006, para. 212). This is particularly so in view of the growing trend of museums to digitize their cultural heritage collections and make them publicly available for both museological/curatorial as well as commercial purposes. To some extent, digital rights management with the use of necessary technological devices has been suggested, albeit with its limits and emphasis on a balanced approach to maintaining rights and access (Pantalony 2002).

Thus, it can be seen that the process of preservation can be in tension with the desire to protect TK and TCEs when disclosure, recording or documentation of this material undermines interests and precludes potential IPRs, and may place it in the public domain without the originating community's or TK holder's awareness of or consent to the full implications of preservation. Concern to avoid this was widely voiced in the WIPO Intergovernmental Committee's discussions (WIPO/GRTKF/IC/5/12, 2003: para. 26).

It has been acknowledged that collectors (fieldworkers) and archives lie at the junction between communities and the marketplace and that they can therefore play a key mediatory role in protecting TCEs while also making it possible for people to use, re-use
and re-create cultural heritage which is vital to its survival (WIPO/GRTKF/IC/5/3, 2003: para. 231). However, it has also been emphasized that the IP aspects require consideration and management, and in this respect, protocols, codes of conduct and/or guidelines dealing with the IP aspects may be useful for both communities and for collectors, museums and archives. Member States of WIPO, especially of the European Community, have expressed support for work in this area (WIPO/GRTKF/IC/4/3, 2002). Anthropologists, folklorists, ethnomusicologists and others have also discussed this issue at length (Chaudhuri 2002; Seeger 1996) and there are already several policies, ethical codes, protocols and guidelines developed by folklorist, ethnographic and anthropological societies and other professional bodies, although few appear to deal with IP questions. Certain archives and institutions address these questions in their day to day activities. For example, Chaudhuri reports on efforts at the Archives and Research Centre for Ethnomusicology, American Institute for Indian Studies, in India, to protect the rights of performers by limiting the rights of the depositors of field recordings and by contacting the performers of deposited recordings to explain their rights (Chaudhuri 2002: 36). The American Folklife Center, of the Library of Congress, follows a similar approach, viewing the collector/donor as well as the archive as being in a curatorial position only, and committed to fulfilling the wishes of the original performer of the tradition.

In developing IP-related protocols, codes of conduct and/or guidelines, some existing examples of protocols and codes of conduct that could be used as a starting point include:

(i) The Australian National Association for the Visual Art's (NAVA) report *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Crafts Sector*. This report has raised public awareness and encouraged discussion of indigenous cultural and IP issues. The report details protocols for dealing with material created by indigenous people and with material containing imagery, motifs or styles which are identifiably indigenous. These codes are not legally enforceable, but they do establish industry standards that may, over time,
be pointed to as a standard of conduct setting the course for legal rights (Australia Visual Arts and Crafts Report, 2002:139);

(ii) The Statement of Ethics of the American Folklore Society;

(iii) The Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services;

(iv) The Code of Practice of the Australian Arts Council for the Australian Visual Arts and Craft Sector;

(v) The Research Policy of the Working Group of Indigenous Minorities of Southern Africa (WIMSA);

(vi) From Canada, the Inuit Tapiriit Kanatami Guidelines for Responsible Research, the Dene Cultural Institute Guidelines and the Traditional Knowledge Research Guidelines: a Guide for Researchers in the Yukon, prepared by the Council of Yukon First Nations;

(vii) Previous Possessions, New Obligations -Policies for Museums in Australia and Aboriginal and Torres Strait Islander Peoples.

In fact WIPO has commissioned separate studies of different regions in order to obtain a more a clearer understanding of the nature of existing codes, protocols and best practices relating to digitization of intangible cultural heritage (Skrydstrup 2006; Talakai 2007). These surveys include short case-studies that have helped reveal the challenges in the protection of TCEs-such as those relating to definition and scope of subject-matter; notion of misappropriation; the incorporation of customary laws; balancing protection with needs for access and the elusive search for a common indexical language (Skrydstrup 2006: 101-111).

