CHAPTER I

INTRODUCTION

One of the fundamental concerns in the protection of traditional knowledge of indigenous, local and traditional communities is the free access to their non-IPR protected knowledge. Traditional knowledge\(^1\) is frequently assumed to be in the “public domain,” and is often removed from its traditional context, copied, used and imported into foreign countries, without acknowledgment of source, regard for its religious and cultural underpinnings or even adequate compensation. Most narratives of exploitation and misappropriation of “traditional” and indigenous knowledge have revolved around the categories of agricultural and medicinal plants and cultural expressions.

To illustrate the tendency to view traditional knowledge (TK) as being open to unrestricted access and appropriation, without consent, one may consider the unauthorized reproduction of sacred Australian Aboriginal paintings on carpets, printed clothing fabrics, garments and greeting cards and their subsequent distribution and sale that have led to claims before the Australian courts\(^2\) for protection of indigenous rights and culture. The rich traditions of indigenous music from Ghana, the Solomon Islands and African ‘pygmy’ communities have also been “sampled” by record companies and performance groups, to be later peddled as original compositions. Sacred and secret material of communities has been subjected to unauthorized use, disclosure and reproduction, such as in the case of the sacred Coroma textiles of Bolivia and in the United States copyright has been claimed on yoga- an ancient Indian tradition.\(^3\)

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\(^1\) One of the challenges in working in the area of traditional knowledge and cultural expressions is to reconcile the diverse meanings and connotations associated with existing terminology. Traditional knowledge is often broadly understood in terms of biological diversity, farmers’ rights, genetic resources and traditional cultural expressions in the form of music, dance, handicrafts, designs, artworks, elements of languages and movable cultural properties. The WIPO Glossary of Terms related to traditional knowledge clarifies some of the diverse definitions adopted at different international fora. See http://www.wipo.int/tk/en/glossary/


\(^3\) In 2003, Bikram Choudhary, a yoga instructor in the US, obtained a copyright on his sequence of 26 yoga postures and two breathing exercises done at a room temperature of about 40 degrees Celsius. In 2005, Open Source Yoga challenged Bikram’s copyright before the U.S. District Court in Northern California.
Intellectual property rights over resources “as they are,” without further improvement have also been granted; for example, US plant patent on ayahuasca, a sacred and medicinal plant of Amazonia or the Indian experience concerning the patents granted on TK like neem and turmeric “as it is” in the US and European Patent Offices.4

In each of the above-mentioned cases, indigenous and local knowledge bases were considered as falling outside the protection of intellectual property rights (IPRs) owing to a lack of “value” as “intellectual property,” unless innovated upon; lack of fixation to prove prior art or authorship and inability to trace the “author,” “creator” or “inventor” in traditional, indigenous or local knowledge beyond an amorphously located community. TK is a cumulative knowledge and is evolving. Innovations do take place in TK (Sunder 2007). Although, when compared to scientific knowledge, it is difficult to find the particular state of art in TK as much of the TK is not documented, not to speak of the tacit knowledge in TK and the portion of TK that is held as secret or sacred (Agrawal 1995).

Thus, in the wake of the “biopiracy” cases in the 1990s developing countries began demanding the protection of TK in international law. However, since the comparative advantage of the developing world in the realm of biological and genetic resources is high, the demands for the protection of TK have encountered fair amount of opposition and sometimes ambivalence on the part of the developed countries. The earliest attempt to link IPRs and traditional knowledge began in United Nations Economic, Social and Cultural Organization (UNESCO) in 1952 with the adoption of the Universal Copyright Convention (UCC). The UCC, read in conjunction with the 1886 Berne Convention for the Protection of Literary and Artistic Works, established standards of copyright protection which each country undertook to observe in national legislation.

The copyright claims on “Bikram yoga” have been controversial and cases on these copyright claims have been settled out of court in the US (Srinivas 2007).

