CHAPTER IV

TRADITIONAL CULTURAL EXPRESSIONS AND CULTURAL HERITAGE: SOME LEGAL AND POLICY ISSUES

I. Introduction

The link between culture and development as pointed out in the 1995 Report of the World Commission on Culture and Development (Perez de Cuellar 1995) and the need therefore to expand the scope of culture and cultural heritage protection add to the envisaged commitments of international organizations like the UNESCO. Moves to develop international protection of intangible cultural heritage are said to be in keeping with these developmental aspirations. It has been argued that, in economic terms, it is useful to understand the notions of ‘cultural value’ and ‘cultural capital’ with the latter seen as the stock of cultural value embodied in an asset that may be tangible or intangible (Throsby 1999: 7). Cultural development has included, in some cases, the revival of older cultural traditions that may actually have died out and local economic development is often associated with the growth of crafts industries in response to tourism. The exploitation of local traditional knowledge in agriculture and forestry, for example, can be crucial to husbanding the natural resources on which a community relies for its survival. In this way, intangible aspects of cultural heritage can play an important role in economic and social as well as cultural terms for a given society. The Action Plan from the Stockholm Conference (1998) makes this point clear when recommending Member States to promote cultural and linguistic diversity, local cultures and languages and also encourage cultural diversity and traditions as part of their development strategy. In this regard, therefore, a study of some of developments in the UNESCO in the realm of cultural and traditional expressions, particularly with regard to safeguarding and preservation, is imperative. The present chapter highlights some of the key terms of reference in the debate at the UNESCO and also traces historical developments in the “normative” protection for expressions of folklore as envisaged by the UNESCO.
II. **UNESCO's Mandate**

The UNESCO shares its genesis with the United Nations and its formation is believed to be a response to the urgent need for a separate international institutional framework for inter-governmental co-operation and co-ordination of policies and action in the educational, scientific and cultural aspects of human life that would clearly reflect a holistic attempt at elimination of the causes of war. The Preamble to the UNESCO Constitution recognises that "the ignorance of each other's ways and lives has been a common cause, throughout the history of mankind" of suspicion and mutual mistrust between the peoples of the world which have "all too often broken into war." The UNESCO Constitution also decries the denial of "democratic principles of the dignity, equality and mutual respect of men" that led to the Second World War and the propaganda of the doctrine of inequality of men and races made possible through ignorance and prejudices. UNESCO's Constitution envisages that all nations have a "sacred duty" to fulfill by wide diffusion of culture and education of humanity, justice, liberty and peace for all. According to the UNESCO, "a peace based exclusively upon the political and economic arrangements of governments would not be a peace" based on "the unanimous, lasting and sincere support of the peoples of the world", as it could only be founded upon "the intellectual and moral solidarity of mankind".

While functionalism in the process of international organizations helps identify areas of cooperation in international relations, the UNESCO like many other organizations is also subject to the dynamic inter-play of international politics. The principle of non-intervention as enshrined in Article 2(7) of the UN Charter is fairly embedded within the UNESCO Constitution. Thus, Article I (3) of the UNESCO Constitution prohibits the Organization "from intervening in matters which are essentially within [the] domestic jurisdiction" of Member States, and clarifies that this prohibition is "with a view to preserving the independence, integrity and fruitful diversity of the cultures and educational systems of the State Members of the Organization". This keeps the UNESCO sensitive to the fact that preservation of cultures and educational systems is essentially a sovereign function of a State and that the Organization is not permitted to intervene in these matters, except through means and methods indicated in the Constitution. Particularly, Article I(2) of the UNESCO Constitution provides that these
methods are to "collaborate", "give fresh impulse", "suggest", and "maintain, increase and diffuse knowledge" by assuring conservation and preservation, by encouraging and initiating methods of cooperation in the fields of education, science and culture.

The norm-setting competence of the UNESCO is explicitly recognised and an implementation mechanism for normative decisions is provided for in its Constitution. Thus, the UNESCO Constitution empowers the General Conference of the Organization to adopt two kinds of norm-setting instruments, namely (a) agreements or conventions and (b) recommendations. It leaves the Organization free to recommend such international agreements as may be necessary to decide which of them are to be utilized in a given situation in furtherance of its objectives. Article I(2)(c) of the UNESCO Constitution envisages "recommending to the nations concerned the necessary international conventions" with a view to "assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science." Article IV(4) speaks of both conventions and recommendations. Article IV (4) stipulates that the General Conference of UNESCO (or for that matter a special conference) may adopt proposals for submission to Member States in the form of either recommendations or international conventions. Evidently, the choice of form is left to the Conference to decide. However, the difference between a recommendation and convention lies in the manner in which they are adopted: the former requires only a simple majority vote, while the latter a two-thirds majority. UNESCO Conference has also developed a third form of norm-setting instruments in the form of declarations.

As regards implementation of the UNESCO instruments by Member States, Article IV, (4) of the UNESCO Constitution imposes an obligation on Member States to submit the recommendations and conventions "to its competent authorities" within a period of one year from the close of the session of the General Conference in which they were adopted. It may be noted, however, that the obligation is only to submit such

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1 Legally, there is no difference between a "declaration" and a "recommendation" as both are technically non-binding instruments. However, like the UN General Assembly, UNESCO Conferences too have adopted the practice of designating a resolution as a "declaration" if they deem it to be "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated" (Schachter, Legal Opinion, UN Human Rights Commission, 1962). UNESCO does not consider "any one of these various instruments is superior to the others". Yet, "in the case of declarations, stress is laid on moral authority" (UNESCO's Standard-Setting Instruments, 1981: XIV).
recommendations and conventions to competent national authorities for approval. It does not extend to an obligation to carry out the recommendations and conventions "here and now". States may freely decide whether or not to become parties to the conventions. The obligation to implement a convention would arise only if a State decides to become a Party to it. When it becomes a Party, there arises an obligation to take all actions necessary to bring the convention into effect, including incorporation of the convention obligations into the domestic law of the State.

The above provision is further augmented by Article IV (6) of the UNESCO Constitution, whereby a reporting procedure is set in place for Member to indicate to the UNESCO General Conference on the action taken by them on the UNESCO recommendations and conventions. However, the UNESCO has noted on some occasions that the majority of Member States habitually fail to comply with the reporting obligation.

III. Culture, Cultural Property and Heritage: Contested Meanings

Even as globalization offers a positive view of human development and a multiplicity of potential identities, it also represents a threat of fragmentation and lack of personal, collective and moral boundaries. This is said to partly explain the struggle of many communities and individuals for the preservation of their cultural identity (Donders 2002: 23). Efforts to protect cultural expressions, cultural property and heritage at the UNESCO have shown how different political interests and interpretation have determined the scope of protection offered in normative responses. The very concept of culture per se has undergone a series of contestations. Scholars like Donders (2002: 234) argue that different concepts of culture may lead to different approaches to cultural rights. This view holds true in the way legal protection has evolved for culture and cultural property within the UNESCO (Harding 1999; Berryman 1994). According to Donders, if culture were considered as the accumulated material heritage of humankind, then cultural rights would include the right of equal access to this cultural capital and the right to cultural development (Donders 2002: 235). When seen from a strict creative perspective, cultural rights would include the rights of individuals to create freely and to have free access to these creations in museums, theatres and libraries (Ibid.). Another approach to culture,
which is said to represent the anthropological view, sees culture as the material and
spiritual activities, products, meanings and values of a given social group. This view
according to some scholars forms the core of what is now known as the right to cultural
identity and the right of a community to develop its own culture (Coombe 1998b; Stavenhagen 2001: 89-92). This right is not primarily a right of individual enjoyment
(although it is conferred upon individual members of minority groups), but rather is a
right of a collectivity. It has been suggested by Burgers (1990: 63-74) that such rights
pertain to those who belong to specific cultures, engage in collective action, share
common values, and perpetuate these values as members of the group. Much of
contemporary scholarship seems in favour of understanding culture as a broad concept, or
way of life, including various aspects, such as language, religion and cultural heritage,
which are important values for the individual’s well being (Donders 2002: 39). This
overarching understanding of culture has however evolved over a long period of time and
assumes significance in searching for alternatives in the protection of expressions of
folklore.

III.1. Protection of “Cultural Property”: The Genesis

Attempts to protect cultural property are not new. As early as the beginning of the
nineteenth century, two distinct threats to the integrity and unity of national cultural
heritages existed: the looting of national treasures during times of war and the illegal
exportation of similar works during times of peace. It was not until the Napoleonic period
(1799-1815) that specific effort began to restore stolen objects to their rightful owners.
During the more than one hundred and fifty years since the Convention of Paris (1815),
restitution of cultural property looted during times of war has become a fundamental rule
in the regulation of armed conflicts (Sayre 1986: 853). The Declaration of the Brussels
Conference of 1874 and the Hague Conventions of 1899 and 1907 focused on the
confiscation and destruction of cultural heritage during times of war. Using the U.S.
Lieber Code of 1863 as a model, these documents attempted to limit foreign access to
cultural heritage by converting it into private property. The Brussels Declaration and the
1899 Hague Convention state that cultural heritage, "although belonging to the State,
shall be treated as private property.” The types of property that fell within the stated
private property protections were described in primarily functional terms of property "devoted to religion, charity, education, arts and sciences." Needless to say, these early documents focused on heritage considered important by Western standards (Harding 1999: 298).