IX. Documentaries and Inventories

Faced with increasing cases of biopiracy of their traditional knowledge, certain developing countries like India and China have embarked upon ambitious documentation efforts to safeguard their traditional knowledge, especially traditional medicinal knowledge (TMK) from “poaching” in the public domain. Much of the documentation
efforts such as the Indian Traditional Knowledge Digital Library (TKDL) and other regional and sub-national efforts to document TK like the People's Biodiversity Registers (PBRs) etc. were undertaken with the understanding that the documentation would establish prior art and thus prevent the possibilities of patent rights in TK.

IX.1. The Traditional Knowledge Digital Library

The TKDL initiative by India is perhaps "the most self-conscious example" of modern twenty-first century archives creation to make traditional knowledge inalienable from the public domain (Reddy, 2006: 174). TKDL is a collaborative project between the National Institute of Science Communication and Information Resources (NISCAIR), Council of Scientific and Industrial Research, Ministry of Science & Technology and the Department of Ayurveda, Yoga & Naturopathy, Unani, Siddha and Homoeopathy (AYUSH), Ministry of Health and Family Welfare, which is being implemented at NISCAIR. An inter-disciplinary team of traditional medicine (Ayurveda, Unani, Siddha, Yoga) experts, patent examiners, information technology experts, scientists and technical officers are involved in creation of TKDL for Indian Systems of Medicine. The TKDL contains information on 36,000 formulations used in classical Ayurveda. The construction of this database involves a fascinating cultural history waiting to be told with almost 300 Vaidyas, Sanskrit scholars, and analysts employed for two years to translate verses (Slokas) and aphorisms (Sutras) from the traditional pharmacopeia and Ayurvedic compendia (Samhitas) into structured language using a classification called the Traditional Knowledge Resource Classification (TKRC). A second group isolated medicinal uses of plants from these to list them in databases and yet another group of analysts matched these entries with original sources to compare and validate their content (Reddy, ibid.).

Presentation on the TKRC at the International Patent Classification (IPC) Union led to the creation of WIPO-TK Task Force consisting of USPTO, EPO, JPO, China and India by IPC Union for enhancing the sub-groups in IPC for classifying the TK-related subject matter and considering the linking of TKRC with IPC. In February 2002, Committee of Experts recommended: (i) inclusion of 200 subgroups on TK against earlier single group on medicinal plants, (ii) linking of TKRC to IPC and (iii)
continuation of work on biodiversity, TK and TCE. Thus, a new main group was included in IPC i.e. AK61K 36/00 with approximately 200 subgroups covering different categories of plants. Later in October 2004, in the 35th IPC Union Meeting linking of Traditional Knowledge Resource Classification with International Patent Classification was approved.

There are also several documentation initiatives at the international level. For example, UNESCO has produced, jointly with the African Cultural Institute, a guidebook entitled Crafts: Methodological Guide to the Collection of Data (UNESCO/ICA 1990). Using this guidebook, and following its wide distribution to UNESCO Member States in English, French, Spanish and Arabic, computerized databases will gradually be established by UNESCO, which will be accessible through international networks. This network for the worldwide collection and dissemination of data on craft forms and techniques will have its focal point in the International Centre for the Promotion of Crafts, which was established in September 1996 in Fez, Morocco (WIPO/GRTKF/IC/5/3, 2002, para. 223). UNESCO has also recently affirmed the use of inventories as a preservation strategy for intangible cultural heritage (UNESCO Safeguarding Convention, 2003, article 12).

