CHAPTER VIII

CONCLUSIONS

Attempts to formulate an international framework for the protection of traditional knowledge (TK) have been fraught with conceptual challenges and contestations by various actors involved in the debate. Nowhere is this more obvious than at the ongoing negotiations in the WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC). It has been affirmed that defining TK involves serious consideration of the different nature and forms of expression of the information embraced by TK. Developing countries are increasingly keener to move beyond a debate on definitions for TK and instead are trying to gather support for more substantive terms of protection. They have stressed the importance of protecting TK, even if defined inadequately. In other words, instead of attempting to arrive at a precise definition of “traditional knowledge” eligible for protection, it may be more necessary to emphasize the distinctive characteristics of TK such as, (a) its intergenerational character; (b) objective link with a community of origin; and (c) subjective association within that community, so that it forms part of a community’s own self-identity. This desire for a more descriptive definition, rather than a listed-exhaustive format is what seems to be favoured even in WIPO’s recent Draft Objectives and Principles for the Protection of Traditional Knowledge.

A study of the ongoing debate on the protection of TK in international law reveals how traditional cultural expressions (TCEs) are perceived within the context of general protection of TK. Considering limitations in IP law, WIPO has chosen to draw a distinction between pre-existing traditional cultural expressions (“TCEs stricto sensu”) and contemporary interpretations and adaptations of them. WIPO’s recent Draft Objectives and Principles for the Protection of TK (WIPO/GRTKF/IC/10/5, 2006) indicates preference for a separate, complementary and parallel process of protection for TCEs as against that for TK. Even though developing countries and indigenous groups have indicated the fundamental inseparability of TK and TCEs, it seems that for reasons of practicability and different legal regimes, WIPO has chosen to keep the protection of
TK separate from that for TCEs. This separation is unfortunate and may have serious implications on some of the larger issues of cultural and indigenous rights which have been duly acknowledged in other fora such as the CBD and the UNESCO.

Most developing countries agree that an internationally binding agreement to protect TK is the way forward. However the nature, content and status of such an international instrument continues to remain elusive. Significant progress has been made by developing countries in addressing concerns over bio-piracy at the CBD and it has been urged that parallel negotiations in the WTO and WIPO must complement these efforts. While protection of TK and TCEs continues to be affected by different interpretations regarding their terminology, the work with regard to genetic resources has moved with more positive results. Mandatory disclosure requirements to enable access to genetic resources, prior informed consent and fair and equitable benefit sharing of returns from the use of genetic resources and associated traditional knowledge has been mooted by certain developing countries such as the African Group of countries, Brazil and India. Much of the progress attained at CBD is however subject to how its emphasis on access and benefit-sharing, prior informed consent and disclosure of origin are considered TRIPS-compliant. These vital negotiations are ongoing and the divide between developing and developed countries appears fairly intransigent.

The willingness of both developed and developing countries to compromise and negotiate terms of protection at the WIPO are therefore significant. A perusal of country positions on the recent developments in the protection of TK at the WIPO IGC shows developed countries emphasizing the need for evidence-based protection for TK. In turn, developing countries argue that since the TRIPS Agreement requires countries with traditional and indigenous communities to provide intellectual property (IP) protection for a broad range of subject-matters including new ones such as plant varieties, biological materials, lay-out designs and computer software, it is only equitable that traditional knowledge should be given legal recognition. Major concerns on the part of developed countries is with regard to access to resources and legal certainty in access and benefit sharing arrangements pertaining to the use, transfer and use of TK and related resources. On their part, the developing countries have continued the stress on the potential for economic development through an accountable system of access and use of their TK.
Other concerns relating to food security, sustainable environmental development and the right of indigenous and cultural communities to "their way of life" have also been expressed by developing countries.