The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter Hague Convention 1954) also dealt with the protection and disposition of cultural property during time of war, but viewed it as the "cultural heritage of all mankind" (Hague Convention, 1954, Preamble) and established a system for the universal protection of cultural property rather than leaving it to the law of private property. The definition of cultural property contained in the Hague Convention of 1954 is much more elaborate and focuses on the fundamental value rather than the functional purposes of cultural property, referring to it as "property of great importance to the cultural heritage of every people" (Hague Convention 1954, article 1(a)). The Protocol to the 1954 Hague Convention mandates that all cultural property imported into a Contracting Party's territory "either directly or indirectly" from occupied territory should be taken into custody and returned to the competent authorities of the territory previously occupied once hostilities have ended. In comparison, less international attention has been focused on the protection of cultural property in times of peace perhaps because of public perception that greater danger of destruction and pillage exists during war (Bassiouni 1983: 298). But similar to the earlier Hague Convention, the definition of cultural property in the 1954 Hague Convention also reads like a list of Western-appreciated antiquities (Harding 1999: 299). Article 1 in the Hague Convention 1954, defines cultural property as follows:

"For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership; (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments or architecture, art or history, whether religious or secular; archeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above."

It was only with the passage of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of
Cultural Property, that there was some recognition of the national character and definition of cultural property. Cultural property is defined in the 1970 UNESCO Convention “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, pre-history, history, literature, art or science.” Under the terms of the Convention, each signatory nation is empowered to limit the scope of the definition. The Convention enumerates eleven categories of property, including such items as flora, fauna, elements of archaeological sites that have been dismembered, antiquities over a hundred years old and objects of ethnological interest (UNESCO Convention 1970, Art. 1(a)-(k)). This list is not meant to be exhaustive and it covers a range of objects that, at least within the sphere of manmade and natural objects, seems comprehensive. Nonetheless, some scholars believe the imprecision in the UNESCO definition of cultural property is one of the weaknesses of the 1970 UNESCO Convention (Lehman 1997: 542-43). Furthermore, in Article 2, the Convention uses broader terms and acknowledges that illicit, import, export and transfer of ownership of cultural property is one of the main causes for the impoverishment of “the cultural heritage of the countries of origin of such property.” The interchangeable use of cultural property for cultural heritage within the Convention has certain legal implications which require some focus.

III.2. Distinguishing Cultural Property from Cultural Heritage

While ‘cultural heritage’ is a relatively new term and has far less ideological baggage in tow, ‘property’ has acquired a wide range of emotive and value-laden nuances (Prott and O’Keefe 1992: 309). Some experts have defined cultural property as “that specific form of property that enhances identity, understanding, and appreciation for the culture that produced the property” (Gerstenblith 1995: 559, 569). The importance of an object as a source of information, its aesthetic qualities and age are also factors in determining a definition of cultural “property” (Fechner 1998: 380). Others have distinguished “heritage” as being essentially a collective and public notion, belonging by definition in the realm of public interest and held for the public good (Prott and O’Keefe 1992). The legal concept of 'property' can be subdivided in a variety of ways: those stated above (real, personal and intellectual); movable, immovable; tangible, intangible. This
process of classification is designed to make it intellectually easier to assess the interests involved and the appropriate response. In relation to the cultural heritage it is largely unhelpful in that cultural complexes often flow across the classifications in a way that the legal system has not been constructed to cope with. Prott and Keefe point out that the fundamental policy behind property law is the “protection of the rights of the possessor”-a right which is largely believed to be untrammeled in its scope. In comparison, the law relating to cultural heritage protection is said to not only provide physical protection to subject of protection but also make way for the enjoyment of present and future generations (Prott and Keefe 1992: 309, 311).

Furthermore, the facet of “commoditization” in “cultural property” is also believed to be a stumbling block in heritage protection (Ibid., at 311). The fact that art and culture are generally considered in the light of their commercial value has resulted in increased looting and destruction of sites and monuments of heritage value. The use of the term “heritage” although may not anesthetize us against the pains of loss and damage to artworks, historical, monumental and other “works” of art, it is hoped to lessen the impact of the ill-effects of a strictly property-construct to protection strategies (Ibid.).

Coupled with these concerns in the use of “cultural property” in identifying and realizing heritage protection objectives, is the growing acceptance of the indivisibility of context and information in the material protection of tangible manifestations of culture. Scholars argue that in societies where intellectual and spiritual life has found forms not represented by great monumental complexes or the creation of a vast number of material objects, the preservation of cultural identity depends far more on the appreciation of tradition and the preservation of folklore, rituals and traditional skills. Under such circumstances, their need for protection is not well comprehended by the word ‘property’ (Prott and Keefe 1992: 31).

Nonetheless, certain scholars have asserted that in increasing instances the definitions of cultural heritage and cultural property have become inseparable (Roussin 2003-2004: 708-09). How cultural property may indeed be considered in some ways as cultural heritage that would help connect members of a society to their predecessors is said to obtain formal expression in the 2001 UNESCO Universal Declaration on Cultural
Diversity (Article 8) which states that “particular attention must be paid to...the specificity of cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods.”

III.3. Protection of Intangible Cultural Heritage: The Beginning

The desire to save, protect and preserve the world’s living cultural heritage has according to some scholars undergone a “two-track history” that formally extends back to the 1950s (Kurin 2004: 67). Historically, the earliest attempts to provide international protection for folklore (as it was then termed) started with interest in applying copyright rules to this end. The Universal Copyright Convention (1952) could provide indirect protection for folklore in its Article I by allowing for the protection of folklore in national legislation. The issue of international protection of folklore through copyright was also discussed at the Stockholm (1967) and Paris (1971) conferences for revision of the Berne Convention. Between 1973 and 1978, three intergovernmental meetings on cultural policy were convened by UNESCO- Yogyakarta (1973), Accra (1975) and Bogota (1978) - all three calling for UNESCO’s help in preserving popular traditions as part of cultural heritage protection. As seen in the preceding chapters, the scope of protection for traditional forms of expression such as folk tales and songs was and continues to remain questionable within the parameters of international copyright law. Nonetheless, much of the discussion along this dimension is before the World Intellectual Property Organization.

The other track taken up for the protection of cultural heritage was according to Kurin (Ibid.), “a more diffuse, nationalistic one, oriented to social and cultural policy.” In this regard, early efforts by Japan, in the post Second World War period, to support traditions that embodied its national cultural patrimony are considered relevant. This programme is said to have emerged in reaction to the concern that ancient, royal, and local traditions would disappear in the wake of modernization and thus diminish national identity. Taking its cue from the Japanese Law for the Protection of Cultural Properties (1950) and its revision (1954), a variety of other national programmes grew showing similar concerns in the Czech Republic, France, Philippines, Poland, Republic of Korea, Romania, Thailand, the United States and other nations.
However, even though countries like Bolivia with the support of several other nations proposed an international legal instrument for protection of oral traditions (Condominas 2004: 22), the scope for protection of such “intangible cultural heritage” remained elusive within the UNESCO framework until the early 1970s. The World Heritage Convention (WHC), adopted by the UNESCO General Conference in 1972, fashioned a vital idea of the protection of cultural heritage into an international legal instrument. The inclusion of the notion of “common heritage” in a text of international law is considered by some as “highly innovative” and by no means certain that it could have been adopted today. It may be recalled that attempts to introduce the notion of common heritage during negotiations leading to the adoption of the 1992 CBD were rejected and replaced by that of “common concern” (Batisse and Bolla 2003).

The 1972 Convention was drafted to establish “an effective system of collective protection of the cultural and natural heritage of outstanding universal value...” (article 1). It acknowledged that “cultural heritage and the natural heritage are increasingly threatened with destruction not only by traditional causes of decay, but also by changing social and economic conditions....” (UNESCO 1972, preamble). Each State Party to the Convention was to identify and delineate cultural and natural heritage situate in its territory (Article 3) and also “recognize” the “duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage ...” (Art. 4). Inventorying of property forming part of cultural and natural heritage was considered crucial in the protection strategies under the Convention [Art. 11(1)]. The World Heritage List, conceived in Article 11(2) of the 1972 Convention was intended as a programme oriented towards international recognition and national support for the restoration, conservation and preservation of tangible monuments, sites and landscapes (Kurin 2004: 68).

The WHC however was conservative in its definition of humanity’s “heritage.” It defined the heritage to be protected in an evolving “List” of properties meeting criteria concerning only monuments, sites or territories. In so doing, it excluded other elements—both tangible and intangible—belonging to the heritage of humankind which may also be seen as having “outstanding universal value”, such as scientific discoveries, great works of art produced by painters or sculptors, or literary and musical masterpieces. This
restriction to immovable properties alone was imposed by force of circumstances, which
according to some scholars makes the title of the Convention “rather misleading” (Batisse
and Bolla 2003).

The definition of cultural and natural heritage within the WHC is said to reflect
the “convergence of two schools of thought” rather than “a product of the debate among
philosophers, historians and sociologists about the concept of heritage” (Pressouyre
2000). One came directly from the 1931 League of Nations conference in Athens, and
concerned preserving cultural heritage as defined in terms of classical notions of a
“masterpiece” or “wonder of the world.” The other stemmed from the first international
conference on protecting nature, in Berne in 1913, which was followed by the Brunnen
Conference (1947) and the foundation of the World Conservation Union which aimed to
pass on to future generations “unspoiled” nature untouched by humans.

The discrepancy between protection of the tangible and intangible cultural
heritage and the heavy emphasis in favour of the former was succinctly captured in the
1994 Report of the World Commission on Culture and Development, Our Creative
Diversity: “the intangible had for long been an ignored heritage. Ways of life have been
ignored because they are in simple formats” (UNESCO, 1995: 94). The distinction made
between tangible and intangible forms of cultural heritage and the practical usurpation of
the WHC’s mandate in favour of European cultural traditions, “at the expense of popular
forms of cultural expression or of historical truth” (Munjeri 2004:13) is believed by some
scholars to be influenced by the issue of values and valorization. To qualify for
protection, some of the essential qualities outlined for cultural heritage were that it be
“stable,” and “static” and have “intrinsic values” as well as qualities of “authenticity.”
The Operational Guidelines for the Implementation of the World Heritage Convention,
defined authenticity as restricted to four components i.e.: authenticity in materials based
on physical values or fidelity to the object; authenticity in workmanship- entailing
“creative genius”; authenticity in design, representing values based on the creator’s
(architect, engineer, etc.) original intention and finally ‘authenticity in setting’ or fidelity
to context, i.e. values contingent upon locus and spatial considerations. In essence,
cultural heritage was believed to be intrinsically linked to values in physical attributes
(Munjeri 2004: 13). These values have however been critiqued for their reductionist
approach to examining the complex issue of what constitutes cultural heritage (Avrami and Mason 2000: 7-8). Similarly, notions of “authenticity” as attached to such heritage are also considered to be restrictive (Munjeri 2004: 13).