4 The experiences in fighting against biopiracy made the developing countries aware of some of the shortcomings in the patent system regarding prior art in TK and in the way different patent offices treat issues of prior art, novelty and inventive step. For instance, the patent application based on the chemical properties of acadirachta indica (i.e., a method for controlling fungi on plants with the aid of the extracted hydrophobic neem oil) was rejected by the Board of Appeal of EPO for lack of inventiveness. See Thermo Trilogy Corp. vs. Aelvoet Magda, the Green Group in the European Parliament et al., Case No. T-0416/01, Bd. of Appeal, Eur. Patent Office (2005), available at http://legal.european-patent-office.org/dg3/pdf/t010416eu1.pdf
The relationship between folklore and copyright was also considered through a 1967 amendment to the Berne Convention [article 15(4)], providing an opportunity to protect unpublished works of an unknown author by a member of the Berne Union, where such author may be presumed to be a national of that country. The Berne Convention (article 7.3), however, does not require countries of the Union to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.

In 1973, pursuant to a reference made by the Government of Bolivia, UNESCO examined the possibility of drafting an instrument for the protection of folklore as a protocol to the UCC. The developments in UNESCO and World Intellectual Property Organization (WIPO) in subsequent years resulted in the setting up of a Working Group to study draft provisions that finally emerged as the 1982 Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (UNESCO Model Provisions). The WIPO-UNESCO Model Provisions define subject-matter of protection and provides a general framework against unauthorized use with gainful intent and outside traditional or customary context (section 3) as also requires for acknowledgment of the source of folkloric expressions (section 5).

International instruments such as the Convention on Biological Diversity in 1992 recognized the crucial role played by the knowledge, innovations and practices of indigenous and local communities in the conservation of biological diversity and the obligation to "respect, preserve and maintain" the same [CBD, article 8(j)]. CBD's governing body- the Conference of the Parties (COP), has through its meetings and decisions, created a work programme for the implementation and review of the CBD. At COP-II in 1995, the COP began a process of investigating the links between intellectual property rights and the various provisions of the CBD. At COP-IV in 1998, Decision IV/9 established a working group on the implementation of Article 8(j) of the CBD. The fair and equitable sharing of benefits is one of the three primary objectives of the CBD (articles 1 and 15). In 2002, the sixth COP resulted in the adoption of the Bonn
Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefit Arising out of their Utilization.

The increase in "biopiracy" has also reinforced efforts by developing countries to challenge the procedural unfairness and disregard for their knowledge assets as envisaged under TRIPS. Developing countries like Brazil, India and others have called for a review of Article 27 (3) (b) of TRIPS so as to exclude patenting of life forms, declaration of source of origin of a biological invention as part of patent application process and incorporation of the principle of informed consent as found in Convention on Biological Diversity (CBD). The Doha Ministerial Declaration, adopted on 14 November 2001, instructed the TRIPS Council to examine the relationship between TRIPS and the CBD and the protection of traditional knowledge and folklore. The Declaration requires that this examination be guided by Articles 7 and 8 of TRIPS and that it "take fully into account the development dimension." The review of Article 27(3) (b) continues to be part of the work programme of the TRIPS Council.

Apart from the developments at the WTO, developing countries have taken their demands for the protection of TK to other fora dealing with IPRs. During 1998 and 1999, WIPO conducted fact-finding missions (FFMs) in 28 countries to identify the IP-related needs and expectations of traditional knowledge holders. For the purposes of these missions, folkloric expressions were treated as a sub-set of TK. As of 1999, WIPO defined traditional knowledge (TK) as:

"tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed

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5 The Bonn Guidelines are intended to be used for developing and drafting legislative, administrative or policy measures on access and benefit sharing (ABS) and in contracts which have a number of provisions relating to IPRs. Parties with genetic resource users under their jurisdiction are suggested to consider adopting "measures to encourage the disclosure of the country of origin of the genetic resources and of the origin of traditional knowledge, innovations and practices of indigenous and local communities in applications for intellectual property rights" [Bonn Guidelines, paragraph 16(d) (ii)]. To ensure the implementation of the CBD provision relating to benefit sharing on mutually agreed terms, two elements are to be considered as guiding parameters in contracts and as basic requirements for mutually agreed terms. Firstly, the provision for the use of intellectual property rights shall include joint research, obligation to implement rights on inventions obtained and to provide licences by common consent, and secondly, the Bonn Guidelines require the possibility of joint ownership of intellectual property rights according to the degree of contribution [Bonn Guidelines, paragraph 43(c) and (d)].
information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.\textsuperscript{6}

The WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (GRTKF) was constituted in late 2000, for the purpose of addressing both policy and practical linkages between the IP system and the needs and concerns of holders of traditional knowledge and custodians of traditional culture. The 2001 WIPO Report on Intellectual Property Needs and Expectations of Traditional Knowledge Holders identified \textit{inter alia} the following objectives for protecting TK:

a) conservation and preventing loss or disappearance of TK, including cultural and biological diversity;

b) preventing unauthorized exploitation;

c) encouragement of innovation and creativity;

d) prevention of misappropriation, distortion and other prejudicial actions; and

e) protection of “dignity and moral rights of traditional innovators and creators.”

Other international instruments like the International Treaty on Plant Genetic Resources for Food and Agriculture (PGRFA), adopted by Food and Agriculture Organization (FAO) Member countries in November 2001, also contain standards that are relevant to TK. Article 9 of the Treaty recognizes the contribution of “local and indigenous communities and farmers of all regions in the world” to the conservation and development of plant genetic resources (PGRs). The treaty recognizes that the implementation of farmers’ rights requires the “protection of traditional knowledge that is relevant to plant genetic resources for food and agriculture”, as well as the rights of participation in the benefits and decision-making related to PGRs (article 9.2).

Important intergovernmental bodies\textsuperscript{7} like the United Nations Conference on Trade


\textsuperscript{7} The following organizations currently deal with TK: the UN Economic and Social Council (ECOSOC); the UN Convention to Combat Desertification (UNCCD); the UN Conference on Environment and Development (UNCED); the UN Conference on Trade and Development (UNCTAD); the UN Development Programme (UNDP) United Nations Environment Programme (UNEP); the UNESCO;
and Development (UNCTAD) have also highlighted the need for an international mechanism that might explore minimum standards of an international *sui generis* system for TK protection. In 2002, the UNCTAD and Indian initiative on ‘Protection and Commercialization of Traditional Knowledge’ resulted in a communiqué that listed the elements that might be incorporated into an international framework on traditional knowledge in the following terms:

i) local protection to the rights of TK holders through national level *sui generis* regimes including customary laws as well as others and its effective enforcement *inter alia* through systems such as positive comity of protection systems for TK;

ii) protection of traditional knowledge through registers of TK databases in order to avoid misappropriation;

iii) a procedure whereby the use of TK from one country is allowed, particularly for seeking IPR protection or commercialization, only after the competent national authority of the country of origin gives a certificate that source of origin is disclosed and prior informed consent, including acceptance of benefit sharing conditions obtained; and

iv) an internationally agreed instrument that recognizes such national level protection. This would not only prevent misappropriation but also ensure that national level benefit sharing mechanisms and laws are respected worldwide.

United Nations Development Fund for Women (UNIFEM); UN Working Group on Indigenous Populations (UNWGIP); the World Health Organization (WHO); the International Labour Organization (ILO); the Food and Agricultural Organization (FAO); the World Trade Organization (WTO) and the World Bank (WB). Many international agreements explicitly address the issue of TK: the ILO Convention on Indigenous Peoples Living in Tribes in Independent States, No. 169 (1989); the UN Declaration on the Rights of Indigenous Peoples; the Convention on Biological Diversity; the UN Convention to Combat Desertification in Countries strongly affected by drought and or Desertification particularly in Africa; the International Agreement (initiated in the context of the FAO) on Plant Genetic Resources for Nutritional and Agricultural Purposes; the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage; the Convention on the Protection of New Plant Varieties (UPOV) in relation to seeds is also worth mentioning. The UNDP and the World Bank have set up programmes in favour of indigenous peoples as also others such as the European Bank for Reconstruction and Development (EBRD), the Asian Development Bank (ADB) and the African Development Bank.