In the case of TCEs, some of the key policy concerns in their protection may be summarized as: a) protection of TCEs against unauthorized use, especially commercial use; (b) prevention of insulting, derogatory and/or culturally and spiritually offensive uses of TCEs; (c) prevention of the appropriation of the reputation or distinctive character of TCEs that misleads or is false indications as its authenticity, origin, or "style;" (d) prevention of the failure to acknowledge source when TCEs are used; (e) defensive protection of TCEs against the obtaining of IP rights over the TCEs or its adaptations); and, (f) unauthorized disclosure of confidential or secret TCEs.

Present deliberations in the WIPO have resulted in conceiving a "layered" protection of TCEs. For TCEs/EoF of particular cultural or spiritual value to a community, a right of "free, prior and informed consent" (PIC), akin to an exclusive right in IP terms has been suggested. According to these suggestions, acts usually covered by IP laws, especially copyright, related rights, trademarks and designs, would be subject to the PIC of the relevant community. These TCEs will need to be registered or notified to obtain protection. Developing countries support the requirement of PIC as a central principle and mechanism in an international system for the protection of TCEs/EoF. An effective way of evaluating whether an act would constitute misappropriation is by evaluating the existence of PIC. Other TCEs/EoF (which are not registered or notified, but which still have the required linkage with the community concerned) can be protected by regulating use by third parties. These TCEs/EoF could be used, as a source of creative inspiration for example, without the need for prior consent or authorization, in furtherance of creativity and artistic freedom. Principles affecting regulation and use can be drawn from moral rights, unfair competition principles, with civil and criminal remedies proposed, as well as the payment of an equitable remuneration or equitable benefit-sharing, to be determined by a competent authority. WIPO also recommends adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret TCEs.

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Thus, it can be seen that increasingly the WIPO has acknowledged that existing IP law cannot provide holistic and adequate protection to TCEs and those who maintain, hold and create them. The movement away from definitional challenges to a more substantive debate on the protection of TCEs at the WIPO should be considered an encouraging development for developing countries. It must however be emphasized that WIPO has clearly steered clear of acknowledging new property rights pertaining to the protection of TK and TCEs. It may be recalled that most developed countries like Japan and the US are opposed to the idea of new property rights in TK and TCEs. WIPO's preference to view possibilities in existing IP law and *sui generis* solutions alludes to its unwillingness or the inability to contest existing structures in IP law.

A brief analysis of existing international IP law, however, shows that IP law may indeed prove useful in addressing some of the concerns regarding the protection of TCEs. Contemporary expressions of TCEs, with the necessary “creative” element can obtain copyright protection. Some of the limitations in copyright law, such as issues regarding originality, identified authorship, fixation and duration of protection are overstated. Furthermore *sui generis* laws like the 1976 Tunis Model Law on Copyright; 1982 WIPO-UNESCO Model Law Provisions, the 2001 Panama Special Intellectual Property Rights Law and the 2002 Pacific Regional Framework, seem to demonstrate the ability to address some of these concerns.

Existing international law, such as the 1996 WPPT, offers protection to the performance of expressions of folklore. This form of protection however has serious limitations. Protection under the WPPT does not extend to communities and covers only aural performances, or the aural aspect of an audiovisual performance. Furthermore, under Article 19 of the Rome Convention, 1961, once a performer has consented to the inclusion of his performance in a visual or audiovisual fixation, the rights in the Convention “shall have no further application.” In such a scenario, the crucial factor determining protection of performances of TCEs could be to prevent all ways of “fixing” performances without permission of the performer or related community, as the case may be.
Trademark protection may also prove useful in supporting the trade interests of indigenous groups, especially where adequate trademark registration would help assure consumers of authentic indigenous products. There are however several problems in the use of trademarks as a means to protect TCEs. Some of these include: the requirement of application and renewal fees and the general lack of awareness of the law and its possibilities amongst members of the relevant indigenous and traditional community, especially as regards opposition and invalidation proceedings. Design protection also seems to be used in some countries like China and Kazakhstan to protect folklore designs. This form of protection also has its limitations considering the fact that designs travel easily across borders both within and outside a country and it is difficult to identify where and by whom the element of “novelty” or “originality” was introduced. Recourse to GIs, moral rights, public domain payant and droit de suite are also seen to be of limited use in the protection of TCEs.

