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Intellectual Property Rights in Indigenous Cultural Heritage: Basic Concepts and Continuing Controversies

By Christoph Antons¹

1. Introduction: Traditional Cultural Expressions and Decolonisation

The developments at international level in the debate on what intellectual property lawyers refer to as traditional cultural expressions (TCE) have to be seen in the context of the decolonisation movements after World War II. Post WWII developments saw the formation of the United Nations and the emphasis on human rights in the UN Charter. With this emphasis came development programmes for Indigenous peoples and the recognition of Indigenous rights in ILO Convention No. 107 of 1957 concerning the Protection and Integration of Indigenous, and other Tribal and Semi-tribal Populations in Independent Countries. The decolonisation movements also initiated or renewed a parallel debate about the repatriation of items of cultural heritage. There was a remarkable shift in this discussion from ‘cultural heritage of mankind’ to cultural particularism and an emphasis on ‘cultural property’, as Merryman has pointed out with reference to the preambles of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, on the one hand, and the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970, on the other hand.²

This chapter aims at adding an intellectual property perspective to the debate on international trade in Indigenous cultural heritage. It will examine the international discussion about the options for legal protection of traditional cultural expressions and expressions of folklore (EoF) and pay particular attention to the position of developing countries in international negotiations. In accordance with the author’s current research, examples will be drawn in particular from Asian developing countries. Because of the crucial role of emerging economies such as China, India or Brazil in international trade talks and their interest in traditional knowledge protection, it is submitted that the role of developing countries provides

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² John Henry Merryman, ‘Two Ways of Thinking about Cultural Property’, (1986) 80 *American Journal of International Law*, 831-853, as quoted in Derek Gillman, *The Idea of Cultural Heritage*, Cambridge: Cambridge University Press, 2010, chapter 2, pp. 41-62.

an important consideration in addition to the position taken by the countries studied in this project.³

The initial focus in this debate after decolonisation was on what was then still termed 'folklore', artistic expressions at the local level. Such artistic expressions of Indigenous and local people often had an 'exotic' appeal in the industrialised world and they became important in the cultural encounter between the colonising West and the colonised peoples of Asia, Africa and Latin America. While such expressions had previously often been regarded as primitive and unskilled, artistic movements of the early 20th century such as expressionism discovered and valued the archaic symbolism and power of such artistic expressions and they began to incorporate it into their art.⁴

At a time when the imperial powers were ruling much of the world, the people producing the objects of fascination in the colonies were not asked what they thought about the inspiration their artistic expressions provided to European art movements. While the symbolism of non-Western crafts was appreciated, literal copying was not common and the appreciation was still confined to an avant-garde circle. Decolonisation and the arrival of new media able to spread cultural expressions around the world were soon to change this state of affairs. With the arrival of radio and phonogram came the creation of a global music industry able to bring American jazz or Italian opera to even the most remote corners of the world. The new industry had an appetite for new thrills and musicians were eager to engage with musicians from elsewhere. While it had been common for European composers of the 19th century to use their respective own folk traditions and to borrow from neighbours on occasion, American jazz and pop music went far beyond local shores. Itself a blend of African and European influences, it began to incorporate Latin American music from the 1940s and Asian music from the 1960s onwards.⁵ Conveniently for music producers, under copyright principles 'traditional' folk music in the public domain could be easily adapted and turned into new copyrighted works.

Worldwide hit records based on songs from Africa or Latin America in the 1960s and 1970s belatedly led to several copyright disputes in recent years.⁶ The disputes achieved wider significance, however, in a debate about the recognition of intellectual property rights as part of cultural heritage and as cultural property. As such, they were increasingly taken up by national governments, in particular those of developing countries.⁷

³ Christoph Beat Graber, 'Institutionalization of creativity in traditional societies and in international trade law', in: Shubha Gosh (ed.), *Creativity, Law and Entrepreneurship*, UK: Edward Elgar, 2010, p. 10; Christoph Antons, 'IP law reform in developing countries after the global financial crisis', *International Review of Industrial Property and Copyright Law*, Vol. 40 No. 8, 2009, pp. 881-882.

⁴ Derek Gillman, *supra* note 2, pp. 53-62; Dietmar Elger, *Expressionismus: Eine deutsche Kunstrevolution*, Cologne: Benedikt TaschenVerlag, 1988, pp. 79-80, 93-94 and 119-120; For a fascinating comparison of the work of the artist collective 'The Blue Rider' and ethnographic objects in the Munich Museum of Ethnography that inspired it, see the various contributions in Staatliches Museum für Völkerkunde München, *Der Blaue Reiter und das Münchner Völkerkundemuseum*, Kunstkabinett, Volume 3, Munich: Hirmer, 2009.

⁵ Christoph Antons, 'Traditional cultural expressions and their significance for development in a digital environment: examples from Australia and Southeast Asia', in Christoph Beat Graber and Mira Burri-Nenova (eds.), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, Cheltenham: Edward Elgar, 2008, p. 297

⁶ Rian Malan, 'Where does the lion sleep tonight?' *Rolling Stone*, 25 May 2000, online at <http://www.3rdear.com/forum/mbube2.html> (last accessed 24 December 2010); Simon Robinson, 'It's a Lawsuit, a Mighty Lawsuit', *Time Magazine*, 25 October 2004; Owen Dean, 'Copyright in the Courts: The Return of the Lion' *WIPO Magazine*, April 2006; Pedro Escribano 'El condor pasa' patrimonio cultural de la nación', *La República*, 13 April 2004.

⁷ Michael Halewood, 'Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection' 44 *McGill Law Journal*, 1999, p. 953

2. From the Berne Convention to the WIPO/UNESCO Tunis Model Law and the Model Provisions

Coinciding with such high profile cases was a widespread attempt during the 1960s and 1970s to incorporate some form of folklore protection into the new national copyright laws of newly independent nations. As a consequence, folklore protection was included in the discussions concerning the revision of the Berne Convention at the Diplomatic Conference in Stockholm in 1967.⁸ The result was Article 15.4 Berne Convention, which leaves it to relevant national legislation of member states to designate a 'competent authority' to represent, protect and enforce rights to 'unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union'. Countries that designate such an authority must notify the Director General of WIPO and provide full information (Article 15.4.b).