In fact, the task of inventory-making is the only activity to which States Parties to the Convention are obliged. In Article 11, paragraph (b) of the Convention, which describes the role of State parties, it is stated that each State Party shall identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant nongovernmental organizations.” This gives a clear mandate to national authorities and other relevant bodies to engage in the identification of intangible heritage present in the State’s territory and in the establishment of one or more inventories of the intangible heritage. Furthermore, Article 12 of the 2003 UNESCO Convention, which is dedicated to inventory-making by States Parties to the Convention, indicates chief tasks such as collection, typification and compilation of information regarding TCEs of various forms as well as the continuous up-dating and reporting towards UNESCO. The principles to be taken into account when elaborating national inventories on intangible cultural heritage are provided in the specific provisions and in the spirit of the 2003 Convention:
i) Foster cultural identity and cultural diversity;

ii) Respect international human rights instruments;

iii) Ensure the participation of communities, groups of practitioners, creators and artists of the concerned heritage and relevant non-governmental organizations (UNESCO Safeguarding Convention, 2003, Articles 11.b (iv) and 15);

iv) Respect the non-static characteristics of this heritage;

v) Adopt a flexible and decentralizing approach for the identification of intangible cultural heritage at national level, bearing in mind the specificity of different cultures;

vi) Respect an equity approach towards the various forms of intangible heritage. This significant principle implies avoiding creation of a hierarchy among different expressions of intangible cultural heritage both at national and international levels;

vii) Guarantee accessibility [UNESCO Safeguarding Convention, 2003, Article 13.d (ii) and (iii)] to the intangible cultural heritage as well as to its documentation, except for those forms which are kept secret according to the customary practices of the custodian communities.

viii) Clearly defined objectives for the establishment of inventories.

In order to obtain the support of the relevant communities in the process of inventory-making, the salience of clearly explaining the objectives of the inventory to them and to take their views and needs into account as well has been emphasized. The Asia Pacific Cultural Centre for UNESCO has suggested that inventory-making should be a process in which both levels -the national level as well as the community level have a say (ACCU Workshop, Final Report, 2004:84).

IX.2. Documentation: Limits and Concerns

The usefulness of documentation efforts as actual means of protecting TK and its associated TCEs however remains a moot question with scholars divided on its impact. Scholars like Gopalakrishnan opine that documentation of TK has made the position of developing countries even more vulnerable by taking the "knowledge base that remained
within the confines of the community” and “slowly making available for plunder without their knowledge and consent” (Gopalakrishnan 2002: 725). Study of the documentation efforts in traditional medicine in India reveals some of the inherent tensions and concerns. Perhaps more than any other intangible cultural forms, traditional medicinal knowledge is at once tangible as well as a healing practice, cultural object as well as a traditional cultural expression. Referring to the Indian TKDL project, Reddy (2006: 175) notes that “within Ayurvedic practitioner circles, the technocratic, top-down nature of the electronic database has not escaped criticism. In the first instance, Indian library and technology experts suggest that digital media technologies are far more fragile, prone to degradation, and obsolescence” than previously imagined. A more important and far-reaching set of critiques comes from the critical development literature, which argues that this headlong rush toward digitizing knowledge transforms the very nature of medical heritage specimens and decontextualizes them, thus raising serious questions about the commensurability of indigenous knowledge with Western science. Scholars suggest that there are fundamental epistemological contradictions at the heart of TKDL and, indeed, of indigenous knowledge database creation itself. As an example of ex situ conservation, the instrumental logic of database creation encourages a set of homogenizing processes whereby knowledge is particularized (separated as types and fixed in time), validated (abstracted from context), and generalized (catalogued, archived, and circulated)—processes that strip away all the detailed, contextual aspects that could even potentially mark it as indigenous (Reddy 2006, ibid.).