The multi-faceted nature of TCEs and related concerns of various stakeholders requires to be addressed in terms beyond IP law. Indeed, certain indigenous groups and scholars have stressed that a “one-size-fits all” solution in IP law for the protection of TCEs may actually be detrimental. Even if new intellectual property rights in TCEs were to come by, they would be insufficient unless they are tied to broader public policy strategies. The desire to support and maintain cultural traditions and diversity is certainly emerging as an important issue of international public policy. The role of the UNESCO in the protection of TCEs therefore assumes relevance.

The paradigm shift in the “private property” logic of protection of cultural property as seen in the 1899 Hague Convention to the more universal “common heritage” form of protection in the 1972 UNESCO Convention is significant. UNESCO’s invitation to States to create a system of Living National Treasures and forward the list of such ‘Treasures’ to UNESCO is also worthy of mention. The Living Human Treasures Programme places the skills and techniques of those who practise traditional culture and folklore at the centre of preservation, an element so far missing from the international protection of cultural heritage. However, the said Programme could possibly result in ossifying culture and also involves the difficult question of identifying exponents of traditional knowledge and skills. Another UNESCO Programme worth mentioning is the
UNESCO Proclamation of Masterpieces of the Oral and Intangible Culture. The Proclamation rewards two types of expression of intangible cultural heritage (ICH): forms of popular and traditional cultural expressions and cultural spaces. Indian traditional cultural expressions such as Kutiyatam, Ramalila and "Vedic Chanting" are among the ninety UNESCO Proclamations to date.

The most distinct attempt thus far to protect TCEs by the UNESCO is reflected in its 2003 Convention for the Safeguarding of the Intangible Cultural Heritage. The Convention envisages protection for a fairly broad category of cultural expressions. However, its requirement that the protected cultural expressions be totally compatible with human rights instruments, reflect mutual respect between communities and be sustainable is considered by some as unrealistic and possibly capable of removing a vast set of expressions from the purview of protection. Furthermore, the 2003 Convention places heavy emphasis on the use of lists and inventories as safeguarding measures for protecting intangible cultural heritage. These measures have been shown to be not only impracticable sometimes but also capable of undermining the IP interest of communities that hold, maintain and create these ICH. Despite these weaknesses in the 2003 UNESCO Convention, its emphasis on maintaining cultural diversity and vitality is important.

The protection of TK in general and TCEs in particular is increasingly faced with the reality that no single organisation is likely to have the capacity, expertise or resources to handle all aspects of TK. It 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. The consideration of IP policy perspective alone in the protection of TCEs creates a heavy emphasis on commodification of TCEs, which is inimical to the interests of a majority of indigenous and local communities that are said to hold their traditional knowledge in bundles of relation and trust. Furthermore, even UNESCO's measures are believed by some to not wholly support the interests and expectations of traditional and indigenous communities. UNESCO's emphasis on documentation and inventoring of TCEs for purposes of safeguarding and preserving are believed by some 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. Even at the 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. Holistic protection of TCEs and the rights of related communities will require closer co-operation between efforts to obtain IP protection and the maintenance of “manifestations” of intangible cultural heritage. In this regard, WIPO and UNESCO must work more closely.

Existing non-IP measures are relevant while considering policies for the protection of TCEs. There appears to be 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. 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 relevant. However, the legal effect of the UN DRIP is not easy to assess owing to reservations by States. Though human rights language and decisions of human rights courts have high moral force, the “gap” in implementation domestically may need to be accounted for. Furthermore, recognition of “group rights” is not easily allowed by States owing to concerns for political and social stability of their countries.