During the 1960s and 1970s, a number of developing countries in Latin America and Africa included folklore protection in their new copyright acts.⁹ The usual approach was to regard folklore as part of the cultural heritage of the nation and to use the 'authors of unknown identity' formula of Article 15.4 Berne Convention. Some laws differed from the Berne Convention, however in protecting published as well as unpublished works.¹⁰ The Convention concerning the African Intellectual Property Organization (OAPI Convention) of 1977 became the first regional treaty to make reference to folklore protection. In 1973, the government of Bolivia sent a memorandum to the Director General of UNESCO, in which it requested that UNESCO look into the possibility of an international instrument on the protection of folklore, which was to be attached as a protocol to the Universal Copyright Convention.¹¹ The resulting Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions drafted by a joint Working Group of UNESCO and WIPO experts were finally adopted in 1982 and published in 1985. A few years earlier, in 1976, both UNESCO and WIPO had assisted a Committee of Governmental Experts convened by the Tunisian government to draft and adopt the Tunis Model Law on Copyright for developing countries, which made extensive reference to folklore.¹²

The main provision on folklore in the Tunis Model Law is Section 6 dealing with 'works of national folklore'. It foresees the exercise of the rights to folklore by a 'competent authority' without limitation in time. In the commentary to the provision, it is suggested that the competent authority could be the body responsible for the administration of authors' rights in a country. An exception can be made for use for non-commercial purposes by a public entity. The provision further prohibits the importation of copies of such folkloristic material made abroad without the authorisation of the competent authority. Section 2 of the Model Law on derivative works states that works derived from national folklore are also protected as original works. The list of

⁸ Graber, *supra* note 3, pp. 6-7.

⁹ The WIPO/UNESCO model provisions of 1985 mention the following countries and respective years of their copyright acts: Tunisia, 1967; Bolivia, 1968; Chile, 1970; Morocco, 1970; Algeria, 1973; Senegal, 1973; Kenya, 1975; Mali, 1977; Burundi, 1978; Ivory Coast, 1978; Guinea, 1980, see UNESCO/WIPO (1985), *Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions*, Paris-Geneva: UNESCO/WIPO, 1985, p. 4.

¹⁰ *Ibid.*

¹¹ *Ibid.*, p. 6.

¹² International Bureau of WIPO, 'The Protection of Expressions of Folklore: The Attempts at International Level' (Geneva, WIPO, 1998), available at <<http://itt.nissat.tripod.com/itt9903/folklore.htm>>, 7 July 2008; Janice Weiner, 'Protection of Folklore: A Political and Legal Challenge', *International Review of Industrial Property and Copyright Law*, Vol. 18 No. 1, 1987, pp. 56-92.

protected works in section 1 mentions folkloristic expressions such as tapestry and handicraft, but it refers to section 6 for any work that constitutes national folklore. As an optional provision, section 5bis exempts folklore from the fixation requirement preferred in some copyright systems. Folklore is defined in the definition section 18 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 basic elements of the traditional cultural heritage'.

The Tunis Model Law constitutes an attempt at the national regulation of folklore by using copyright principles. The commentary speaks of its potential for economic expansion as well as of the intimate link to the individual character of each people. It sees the national authority as empowered to represent the people that create the material. Apart from the suggestion referring to collecting societies, the Model Law leaves it to the various governments to develop solutions in forming representative competent authorities and how precisely their empowerment by the originators of the material can be achieved. The Tunis Model Law thus appears as a document drafted in the spirit of a time when economic development was regarded to a large extent as a state-led and state-planned process. Reference to the individuals and communities generating the material is made in the definition section 18 and in the commentary to section 6, but their role remains very limited. Although many copyright acts of developing countries at the time used elements of the Tunis Model Law as departure point,¹³ the joint expert committee of UNESCO and WIPO commented almost a decade later on the occasion of the release of the Model Provisions in 1985 that 'at least so far, legal protection of folklore by copyright laws and treaties does not appear to have been particularly effective or expedient.' The committee noted in particular that until the drafting of the Model Provisions no notification designating a national authority under Article 15.4 of the Berne Convention had been deposited with the Director General of WIPO.¹⁴ It noted further that 'one has the impression that copyright law is, after all, not the right kind of law for protecting expressions of folklore.' Mentioned as problematic in this context are in particular such features of copyright as individual originality and the limited duration of copyright protection.

The experiences of countries that have used the approach of the Tunis Model Law certainly confirm this analysis. Indonesia, for example, adopted the Tunis Model Law approach in Article 10 of the Indonesian Copyright Act of 1982. The Indonesian provision mixes principles drawn from heritage protection and cultural property with the 'national folklore' concept drawn from the Tunis Model Law.¹⁵ This generated a nationalist discourse on intellectual property and national heritage and a few conflicts with neighbouring Malaysia about what currently should be regarded as primarily cultural heritage rather than intellectual property.¹⁶ In spite of such cross-border disputes, the relevant provision in Indonesia has actually never been implemented

¹³ For the example of Indonesia's Copyright Act of 1982, see Christoph Antons, *Intellectual Property Law in Indonesia*, London: Kluwer Law International, 2000, pp. 84-90; Christoph Antons, 'What is "Traditional Cultural Expression"? International Definitions and Their Application in Developing Asia', *The WIPO Journal* No. 1, 2009, pp. 103-116.

¹⁴ The *Final Report on National Experiences with the Legal Protection of Expressions of Folklore*, published by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Third Session, WIPO/GRTKF/IC/3/10, on 25 March 2002, p. 9, reports one designation under Article 15.4. by India.

¹⁵ Christoph Antons, *Intellectual Property Law in Indonesia*, supra note 13; Christoph Antons, 'What is "Traditional Cultural Expression"?', supra note 13; Christoph Antons, (2010a) 'Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions', paper presented at the 2nd International Conference of the Asian Borderlands Research Network, Chiang Mai, Thailand, 6 November 2010, available as working paper on SSRN, <http://ssrn.com/abstract=1799548>.

¹⁶ Christoph Antons, 'What is "Traditional Cultural Expression"?', supra note 13; Christoph Antons, 'Asian Borderlands', supra note 15; Stephen Fitzpatrick, 'Malaysia 'Steals' Bali Dance', *The Australian*, 26 August 2009; 'Malaysia Urges Indonesia to Drop Plans to Sue over Folk Song', *Jakarta Post*, 8 October 2007; 'Indonesian Outrage over a Dance', *Asia Sentinel*, 25 August 2009.

and the institutional framework for implementation has yet to be created. The implementation of the copyright approach to 'national folklore', therefore, has not generated any tangible results. However, in spite of such not very successful examples, the copyright approach to folklore has remained popular. According to the current WIPO website collecting legislative texts on the protection of traditional cultural expressions (expressions of folklore) (TCEs) no less than 27 countries in Africa, Asia, Latin America and the Pacific have provisions referring to folklore as part of their copyright acts.¹⁷

Some of the lessons from the discussion generated by the 'national folklore' approach of the Tunis Model Law are visible in the 1982 UNESCO/WIPO Model Provisions, published in 1985. Firstly, different from the Tunis Model Law, the Model Provisions offer a *sui generis* approach to folklore protection against illicit exploitation and other prejudicial action. As a consequence, the document uses the term 'expressions of folklore' rather than 'works'. Secondly, in contrast to the Tunis Model Law, the Model Provisions move away from the rather narrow focus on 'national folklore' and acknowledge the communities and individuals producing the material. It is recognised that 'the artistic heritage of communities is a more restricted body of traditional values than the entire traditional artistic heritage of the nation'. 'Traditional artistic heritage developed and maintained by a community' is understood as representing a special part of the 'cultural heritage of the nation'.¹⁸ The greater role granted to local communities becomes especially visible from those parts of the Model Provisions that deal with the process of authorisation and with the question as to who should authorise permitted forms of utilisation. Here, the model provisions decide on a system of preliminary authorisation rather than subsequent checks of permitted use. The commentary points out that preliminary authorisation and previous clearance combined with sanctions was preferred, because it would provide certainty for users of the system and allow the entities supervising the system to prevent harm at the outset rather than being confined to damage control.