Recognizing the problem of conceiving cultural heritage in such narrow terms, the World Commission on Culture and Development, observed that defining a building as being of historical and cultural value meant placing it at a certain distance from everyday life (UNESCO, WCCD Report 1995). The importance of conceiving “authenticity” and its linkage to cultural heritage was acknowledged in the 1994 Nara Declaration on Authenticity which called inter alia for an expansion of the framework of ‘authenticity’ to include traditions, techniques, spirit, feeling, historic and social dimensions of cultural heritage. The Nara document accepted that “all cultures and societies are rooted in particular forms and means of both tangible and the intangible.” (Larsen 1994) This embrace of differences in values of cultural property, judged on the basis of “an interactive matrix of both cultural and physical properties with local, national and regional cultural differences on one axis and property differences on the other” (Munjeri 2004: 16) is considered a major breakthrough.

Thus, it can be seen that the international protection of “heritage” in the form of cultural treasures, monuments involving human creativity and natural ones-created without human involvement, dominated the application of the 1972 Heritage Convention until the early 1990s. Even though the conception of tangible cultural heritage began to give way to other non-European cultural heritage, the search for protection of “intangible cultural heritage” continued to be elusive at the UNESCO. Bolivia, with the support of several other nations, had in 1973, asked the UNESCO to consider the possibility of drawing up a Protocol to the Universal Copyright Convention which would govern “the conservation, the promotion and the diffusion of folklore.” Little action followed for a decade.

Eurocentric protection of cultural heritage sites was obvious in the 1990s. In 1994, it was noted that nearly half of the sites on the World Heritage List were ones within Europe. For example, European historic towns and religious buildings (cathedrals, etc.) were over-represented in relation to the rest of the world; the architecture was elitist
(castles, palaces etc.). In the Meeting of Experts that met in June 1994 at UNESCO Headquarters it was noted that “in general terms all living cultures especially traditional ones with their depth, their wealth, their complexity and their diverse relationships figured very little on the List.” Consequently in June 1994, the World Heritage Committee adopted the recommendations of experts who had looked into the representativeness of the World Heritage List. These recommendations are said to have encompassed a conception of culture more acceptable to anthropologists and ethnologists, with its emphasis on a complex mixture of social organizations, ways of life, beliefs, know-how and expressions of past and present cultures (Pressouyre 2000).

The accession to the List of cultural landscapes, such as the rice terraces of the Philippine Cordileras and France’s Saint-Emilion vineyards or for that matter the historical Shalimar gardens (entered into the List in 1981) in Lahore, Pakistan and the Taj Mahal (entered into the List in 1983) in New Delhi, India are considered as some of the positive outcomes of the 1994 change in guidelines.

III.4. Protection of Works in Public Domain: Some Basic Issues

A key policy challenge in coordinating any new protection for TCEs within existing IP systems has been with regard to the unauthorized and prejudicial exploitation of works in the “public domain”. As noted previously, an integral part of developing an appropriate policy framework within which to view IP protection and TCEs has been to obtain a clearer understanding of the role, contours and boundaries of the so-called “public domain” and the implications for the “public domain” of protecting TCEs (WIPO WIPO/GRTKF/IC/5/3, 2003: paras. 22 to 33). In response to the growing concern expressed, among authors and in cultural circles over the deception of the public as to the true authorship of a work whose copyright term has expired, or to cases involving the distortion and unauthorized commercial exploitation of such works, particularly when they are taken up by various mass media (UNESCO Report, 22C/27, 1983, para. 3), the need for the protection of works in the public domain was included in UNESCO’s programme for 1977-1978 on the initiative of the late Paulo de Bereido Carneiro, a member of the Executive Board at the time. The aim of this project was accordingly “to defend the authenticity of works of the mind as integral parts of the cultural heritage and
as emanations of their authors' personalities" (Ibid.). In self-admission, UNESCO acknowledged that its project had "no bearing whatsoever upon the financial interests or economic rights that are one of the attributes of copyright during the legal term of protection of works under that right."

The Director-General of the UNESCO convened, from 18 to 21 September 1979, a working group, consisting of representatives of international non-governmental organizations and instructed to find ways to secure the right to respect or integrity for works in the public domain. Here, while stressing the complexity of the question concerning the various theoretical and practical problems associated with the protection of work in the "public domain," the participants, with one exception, considered that steps should be taken to preserve "works of the mind from destruction or from distortion that might compromise their identity as an integral part of the cultural heritage of nations."

In accordance with the work plan concerning 21 C/Resolution 5/02, a Committee of Governmental Experts met at the UNESCO Headquarters from 17 to 21 January 1983. The purpose of the meeting was to seek ways and means of preventing the distortion of works in the public domain and to study the possibility of formulating draft recommendations applicable at national and international levels, to serve as the basis for the preliminary study on the technical and legal aspects of this question which the aforementioned resolution of the General Conference had invited the Director-General to prepare. The Committee was unanimous in stressing the risks of distortion and undesirable modification to works of the mind as a result of ever-increasing popularization and commercial exploitation. It was likewise unanimous in recognizing that three categories of interests are involved in the protection of the integrity of works whose protection under copyright has expired: the interests of authors in seeing that works of the mind are respected; the interests of present or future generations who have the right to expect cultural authenticity; and the interests of those who make use of works (publishers, producers of phonograms, broadcasting organizations, etc.) and who demand total freedom of action (UNESCO Report, 22C/27, 1983, para. 9).
The UNESCO Committee of Experts at its January 1983 meeting while considering action to provide appropriate protection for works in the public domain favoured the use of rules concerning moral rights at least in those countries recognizing the existence of such rights. The Committee observed that when moral rights are employed in conjunction with consumer law, such measures could prove sufficiently flexible and rigorous to preserve the cultural heritage over a period of time and in the public interest, without hindering creativity, and at the same time enabling cultural industries to play their role to the full. In cases where the protection of moral rights is unknown, other principles could replace this concept, such as the general theory of the law on misrepresentation, the rules of equity, the law of civil liability and the law on historical monuments (Ibid., para. 10). Upon further inquiry into the ways and means of ensuring the protection of works in public domain, a large majority within the Committee declared itself in favour of a recommendation to Member States. However a number of delegates felt that an international instrument was not required and the issue could be settled at the national level (Ibid., para. 11).

A variety of experts’ meetings were held in the 1980s. In 1982, the World Conference on Cultural Policies put forward a definition of ‘culture’ that made clear the centrality of intangible heritage in understanding culture. In 1982, UNESCO set up a Committee of Experts on the Safeguarding of Folklore and a special Section for the Non-physical Heritage was established. A meeting of the Committee of Governmental Experts on the Safeguarding of Folklore was convened in 1985 in Paris to carry out an interdisciplinary study of the possible range and scope of general regulations for the safeguarding of folklore. They decided to develop a set of international standards in a recommendation. This form of text was chosen over that of a Convention since it was considered a more flexible instrument containing general principles that Member States could be invited to adopt through legislative, administrative or other means. It was decided to base the recommendation on an interdisciplinary approach to folklore that addressed the issues of definition, identification, conservation, preservation and utilization of folklore. Certain

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2 Mexico City, 6 Aug. 1982: “In its widest sense, culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only arts and letters, but also modes of life ..., value systems, traditions and beliefs.”
infrastructural approaches were also to be looked into such as establishing an international register of folklore and developing a standard typology of folklore (Sherkin 2001). It was felt that the intellectual property aspects of the international protection of folklore, to be addressed jointly with WIPO, should only be dealt with after the question of the international protection of folklore had been clarified through the Recommendation text.

IV. WIPO-UNESCO Joint Efforts to Protect Expressions of Folklore

In June/July 1982, UNESCO and WIPO jointly organized a meeting of a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore in Geneva. The primary purpose of this meeting was to draw up model provisions for national laws to protect EoF using principles similar to those of IP law and taking into account the results of previous meetings. Such provisions would make the utilization of folklore subject to authorization and allow the imposition of prohibitions or restrictions on cultural distortions and economic exploitation of folklore materials. Ultimately, at this meeting the Committee adopted the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions. Many hoped that these provisions would serve as a basis for a subsequent international regulation.

This focus on an international legal instrument continued throughout 1983, when UNESCO and WIPO jointly convened the second and third Regional Meetings of Expert Committees in New Delhi (January/February) and Dakar (February). These meetings, like the preceding one (Bogota), recommended the elaboration of a specific international regulation of the intellectual property aspects of folklore, an action, it was argued, that could be implemented more quickly than an interdisciplinary operation. In addition, these Committees reiterated that emergency action be taken for the preservation of popular traditions.

However, in addition to UNESCO-WIPO efforts, UNESCO also began to assume a more active role independent of WIPO in the protection of folklore. This was evident at the 116th session of the UNESCO Executive Board (May/June 1983), where a report
entitled "Preliminary Study on the Technical and Legal Aspects of the Safeguarding of Folklore" (Document 116 EX/26) was submitted for examination. The Board was invited to decide whether it would submit to the General Conference, at its twenty-second session, a proposal concerning an international regulation for the safeguarding of folklore. Finally, in accordance with the findings of Document 116/FX 26, the Executive Board decided to propose to the General Conference that UNESCO and WIPO continue their efforts towards the formulation of international regulations for the preservation of folklore as intellectual property.