Developing countries and indigenous groups are increasingly advocating the use of customary laws and protocols for the protection of TCEs. Customary legal systems, including those pertaining to TK, 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; international instruments like the 1989 ILO Convention No. 169 and the 2007 UN DRIP and; *sui generis* systems, such as that of the Philippines, in its 1997 Indigenous Rights Act. These laws and protocols are central to the 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 role of marketing arrangements in protecting and providing incentives for maintaining or “saving” traditional skills also needs to be considered in protective strategies. Given the difficulties of implementing IPR structures, scholars suggest that market adaptation and access problems are more manageable. Nonetheless, producer groups of crafts and handloom in developing countries like India face major impediments in entering the mainstream markets. These hurdles include inter alia, (a) the lack of market intelligence needed to produce goods of acceptable quality to meet demands in domestic and national export markets; (b) inadequate information on where markets and potential buyers for their products exist; (c) lack of access to the latest technology available; (d) scattered nature of production base; and (e) skill levels and small size of operation that lead to low productivity and failure to benefit from economies of scale. In this regard, support from community-based organizations or commercial arrangements that lay an emphasis on cash advances, long-term relationship and continued demand and supply chain would help solve some of the above-said problems faced by traditional artisans. The important role played by design intervention in folklore products, especially handicrafts, has also been highlighted in some pilot projects in India. Other non-IP measures that may prove useful for the protection of TCEs include “fair, trade”, privacy law, setting up of fairs and festivals and work by cultural organizations for the dissemination and promotion of TCEs.

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. However, 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 raises serious IP implications that are believed to be inimical to the interest of tradition bearers

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and the TCEs themselves. Documentation may open TCEs for easy appropriation, without acknowledgement or benefit and also has the potential to decontextualize heritage specimens and religious traditional expressions. In this regard, the need for definite protocols for access and the need to increase the sensitivity and awareness of researchers, archivists, collectors etc. cannot be over emphasized.

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.

A consideration of the *sui generis* laws in countries such as the Philippines and Panama reveal that the rights of indigenous groups and the desire to mitigate the effects of colonization in the past are at the heart of their interest to protect TCEs. Furthermore, the Philippines has chosen to have a broad understanding of “community intellectual rights” that encompasses both tangible and intangible elements and conveys a more holistic understanding of the life ways of the indigenous communities, without the separation of TK from TCE elements, as has been generally desired for by indigenous and traditional communities. Under the Philippines’ law, commercialization and creation of property rights beyond the contours of indigenous communities would have to weigh against cultural and human rights as also notions of customary ownership.

As regards, exceptions and limitations to the protection of TCEs, Panama law allows exemptions for folkloric dance groups and certain small non-indigenous artisans. Panama also has exercised the right to restrict “borrowing” and incidental uses of its cultural expressions. Use of registers is also envisaged in Panama law to protect the collective rights of the indigenous people in their cultural expressions. However, caution is exercised by not requiring full disclosure from indigenous peoples. Panama also uses criminal sanctions against cases of “passing off”, civil action in the form of imposition of
fines and also takes recourse to customs legislation and industrial property legislation to
give fuller protection to its cultural expressions. Unfortunately, despite these laudable *sui
generis* solutions formulated in Philippines and Panama, there is little evidence to
confirm their use and effectiveness.

In contrast, a study of existing legislations in the US, show a preponderance of the
use of unfair competition law to protect cultural expressions as seen in the 1992 Indian
Arts and Crafts Act. Protection of the spiritual and religious dimensions to the cultural
life of Native Americans finds expression in the 1990 Native Americans Graves
Protection and Repatriation Act. The US also employs a combination of civil and
criminal law remedies to ensure “truth in marketing” of Indian made products. Under US
law, a proposed trademark may be refused registration or cancelled if the mark consists
of or comprises matter which may disparage or falsely suggest a connection with persons,
living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or
disrepute. This use of trademark law as a defensive tool to protect against cultural and
religious offence may potentially recognize the rights of other indigenous and traditional
groups worldwide.