Thus it can be seen that presently there exists no exclusive international treaty on the protection of TK, although clearly some developing countries\(^9\) would like to see faster progress towards an international regime of some kind, especially on issues relating to biodiversity and TK. Considering the complex nature of TK, objectives and concerns guiding the demands of developing countries for its protection as well as the presence of varied actors and their associated interests that have led the international debate on the protection of TK, it remains unclear how the ongoing efforts in international law will shape up.

I. An Overview

Traditional knowledge has been used for centuries by indigenous and local communities. It has gone through a series of inter and intra-generational transfers and plays a vital role in areas like food security, agriculture, medical treatment and development. The protection of traditional and indigenous knowledge under IPRs has received growing attention since the adoption of the Convention on Biological Diversity (CBD) in 1992. Numerous contributions by academics, NGOs and governments have considered the need to provide some form of protection to TK. However, significant divergences exist as to whether IPRs should be applied and, if that were the case, what should be the rationale and modalities of protection (Correa 2001).

A review of literature reveals the tendency among some scholars to make a case for protection of TK in the same breath as the protection of expressions of folklore (Raghavan 2001). The term “traditional knowledge” is most often used to refer to knowledge, innovations, and practices relevant to the preservation of biological diversity, pursuant to the 1992 Convention on Biological Diversity [article 8 (j)]. The term

\(^9\) See Cancun Declaration of the Group of Like-Minded Megadiverse Countries concluded in Mexico on 18 February 2002. The group consists of 17 members: Bolivia, Brazil, China, Colombia, Costa Rica, Democratic Republic of Congo, Ecuador, India, Indonesia, Kenya, Madagascar, Malaysia, Mexico, Peru, Philippines, South Africa, and Venezuela. These countries acknowledged in the Declaration the importance of their "natural heritage, which represents nearly 70% of the planet’s biodiversity," their associated "cultural wealth and diversity" and emphasized the need for preservation and utilization of these resources in a sustainable manner. The Cancun Declaration in part 1(l, m, n) makes specific mention of measures desired for the protection of traditional knowledge. The Group of Like-Minded Megadiverse Countries played an important role in seventh COP meeting of the CBD to start negotiations on an international regime on access and benefit sharing.
indigenous knowledge, tribal knowledge, farmers' knowledge, local and folk knowledge are also widely used. The coupling of TK with folklore by the WIPO in its Intergovernmental Committee on GRTKF has encouraged intellectual property scholars to use the term more loosely so as to include other forms of collectively held cultural goods (Coombe 2005a). Although in layman's terms TK appears to be viewed in fairly general terms, the cultural dimensions of TK are often avoided in legal and economic considerations and the importance of cultural issues in emerging struggles for social justice are even more rarely appreciated.

The demand for the protection of TK has received some positive response in the realm of biodiversity-related knowledge. Work at CBD has enunciated core principles that developing countries support for the protection of TK, namely: prior informed consent for access to bio and genetic resources and associated knowledge, disclosure of origin of source and equitable benefit-sharing in case of commercialization. Of what can be discerned from WIPO's most recent session in 2007 (WIPO/GRTKF/IC/10/7 Prov.), developing countries are keenly contesting for the incorporation of principles of prior informed consent and benefit-sharing within an evolving instrument for the protection of folkloric expressions - a move reflective of the demands for protection of TK in cases pertaining to bio-piracy, use of traditional medicine and plant varieties protection (Correa 2001). Some scholars, nonetheless, support the prudence in treating folklore as a category requiring separate focus within the debate on the protection of TK owing to the sheer breadth and diversity of what may be included within the notion of TK and the significant differences in the nature of rights that may arise in artistic and cultural works as compared to those in the scientific or technical field (Wendland 2002). Thus, presently there appears to be a lack of clarity in the subject-matter of protection in TK and the relationship between TK and traditional cultural expressions (TCEs).  