The binary approaches to folklore - one addressing its overall nature, the other its existence as intellectual property, persisted in 1984. Throughout this year, UNESCO and WIPO continued their joint efforts by organizing the fourth Regional Meeting of the Expert Committee (October, Doha), and a Committee of Experts on the International Protection of Expressions of Folklore by Intellectual Property (December, Paris). Both meetings addressed the need for specific international regulations to protect expressions of folklore through IP law. The Paris meeting concluded that the Secretariats of UNESCO and WIPO should continue to explore a treaty for IP-type protection for expressions of folklore and prepare a document which would consider alternative means of implementing this protection. All findings were to be submitted to the Executive Committee of the Berne Union and the Universal Copyright Committee. However, this joint meeting in Paris was the last of its kind. UNESCO and WIPO convened no further conferences on this matter for the remainder of the decade.

3 This study was based not only on the findings of the Intergovernmental and Regional Committees of Governmental Experts convened between 1980 and 1983 but also on the responses received from the UNESCO "Questionnaire on the Protection of Folklore" circulated in August 1979.

4 This act was Agenda Item 5.6.2. (22/04/83) at the Executive Board's 116th session. In light of the findings of the 1981 and 1982 Committees of Governmental Experts, and pursuant to Resolution 5/03, adopted by the General Conference at its twenty-first session, the Director-General submitted this Document to the Executive Board.

5 The meeting of the Expert Committee followed the decision of the UNESCO Executive Board (16 EX/5.6.2) adopted at its 116th session and the decision of the Governing Bodies of WIPO at their fourteenth series of meetings (October 1983).

6 The Executive Committee of the Berne Union and the Intergovernmental Copyright Committee reconvened in December 1983 (Geneva).
The Second Committee of Governmental Experts on the Preservation of Folklore, convened 14-18 January 1985 in Paris was aimed for an interdisciplinary study of possible regulations that could safeguard folklore as a whole. Little attention was paid to the intellectual property aspects of folklore. Focus was limited to the ways in which local communities could obtain remuneration and to the means by which folklore could be protected against illicit exploitation (Sherkin 2001). For this reason, WIPO felt that its contribution to the work of the Committee would be marginal and, thus, declined to participate. This reasoning was transmitted in a letter dated 11 January 1985 by the Director of the Public Information Division of WIPO to the Director of the Copyright Division of UNESCO. An excerpt of this letter is cited below:

"The preparatory document . . . quotes from the decision of UNESCO's Executive Board . . . concerning the separation of UNESCO's work on general regulations concerning the preservation of folklore and UNESCO's work, jointly with WIPO, on specific regulations regarding the 'intellectual property' aspects of such preservation . . . . [T]his separation is clearly necessary in order to ensure rational and coordinated methods of work without duplication. Particularly in view of the fact that WIPO will not be represented at the second session of the Committee, we would be grateful if you could, if necessary, remind the participants that this separation has already been agreed and should be maintained."

IV.1. The 1989 UNESCO Recommendation

Pursuant to its deliberations, the Second Committee of Governmental Experts on the Preservation of Folklore concluded that international regulations should be established in the form of a recommendation rather than a convention to Member States. A recommendation, unlike a convention or declaration, is a flexible instrument whereby the General Conference formulates principles and invites Member States to adopt any means, legislative or otherwise, in order to apply them. The Committee also suggested that an interdisciplinary approach to folklore be embraced, one that would address its definition, identification, conservation, preservation, and utilization. The Committee also recommended that the General Conference examine the development of infrastructure possibilities, including the establishment of an international register, network, and standardized typology of folklore and cultural property.
The Governing Bodies of WIPO and UNESCO agreed to organize a Committee of Governmental Experts in 1987. The aim of this Committee was to continue the examination of measures to be taken to ensure both the preservation of folklore within a global and interdisciplinary framework and the international protection of intellectual property aspects of folklore. To this effect, the Copyright Division of UNESCO assembled a Special Committee of Technical and Legal Experts on the Safeguarding of Folklore to convene in June 1987. The working document for this Committee was elaborated by the Second Committee of Governmental Experts on the Preservation of Folklore (January 1985). However, WIPO later decided that it did not wish to be included in the organization of this meeting. The WIPO felt that the intellectual property aspects of the international protection of folklore expressions, of concern to both UNESCO and WIPO, could only be addressed after the question of the preservation of folklore, of concern to UNESCO alone, had been clarified. Specifically, WIPO felt that one of the basic obstacles to the adoption of an international instrument on the protection of the expressions of folklore by intellectual property law is the general dearth of appropriate and reliable national sources for the identification of expressions of folklore to be protected. For this reason, WIPO maintained that only when progress is made in the field of identification of national folklore could there be any chance for success in developing international protection for the expressions of folklore by intellectual property laws (Sherkin 2001). Despite its withdrawal, a representative of WIPO from the Copyright Law Division attended the meeting.

The Special Committee deliberated over the general question of folklore, particularly the means to create appropriate infrastructures for its protection, including the establishment of a universal typology and the promotion of international cooperation. The Committee suggested that such efforts could be achieved through the provision of intellectual and technical assistance to Member States, particularly the developing countries, for the establishment of centers and the training of specialized personnel. The legal protection of folklore was not widely considered, as it was identified as problematic in nature. Some delegations felt that the intellectual property aspect of the issue belonged to other bodies, while others maintained that the intellectual property aspect covered only part of the legal protection of folklore. At the 23rd session of the UNESCO General
Conference, several representatives of Member States expressed the view that the protection of folklore should not be considered from the point of view of copyright, as works of folklore fall within the public domain and, as such, deserve protection from national legislation. A subsequent letter from the Ambassador of Mexico to the Director-General of UNESCO expressed the following view: "The safeguarding, preservation, promotion, dissemination of folklore obviously cannot be dealt with in the context of intellectual property, which has to do more with commercial considerations."

On 1 June 1988, the first draft of a Recommendation (Document CC/MD/4) prepared by the Special Committee of Governmental Experts (1987) was distributed to UNESCO Member States for their opinions and observations. On the basis of comments transmitted and further deliberations in another special committee of experts, the Committee unanimously approved the draft Recommendation on the Safeguarding of Folklore and submitted it to the General Conference for adoption, as provided for in Article IV, paragraph 4, of the UNESCO Constitution and Article 11 of the Rules of Procedure concerning Recommendations to Member States. Subsequently, the General Conference at its 25th session adopted the Recommendation on the Safeguarding of Traditional Culture and Folklore.

Thus, it can be discerned that the process of adopting 1989 Recommendation on Safeguarding Traditional Culture and Folklore, one of the first UNESCO instruments for the protection of folklore involved a laborious, costly and time-consuming process that lasted for more than 15 years. Yet, the adoption of the 1989 Recommendation occurred despite many obstacles because the document appealed to a large majority of UNESCO Member States. It was of particular interest to the countries of Central and Eastern Europe, which had ideological reasons at the time to preserve and accentuate the importance of popular ethnic culture, as well as to the countries of Africa, Latin America, Asia, and the Pacific, which have long been concerned about the erosion and exploitation of their intangible cultural heritage.

However, the entire process of adopting the 1989 Recommendation became enmeshed in a divisive debate based in the perceived opposition between the overall question of folklore and its intellectual property aspect. The positions of UNESCO,
WIPO, and UNESCO Member States were dominated by this issue. The 1989 UNESCO Recommendation though initially welcomed by a majority of Member States in the UNESCO was barely followed up later (Kurin 2004: 68). A closer look at the provisions of the 1989 UNESCO Recommendation would help identify some of the shortcomings that required further engagement and deliberations in UNESCO’s attempts to protect “intangible cultural heritage.”

IV.2. Salient Features of the 1989 Recommendation

The definition given for ‘folklore’ in the 1989 Recommendation is the one of the earliest attempts to define this area of heritage for a formal legal text in the cultural heritage field. The UNESCO’s Tunis Model Law on Copyright for Developing Countries (1976), precursor to the 1989 Recommendation was also an attempt to provide protection to “national folklore” and defined ‘folklore’ in Section 18 (iv) as: “all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basis elements of the traditional cultural heritage.” The 1989 Recommendation, in turn, recognizes folklore as “part of the universal heritage of humanity” and a powerful means for unity in diversity and the assertion of cultural identity. The Recommendation was made by the UNESCO General Conference in view of “the extreme fragility of the traditional forms of folklore, particularly those aspects relating to oral tradition and the risk that they might be lost.” For the purposes of the Recommendation, folklore, also termed as “traditional and popular culture”, is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity and its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts (1989 UNESCO Recommendation, Part A).

In the 1989 UNESCO Recommendation, folklore as a form of cultural expression is seen as representing the identity of groups, either familial, occupational, national, regional, religious etc. (1989 UNESCO Recommendation, Part B). The groups identified
are not exhaustive and the legal implications of group identities and rights seem not to have been dealt with. Identification of folklore for safeguarding, through national inventories, identification and recording systems and creation of standard typologies of folklore is one of recommended strategies [1989 UNESCO Recommendation, Part B (a), (b), (c)].

Conservation within the purview of the above-said Recommendation is concerned with documentation regarding folk traditions and its object is, in the absence of non-utilization or evolution of such traditions, to give researchers and tradition-bearers access to data enabling them to understand the process through which tradition changes (1989 UNESCO Recommendation, Part C). The 1989 UNESCO Recommendation alludes to the inability of directly protecting “living folklore”, “owing to its evolving character” and instead chooses to suggest the focus of State efforts on folklore that has been fixed in a tangible form (Ibid.). States were accordingly recommended to establish national archives to collect and “properly” “store” and make available folklore [Part C (a)]. Museums and the use of archival methods were also suggested as conservation measures [Part C (c), (e)].