The Model Provisions leave sensitive areas to the discretion of national legislators by offering various bracketed options for regulation. As for the authorising entity, the Model Provisions realise that countries have very different policies with regards to recognising traditional rights of communities. As a consequence, the authorising entity can be either a 'competent authority' as in the Tunis Model Law, where expressions of folklore are regarded as 'property of the nation' or the authorisation can be left to the relevant community itself, where 'aboriginal or other traditional communities are recognized as owners fully entitled to dispose of their folklore' and 'sufficiently organized to administer the utilization of the expressions of their folklore'.¹⁹ The commentary suggests as options for the 'competent authority' the Ministry of Culture or of Arts, any public institution for matters related to folklore, authors' society or similar institution or a representative body of the community concerned.²⁰ If the legislators choose a 'competent authority', the provisions offer the possibility for an additional supervisory authority, in particular for matters related to the fixation and allocation of fees. In such cases, decisions can be appealed by both applicants and concerned communities. Alternatively, if authorisation is granted directly by the community, such mechanisms are not necessary. The commentary suggests, however, that if authorisation were granted by designated representatives rather than the 'community as such', the representatives would qualify as a competent authority.²¹ While this seems obvious, it is rather difficult to imagine how the 'community as such' could grant authorisation on a regular basis without involving designated representatives. In the end, the

¹⁷ See <http://www.wipo.int/tk/en/laws/folklore.html> (last accessed on 29 December 2010).

¹⁸ UNESCO/WIPO, *supra* note 9, p. 15.

¹⁹ *Ibid.*, pp. 19-20.

²⁰ *Ibid.*, p. 24.

²¹ *Ibid.*, p. 25.

expert committee recommended that an important role be given to the representatives of various folklore communities of a country and that representatives of cultural and ethnological institutions, including museums, should be associated with the work of the competent authority.

The *sui generis* model provisions represent a clear step forward in recognising the nature of folklore, its origin and administration in comparison to the previous approach focused on copyright and 'national folklore'. Nevertheless, they also raise a number of concerns. Firstly, they provide for copyright style exceptions to protection in section 4 in the interest of education, utilization by way of illustration in the work of an author or authors and borrowing of expressions of folklore for creating an original work. A further exception is 'incidental utilization', for which section 4(2) provides the examples of current event reporting or inclusion of folkloristic expressions in a photograph, film or television broadcast. The concern here is that many expressions regarded as folkloristic can have secret and sacred meanings and they may play a role in religious rituals of communities.²² Where such religious connotations are involved, it seems not entirely appropriate and probably unrealistic to expect from communities to consent to their use in the interest of education, artistic development or news reporting. In particular, in cases where communities struggle for a greater degree of self-determination within nation states they may advocate a tighter control of their cultural expressions and not be content with educational or other uses that benefit mainstream society rather than their own.

Similar objections can be raised, secondly and more generally, against the requirement that utilisations subject to authorisation must be made 'with gainful intent and outside their traditional or customary context'. This leaves outside the scope of protection utilisations by national and public bodies that are not of a commercial nature. Again, where religious and secret/sacred expressions are involved, such non-commercial use may still be offensive and inappropriate. Further, where the community seeks to restrict the use of the material for commercial or non-commercial reasons, public use by institutions of mainstream society may compete with such purposes. Finally, it would cover the use of folkloristic expressions by community members with gainful intent, although they may in fact be entitled to such use under their customary law. In such a situation, a national law that interferes in community affairs could create conflicting entitlements and lead to disputes.

Thirdly, in view of the cross-border nature of at least some of the material and the difficulties in establishing its origin with certainty, some of the criminal penalties for offences could be of concern, at least where offences are due to negligence rather than wilful intent. Fourthly and finally, while the Model Provisions give communities an important role in the authorisation process, they are ambiguous with regards to the distribution of collected fees. The commentary is clear in stating that the community should decide how to use such fees, if they authorise the utilization and that the state in such case should ensure its share 'if at all' only via taxes or other appropriate measures.²³ Section 10 of the provisions, however, allows for the conclusion that all fees collected, independently from the collecting entity, must be used for the purpose of promoting or safeguarding national culture or folklore. Where a competent authority is involved, the provisions recommend to pay a percentage of the fees to the community and to allow the authority to retain a percentage for administrative purposes. The vast majority of benefit-sharing models that are currently being practised seems to have followed this latter approach, with differences in the percentage that is being retained by representative agencies, on the one hand, and that is being transferred to communities, on the other hand.

Subsequent to the drafting of the Model Provisions, the joint expert committee of UNESCO and WIPO also developed a Draft Treaty for the protection of Expressions of Folklore against

²² Graber, *supra* note 3, p. 4.

²³ UNESCO/WIPO, *supra* note 9, p. 26.

Illicit Exploitation and other Prejudicial Actions.²⁴ Adoption of such a treaty, however, was ultimately found to be premature mainly for two reasons: the lack of appropriate sources for the identification of expressions of folklore considered for protection and the lack of workable mechanisms for settling the questions of folkloristic expressions that can be found in several countries of a region simultaneously. As we shall see later, these questions continue to pose problems until now.

3. From 'Expressions of Folklore' to 'Traditional Cultural Expressions' and 'Traditional Knowledge'

In cultural policies, a significant broadening of the concept of 'culture' from its previous high art definition to one that includes modes of life, value systems, traditions and beliefs occurred after the Mexico Declaration on Cultural Policies of 1982.²⁵ From the late 1980s onwards, the debate about the international protection of expressions of folklore became increasingly linked with a new debate related to heritage and culture based on such a broadened understanding of the concepts. It concerned genetic resources and forms of traditional knowledge relevant for the new biotechnology industry, for medicines and the conservation of biodiversity. This new debate was initially conducted in different international forums than the one on expressions of folklore. The first one of these was the UN Food and Agriculture Organisation (FAO). With strong developing country membership, FAO had traditionally been critical of intellectual property rights in agriculture. As for plant genetic resources important for agricultural innovation, FAO had sponsored the International Undertaking on Plant Genetic Resources for Food and Agriculture of 1984, which regarded plant genetic resources as 'heritage of mankind' and as freely accessible and exchangeable.²⁶ The concept of 'farmers' rights' emerged during discussions in the FAO Commission on Genetic Resources for Food and Agriculture, in which developed countries favoured the harmonisation of the International Undertaking with the International Union for the Protection of New Plant Varieties (UPOV) and the exemption of plant breeders-rights protected varieties from the common heritage principle. As a counterweight against the expansion of intellectual property rights in food and agriculture, the notion of 'farmers' rights' was introduced.²⁷ It was given a more concrete meaning in FAO resolution 5/89 of 1989, which became an annex to the 1983 International Undertaking. Accordingly, 'farmers' rights' were defined as:

Rights arising from the past, present and future contribution of farmers in conserving, improving and making available Plant Genetic Resources, particularly those in the centres of origin/diversity. These rights are vested in the International Community, as trustees for present and future generations of farmers, for the purpose of ensuring full benefits of farmers and supporting the continuation of their contributions.