Furthermore, the need to protect TK requires a consideration of the legal tools that have been mooted for the purpose. Legal options for the protection of TK tend to oscillate between two extremes: one position that advocates the extension of intellectual property

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10 Throughout the course of this study, the terms traditional cultural expressions (TCEs) and expressions of folklore (EoF) are used as interchangeable synonyms without prejudice to the use of other terms in national or international law for the protection of these expressions.
protection and the other promoting “the status quo where such knowledge is treated as a public good” (Mugabe, 1994). The efforts to provide legal protection of TCEs or folklore at WIPO, in the context of cultural and intellectual property policies generally addresses issues such as: i) preservation and safeguarding of tangible and intangible cultural heritage; ii) the promotion of cultural diversity; iii) respect for cultural rights and iv) the promotion of cultural innovation-including that which is tradition-based-as ingredients of sustainable economic development. In view of the potential of craft production, a major economic force in many developing countries, some scholars have advocated resort to IPR protection, especially to prevent counterfeiting of artisan crafts (Fowler 2004). It remains unclear, however, whether IPRs can be employed for the preservation and safeguarding of culture and cultural diversity.

Review of existing international law on the protection of traditional knowledge shows that while much of the international community’s attention has been directed towards the protection of biodiversity-related traditional knowledge, there is relative dearth of such activity in the realm of traditional cultural expressions. The pre-occupation with definitions of “traditional,” “folklore,” and “indigenous knowledge” have held captive for decades the attempts to formulate an international legal instrument for the protection of folklore. Though the 1982 WIPO-UNESCO Model Provisions define subject-matter of protection and provide a general framework against illicit exploitation, misappropriation and prejudicial uses of folklore, it has failed to receive unequivocal support. Requests for modifications in the UNESCO Model Provisions have been often repeated as evidenced by the 1999 UNESCO/WIPO African Regional Consultation on the Protection of Expressions of Folklore and response to questionnaires advanced to Asian countries such as India, Indonesia and the Philippines in a WIPO-commissioned study of national experiences (Kutty 2002). Folklore as perceived by communities in India is not confined to the limited scope offered in the definition of expressions of folklore (EoF) in the Model Provisions. Folklore has to bring in its ambit beliefs,

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12 Nevertheless, it must be pointed out that many countries, especially in parts of Africa, did in fact adopt the 1982 Model Provisions by incorporating copyright protection for folklore in their national legislation (Kuruk, 1999).
technologies and indigenous knowledge systems as a whole, if it has to serve the purpose for which protection devices are being thought of (Kutty 2002). The amendment to the Berne Convention, in Article 15(4), provides an opportunity to protect unpublished works of an unknown author by a Member of the Berne Union, where such author may be presumed to be a national of that country. It does not however require countries of the Union to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years. This limit on copyright protection as mandated by the Berne Convention [articles 7(1) and 7(3)], TRIPS (article 12) and national laws (United States Constitution, article I, 8) also seems to have been addressed by some sui generis laws.