The Recommendation also lays an emphasis on the relevance of preservation of folk traditions and their transmitters, “having regard to the fact that each people has a right to its own culture and that its adherence to that culture is often eroded by the impact of the industrialized culture purveyed by the mass media” (Part D, 1989 UNESCO Recommendation). Though the Recommendation indicated the importance of measures to guarantee the status of and economic support for folk traditions both in communities that produce them and beyond, its suggestions thereof were more focused on education, building awareness and preserving access through documentation, archiving, research etc.

Despite having accepted that “folklore constitutes manifestations of intellectual creativity whether it be individual or collective” (UNESCO 1989 Recommendation, Part F), the Recommendation steered clear of ‘intellectual property aspects’, while considering the “protection” of folklore. The 1989 Recommendation deferred to the competence of the WIPO in dealing with the intellectual property matters concerning folklore. Focus on “other rights” by UNESCO in its 1989 Recommendation included:
a) Protection of the informant as the transmitter of tradition (protection of privacy and confidentiality);

b) Protection of the interest of the collector by ensuring that materials gathered are conserved in archives in good condition and in a methodical manner;

c) Adoption of necessary measures to safeguard the materials gathered against misuse, whether intentional or otherwise; and

d) To recognize the responsibility of archives to monitor the use made of the materials gathered.

IV.3. The 1989 UNESCO Recommendation: Limitations

Several scholars have remarked that the use of terms like 'traditional culture' and 'folklore' in the 1989 UNESCO Recommendation, which have evolved from an earlier system of colonialist thought and domination is problematic (Zanten 2004: 37). The terms do help capture fundamental characteristics of folklore, namely, that it is born out of traditional culture and is intimately linked with a specific community. Concentration on the importance of folklore in relation to the social and cultural identity of the individual or group that creates it is also believed to be useful (Blake 2002: 10). The inclusion of a reference to the method of transmission ('orally, by imitation or by other means') in the Recommendation also underlines the importance of the human element in intangible heritage.

Nevertheless, the Recommendation fails to express the centrality of the individual, group or community to the creation and maintenance of traditional culture. It does not refer to the social, cultural and intellectual context of its creation – including the values and know-how of the community involved – but only to the folklore product itself. The 1989 UNESCO Recommendation also fails to include the spontaneous act of creation that is as important as the product itself. Furthermore, it makes no specific reference to indigenous heritage, its reference to traditional knowledge is too limited and neither does it relate to sufficient interest groups such as local cultural communities, NGOs, private sector craft industries, farmers etc. (Ibid.).
Certain terms used in the Recommendation, like 'protection', 'preservation', and 'revitalization' are believed to have paternalistic connotations in some parts of the world. Furthermore, the 1989 Recommendation was also believed to be skewed in favour of researchers, with little to offer to practitioners (ACCU Workshop Report, 2004:12). The fixation requirement within the Recommendation is unhelpful in addressing concerns regarding intangible cultural expressions, most of which are born out of oral traditions (1989 UNESCO Recommendation, Part C). Furthermore, the Recommendations on "protection of folklore" were heavily weighed in favour of access to folk traditions and measures to safeguard the interest of those who collected such material. The Recommendations were bereft of a consciousness of possible unauthorized exploitation of folk materials or even the potential hurting of religious and communal feelings in the event of non-customary usage. Therefore although the 1989 Recommendations identified practices that countries could put into place to preserve their intangible cultural heritage, there were few takers.

IV.4. The 'Living Human Treasures' Programme

Considering that knowledge and skills linked to music, dance, theatre and traditional craftsmanship, are in danger of disappearing due to declining numbers of practitioners and growing disinterest of young people and lack of funds, in 1993, UNESCO invited States to create a system of Living National Treasures and forward the list of such 'Treasures' to UNESCO. The concept of Living National Treasures originated in Japan. Under Article 56 of the 1950 Japanese Law for the Protection of Cultural Properties, the responsible Minister may designate important intangible cultural properties and single out the holders of such properties. The Government of Japan thus gave special recognition to the bearers of the skills and techniques essential for the continuation of selected important intangible cultural properties (O'Keefe 2004: 247).

This programme proposes the establishment by Member States of systems of 'living cultural properties' that are exponents of traditional culture and folklore. Member States are invited to submit to UNESCO a list of 'Living Human Treasures' in their country for inclusion in a future UNESCO World List. The programme recognizes that one of the most effective ways of safeguarding intangible heritage is to conserve it by
collecting, recording, and archiving and that it would be even more effective to ensure that the bearers of that heritage continue to acquire further knowledge and skills and transmit them to future generations. By identifying the bearers of this heritage and their ability to transmit the skills, techniques and knowledge to 'apprentices' as the focus of protection, it recognizes that its existence depends on the social and economic well-being of its holders and their way of life. The choice may therefore be between allowing certain traditional skills to die out and social and economic development.\(^7\)

The Living Human Treasures programme also places the skills and techniques of those who practice traditional culture and folklore at the centre of preservation, an element so far missing from the international protection of cultural heritage. Besides public recognition of Living Human Treasures, the system includes measures for the provision of, for example, special grants/subsidies to designated Living Human Treasures, so that they can assume their responsibilities for the safeguarding of the intangible cultural heritage. These measures aim especially at the perpetuation of their knowledge and skills, the transmission of their knowledge and skills to the younger generations through formal and non-formal training programmes, contributing to the documenting and recording of the intangible cultural heritage concerned through video or audio recording, publications, etc. [UNESCO Guidelines for the Creation of a Living National Treasures System, 1998, Section 3(ii)].

The UNESCO Guidelines for the Creation of a Living National Treasures System (1998) contains inter alia material on legal provisions; identification and designation; criteria of selection; number of nominees per year; rewards granted to appointees and duties of appointees. The system envisages rewarding persons embodying the skills that the State considers should be preserved. The actual reward can take a number of forms: public recognition that the appointee has reached a high rank within society; continuing publicity given to the appointee’s work or financial incentives.

However, the translation of these principles to a legal or administrative framework raises the difficulty of how to select the exponents of traditional knowledge

\(^7\) An example of a traditional skill rapidly dying out is that of the Pambe-zan in Iran which uses traditional instruments and skills to renew the cotton stuffing in traditional mattresses – today, this job is increasingly done by machine in shops (Blake, 2002: 45).
and techniques to be listed as ‘Living Human Treasures’. As with the World Heritage List, the membership of the Commission of Experts and the criteria for the heritage transmitted are crucial. For example, one criterion for selection is the danger of disappearance of certain forms of traditional culture owing to a serious decline in the number of practitioners and/or their successors. This criterion clearly underscores the central role of the practitioners themselves and their apprentices (Blake 2002: 45) yet it may give rise to situations wherein enabling interventions are directed as a last resort for protection. Furthermore, it has also been pointed out that attempts to preserve State’s culture in the form of skills and techniques of high historical and artistic value, there is also the danger of ossifying these skills and techniques and making them increasingly irrelevant to the society that seeks to preserve them (O’Keefe 2004: 248).

IV.5. UNESCO-WIPO Regional Consultations

In 1999, four UNESCO-WIPO Regional Consultations on the Protection of Expressions of Folklore (hereinafter regional consultations) were held in Quito (Latin America and the Caribbean), Hanoi (Asia-Pacific), Tunis (Arab States) and Pretoria (Africa). The regional consultation process sought to clarify among other things, the nature and extent of existing international protection of folklore, the extent to which the 1982 Model Provisions remain a valid document and what other approaches need to be explored in the light of the evolution of the perception of the role of heritage in social life (Regional Consultation, Pretoria, WIPO-UNESCO/FOLK/AFDR/99/). The regional consultations also debated about how to organize regional and sub-regional co-operation on the question of identification and ownership (origination) of trans-boundary expressions of folklore and measures to develop a fair and effective system of international protection for artistic expressions of folklore and traditional knowledge.

These regional consultations noted the growing international recognition of the socio-economic value of expressions of folklore and their increasing commercial exploitation (Regional Consultation, Latin America & the Caribbean, WIPO-UNESCO/FOLK/LAC/99/1). The regional consultations also identified folklore as indispensable for the development, perpetuation and dissemination of cultural heritage in general and stated that adequate protection to ensure cultural diversity is necessary in the
face of globalization (Recommendation (Introduction), WIPO-UNESCO/FOLK/LAC/99/1). It was felt that important elements of traditional knowledge and folklore are being and will continue to be lost in the absence of a proper legal protection mechanism at national and international levels (Regional Consultation, Hanoi, Resolution at Point 3, WIPO-UNESCO/FOLK/ASIA/99/1). The regional consultations emphasized the role of the UNESCO and WIPO in the international protection of expressions of folklore, “taking due account of the similarities and differences between traditional knowledge and expressions of folklore” (Regional Consultation, Quito, Recommendation (Introduction). However, existing IPR regimes were also believed to be inadequate to address all of the issues involved in the protection of traditional knowledge and folklore (Regional Consultation, Hanoi, Point 4). The need to develop the means and resources for the urgent tasks of inventorying, identifying, conserving, preserving and disseminating folklore and the importance of sufficient financial and other resources to carry out such work was also stressed (Regional Consultation, Tunis, WIPO-UNESCO/FOLK/ARAB/99/1).

In the course of the regional consultations it was noted that countries were increasingly veering in the direction of a *sui generis* form of binding legal protection at national and international levels (Regional Consultation, Hanoi, Point 3), adapted to the nature and function of such heritage, in ways that the IP system could not address (regional Consultation, Tunis, Point 5). UNESCO and WIPO were also asked for increased assistance to developing countries in legal and technical expertise, training in the identification, documentation and conservation of traditional knowledge and folklore, the provision of necessary equipment and resources and increased budgetary resources to ensure effective protection of expressions of folklore.