Reddy furthermore points out that the inherent epistemological tensions within databases are, however, not the only problems that plague the TKDL. According to her, the most interesting response and counterclaim has come from the shuddha or pure Ayurvedic practitioners, a subgroup or professionalizing faction among Ayurvedic advocates in postcolonial India who were not consulted during the database creation. Since the 1940s, the politics of professionalizing Ayurveda has been divided into two streams of revivalists: the straights, or the “shuddha” practitioners, and the integrated practitioners, who believed it was necessary to compete with biomedicine by borrowing its institutional practices, each with their own professional associations, schools, and political lobby groups. The “shuddhas” despite several charismatic leaders through the
1950s, steadily reduced in their influence under the winds of change ushered in by liberalization in the 1980s. The 21st century has witnessed greater favour within a policy framework for integrated Ayurvedic institutions, curricula, standards, and practice, and integrated practitioners have dominated the public face of Ayurvedic politics. Faced with the TKDL that ostensibly seeks to use technology for the creation of an authentic Ayurveda database, the “shuddha” stream of Ayurvedic proponents have found the opportunity to mobilize support against the “sacrilege” and opening up of the sacred texts beyond its “rightful interpreters.” Thus scholars like Reddy (2006: 180) after a close enquiry into the ongoing documentation efforts in India have concluded, that “making heritage legible is a double-edged sword: it transforms cultural objects and marginalizes cultural producers, but it also creates new types, categories, and subjectivities to be managed and controlled.” Reddy however concludes on a hopeful note that “although it remains to be seen how ownership claims eventually play out, this property turn in cultural identity politics could ultimately be transformative. It could, in fact, lead to a real politics of redistribution, to a redistributive justice between groups that goes well beyond the sterile politics of recognition that has dominated cultural heritage disputes in the past” (Reddy 2006: 181).

IX.3. WIPO Toolkit

Considering the unintended yet serious consequences of documenting TK and related TCEs, holders of TK and genetic resources have asked WIPO, since 1998, for practical guidance on IP aspects of documentation. In response to these needs, the WIPO IGC considered the following proposal to develop a ‘toolkit’ at its third session in June 2002:

“One very practical contribution that the Committee could make would be to consider … in more detail … the intellectual property implications arising out of the recording of traditional knowledge. For instance, the Committee could consider the compilation and publication of an “Intellectual Property Documentation Toolkit for Traditional Knowledge Holders.” Not only could this Toolkit inform and educate traditional knowledge holders and their representatives of the intellectual

11 In fact, there have been reports in India of one prominent Ayurvedic practitioner having threatened to wage a legal dispute in the Indian courts to reclaim exclusive use over sacred texts by making Ayurveda itself and its reigning god Dhanavantri the plaintiff (Indian Express 2004).
property implications of publication of traditional knowledge, and thereby enable any consent to such publication and dissemination to be 'informed consent,' but the Toolkit could also place a particular, and very pertinent, emphasis on the intellectual property implications of recording traditional knowledge (whether in a written format, by audio-tape or by video-tape) by traditional knowledge holders themselves" (WIPO/GRTKF/IC/3/5, 2002, para. 19).

Following wide support by Committee participants, the Committee adopted this proposal (WIPO/GRTKF/IC/3/17, para. 130) specifying that the toolkit should be developed in close cooperation with representatives of indigenous and local communities, and other relevant organizations, such as the Secretariat of the Convention on Biological Diversity (CBD) (WIPO/GRTKF/IC/3/17, paras 106 to 110). The Chairman noted that several delegations had proposed that the toolkit be “simple, balanced and developed with an advisory body” (WIPO/GRTKF/IC/3/17, para. 130).

The toolkit has been developed through a broad consultative process involving a wide range of stakeholders, in particular indigenous and local community organizations. WIPO has noted that “the most important prerequisite for an effective and balanced toolkit is that all stakeholders have been fully consulted and their comments taken into account, especially TK holders and custodians of genetic resources themselves” (WIPO/GRTKF/IC/5/5, 2003, para. 9). In one of WIPO’s more recent consultations held

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12 The Delegations of Bolivia, Cameroon, Canada, Côte d’Ivoire, Egypt, Japan, New Zealand, Norway, Panama, Peru, Switzerland and Venezuela, as well as the representatives of the Inuit Circumpolar Conference and the Saami Council supported the development of the Toolkit. See paragraphs 99 to 106 of document WIPO/GRTKF/IC/3/17 (“Report”).