Sui generis laws in TK\(^{13}\) are believed to provide the space for Members to the TRIPS to define fair use and prior art as limitations on protected property and the exclusive rights of IP holders (Ghosh 2003: 82). Notwithstanding some sui generis national laws that seem to envelop traditional cultural expressions more readily for the purposes of protection—whether in case of commercialization or for the purpose of ensuring integrity of cultural identity, certain matters still remain unaddressed, inter alia; exploration of the role of derivative works in relation to folklore protection and the protection of performers’ rights of traditional dances and music in relation to unauthorized fixation and unauthorized reproduction of such fixations. Furthermore, emphasis on sui generis national protection of folkloric expressions, does not clarify as to the role of international law in affording protection for folklore beyond national borders. Also, an enquiry into possible options in international IP policy for the protection of folkloric expressions rarely exhibits the scope for complimentarity between IP law and sui generis systems in the protection of folkloric expressions (Lewinski 2003; Kuruk 1999).

\(^{13}\) The 1982 Model Law Provisions and the 2000 Panama Special Intellectual Property Regime Law and the 2002 South Pacific Model Law allow for indefinite period of protection. Beyond existing copyright law, sui generis systems recognize the possibility of “collective” or “community” rights in cultural expressions. The authorization for use of rights vested under these systems are either to be obtained from a competent authority set up by the State or from the concerned community (1982 Model Provisions, section 10; Tunis Model Law on Copyright, section 6; South Pacific Model Law, section 4).
An important point that emerges while reviewing the ongoing work on the protection of traditional knowledge is the preference shown by developing countries for a legally binding international instrument for the protection of TK and folklore.\textsuperscript{14} Developing countries have been stressing that indigenous, traditional and other cultural communities should be directly involved in decision-making about the protection, use and commercial exploitation of their TCEs, using customary decision-making processes, laws and protocols as far as possible.\textsuperscript{15} Work at the WIPO Intergovernmental Committee on GRTKF was initially hoped to produce different possible approaches to the protection of folklore. The possible form or status of any outcome at the WIPO, was left flexible: a binding international instrument or instruments (e.g. obliging Contracting Parties to apply the prescribed standards in national law); a declaration espousing core objectives and principles and establishing the needs and expectations of bearers of TCEs/expressions of folklore as a political priority; or other forms of soft law or non-binding instruments, such as a statement or recommendation; guidelines or model provisions; or authoritative or persuasive interpretations of existing legal instruments (WIPO/GRTKF/IC/6/6, 2003).

Another key issue that has emerged in the attempts to protect traditional knowledge is the desire expressed by developing countries to go beyond the rationale of commerce and profits. Apart from the common economic interests in reaping the potential of TK to enhance the profits of the agricultural, biotechnological and pharmaceutical sectors,\textsuperscript{16} developing countries are also emphasizing on the importance of others concerns such as equity, cultural preservation, health care and related developmental needs.\textsuperscript{17} The reification of "culture" as a corporeal whole that is especially bound to happen when

\textsuperscript{14} These countries include India, the African Group of countries and certain Latin American countries like Panama. Do\textsuperscript{c} WIPO/GRTKF/IC/10/7 Prov., 26 January 2007.

\textsuperscript{15} Position Paper of the Asian Group and China (WIPO/GRTKF/IC2/10); 1999 WIPO-UNESCO African Regional Consultation on the Protection of Expressions of Folklore (WIPO-UNESCO/Folk/AFR/99/1).

\textsuperscript{16} Brazil, "Review of Article 27.3 (b) - Communication from Brazil," IP/C/W/228 (24 November 2000), IP/C/M/28, para. 136; India, "Protection of Biodiversity and Traditional Knowledge - The Indian Experience," IP/C/W/198 (14 July 2000).