In the midst of a vacuum in international law for the protection of traditional folkloric expressions, the mid-1990s witnessed heightened international awareness to the negative effects of globalization on valuable traditions, practices, and forms of knowledge rooted in diverse societies. While scholars and community advocates pressed for means to encourage contemporary linkages to the distinctive cultural past, national governments also became sensitive to the importance of publically asserting the value of their national cultures (Kurin 2004: 68). Renewed attention to the issue of local, national
and regional cultural survival that resulted in a series of UNESCO-sponsored regional conferences on the matter, culminated in a global conference at the Smithsonian Institution, Washington, in 1999 (Global Assessment of the 1989 Recommendation, 1999). Point 12 of the Action Plan was a recommendation to States that they should consider 'the possible submission of a draft resolution to the UNESCO General Conference requesting UNESCO to undertake a study on the feasibility of adopting a new normative instrument on the safeguarding of traditional culture and folklore'. The Czech Republic, Lithuania, and Bolivia (supported by Bulgaria, Côte d'Ivoire, Slovakia and Ukraine) submitted a Draft Resolution to the 30th General Conference of UNESCO in November 1999 requesting that a preliminary study be made into the question of developing a new standard-setting instrument for the safeguarding of intangible cultural heritage (UNESCO Doc.30 C/DR.84).

The Conference re-iterated the inefficacy of the UNESCO Recommendation in its 'top-down,' state-oriented, 'soft' international instrument that defined traditional culture in essentialist, tangible, archival terms, having little impact around the globe upon cultural communities and practitioners. The Conference and the resultant publication of the Safeguarding Traditional Cultures, urged a more dynamic view of cultural traditions as 'living' and community-involved participatory approach to the safeguarding of traditional cultures. In 1997, under the leadership of its Director General, Koichiro Matsuura, the UNESCO instituted a programme for Masterpieces of the Oral and Intangible Culture.

IV.6. Proclamation of Masterpieces of Oral and Intangible Culture

The UNESCO Proclamation of Masterpieces of the Oral and Intangible Culture seeks to raise public awareness of the value of this heritage and to encourage States to take legal and administrative measures to safeguard it. It was a response to a number of concerns, one of which was the disappearance of storytelling in traditional areas of certain cities. Similar to the ‘Human Living Treasures’ programme, it seeks the unique — the 'masterpiece'. The Proclamation rewards two types of expression of intangible cultural heritage: forms of popular and traditional cultural expressions and cultural spaces. This heritage is made up of many and varied complex forms of living
manifestations in constant evolution including oral traditions, performing arts, music, festive events, rituals, social practices and knowledge and practices concerning nature. The Programme not only seeks to raise awareness and recognize the importance of this heritage, but also stresses the need to safeguard and revitalise it. Other objectives include establishing national inventories of the intangible cultural heritage, creating national committees for the protection of the intangible heritage, adoption of legal and administrative measures by the Member States and the full implication of the tradition bearers – local traditional artists and knowledge bearers – in its identification and revival.

The procedure for selecting ‘masterpieces’ is modeled on that used with respect to nominations for the World Heritage List under the Convention concerning the Protection of the World Cultural and Natural Heritage 1972 (O’Keefe 2004: 248). States may nominate cultural manifestations with inter alia, descriptions of what they are, why they should be selected and proposals for preservation management. According to the terms of reference, the manifestation must be either a strong concentration of the intangible cultural heritage of outstanding value or a popular and traditional cultural expression of outstanding value from a historical, artistic, ethnological, sociological, anthropological, linguistic, or literary point of view (UNESCO Implementation Guide, 2001). Nominations go to various organizations for assessment. These include the International Council for Traditional Music, the International Union of Anthropological and Ethnological Sciences and the Comité International Permanent de Linguistique. An international jury makes the final decision as to what will be included in the list of ‘masterpieces’. The proposed cultural expressions and spaces should be a living cultural tradition, demonstrate human creative genius, be a means of affirming the cultural identity of the communities concerned or be at risk of destruction or of disappearing. The candidature files must also include a sound action plan for revitalisation, safeguarding and promotion as awarding recognition of cultural spaces and expressions as Masterpieces does not itself constitute protection.

Furthermore, action plan implementation is fundamental as it gives full significance to the programme and provides operational projects supported by UNESCO. A Proclaimed Masterpiece implies commitment on behalf of the Member State concerned to ensure implementation of the action plan presented in the candidature file. The
safeguarding measures are identified and elaborated with the communities concerned, their full implication is essential so as to take into consideration their aspirations, preoccupations and the values of the tradition bearers. The action plans provide concrete activities such as reinforcing research and documentation, identification and census taking of the knowledge bearers, providing support to measures ensuring transmission of knowledge and know-how to future generations, raising awareness at local and international levels through festivals and conferences, adopting protective legal measures, introducing specialised teaching in school and university curricula, etc.

The first UNESCO Proclamation of Masterpieces of the Oral and Intangible Culture held in May 2001 at UNESCO Headquarters stressed the urgent need for protecting and safeguarding the intangible cultural heritage. The proclaimed masterpieces are extremely varied, covering all sorts of socio-cultural phenomena ranging from theater and music to folklore and traditional royal and popular rituals. The 2001 Masterpieces ranged from the Chinese kunqu opera to the balaphone tradition of Guinea, from Sicilian puppetry to the disappearing oral tradition of an Amazonian rain-forest community. The Masterpieces programme was well received despite considerable conceptual and practical problems involved in the selection criteria (Kurio 2004: 69). Proclamations in 2001 also included Kutiyatam, the Sanskrit Theatre, practiced in the province of Kerala, India. Kuttiyatam is one of India’s oldest living theatrical traditions, originating more than 2,000 years ago. It represents a synthesis of Sanskrit classicism and reflects the local traditions of Kerala.

During the second Proclamation, held in November 2003, a further 28 Masterpieces were proclaimed, thus enriching the list with many new and remarkable

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8 Kuttiyatam is traditionally performed in theatres called Kuttampalams, located in Hindu temples. Owing to their sacred nature, access to the performances was originally restricted. With the loss of the patronage of the feudal class in the nineteenth century, traditional performers, who formerly held performance and acting techniques in secret within select families have been forced to progressively open up to a larger audience and make joint efforts to sustain their profession. Kuttiyatam is described a stylized and codified theatrical language, which through nuanced expressions of the eye (neta abhinaya) and gestures (hasta abhinaya), reveals the thoughts and emotions of the main character. Actors acquire the skill to become full-fledged performers over a period of ten to fifteen years, undergoing rigorous training, involving breath control and subtle muscle movements of the face and body. The sacred dimension to the performance remains intact to this day, as attested by purification rituals and worship symbols. Unlike previously when the performance skills were held as exclusive and secret property of select families, today male actors hand down detailed performance manuals to their trainees.
cultural expressions and spaces. The Second Proclamation coincided with the adoption, by UNESCO Member States, of the Convention for the Safeguarding of the Intangible Cultural Heritage, representing the outcome of endeavours led by UNESCO for over 20 years. From India, the tradition of “Vedic Chanting” was included in the 2003 Proclamation. The Vedas or “books of knowledge,” comprising of a vast corpus of poetry, philosophy and mythology” are regarded as foundational to the Hindu religion (“Oral Tradition of Vedas,” IGNCA). The Vedas, developed and composed by the Aryans over 3,500 years ago, have been transmitted orally over many generations and are traditionally chanted during sacred rituals and daily devotions of Vedic communities. Although the Vedas continue to play an important role in contemporary Indian life, only 13 of the over one thousand Vedic recitation branches have survived. Noted schools in Maharashtra, Orissa, Karnataka and Kerala are considered under imminent threat.

Upon the recommendation of the International Jury for the Third Proclamation, UNESCO proclaimed 90 Masterpieces of the Oral and Intangible Heritage of Humanity, from all regions of the world. India’s Ramlila—the traditional performance of the Ramayana was declared as a Masterpiece of Oral Intangible Heritage in 2005. Ramlila⁹, performed in towns and villages across northern India, stages the Ramayana based on the Ramcharitamanas—one of the most popular storytelling forms in the north India. Recent development of mass media, particularly television serials have led to a reduction in its audience and affected the once vibrant participation and community gathering of village people. The proclaimed Masterpieces have been integrated in the “Representative List of the Intangible Cultural Heritage of Humanity” under the 2003 UNESCO Convention on Safeguarding of Intangible Cultural Heritage. The Representative List of the Intangible Cultural Heritage of Humanity was established on 5 November 2008, with the integration into this List of the 90 cultural elements that were proclaimed Masterpieces of the Oral and Intangible Heritage of Humanity by UNESCO in 2001, 2003 and 2005. Twenty-six of these elements are in the Asia Pacific Region, 20 in Europe, 19 in Latin America and

⁹ Ramlila, literally “Rama’s play”, is a performance of the epic Ramayana, in a series of scenes that include song, narration, recital and dialogue. It is performed across northern India during the festival of Dussehra, held each year according to the ritual calendar in autumn. Ramlila recalls the battle between Rama, the hero of Ramayana—an epic composed by Tulsidas in the sixteenth century—and Ravana and consists of a series of dialogues between gods, sages and the faithful.
the Caribbean, 18 are located in Africa, and 7 in the Arab region. Nine of them are shared by two or more countries (UNESCO Press Release 2008-112).

Challenges in the Proclamation of Masterpieces

The UNESCO Proclamation of Masterpieces of the Oral and Intangible Culture is hailed for its salience in the social sciences, especially for cultural anthropology, owing to its recognition of the value of collective memory of peoples and the inventory of human cultural capital. However, this process requires assessment of radically different cultural manifestations. Compilation of the World Heritage List already illustrates the difficulty of making choices between places in different parts of the world and, indeed, between places in the same part. Yet that List deals with physical structures and sites. The ‘Masterpieces’ programme deals with language, literature, music, dance, games, rituals, customs and so on. It would be hard to choose one example from the same genre (for example, puppets from Indonesia, Sicily, and Viet Nam) let alone compare like with what is unlike (O’Keefe 2004: 249).