While the concept of farmers' rights represents a first recognition of traditional knowledge for the more limited field of food and agriculture, the subsequent Convention on Biological Diversity (CBD), concluded at the Rio Biodiversity Summit of 1992, firmly established the wider

²⁴ A copy of the treaty is attached as Annex IV to the *Final Report on National Experiences*, supra note 14.

²⁵ William Logan, Michele Langfield and Máiréad Nic Craith, 'Intersecting concepts and practices', in Michele Langfield, William Logan and Máiréad Nic Craith (eds.), *Cultural Diversity, Heritage and Human Rights: Intersections in theory and practice*, London-New York: Routledge, 2010, p. 6.

²⁶ Michael Blakeney, 'Intellectual Property Aspects of Traditional Agricultural Knowledge', in Peter Drahos and Michael Blakeney (eds.), *IP in Biodiversity and Agriculture*, London: Sweet & Maxwell, 2001, p. 44; Carlos Correa 'Access to Plant Genetic Resources and Intellectual Property Rights', in: Peter Drahos and Michael Blakeney (eds.), *IP in Biodiversity and Agriculture*, London: Sweet & Maxwell, 2001, pp. 103-107.

²⁷ Halewood, supra note 7, p. 970.

concept of 'traditional knowledge' in the minds of policy makers. In Article 8(j) parties of the CBD were required, subject to national legislation, to

respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Apart from Article 8(j), 'traditional cultural practices' are mentioned in Article 10(c) of the CBD, which requires parties 'as far as possible and as appropriate' to protect and encourage 'customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements'.

The traditional knowledge provisions of the CBD have to be seen against the background of a fundamental shift in the understanding of genetic resources from heritage of mankind to the sovereign rights of nation states to grant access to and exploit such resources, as stated in Article 3 of the CBD²⁸ and now reaffirmed in the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity. They have further to be seen in the context of a shift from 'top-down' to 'bottom-up' strategies in environment protection and development policies and a greater role for neo-liberal ideas and private property concepts that accompanied these developments.²⁹ A final influence is what has been called the 'new indigenism'³⁰ referring to the international collaboration of various national and regional movements of Indigenous peoples to shape their rights discourses and develop common strategies in their bargaining with national governments.³¹ Expressions of Folklore now became integrated into these new paradigms and linked with the much broader concept of traditional knowledge advanced by Indigenous groups, environmentalists and human rights lawyers and activists, often under the even broader term of 'cultural heritage'.³²

While the question of physical access to genetic resources and associated traditional knowledge became the task of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing of the CBD, WIPO became responsible for the intellectual property side of the debate³³ Between May 1998 and November 1999, WIPO embarked on fact-finding missions to 28

²⁸Christoph Antons, 'Sui Generis Protection for Plant Varieties and Traditional Knowledge in Biodiversity and Agriculture: The International Framework and National Approaches in the Philippines and India', *The Indian Journal of Law and Technology*, Volume 6, 2010, pp. 89-139; Christoph Antons, 'The role of traditional knowledge and access to genetic resources in biodiversity conservation in Southeast Asia', *Biodiversity and Conservation*, Vol. 19, 2010, pp. 1189-1204.

²⁹ Stephen B Brush, 'Protecting traditional agricultural knowledge' *Washington University Journal of Law and Policy*, Vol. 17, 2005, pp.77-78; Tania Murray Li, *The Will to Improve: Governmentality, Development and the Practice of Politics*, Durham-London: Duke University Press, 2007; Peter Newell, 'The marketization of global environmental governance: manifestations and implications', in: Jacob Park, KenConca and Matthias Finger (eds.) *The Crisis of Global Environmental Governance: Towards a new political economy of sustainability* (Oxford-New York: Routledge), 2008, pp. 77-95

³⁰ Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity*, Berkeley-Los Angeles-London: University of California Press, 2003; Ronald Niezen, *A World Beyond Difference: Cultural Identity in the Age of Globalization*, Malden, MA-Oxford-Carlton, Vic.: Blackwell Publishing, 2004.

³¹ Christoph Antons, 'The International Debate about Traditional Knowledge and Approaches in the Asia-Pacific Region', in Christoph Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, Alphen aan den Rijn: Kluwer Law International, 2009, pp. 40-41; Christoph Antons, 'Traditional knowledge in Asia: Global agendas, local subjects', in: John Gillespie and Randall Peerenboom (eds.), *Regulation in Asia: Pushing back on globalization*, London-New York: Routledge, 2009, pp. 68-72.

³² Lyndel V. Prott, 'Problems of Private International Law for the Protection of the Cultural Heritage', (1989) 217 *Recueil de Cours de l'Académie de la Haye*, p. 310; Rosemary J. Coombe, 'The Expanding Purview of Cultural Properties and Their Politics', *Annual Review of Law and Social Science* 2009.5, p. 398.

³³ Halewood, *supra* note 7, pp. 985-987.

countries to find out about the intellectual property-related needs and expectations of traditional knowledge holders.³⁴ Interestingly, WIPO chose for these missions a very wide definition of traditional knowledge, which included expressions of folklore as a sub-set.³⁵ In its final report on the outcome of these missions, WIPO's working definition of traditional knowledge included 'tradition based literary, artistic and scientific works, performances, inventions, scientific discoveries, designs, marks, names and symbols, undisclosed information and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic field.'³⁶ The concept was illustrated by a picture of overlapping circles, whereby heritage as the widest concept included traditional knowledge, which in turn included overlapping circles of expressions of folklore and Indigenous knowledge. The working definition crossed the entire range of intellectual property rights, although it distinguished intellectual property related forms of traditional knowledge from even wider forms of 'Indigenous cultural and intellectual property' advocated by human rights advocates and representatives of Indigenous groups. The holistic understanding of 'Indigenous cultural and intellectual property' was supported by cultural heritage experts advocating a widening of the term 'cultural property' to 'cultural heritage' and a recognition of the parallels to environmental law.³⁷ At the international level this wider understanding of cultural heritage was adopted by Erica-Irene Daes, the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.³⁸ It was embraced by Terri Janke in her report 'Our Culture: Our Future' written in 1998 for the Australian Aboriginal and Torres Straits Islander Commission (ATSIC). Her definition of the material for protection included also Indigenous ancestral remains, sacred Indigenous sites, 'cultural environment resources' such as minerals and species and even languages as far as they are relevant for 'cultural identity, knowledge, skill and the teaching of culture'.³⁹

The different definitions started a discussion about the conceptualisation of the subject matter. Mainly three positions can be identified in the relevant literature: the first position uses a very wide holistic definition of 'cultural and intellectual property' that departs from a broad understanding of 'cultural heritage' in which intellectual property is a mere subset. As such, it goes far beyond intellectual property related material and it includes principles of intellectual property within the 'cultural property' concepts of conventions such as the 1970 UNESCO Convention. The second position is in accordance with the original WIPO working definition of traditional knowledge. It concentrates on intellectual property aspects of cultural expressions, but maintains that it is somewhat unrealistic and against the nature of the material to be protected to distinguish clearly between scientifically relevant traditional knowledge and the more artistically oriented expressions of folklore. The third position is the current position developed during the WIPO negotiations. It acknowledges the crucial link between traditional knowledge and expressions of folklore, but argues that it is more convenient and in the interest of achieving tangible outcomes to treat the material separately and to draft separate sets of policies for both fields. Reasons mentioned are that the advanced stage of the work on expressions of folklore merits distinct consideration of this subject matter and that the sheer

³⁴ WIPO, *Final Report on National Experiences with the Legal Protection of Expressions of Folklore*, above note 14, pp. 12-16.