\textsuperscript{17} The need to integrate the "development dimension" into the policy making on IPRs is recognized in para. 19 of the Doha Ministerial Declaration (2001). Accordingly, the TRIPS Council has been instructed to inter alia to examine "the relationship between the TRIPS Agreement and the Convention on Biological Diversity," and "the protection of traditional knowledge and folklore," guided by "the objectives and principles of the TRIPS."
viewed through the lens of IPRs has been critiqued by certain anthropologists. It has been asserted that basic cultural understandings sit uneasily within a framework of intellectual property (Strathern 1996). The treatment of culture as a bounded, static entity, which must be preserved at all costs is also viewed by some scholars as detrimental to the creative-mixing ("creolization") or invention of traditions (Brown, 1998). Arguments advanced to protect free speech and "public domain" for purposes of nurturing creativity has nonetheless disregarded the significance of other human rights affording respect of religious beliefs, cultural identity\(^\text{18}\) and right to development. With the advent of cases before Australian courts [Yumbulul vs. Reserve Bank of Australia, (1991) 21 I.P.R. 48; Milpurrurrurru vs. Indofurn Ltd., (1994) 130 A.L.R. 659], concerning claims by indigenous communities for intellectual property rights against misappropriation and illicit exploitation of aboriginal art and secrets, developing countries have also tried to employ the rhetoric of the "indigenous" and "traditional" to strengthen their claims for IPRs in folklore. Scholars have however argued that the experience of international agencies and associations of indigenous peoples demonstrates the impossibility of a single, globally viable definition for "indigenous"; without running the risk of under or over inclusiveness (Kingsbury 1998). It remains to be examined how far the Australian experience in the protection of indigenous knowledge can be drawn upon, cutting across differences in the socio-political and economic realities in a given State.

In the light of these concerns, therefore it seems relevant to enquire and study options beyond intellectual property law that could be used to protect traditional knowledge and cultural expressions. An important institution to take note in this regard is the UNESCO whose efforts in the protection of folklore are guided by the understanding that in "protection" of folklore, the larger role of preservation and safeguarding of cultural heritage and the promotion of cultural diversity cannot be ignored. The 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, adopted in April 2006, defines "intangible cultural heritage" to include inter alia expressions, knowledge skills, objects and artefacts, which communities, groups and in some cases individuals recognize as their cultural heritage (article 2.1). Together with its other

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\(^{18}\) See Universal Declaration of Human Rights, 1948. article 27; International Covenant on Civil and Political Rights, 1966, article 27.
conventions such as the Convention for the Protection and Promotion of Diversity of Cultural Expressions (2005); 1971 Convention on Protection of World Cultural and Natural Heritage; and the 1970 Convention Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property, UNESCO has evolved standard setting in the protection of cultural expressions. In comparison to the emphasis given on IPR model of protection of TK vis-à-vis the WIPO, the role of UN specialized agencies such as the UNESCO and the UNCTAD that represent developing country perspectives are not sufficiently dealt with. This study would endeavour to fill in this gap.

II. Scope of the Study

The issues concerning protection of TK have been discussed in various intergovernmental, regional, national and non-governmental fora. However, its content, nature of protection, rights of beneficiaries and scope for enforcement are still unclear. Apart from reviewing existing laws both at the national and international level, the study seeks to trace the ongoing debate and address some of the policy responses that have emerged from different fora. The present study is primarily limited in its focus on various approaches to the protection of expressions of folklore. This study will also makes a modest attempt to examine the mandate of WIPO in the global governance of intellectual property rights and existing standards of intellectual property protection as embodied in TRIPS, with specific focus on the protection of folklore, taking into account the concerns of developing countries. The study also seeks to examine the normative and institutional response from the UNESCO in the protection of expressions of folklore. In order to evince a balanced approach to the protection of folklore, the study will also analyze the relevance of non-IP options like human rights relating to cultural identity and diversity and common law remedies in the protection of folklore.

19 The 2003 UNESCO Convention identifies forms of safeguarding measures. These include integration of the safeguarding of heritage into planning programmes of the State party [article 13 (a)]; designation or establishment of competent bodies for purposes of safeguarding and fostering of scientific, technical and artistic studies, as well as research methodologies, with a view to effective safeguarding of the intangible cultural heritage, in particular the intangible cultural heritage in danger [article 13 (c)]. The UNESCO Convention also recognizes the importance of education, awareness-building and capacity building measures targeted towards concerned communities and public at large (article 14).
III. Research Questions

The study proposes to address the following research questions:

1) What are the policy issues concerning the protection of TK, with regard to developing countries?