The identification of intangible heritage remains a major problem and the lack of an agreed set of criteria for this has presented the greatest challenge to elaborating criteria for the selection of cultural spaces and forms of cultural expression as ‘masterpieces’ of oral and intangible heritage. Use of the term ‘masterpieces’ itself has been subject to debate. Concerns have been expressed that it tends to create a hierarchy of cultures incompatible with the nature of oral heritage and that, rather, the ideas of excellence, uniqueness and typicality need to be emphasized (Blake 2002: 46). The definition of ‘oral and intangible heritage’ used for this programme is based on that of ‘folklore’ in the 1989 Recommendation, with the addition of the phrase ‘traditional forms of communication and information.’ Thus the opportunity for developing a new and better definition has been missed and the problems identified in the 1989 definition have been perpetuated. However, the concept of ‘cultural spaces’ as physical or temporal spaces that owe their existence to cultural activities that have traditionally taken place there and where the temporal spaces are generally characterized by periodicity is one element of the Masterpieces Programme that adds an important new dimension to the notion of
intangible heritage (ibid.). It is also in keeping with the development of new criteria for ‘associative cultural landscapes’ in the Operational Guidelines of the 1972 Convention.

However, several questions have continued to haunt the debate concerning the protection of folklore. Why should cultural phenomena be preserved and revitalized? Can culture and folklore be preserved? Should they be preserved? Might preservation lead to fossilization and alienation from the living socio-cultural source, or will it revitalize culture and foster the invention of tradition? What happens to culture and folklore when they are politicized through international and national governmental protection programs? Should not tradition always be subject to change—both invention and development and decline and deterioration? (Nas 2002: 139-40).

V. UNESCO Convention for the Safeguarding of Intangible Cultural Heritage

The resurgence of activity in the UNESCO to protect TCEs in the beginning of this century is influenced by the understanding that cultural industries will be the industries of the future. Indeed, UNESCO’s Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005, articles 5 & 8) has tried to legitimise domestic legal measures aimed at the protection of local producers of cultural activities, goods and services. The focus of the UNESCO Convention appears to be on the audiovisual sector and it has been pointed out that the coverage of cultural industries must be considered much wider (UNCTAD, TD(XI)/BP/11, 2004, para. 67), to include handicrafts, handlooms, unique cultural and traditional products – clothes, artefacts, furniture, sculptures, jewellery; intangible products such as entertainment and music, design services (architecture, interior design), person embodied services such as traditional health therapists – traditional medicine practitioners, traditional fine arts performers – dancers, musicians etc). The 2005 UNESCO Convention may have minimal legal effect on existing trade obligations and also may not have much to offer by way of protecting and promoting cultural diversity among nations (Srinivas 2006). Therefore to understand UNESCO’s contribution to the protection of TCEs, the present Chapter will undertake a more focused study of the terms of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage.
Buoyed by the success of the Masterpieces Programme, advocates argued that the case for a convention to safeguard intangible cultural heritage was strong. The need for significant funds through voluntary donations and international attention was found imperative to bolster efforts to safeguard intangible cultural heritage. At a meeting of experts at UNESCO Headquarters in June 2002, attempts were made to establish the definition of most relevant terms concerning safeguarding of intangible cultural heritage. In preparation of this meeting, a group of experts from the Netherlands, invited by the Netherlands National Commission for UNESCO, proposed a set of draft definitions of terms relating to intangible cultural heritage. The group of international experts used the draft glossary drawn up by the group of Dutch experts as a starting point and also considered the earlier definitions by UNESCO and group of scholars, notably inter alia the work done at the Turin meeting in March 2001. The Turin meeting partially influenced the formation of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (Zanten 2004: 37). The Turin definition for ‘intangible cultural heritage’ was as follows:

“Peoples' learned processes along with the knowledge, skills and creativity that inform and are developed by them, the products they create and the resources, spaces and other aspects of social and natural context necessary to their sustainability; these processes provide living communities with a sense of continuity with previous generations and are important to cultural identity, as well as to the safeguarding of cultural diversity and creativity of humanity.”

Thus the plausible definitions that were emerging from early debates on an international convention for safeguarding intangible cultural heritage showed an increasing readiness to concede to different perceptions to what may constitute culture; the role of individuals and communities themselves in recognizing intangible cultural heritage and reflecting a paradigm shift in understanding cultural heritage as being “constantly re-created by communities.”

The 2003 UNESCO Convention, unlike its previous instruments like the 1989 Recommendations on Safeguarding Traditional Culture and Folklore, takes into consideration the “deep-seated interdependence between intangible cultural heritage and the tangible cultural and natural heritage” (Preamble). Apart from acknowledging the
deleterious effects of globalization on intangible cultural heritage, the 2003 Convention also makes note of the important role that communities, in particular indigenous communities, groups and, in some cases, individuals, play in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage and helping enrich cultural diversity and human creativity. The 2003 Convention is expected to fill in the vacuum existing in international law owing to the absence of a "binding multilateral instrument...for safeguarding of the intangible cultural heritage" (Preamble).

V.1. Subject-matter of Protection

For the purposes of the 2003 Convention, "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills — as well as the instruments, objects, artefacts and cultural spaces associated therewith — that communities, groups and, in some cases, individuals recognize as part of their cultural heritage" (UNESCO Convention 2003, Article 2). The 2003 UNESCO Convention furthermore notes the inter-generational nature of transfer and constant recreation done by “communities and groups in response to their environment,” and “their interaction with nature and their history” [UNESCO Convention 2003, Article 2(1)]. According to the 2003 Convention, these cultural expressions provide these communities “with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.”

The 2003 UNESCO Convention, Member States were careful to exclude the consideration of intangible cultural heritage which could possibly be incompatible with “existing international human rights instruments,” as well as with the requirements of “mutual respect among communities, groups and individuals, and of sustainable development.” This may be seen a desire on the part of the UNESCO to keep faithful to its constitutional goals for peace and mutual respect between communities and nations. However, scholars like Kurio note that the criteria for consideration for protection within the terms of the Convention, as relating to human rights, mutual respect and sustainability, may be “very high” standards, probably even “unrealistic” and “imposing” (Kurio 2004: 70). Some of the examples highlighted by Kurin help explain the concern. For example, would a religious tradition that includes Brahmins, but excludes non-Brahmins disqualify as an intangible cultural heritage because of its discriminatory
quality? Similarly, it is unclear whether a certain musical tradition that only allows men to play instruments, say for instance as in the case of the playing of the Mohan bansi in Tripura (IGNCA Report on Cultural Mapping), would fail to obtain protection under the terms of the 2003 UNESCO Convention owing to sex discrimination. Similar problems may arise with the application of "mutual respect" and sustainability as a clause for protection. Often times, cultural expressions of particular peoples and community reflect their identity in terms of notions of justice and celebration of victories, kings, martyrdom, religious conversion etc. This kind of symbolism of struggle and conflict between communities would be hard to ignore. Furthermore, Kurin rightly points out that the criterion of sustainability in the protection of intangible cultural heritage, though noteworthy is misplaced since "[s]ustainability ...is an ideal to be achieved, not an eligibility requirement for action" (Kurin 2004: 71).

The 2003 UNESCO Convention apart from a descriptive understanding of what constitutes intangible cultural heritage (ICH) also enumerates some of its constituent elements, or "manifestations" in Article 2 (2) to include inter alia:

i. Oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;

ii. Performing arts;

iii. Social practices, rituals and festive events;

iv. Knowledge and practices concerning nature and the universe;

v. Traditional craftsmanship

V.2. Main Features

For the purposes of the 2003 UNESCO Convention, "safeguarding" refers to measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage [Article 2(3)]. This understanding of "protection" of ICH is laudable yet with some problems. For instance, the role of the State to ensure "viability of the intangible cultural heritage" may be too
high a goal to achieve. Besides there is a need to consider that some of the measures that may be envisaged for preservation, protection etc. may indeed compromise the vitality and context of expressions such as in the case of presentations before tourists.

The 2003 UNESCO Convention identifies the safeguarding measures for the protection of ICH at the national level in Part III of the Convention (Articles 11-15). Accordingly, each State Party is required to undertake “necessary measures” to ensure safeguarding of ICH, identify and define the various elements of ICH present in its territory, with the participation of communities, groups and relevant non-governmental organizations (Article 11). The Convention also identifies regularly updated inventories as a means to safeguard ICH in the territories of a nation (Article 12). Reports of these inventories are expected to be made to the UNESCO Committee. Recently, the IGNCA in India, submitted a Report on Cultural Mapping of India under UNESCO's Programme on Cultural Industries and Copyright Policies and Partnerships. This Report was expected to cover “viable forms of art, dance, crafts and music” together with rituals and festivals. The emphasis of this form of cultural mapping was decidedly to enhance economic opportunities for related communities in both urban and rural settings (IGNCA Report, 2007: 6). The use of the data thus generated is yet to be tested.

However, the continuing emphasis of the UNESCO on the use of inventories by States to protect ICH has however been a contentious issue between international experts. Inventories may be a practical tool to identify and itemize ICH as a prelude to management, as is done for cultural 'property' like monuments and archaeological sites. Nonetheless, the enormous resources required updating inventories in India, together with its paucity of personnel and funds may make the exercise difficult. Issues relating to choice of methodology and itemization, factors more within the knowledge of experts would determine the extent to which culture can be prevented from being reduced to “atomistic items,” “bearing little relationship to the goal” of cultural vitality (Kurin 2004: 72).