³⁵ *Ibid.*, p. 13.

³⁶ WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders – WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge*, Geneva: WIPO, 2001, p. 25.

³⁷ Prott, , *supra* note 33, p. 310. See also Gillman, *supra* note 2, p. 48.

³⁸ WIPO, *Final Report on National Experiences*, *supra* note 14.

³⁹ Terri Janke, Terri (1998) *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, Sydney: Michael Frankel & Company, 1998, pp.11-12.

breadth and diversity of what may be included in traditional knowledge suggests that a more limited focus may be desirable and more productive. Finally, and perhaps most important from an intellectual property perspective, the rights that would be relevant in respect of artistic/cultural material are different from those relevant to technical/scientific materials.⁴⁰

4. Towards a Treaty? - The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore and its Revised Objectives and Principles

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) convened for the first time in 2001. As far as expressions of folklore were concerned, the initial sessions dealt with the details of the mandate to look into an update of the Model Provisions in light of the experience countries had made, improve the protection of handicrafts and establish an international *sui generis* system.⁴¹ During further sessions, the IGC established a voluntary fund to allow for greater participation of representatives of Indigenous and local groups, it drafted separate sets of principles, objectives and policy options for the three interrelated issues of its mandate and, specifically, for expressions of folklore or traditional cultural expressions (TCEs) as they were now increasingly called, a gap analysis document. The WIPO General Assembly renewed its mandate during its session in September/October 2009. The renewal came with the obligation to undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs. The new mandate foresees for regular sessions of the IGC as well as for three inter-sessional working groups during the 2010-2011 biennium.⁴²

The first IWG in July 2010 focused on TCEs, regarded as 'the most mature' of the three subject areas.⁴³ The streamlined text resulting from the IWG meeting was tabled at the Seventeenth Session of the IGC, together with the latest version of the Revised Objectives and Principles. The Draft Articles were then again tabled at the Eighteenth Session of the IGC.⁴⁴ Meanwhile, two further IWG meetings have produced Draft Articles on the Protection of Traditional Knowledge and Options on Intellectual Property and Genetic Resources.⁴⁵

If one examines the draft texts and the underlining, slashes and square brackets that signal controversial issues in the Draft Articles and in the Revised Objectives and Principles, it soon becomes clear that the difficulties in finding agreement continue to lie in particular in three areas: firstly, the definition of the subject matter of protection and its relationship to other forms of IP rights; secondly, the question how to delineate the circle of beneficiaries and the related question how rights should be managed; and, thirdly, the scope of protection and the role of exceptions. To understand the reasons for the continuing controversies, it is useful to get an appreciation of

⁴⁰ WIPO, *Final Report on National Experiences*, supra note 14, pp. 31-32; Christoph Antons (2005) 'Traditional Knowledge and Intellectual Property Rights in Australia and Southeast Asia', in: Christopher Heath and Anselm Kamperman Sanders (eds.) *New Frontiers of Intellectual Property Law: IP and Cultural Heritage, Geographical Indications, Enforcement and Overprotection*, Oxford-Portland, Oregon: Hart Publishing, 2005, pp. 37-51; Antons, 'Traditional Cultural Expressions and their Significance for Development', supra note 5, p. 288.

⁴¹ WIPO, *Final Report*, supra note 14, pp. 16-17

⁴² Decision of WIPO General Assembly, Thirty-Eighth (19th Ordinary) Session, September 22 to October 1, 2009, available at <http://www.wipo.int>.

⁴³ WIPO, 'Experts break new ground in traditional cultural expressions talks', *WIPO News & Events*, Geneva, 23 July 2010.

⁴⁴ WIPO, *The Protection of Traditional Cultural Expressions: Draft Articles*, WIPO/GRTKF/IC/18/4 REV. of 14 April 2011.

⁴⁵ WIPO, *Draft Articles on the Protection of Traditional Knowledge Prepared at IWG2*, WIPO/GRTKF/IC/18/7 of 17 March 2011; WIPO, *Options on Intellectual Property and Genetic Resources: Summary of Discussions at IWG 3*, WIPO/GRTKF/IC/18/10 of 14 April 2011.

the various political and economic interests driving the debate. Firstly, in the general TK/TCE/GR debate, the different interests of developed and developing countries are often mentioned. Scope of protection is of great concern here. On the one hand, as the discussions at the end of the previous biennium showed, most developing countries hope for a binding international agreement with a strong scope of protection. Developed countries, on the other hand, prefer a relative informality and stress the importance of exceptions and of a viable public domain as well as the difficulties to harmonise any new laws with currently existing IP rights. Clearly, however, the main economic concern of the industrialised countries is related to the TK debate and to the link between genetic resources and intellectual property rights.⁴⁶ In comparison to the value of TK and with the exception of settler colonies with substantial Indigenous minorities and an interest in providing economic incentives in this field, the economic interest of most developed countries in TCE protection seems rather negligible. TCEs are of concern to much of the developed world in particular because of their link to the other areas of this complex negotiating process. Comparatively speaking, therefore, it may be much easier to reach international agreement on TCEs than on any of the other agenda items of the IGC mandate. The most recent discussions of the IWG confirm this assessment. In particular the discussion about the relationship of intellectual property and genetic resources has not yet generated a draft text, but only a statement of options.⁴⁷

Secondly, there is the sub-national level of the debate. This concerns the important question of the exact mechanisms of distribution of royalties and other benefits between national governments and the 'traditional' and 'local' communities that produce the expressions of folklore, but it concerns also the definition of the subject matter. Although the secret/sacred nature of material is not exclusive to Indigenous cultures, Indigenous peoples are more likely to have cultural expressions that are regarded as secret and/or sacred. Because of their vulnerable position vis-à-vis the majority and their aspirations to achieve greater self-determination they tend towards more restrictive positions on cultural expressions.⁴⁸ At the same time, their culture is usually a way of life that remains strong at the margins of mainstream society.⁴⁹ Indigenous representatives, therefore, tend to be less agreeable to dividing up of their culture in a manner that suits the need of a field like intellectual property law. The recent controversy regarding the representation of Indigenous groups during the formulation of the draft articles on the protection of traditional knowledge at the Eighteenth Session of the IGC in May 2011 confirm that the interests of national governments and Indigenous communities are not always identical.⁵⁰

⁴⁶ See also Graber, *supra* note 3, p. 9, who mentions that most statements in parallel discussions in the WTO TRIPS Council have related to TK and that relatively little has been said with respect to TCE or folklore.