14 A draft outline of the toolkit was prepared by the Secretariat after wide-ranging consultations with stakeholders, and this draft was extensively reviewed by the Committee at its fourth session, in December 2002 (WIPO/GRTKF/IC/4/5). In the discussion, there was continued stress on the need for the toolkit to be developed with the advice of experts and community representatives who have practical experience with IP and the documentation of TK and genetic resources, and the Chair concluded that it be developed with an advisory body (WIPO/GRTKF/IC/4/15). Subsequent work on the toolkit was therefore undertaken in consultation with a range of interested groups and the experts who had delivered presentations on documentation of TK and genetic resources at the Committee’s third session in June 2002. In addition to consultation sessions at international and intergovernmental meetings, especially between WIPO and the CBD Secretariat, the draft Toolkit has been discussed and consulted upon in bilateral discussions with the Tulalip Tribes in the US, the Peoples’ Biodiversity Registers (PBR) Initiative of India, the Society for Research Into Sustainable Technologies and Institutions (SRISTI), the M. S. Swaminathan Research Foundation (MSSRF), the Institute of Advanced Studies of the United Nations University (IAS/UNU), the Foundation for the Revitalization of Local Health Traditions (FRLHT), the African Regional Intellectual Property Organization (ARIPO) and the African Intellectual Property Organization (OAPI) (WIPO/GRTKF/IC/5/5, 2003, para. 7).
on protecting TK, TCEs and GRs, the issue of confidentiality in particular was put forward by participants on questions about whose interest lies behind documentation, who is funding it and what kind of problem would arise if databases were linked to funders. Brendan Tobin, rapporteur on the TK toolkit workshop, said that “if you can’t enforce the obligation of confidentiality, you need to take this into consideration.” Tobin also stressed the importance of ensuring that the TK databases are, in the main, established and maintained by communities, and that ownership of management structure should, where possible, be with local communities (Saez 2007).

The WIPO draft toolkit (WIPO/GRTKF/IC/5/5, Annex) for documentation of TK does not seek to define key elements such as TK, TCEs, GRs or biological resources since these are issues under deliberation within the WIPO Committee. The draft toolkit however makes passing references to definitions proffered for some of the above within the framework of CBD. Moreover, the draft WIPO toolkit acknowledges the relation between TK and folklore by stating: “TK documentation can include not just the knowledge itself, but the traditional way it has been expressed – for example, songs and chants, dances and performances, images, oral narratives and stories” (WIPO/GRTKF/IC/5/5, Annex:4). In view of this link and the issues specific to TCEs that may arise, WIPO is also preparing a “WIPO Practical Guide for the Legal Protection of Traditional Cultural Expressions” which will supplement the advice in the draft toolkit and consider the steps required to protect traditional cultural expressions and folklore. The draft toolkit points out some important things to bear in mind regarding the documentation of TK. The draft toolkit acknowledges that documentation per se does not ensure legal protection of TK and associated knowledge and in fact may sometimes prove detrimental to rights and options. The draft toolkit clarifies that “documentation” should not be placed at similar footing with TK in the public domain and that disclosure of such knowledge should be carefully considered (WIPO/GRTKF/IC/5/5, Annex: 3). The draft toolkit clarifies the ways that that it may be used and its reliance on supplementary range of information relating especially to interests of concerned communities and legal regimes in place. Most importantly, the WIPO draft toolkit in not intended to be a stand-alone solution to the protection of TK and urges that the ways to document TK as are as diverse as the related communities (WIPO/GRTKF/IC/5/5, Annex, 11).
Some of the key stages in documentation identified in the WIPO draft toolkit to protect the interests of holders of TK during documentation are:

A. Before Documenting: the draft WIPO toolkit lays an emphasis on wide consultations with community members having an interest in the TK and the need to make them aware of the implications of the documentation process. Apart from setting clear objectives for documentation and identifying concerns about IP, the draft toolkit also urges an assessment of TK and all IPR options before disclosure. Once all available options have been weighed, the draft toolkit suggests setting an IP strategy to implement objectives (WIPO/GRTKF/IC/5/5, Annex: 2).