A brief analysis of Indian experience shows that there is limited, indirect
protection for expressions of folklore. While India has legislated on biodiversity-related
TK and also protects plant varieties, a specific legislation for the protection of folklore is
missing. The weaknesses in the protection of TCEs owing to lack of “originality”,
“fixation” and “determinate term of protection” continue to be the case in the Indian
Copyright Act. The Indian Copyright Act makes a passing reference to the principle of
droite de suite (resale right) and to some extent accepts moral rights. As far as India’s
copyright law is concerned, folkloric expressions find limited protection within the notion
of performer’s rights. However, performances once fixed are no more protected under
performer’s rights. To obviate this problem it is crucial to avoid fixation without consent.
For this, where a live, public performance is being made, the folklorist may seek the help
of organizers to prevent the use of cameras and other devices capable of making
cinematograph film or sound recording. It has been suggested that using signed
performer’s release for authorised filming and recording is necessary.
The Indian Geographical Indications Act of 1999 also provides protection to handicrafts but presently there is no assurance that geographical indications (GIs) granted in India will receive adequate protection by other Member States party to the TRIPS Agreement. The higher form of protection to wines and spirits in Article 23 of the TRIPS is a bone of contention for the developing countries and it will be interesting to study the progress made in demands for the extension of GI protection to other products. However, some of the ground realities in India are important to bear in mind while considering the efficacy of GI protection. India is faced with counterfeit handicrafts not only from abroad but also from within India. A socio-economic impact study of GIs on developing countries is yet to come by but scholars writing from a Third World perspective have pointed out that the main economic benefit of GIs would be to act as a quality mark which will play a part in enhancing export markets and revenues.

Other recommendations for the protection of TCEs include: (a) the need to develop and regularly update an identification system for traditional folk culture and folklore; (b) establishment of organizations for public administration of copyright and neighbouring rights which would deal with expressions of traditional folk culture and folklore, or, if necessary, extending the powers of existing organizations to cover this area as well; (c) raising awareness amongst the creators of traditional folk culture like folk artists, performers, artisans, etc. of their rights in the area of intellectual property; (d) support for museum and archives holding traditional folk culture and folklore collections and databases in their efforts to monitor how the collections and databases are used for present interpretation or for production purposes in their respective countries; (e) encouraging efforts for protection of in situ collections and databases against abuse and devaluation while emphasizing their cultural and educational value to the general public; and (f) encouraging educational institutions, mainly schools, to introduce classes in traditional folk culture and folklore as a means for developing tolerance and understanding.

Finally, considering the numerous options available in international law, it does appear that though the prospects for a copyright-protection to expressions of folklore are bleak within the existing IPR regime, countries do have a viable menu of options to use for protecting TCEs. Grant of IPRs in TCEs through sui generis form of protection has
been considered in few sui generis laws like in the Pacific region, Panama and the Philippines. All of these laws have evolved in the context of colonization and unauthorized exploitation of their TK and TCEs. There is however little evidence to support how much grant of “positive” copyright-like IPRs has helped. An important question countries will need to address while considering copyright-like protection of TCEs is the extent to which creativity and diversity is allowed to simultaneously subsist. Testing the hypothesis on the greater efficacy of IPRs like trademarks to protect against misappropriation and sale of inauthentic TCEs, shows that the hypothesis holds true only in part. A conclusion on the usefulness of “defensive” IPR tools has to be backed with both theoretical and practical case study. The few case studies done on the use of defensive measures like trademarks and certification in Australia and New Zealand, show that the effect of these measures were dependant upon the strength of the indigenous movement, awareness of both producers and consumers and the ability of producers to renew and pay the fees necessary to keep their trademarks alive. Similarly, the use of documentation and inventories for the protection of TCEs, being advocated both at the UNESCO and WIPO, as a “defensive” form of protection also has some serious problems. In conclusion, though the scope for modifications in existing IP law for protecting TCEs appear increasingly slim, yet the options within IP law and elsewhere remain open for use in protecting different categories of TCEs.