Despite these inherent weaknesses in the conceptual framework of the 2003 UNESCO Convention, a positive outcome is the obligation on States to work with communities, groups and relevant NGOs for the identification and safeguarding of ICH
Under Article 15 of the UNESCO Safeguarding Convention of 2003, each State Party is enjoined by the Convention to "endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit" the ICH intended to be safeguarded, and "to involve them actively in its management." This provision in the Convention can be seen as a way to illicit government recognition and respect for varied cultural traditions practiced by persons within its territory and also acknowledges the value that this ICH have in giving meaning to the lives of communities. Furthermore, this people-centredness in the focus on plans to safeguard ICH is a welcome shift that privileges cultural bearers over the State. Nonetheless, how this principle will be operationalized is another matter. As pointed out previous in the Chapter III which analyses the scope of protection of the rights of "communities" in their TCEs within an IP framework, the problem of who will represent a community will persist even within the terms of UNESCO’s safeguarding measures. The danger of cultural disintegration owing to issues pertaining to representation as witnessed in case studies of the Kani tribe in Kerala also need to be borne in mind. Other problems in the identification of ICH include the logistical and sociological challenge of engaging with far-flung and isolated communities.

Some of the other measures for safeguarding ICH in the 2003 UNESCO Convention include:

i. Adoption of a general policy aimed at promoting the function of the intangible cultural heritage in society and integrating the safeguarding of this ICH into planning programmes;

ii. Establishment or designation of competent bodies in charge of safeguarding ICH;

iii. Adoption of adequate legal, technical, administrative and financial measures aimed at capacity-building of institutions for the purpose of management and transmission of ICH through forums and spaces intended for the performance of the expression thereof as also to facilitate documentation and access to ICH.
The 2003 UNESCO Convention also lays emphasis on the State’s role in raising awareness, education and information of people through “appropriate means” (Article 14).

V.3. Relationship with other International Instruments

Considering the long history of the debate on the protection of expressions of folklore, or ICH as the 2003 Convention refers to, it is crucial to examine the effect of the 2003 UNESCO Convention on existing international law and its relationship with other international instruments. A look at Article 3 of the Convention clarifies that the 2003 UNESCO Convention is to be considered independent of the terms of the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage and cannot be seen as altering or diminishing the level of protection envisaged under the 1972 Convention. This clarification reveals the understanding that certain forms of ICH may be related in subject-matter to those protected under the 1972 Convention. Yet the fact that the independence of these two instruments is announced also indicates an unrealistic, if not unfortunate, distinction between the “tangible” property protected in the 1972 UNESCO Convention and the “intangible” cultural heritage in the 2003 UNESCO Convention.

Furthermore, the 2003 UNESCO Safeguarding Convention also clarifies that nothing in the Convention can be interpreted as affecting the rights and obligations of State Parties that derive from any international instrument relating to IPRs or to the use of biological and ecological resources to which they are Parties [Article 3(2)]. This provision in the 2003 Convention seems to be in the light of political considerations relating to ongoing negotiations between countries on IPR and bio-diversity related protection of TK and TCEs. It is striking to note that while the WIPO has recently iterated the need to view “protection” policies more widely to include inter alia “safeguarding” and “preservation” measures, the UNESCO has been likewise unable to address IP issues relating to the protection of ICH. A brief look at the history of the debate concerning the protection of “folklore” at the UNESCO quite clearly points to the fact that the separation of the work between the WIPO and UNESCO is nothing new. However, the resultant “fragmentation” may undermine the protection of TCEs.
Preservation and safeguarding strategies in the form of documentation and inventoring can trigger concerns about the lack of intellectual property protection and can run the risk of unintentionally placing the materials in the 'public domain' from the perspective of the intellectual property system. Therefore, a possible area for future focus between the two prominent fora—the WIPO and the UNESCO is crucial to better address the needs and expectations of communities with regard to the protection of their TCEs.

VI. UNESCO and Protection of Traditional Music and Handicraft

Apart from the above-mentioned "normative" instruments of the UNESCO, it is also important to mention some of the operational measures that UNESCO has engaged in to protect TCEs. Some of these relate to the protection of music and handicrafts.

VI.1. UNESCO Collection of Traditional Music of the World

The UNESCO Collection of Traditional Music of the World, one of the most outstanding achievements in UNESCO’s programme for the preservation and revitalization of Intangible Cultural Heritage, pays tribute to this task through the dissemination of such treasures of humanity as traditional popular and classical music, sacred music, music of rural and urban origin and festive or carnival music that involves singing, the playing of instruments and dancing. The recordings, most of which were made \textit{in situ}, seek to present living musical traditions as a social act between performers and audience, and are a source of invaluable inspiration for today's creators, musicologists and traditional music lovers.

Launched by Alain Daniélou in 1961 in collaboration with the International Music Council (IMC), the UNESCO Collection of Traditional Music of the World comprises both new recordings and reissues on compact disc of UNESCO’s former collections. Today UNESCO collaborates with the International Council for Traditional Music (ICTM) on new recordings, and with the IMC on reissues.

VI.2. UNESCO and Handicrafts Protection

The Creativity and Copyright Section of UNESCO works with handicrafts, considering them as material expression of traditional cultural heritage and with the
economic and social development of the communities that create and maintain them. In terms of the legal protection of handicrafts, the Creativity Division favours presenting a variety of legal options (that are mainly taken from IPR approaches) to craftspeople, beneficiaries, governments, etc., to choose from in order to identify best practice and what works in the different contexts. These are addressed primarily to the need to protect the originality of the product (through trademarks and appellations of origin) and to protect the professional designation of the producers as ‘artisan’ and ‘craftsperson’. Economic issues addressed include raw materials, taxation systems, export tariffs and the aim of creating a special category for handicrafts within the World Customs Organization. UNESCO has also produced, jointly with the African Cultural Institute, a guidebook entitled *Crafts: Methodological Guide to the Collection of Data* (1990). This guidebook was hoped to lead to computerized databases on craft forms and techniques that would also be accessible through international networks.

Even at the UNESCO, based on the understanding that different approaches will be better adapted to different social, economic, legal and cultural environments, the development of a single model law for all States to base legislation on is not favoured. Furthermore, UNESCO has also stressed that while dealing with handicrafts it is important to assume a dynamic approach of “adaption rather than conservation,” reflecting the ability of many tradition-holder communities to combine tradition with modernity and their realization that this is necessary for maintaining their identity and improving their social and economic circumstances (WCCD Report, 1995: 82).

**VII. Summary**

A historical analysis of the key developments in the UNESCO regarding efforts to protect TCEs shows that though developing countries began to articulate the need to have their “folklore” and related expressions protected within the terms of the Universal Copyright Convention in 1952, it was only with the passage of the World Heritage Convention (WHC), adopted by the UNESCO General Conference in 1972, that a vital idea of the protection of cultural heritage was fashioned into an international legal instrument. 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 was also significant. The decade of the 70s also saw the UNESCO making more references to the concept of "heritage", which decidedly helped shun the baggage of considering protection in purely "property" terms. Despite these developments, the failure to recognize the "value" of "simple formats" and the "ways of life" of the non-European world was evident in UNESCO’s normative instruments. Empirical evidence in the WHC list of protected monuments, sites and territories clearly indicated a European bias and the distinction made between "tangible" and "intangible" form of cultural heritage was believed by developing countries to be an issue of values and valorization. As studied in the previous Chapter on the Protection of Expressions of Folklore in Intellectual Property Law showed that simultaneous attempts in the 1970s, to obtain the protection of intangible elements of cultural heritage at the WIPO, also yielded few results.

In comparison to the previous decades, the 1990s proved to be a more fruitful decade for the protection of TCEs, both in conceptual and practical terms. In 1993, UNESCO invited States to create a system of Living National Treasures and forward the list of such ‘Treasures’ to UNESCO. This Programme was conceived under the consideration that knowledge and skills linked to music, dance, theatre and traditional craftsmanship, are in danger of disappearing due to declining numbers of practitioners and growing disinterest of young people and lack of funds. The Programme also recognizes that one of the most effective ways of safeguarding intangible heritage is to conserve it by collecting, recording, and archiving and that it would be even more effective to ensure that the bearers of that heritage continue to acquire further knowledge and skills and transmit them to future generations. The Living Human Treasures Programme also 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. 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: forms of popular and traditional cultural
expressions and cultural spaces. This heritage is made up of many and varied complex forms of living manifestations in constant evolution including oral traditions, performing arts, music, festive events, rituals, social practices and knowledge and practices concerning nature. The Programme not only seeks to raise awareness and recognize the importance of this heritage, but also stresses the need to safeguard and revitalise it. Other objectives include establishing national inventories of the intangible cultural heritage, creating national committees for the protection of the intangible heritage, adoption of legal and administrative measures by the Member States and the full implication of the tradition bearers – local traditional artists and knowledge bearers – in its identification and revival. Indian traditional cultural expressions such as *Kuttiyattam*, *Ramlila* and “Vedic Chanting” are among the ninety UNESCO Proclamations to date. An important point to note in the List of Proclaimed Masterpieces is that for the first time in the UNESCO, since the days of the 1970 Heritage Convention, developing countries have a greater representation of traditional arts and cultural heritage than the developed countries. Of the 90 Proclamations, 26 of these elements are in the Asia Pacific Region, 20 in Europe, nineteen in Latin America and the Caribbean, 18 are located in Africa and seven in the Arab region.

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 criteria for protection based on compatibility with human rights instruments, mutual respect between communities and sustainability is considered in some ways 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 ICH. 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. Another noteworthy development in the UNESCO, in recent times is the recognition of the need to protect not only products of a culture but also its producers. The call to State Parties to involve communities, groups and related
NGOs in safeguarding measures and the emphasis on education, awareness and capacity building is also significant.

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. Owing to the “saving clause” contained in Article 3 of the 2003 UNESCO Convention, against undermining any international commitments of State Parties to IP or CBD provisions, it remains unclear how far the Convention actually amounts to normative content in international law. Since States are at the epicenter of UNESCO’s attempts to protect ICH, a lot seems to depend on how far States will have both the political will and the resources to comply with their obligation under the 2003 UNESCO Convention. Considering some of the vacuum that still exists in the protection of TCEs despite the efforts and debates at the WIPO and UNESCO, it is important to also examine other non-IP measures available in international law for the protection of TCEs. This shall be accordingly dealt with in the next Chapter.
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