B. During documentation the WIPO draft toolkit cautions against disclosure beyond traditional circle unless done consciously. The draft toolkit also recommends making public recorded TK only if it fits within the chosen IP strategy. Furthermore, it is also suggested that the process of documentation should also include identification of persons who shared the information and claim ownership in the documented subject-matter and the conditions and limitations attached by these persons to the same. The toolkit also refers to the usefulness of clarifying relation between different project partners in the documentation effort through contractual agreements like confidentiality and research agreements (Ibid.).

C. After documentation, the draft toolkit suggests a review of IP options available to protect TK; reconsideration of disclosure as part of IP strategy; need to decide whether databases and registries are viable options to achieve the desired IP objectives and the use and enforcement of IPRs in TK.

X. Privacy Law

The right to privacy has long served a constitutional limit on governmental power though there is little agreement as to its scope and derivation (Rubenfeld 1989). Apart from the "right to be let alone," the right to privacy may also include some types of commercial exploitation of personal information such as unauthorized use of a name or picture (Gavinson 1980). As with the concept of authorship in copyright law, however, the notion of privacy seems to evoke personhood in the individual sense. The sometimes-proffered "right to be let alone," amongst other iterations of privacy law, has been
invoked to provide protection for individualistic privacy. For many native communities, however, indigenous art and cultural expression is interwoven with indigenous identity. The Western concept of privacy for an individual may be applicable to some indigenous culture’s concept of tribal identity, and the quintessential concept of selfhood may be considered as shifting from one person to one people. If a tribe is granted a right to be let alone – or to carry on its traditions autonomously without interference – that tribe’s TCEs, inextricably tied to that tribe’s identity, could acquire a protective legal cover against misappropriation, derogation or uninvited scrutiny.

An interesting example of a privacy issue that is seen in the case concerning the Estate of Tasunke Witko a/k/a Crazy Horse vs. Hornell Brewing Co, 156 F. Supp. 2d 1092. The plaintiffs did not assert an intellectual property claim, but based their argument on defamation and negligent infliction of emotional distress, among other complaints, including privacy. In 1993, Tasunke Witko, a descendant of Crazy Horse, acting as the administrator for Crazy Horse’s estate, brought suit along with the Brule Lakota of the Rosebud Sioux tribe of South Dakota against the brewing company for using the name Crazy Horse in the manufacture, sale and distribution of a malt liquor product, beginning in 1992. Crazy Horse, a respected tribal leader and warrior in the Sioux tribe, had adamantly criticized the abuse of alcohol during his lifetime and the plaintiffs brought suit asserting a variety of violations and claims. The case went through many procedural follow-ups in court and was eventually settled out of court. Interestingly, the US Congress later enacted a federal statute banning the use of the name “Crazy Horse” on any alcoholic beverage. This national ban was however overturned by the New York Federal court on the grounds that the law violated the right to free speech.

XI. Fairs and Festivals

For the dissemination of folklore, the 1989 UNESCO Recommendation envisaged regional, national and international events such as fairs, festivals, films, exhibitions, seminars, symposia, workshops etc. In this regard, in India, during the 1980s, the Government of India envisaged a policy of cultural co-operation many countries through an innovative idea of the Festival of India or Bharat Utsav, with the first of it held in UK in 1982. The objective of the Festival of India was to showcase the richness and variety...
of India’s cultural heritage to the rest of the world. After a series of successful “Festival of India” in Paris, London, New York and Washington, the GOI also decided to hold a show in India, spending around 4 million USD to bring in more than 4,000 artists and artisans from different parts of the country to perform in seven locations, mainly in poor districts. Though received well by Indian, the Festival of India was however mired in controversy in political circles (Weisman, NY Times, 1987).