⁴⁷ WIPO, Options on Intellectual Property and Genetic Resources, *supra* note 48.

⁴⁸ For the variety of approaches enforcing secrecy, including via religious and customary taboos, see Christoph Antons, 'Legal Culture and History of Law in Asia', in Christopher Heath (ed.), *Intellectual Property Law in Asia*, London: Kluwer Law International, 2003, p. 21; Antons, 'Traditional Knowledge and Intellectual Property Rights in Australia and Southeast Asia', *supra* note 41, p. 42.

⁴⁹ Vivien Johnson, *Dreamings of the Desert: Aboriginal Dot Paintings of the Western Desert*, Adelaide: Art Gallery of South Australia, p. 16.

⁵⁰ William New, 'New Texts in Play in WIPO Traditional Knowledge, Genetic Resources Talks', *Intellectual Property Watch*, <http://www.ip-watch.org/weblog/2011/05/12/new-texts-in-play-in-wipo-traditional-knowledge-genetic-resources-talks>. William New, 'Indigenous Peoples won't be "wished away" in Traditional Knowledge Talks', *Intellectual Property Watch*, <http://www.ip-watch.org/weblog/2011/05/14/indigenous-peoples-won%E2%80%99t-be-wished-away-in-traditional-knowledge-talks>.

4.1. The Subject Matter of Protection

As was indicated earlier, the subject matter of protection can be approached from a holistic perspective, from a perspective of a broad meaning of 'traditional knowledge' that includes 'traditional cultural expressions' or from an intellectual property perspective that distinguishes between TK and TCE. The first perspective in particular finds support in much of the anthropology and social science literature on the topic, but it also finds support among human rights and environmental lawyers, among Indigenous commentators and occasionally in the intellectual property literature.⁵¹ In general, however, intellectual property relates to the protection of commercialised and industrialised forms of knowledge and IP experts often find the local variety and changing nature of traditional knowledge systems difficult to accommodate.⁵² The WIPO negotiations after all are aiming at the creation of international rules and principles that apply to as many cases as possible. To a certain extent, this requires the levelling out of local differences and peculiarities.

This legal categorising and the different understandings of traditional knowledge if viewed from a legal or anthropology perspective become perhaps clearer if the concepts of 'local' or 'Indigenous' knowledge as used by anthropologists and those of 'traditional knowledge' and 'traditional cultural expressions' used by lawyers are more closely examined. Anthropologists, such as Ellen and Harris, regard such concepts as fluid. They have identified for the field of environmental knowledge a large number of different terms with partly overlapping meanings. Instead of a definition, they offer a list of loosely worded characteristics. The more important ones on this list are that: (1) Indigenous knowledge is local, rooted to a particular place and set of experiences and generated by people living in those places; (2) It is orally transmitted, or transmitted through imitation and demonstration. (3) It is empirical rather than theoretical. (4) It is constantly changing, although often represented as static. (5) Its distribution is socially differentiated, for example by gender and age. (6) It is holistic and situated within broader cultural traditions, so that separating the technical from the non-technical is problematic.⁵³

Apart from the problem in how far knowledge is 'rooted' to particular places, exactly such a separation of the technical from the non-technical is, however, important for intellectual property law experts and WIPO's Intergovernmental Committee in the search for a definition of the subject matter. IP experts prefer to speak of 'traditional knowledge' and 'traditional cultural expressions'. Accordingly, 'traditional knowledge' *stricto sensu*⁵⁴ is defined in the WIPO working definition for the committee as 'knowledge resulting from intellectual activity in a traditional context', including various parts of traditional knowledge systems, 'knowledge embodying traditional lifestyles of Indigenous and local communities' and 'contained in codified knowledge systems passed between generations'. The working definition is not 'limited to any specific

⁵¹ See for example Janke, *supra* note 40; Coombe, *supra* note 33; Brendan Tobin, 'The Role of Customary Law and Practice in the Protection of Traditional Knowledge Related to Biological Diversity', in Christoph Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, Alphen aan den Rijn: Kluwer Law International, 2009, p. 128; Michael Blakeney, 'Protection of Traditional Knowledge by Geographical Indications', in Antons (ed.), pp. 105-107.

⁵² For such difficulties in the relationship of property lawyers to cultural heritage more generally see Lyndel V. Prott and Patrick J. O'Keefe, "Cultural Heritage' or 'Cultural Property'?", (1992) *International Journal of Cultural Property*, pp. 307-320, at 314.

⁵³ Roy Ellen and Holly Harris (2000) 'Introduction', in: R. Ellen, P. Parkes and A. Bicker (eds.), *Indigenous Environmental Knowledge and its Transformations*, London-New York: Routledge, 2000, pp. 2-5.

⁵⁴ As opposed to traditional knowledge *lato sensu*, which includes traditional cultural expressions, see WIPO, Glossary of Key Terms Related to Intellectual Property and Traditional Cultural Expressions, WIPO/GRTKF/IC/18/INF/7 of 19 April 2011, p. 26.

technical field' and gives as examples agricultural, environmental and medicinal knowledge and knowledge associated with genetic resources.⁵⁵

While it is generally fairly wide, the working definition is nevertheless restricted to 'technical fields'. In contrast to the characteristics listed by the anthropologists, it distinguishes between the technical and the non-technical. In line with that distinction, the WIPO working definition treats traditional knowledge of a technical nature separately from 'traditional cultural expressions', which includes all the material that relates to traditional arts, crafts and ritual.

This bifurcation of the knowledge for the purposes of the intellectual property discussion has sometimes been criticised as distorting the holistic way in which it is conceptualised and transmitted.⁵⁶ Nevertheless, the various working definitions have been reasonably well accepted by now for the purposes of the WIPO discussions by the participating parties as well as by observers from Indigenous organisations. The reason for the acceptance of the terminology is presumably that everyone is interested in a positive outcome of the IGC deliberations. From the viewpoint of Indigenous organisations an international agreement that protects their knowledge and cultural expressions in different parts is still better than no agreement. In this regard at least, the interests of Indigenous organisations seem to be in accordance with those of the governments of developing countries. When it comes to implementation of the concepts, however, the approach is different. It is interesting to note that some governments of developing countries have adopted rules for the promotion and protection of traditional knowledge that have not necessarily respected the distinction between technical knowledge and artistic expressions, but often merged them in domestic legislation.⁵⁷ In the most recent WIPO deliberations the issue occasionally resurfaces, for example when experts from Guatemala and the Indian Council of South America (CISA) support the inclusion of 'sacred places' in the list of protected subject matter, while others preferred to speak of 'spiritual forms'.⁵⁸ The most recent Draft Article 1.1 developed by the IWG makes reference to the overlap by speaking of "'Traditional cultural expressions" ... in which traditional culture and knowledge are embodied and have been passed on'.⁵⁹

The legal working definitions are, however, also different from the anthropological and holistic definition in two further aspects: first, they are not confined to orally transmitted knowledge only, but clearly include also knowledge transmitted in writing. Therefore, the traditional knowledge concept of WIPO is clearly much wider than locally confined and orally transmitted Indigenous knowledge.⁶⁰ In accordance with the arguments presented by India and other Asian developing countries, it includes mainstream traditions that are widely used at the

⁵⁵ *Ibid.*

⁵⁶ See Blakeney, *supra* note 27.