2) How to address the definitional issues with respect to “traditional knowledge,” with specific focus on “folklore”?

3) How to link IPRs and TK and what are the concerns of developing countries?

4) How does international law envision the protection of “culture” and “cultural heritage” and what is the role of the State in this regard?

5) How are policy issues relating to TK, specifically with regard to folklore, addressed in the Indian context?

6) What kind of legal regime should be envisaged for the protection of folklore, consistent with the needs and concerns of developing countries?

IV. Hypotheses

The study is based on the following hypotheses:

1) Existing copyright protection as envisaged in TRIPS would be inadequate to effectively protect folkloric expressions. Furthermore, for the purpose of ensuring economic benefits and to safeguard and preserve culture and its expressions, defensive IPR tools like certification marks, geographical indicators, trademarks and documentation, rather than copyrights, will prove more helpful in ensuring authenticity of folklore-based products.

2) A uniform approach in a binding legal international IP instrument for the protection of expressions of folklore will be inimical to the interests of developing countries. For purposes of flexibility, recourse to a wider menu of options including remedies in common law, human rights law and embodied in sui generis laws must form the alternative basis for protection.
V. Research Methodology

The present study is based on a combination of analytical, historical and descriptive methodology of research. Primary sources include UNESCO and WIPO documents, UN declarations as also other relevant international and national instruments. Relevant decisions of national, regional and international courts are also considered. Case studies on national experiences in the protection of folklore as conducted by WIPO and related institutions form part of the study. Recourse to secondary sources in the form of journal and newspaper articles, books and web resources have also been made. Random interviews and communication with experts involved in the practice and policy related to protection of expressions of folklore has been conducted to supplement the study.

VI. Scheme of Study

The study is organized into eight chapters including Introduction and Conclusion.

Chapter I is the Introduction to the study.

Chapter II on Traditional Knowledge: an Overview traces the history of the debate on the protection of TK and briefly outlines the definitional inconsistencies that have affected the evolution of a protection mechanism. The chapter also summarizes the outcome of representations made by developing countries at international fora such as the CBD, WIPO and the WTO, in order to demonstrate the needs and expectations in the protection of TK. The relationship between TK and TCEs is also clarified in this chapter.

Chapter III is devoted to the study of Traditional Cultural Expressions: Normative and Policy Perspectives. This Chapter also focuses on the theoretical and practical limitations in copyright law for the protection of TCEs and considers possible alternatives to protection within existing IP law. The chapter deals in particular with the ongoing work at the WIPO Intergovernmental Committee for the Protection of Traditional Knowledge, Genetic Resources and Folklore.

Chapter IV on Traditional Cultural Expressions and Cultural Heritage: Some Legal and Policy Issues examines the mandate of the UNESCO in the protection of TCEs and traces the history of the debate and developments at the UNESCO that affect the international protection of expressions of folklore. The chapter also engages in specific legal analysis
of some of the key instruments of the UNESCO dedicated to the protection of expressions of folklore.

Chapter V on Protection of Traditional Cultural Expressions through Non-IP Measures attempts to build a case for an alternate menu of options for the protection of TCEs beyond the existing IP regime. The chapter *inter alia* considers the efficacy of recourse to customary laws and protocols; documentation and inventories; marketing arrangements; fair trade; human rights law; the right to privacy; fairs and festivals and the role of cultural organizations in the protection of expressions of folklore.

Chapter VI on *Sui Generis* Protection of Traditional Cultural Expressions outlines the reasons for countries looking for *sui generis* protection of expressions of folklore and highlights some of the key efforts of members of the international community to work through the challenges posed.

Chapter VII on Protecting Traditional Knowledge: the Indian Experience engages in a legal analysis of the existing laws in India that may be used to protect expressions of folklore.

Chapter VIII provides the Conclusion to the study.