Mention of other ventures in India targeted to highlight Indian folk traditions can also be seen in the annual trade fairs held by the Trade Fair Authority in India (TFAI). The TFAI plays an important role in the dissemination of cultural information of various parts of India. Pragati Maidan in Delhi is the permanent location where the annual fair is held in the month of November. This Trade Fair not only provides consumers access to the goods and technological devices but also provides a platform for some of the best Indian performing arts, music, dance and drama. Open-air theatres, namely, Hamsadhwani, Falaknuma, Shringar, Lal Chowk, Kadambari and Angan Manchan are available for performances by eminent classical and folk artists. Both consumers and artists look forward to these trade fairs are with anticipation. Indeed, some artisans believe annual fairs are insufficient to create adequate marketing opportunities. In order for artisans to reap more benefits, instead it is suggested that programmes and festivals be organized more frequently, may be up to six to eight times in a year, with a special focus on the tourist season (Anees Ahmed, personal interview, 28 September 2008).

XII. Role of Cultural Organizations

Last but not the least, cultural organizations within a country may also play an important role in preserving and simultaneously maintaining the vitality of cultural traditions and arts. India has couple of cultural organizations that set the standards for cultural promotion, interaction and exchange between various proponents and experts. For example, the GOI established the Lalit Kala Akademi (LKA) in 1954. The LKA strives to promote fine arts through exhibitions, publications, workshops and camps and also sometimes organizes small number of exhibitions of folk art (Vatsayan 1972:40). Other key organizations in the realm of the performing arts include the Sangeet Natak Academy (SNA) and the National School of Drama (NSD). The SNA, established in 1953, has set
up a special unit for surveying and documenting many forms of folk, tribal music and
dance along with other classical forms. Its disc and tape library has the largest collection
of Indian classical, folk and tribal music, dance and theatre items. Of these, some are
already extinct, while some other are threatened (Vatsayan 1972: 42). The NSD, founded
in 1959 by the GOI, now an autonomous body, financed by the government, imparts
training in dramatics and propagates theatre in the country. It also facilitates training of
its students in folk, traditional and regional theatre forms. Furthermore, the Indian
government's broadcasting agencies—the All India Radio (AIR) and Doordarshan also
play a vital role in patronizing, propagating and disseminating folk culture in India

XIII. Summary
The debate on the protection of TK in general and TCEs in particular is increasingly
faced with the reality that no single body is likely to have the capacity, expertise or
resources to handle all aspects of TK. Indeed, it is has been suggested that in the
multiplicity of measures available for the protection of TK and TCEs, only some of them
need to be IP-related so as to protect, preserve and promote TK and TCEs. Even at
WIPO, country participants and indigenous group representatives are in favour of a wide-
ranging, flexible and comprehensive approach to resolving the issues relating to the
protection of TCEs. Protection should, they have discussed, combine proprietary, non-
proprietary and non-IP measures, and use existing IP rights, sui generis adaptations of IP
rights, and specially-created sui generis IP measures, including both defensive and
positive measures.

This Chapter therefore embarked upon an examination of some of the existing
non-IP measures that are relevant while considering policies for the protection of TCEs.
It was noted that an analysis of the political and academic discussion of the protection of
TCEs reveals a certain level of oversight in considering the relevance of human rights in
the conceptual matrix. Recent efforts to address the legal fragmentation in the debate on
the protection of TCEs have led scholars to urge an exploration of human rights to
supplement and offer a theoretical framework for the protection of traditional or
indigenous knowledge. It is believed that the common language and vocabulary of human
rights would help the project of articulating theories and policies that will guide us in the adjustment of existing intellectual property rights and the creation of new ones. With regard to the rights of indigenous communities, in the protection of their TCEs, the recently adopted 2007 UN Declaration on the Rights of Indigenous People (DRIP) is particularly relevant. However, the legal effect of the UN Declaration on Rights of Indigenous Peoples is not easy to assess owing to the possibilities of reservations by States. Furthermore, while human rights language and decisions have high moral force, the “gap” in implementation domestically may need to be accounted for. Additionally, recognition of “group rights” is also not easily allowed by States owing to concerns for political and social stability of their countries.