⁵⁷ For examples of legislation merging traditional knowledge and traditional cultural expressions from the Philippines, India and Indonesia, see Christoph Antons, 'Traditional Knowledge, Biological Resources and Intellectual Property Rights in Asia: The Example of the Philippines', *Forum of International Development Studies*, Volume 34, 2007, pp. 1-18; Prashant Reddy, 'The National Biodiversity Authority invites comments on draft amendments' at <http://spicyipindia.blogspot.com/2010/02/national-biodiversity-authority-invites.html>, 2 February 2010 (last accessed on 7 July 2010); Christoph Antons, 'Sui Generis Protection for Plant Varieties', *supra* note 29, pp. 134-135; Christoph Antons, 'Asian Borderlands', *supra* note 15.

⁵⁸ See the comments of the Rapporteur Justin Hughes, WIPO, *Draft Articles on the Protection of Traditional Cultural Expressions/Expressions of Folklore Prepared at IWG 1*, Intergovernmental Committee on Intellectual Property, Traditional Knowledge and Folklore, Seventeenth Session, Geneva December 6 to 10, 2010, WIPO/GRTKF/IC/17/9 of 15 September 2010, pp. 2-3; for the latest version see WIPO, *The Protection of Traditional Cultural Expressions: Draft Articles*, *supra* note 48, p. 4.

⁵⁹ See also the critical remarks made by the Delegation of Belgium fearing confusion with TK, WIPO, IGC, Seventeenth Session, Draft Report, WIPO/GRTKF/IC/17/12 Prov. 2 of 28 March 2011, p. 13.

⁶⁰ See the definition of "indigenous knowledge" in the glossary of key terms, *above* note, p. 13.

national level, such as Ayurvedic medicine or Yoga in India,⁶¹ traditional Chinese medicine in China⁶² or *jamu* in Indonesia.⁶³ However, especially such written knowledge is often widely spread across borders and claims to it may lead to disputes.⁶⁴

Secondly, the WIPO working definition identifies ‘indigenous and local communities’ as knowledge holders, so these knowledge holders do not necessarily have to be communities that have been identified as ‘Indigenous’ in the sense of North American first nations or Australian Aborigines. What it requires is that they live to some extent traditional lifestyles and that they pass on their knowledge from generation to generation. ‘Local communities’ are defined in the current glossary prepared for the negotiations in reference to the CBD as ‘the human population in a distinct ecological area who depend directly on its biodiversity and ecosystem goods and services for all or part of their livelihood and who have developed or acquired traditional knowledge as a result of this dependence, including farmers, fisherfolk, pastoralists, forest dwellers and others.’⁶⁵ The knowledge (and the associated cultural expressions) are, therefore, no longer exclusive to marginalised Indigenous communities, but moved towards the centre where they become the knowledge of mainstream communities and are represented and defended by the nation state. The definition of the knowledge holders as the beneficiaries of international traditional knowledge/traditional cultural expressions protection has been one of the most controversial issues during the WIPO negotiations and a more detailed discussion of it will follow in the subsequent part of this chapter. However, it appears that the wider concept of local communities derived from the context of the CBD works to the disadvantage of Indigenous communities and their more specific claims regarding cultural expressions.

Another controversial issue regarding the subject matter of TCE protection is in how far the material must be ‘authentic’, ‘genuine’ or (the current wording of the Draft Principles) ‘characteristic of a community’s cultural and social identity and cultural heritage’. This discussion also re-appears under the eligibility criteria for beneficiaries of Article 2. While the ‘characteristic’ requirement had been criticised earlier as too burdensome, anthropologists and social scientists have also been critical of authenticity requirements more generally, because they too can become onerous for communities that have to fulfil the expectations of lawyers and administrators with regards to ‘tradition’ and ‘traditional lifestyles’.⁶⁶ They have also pointed to the ‘strategic essentialism’ that can develop, when activists from or working on behalf of Indigenous communities attempt to present a unanimous picture of cultural identity to make it fit into categories of national or international law. This may lead to a representation of culture ‘as a pre-existing given ... rather than as something creatively reworked during struggles to

⁶¹ S.K. Verma, S.K. (2009) ‘Protection of Traditional Knowledge in the SAARC Region and India’s Efforts’, in: C. Antons (ed.) *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, Alphen aan den Rijn: Kluwer Law International, 2009, pp. 336-338

⁶² Bryan Bachner, ‘Back to the Future: Intellectual Property Rights and the Modernisation of Traditional Chinese Medicine’, in Christopher Heath and Anselm Kamperman Sanders (eds.), *New Frontiers of Intellectual Property Law: IP and Cultural Heritage, Geographical Indications, Enforcement and Overprotection*, Oxford and Portland, Oregon: Hart Publishing 2005, pp. 1-36.

⁶³ Christoph Antons and Rosy Antons-Sutanto, ‘Traditional Medicine and Intellectual Property Rights: A Case Study of the Indonesian *jamu* Industry’, in: C. Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, Alphen aan den Rijn: Kluwer Law International, 2009, pp. 363-384.

⁶⁴ Antons, ‘Asian Borderlands’, supra note 15.

⁶⁵ WIPO, Glossary of Key Terms, supra note 57, p. 16. For examples of wider definitions in national legislation that include families and farmers, see Antons, ‘Asian Borderlands’, supra note 15.

⁶⁶ For a critical perspective, see Sonia Smallacombe, ‘On Display for its Aesthetic Beauty: How Western Institutions Fabricate Knowledge about Aboriginal Cultural Heritage’, in Duncan Ivison, Paul Patton and Will Sanders (eds.), *Political Theory and the Rights of Indigenous Peoples*, Cambridge: Cambridge University Press, 2000, pp. 152-162; Peter Sutton, *Native Title in Australia: An Ethnographic Perspective*, Cambridge: Cambridge University Press, 2003, p. 22; Jeffrey Sissons, *First Peoples: Indigenous Cultures and Their Futures*, London: Reaktion Books, 2005, pp. 37-59.

actualise rights.’⁶⁷ Representatives at the WIPO IGC have further asked questions as to who would determine what was characteristic and at which stage that would be done (see, for example, the comments by the French representative and the representative of the Saami Council).⁶⁸