The use of customary laws and protocols can also be considered for the protection of TCEs. These laws and protocols are central to the very identity of many indigenous, local and other traditional communities and can potentially help in the operation of IP law on such matters as the legal identity of communities, ownership or inheritance of rights, equitable interests in an IPR, and a continuing right to use material covered by an IPR. Indeed, the recent WIPO Draft Objectives on Principles for the Protection of TK and TCEs extensively acknowledge the relevance of customary laws and protocols. Few scholars have however issued a caution against the “explosion of legal diversity” and resultant excessive burden on state administration that may be caused due to different customary laws functioning in and between States.

The use of alternative dispute resolution (ADR) has also emerged as a possibility in the development of norms and practical legal mechanisms to deal with the protection of TK, TCEs and GRs within the WIPO. Principles relating to moral rights, droit de suite and public payant system, as independent principles beyond an IP framework may also be considered. The use of contractual arrangements has also been suggested in transactions involving use, transfer or commercialization of TCEs, although bearing in mind the poor bargaining capacity of indigenous people and traditional communities. Few success stories in countries with indigenous population like New Zealand point however to its limited feasibility.
The role of marketing arrangements in protecting and providing incentives for maintaining or “saving” traditional skills has also been emphasized. In this regard, adaptation of traditional skills to new products for changing markets and repositioning of skills and products for upscale markets that appreciate and are willing to pay premiums for handcrafted quality and character have been mentioned. Nonetheless it must be borne in mind that producer groups of crafts and handloom in developing countries like India face major impediments in entering the mainstream markets. Support from community-based organizations or commercial arrangements that lay an emphasis on cash advances, long-term relationship and continued demand and supply chain and design intervention in folklore products would help ameliorate some of the limitations faced by traditional artisans.

Furthermore, “fair trade” as another form of marketing arrangement to promote traditional and folkloric skills is important in the light of the fact that the presence of intermediaries and the lack of clear understanding of the market by artisans quite often results in poor return to producers. Nonetheless while supply possibilities are large in fair trade, growth in the market may be hindered by lack of stores, access to capital and finding adequate staff, buyers and retailers sharing the value of “fair trade.”

Study of non-IP measures for the protection of TCEs also suggests the relevance of museums and archives as sites of preservation, safeguard and education. The deep emphasis on documenting and inventorying of TCEs by museums and archives, as required even by the UNESCO and increasing digitization of archives of TCEs however raise serious IP implications. Documentation may open TCEs for easy appropriation, without acknowledgement or benefit and also has the potential to decontextualize heritage specimens and religious traditional expressions.

Study of the Indian Traditional Knowledge Digital Library (TKDL) reveals both the strengths and weaknesses in the use of documentation as a defensive tool for protecting TK. Thus, while “prior art” claims may be bolstered by the TKDL project, the simultaneous homogenization of knowledge, its decontextualization and greater fragility wrought by digital media technologies has also been highlighted. The use of specific protocols and codes is therefore suggested to preserve against this “double-edged sword”
of defensive protection of TCEs. Of special mention in this regard is the WIPO Toolkit that provides practical guidelines on the IP aspects of documentation.

Other non-IP measures that may prove useful for the protection of TCEs include privacy law, setting up of fairs and festivals and the ongoing work of cultural organizations in a country for the dissemination and promotion of TCEs. Finally, considering the numerous options available in international law, it therefore would be interesting to study some of the ways in which IP, non-IP, proprietary and non-proprietary measures can all be weaved, if at all, into a singly instrument for the protection of "folklore." Few countries have *sui generis* legislation for the protection of TCEs and the next Chapter will seek to examine the content, albeit briefly, of a few of these *sui generis* legislations and consider the extent to which they have been operational, if at all.