The IWG has tried to avoid the discussion about ‘characteristic’ or ‘authentic/genuine’ and initially proposed the following: ‘Protection shall extend to any traditional cultural expression or expression of folklore which is the unique product of an Indigenous people or local community and belongs to that people or community as part of their cultural identity or heritage.’ The proposal has been rightly criticised because of the difficulties it could create where TCEs are shared by several local communities.⁶⁹ For many forms of TCEs it is not only quite common, but even the norm that they are shared by several neighbouring communities that have influenced each other over centuries.⁷⁰ Comments on the Draft Principles in fact correctly acknowledge that TCEs do not have to be unique but are rather ‘the products of cross-cultural exchange and influence and intra-cultural exchange, within one and the same people whose name or designation may vary on one side or another of a frontier’.⁷¹ Perhaps in recognition of these difficulties the current draft Article 1.3 provides that the specific choice of terms should be determined at the national, sub-regional and regional levels. The term ‘unique’ further seems to be too close to the copyright concept of originality. This is not helpful, because the relative lack of originality of many TCEs is precisely the reason for the discussion of *sui generis* TCE laws. Similar objections can be raised against the requirement that the TCE ‘belongs’ to a people or community. In the latest version tabled at the Eighteenth Session of the IGC, both terms have been bracketed and the more general terms ‘indicative of a people or community’ and ‘used and developed by that people or community’ have been introduced.⁷²

There is further still some confusion with regards to the role of individuals in TCE protection and the relationship of TCE protection to copyright and other conventional IP rights. Protected in Draft Article 1 of the Revised Objectives and Principles are ‘the products of creative intellectual activity, including individual and communal activity’. In Article 1 of the IWG Draft, the reference to individuals has been deleted, but they are mentioned in Article 2 as potential beneficiaries and Article 1 refers to Article 2 for that matter. Many statements at the Seventeenth Session of the IGC stressed the collective nature of the expressions.⁷³ In this view, individuals can benefit, therefore, only indirectly as members of their respective communities. The commentary on Draft Article 1 of the Revised Principles focuses on the control of the material by the

⁶⁷ J.K. Cowan, M.B. Dembour and R.A. Wilson, ‘Introduction’, in: J.K. Cowan, M.B. Dembour and R.A. Wilson (eds.), *Culture and Rights: Anthropological Perspectives*, Cambridge: Cambridge University Press, 2001, pp. 10-11, 19.

⁶⁸ WIPO, *Report*, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fifteenth Session, Geneva, December 7 to 11, 2009, WIPO/GRTKF/IC/15/7 of 14 May 2010, p. 34.

⁶⁹ See the comments by Silke von Lewinski, WIPO, *Draft Articles*, supra note 61, p. 3.

⁷⁰ For cross-cultural and cross-border influences due to trade, colonisation and warfare in Southeast Asia see Anne Richter, *Arts and Crafts in Indonesia*, San Francisco: Chronicle Books, 1994; Rens Heringa and Harmen C. Veldhuisen, *Fabric of Enchantment: Batik from the North Coast of Java*, Los Angeles: Los Angeles County Museum of Art, 1996; James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia*, New Haven and London: Yale University Press, 2009. See also the comments by the representative of the Tulalip Tribes in WIPO, *Draft Report*, Seventeenth Session, supra note 62, p. 18.

⁷¹ WIPO, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Seventeenth Session, Geneva, December 6 to 10, 2010, WIPO/GRTKF/IC/17/4 of 21 September 2010, p. 9.

⁷² WIPO, *The Protection of Traditional Cultural Expressions: Draft Articles*, supra note 47, p. 4. These changes were proposed by India during the Seventeenth Session of the IGC, see WIPO, *Draft Report*, Seventeenth Session, supra note 62, p. 14. See however, on the same page, also the criticism of the US.

⁷³ See for example the statements made by the delegations of Egypt, Trinidad and Tobago and the representative of the Indian Council of South America (CISA), WIPO, *Draft Report*, Seventeenth Session, supra note 62, pp. 12-13, 14, 17. Different, however, the delegation of Canada, p. 20 of the *Draft Report*.

community. It explains that the individual plays a central role in the development and re-creation of TCEs, but to recognise a TCE it is not relevant whether it was made collectively or by an individual. The commentary continues to explain that:⁷⁴

even a contemporary expression made by an individual ... can be protected as TCE/EoF, provided it is characteristic of a community's cultural and social identity and heritage and was made by the individual having the right or responsibility to do so in accordance with the customary law and practices of that community.

This understanding of the individual's roles throws up several urgent questions: what will happen to cultural expressions at the intersection of TCE and modern art, for example the cultural expressions of 'urban Aborigines' or of artists and artisans in Diaspora. The Delegation of the United States correctly pointed out that TCEs were only alive when carried in people.⁷⁵ The commentary provided by the IGC allows the conclusion that in practice only traditionally produced material would be covered, where production and motives are still strongly governed by customary laws. That may be realistic for some Aboriginal communities, where customary laws are still strong. However, it is a less realistic notion for many local communities in modernising developing countries, where customary laws co-exist with many other modernising influences. 'Tribal arts' here often co-exist with the 'court arts' of a feudal past and of the most powerful ethnic groups in the country and it is often this 'court art' that becomes symbolically prominent in the creation of a new national culture.⁷⁶ Cultural expressions that are of interest for the creation of 'national culture' are, therefore, equally if not more threatened, but perhaps no longer 'traditional' enough to be protected as TCE. For Aboriginal societies, the current draft means that 'tribal' culture is favoured over urban minority cultures.⁷⁷ However, in cases of mixed urban and traditional styles, when exactly is a cultural expression traditional enough to qualify as TCE and who will decide this issue?

Further, if the focus on TCEs under customary law is retained, there is the possibility of overlap with copyright law in particular in countries with relatively low requirements regarding the standard of originality. The delegations of the Republic of Korea and of Norway raised this issue in commenting on Draft Article 1 of the Revised Objectives and Principles.⁷⁸ This overlap possibility with copyright exists in particular, because Draft Article 3 mentions also adaptations as protected by a future TCE law. The delegations of Australia and Japan also raised the potential impact of such a broad control via *sui generis* TCE legislation on the public domain. To some extent, a currently bracketed Article 5.4 (b) on exceptions and limitations proposes a solution. It attempts to secure a general exception for 'the creation of an original work of authorship by the beneficiaries or in association with them inspired/borrowed by traditional cultural expressions.'

⁷⁴ WIPO, Revised Objectives and Principles, *supra* note 74, p. 14.

⁷⁵ *Ibid.*, p. 16. See also Antons, 'Traditional Knowledge and Intellectual Property Rights in Australia and Southeast Asia', *supra* note 41, p. 49. On individual versus collective rights in heritage protection more generally see also Gillman, *supra* note 2, pp. 28-30. On ownership and possession with regards to indigenous artefacts, see Prott and O'Keefe, *supra* note 55, pp. 314-315.

⁷⁶ Erik Cohen, *The Commercialized Crafts of Thailand: Hill Tribes and Lowland Villages*, Honolulu: University of Hawai'i Press, 2000; Robyn J. Maxwell, *Textiles of Southeast Asia: Tradition, Trade and Transformation*, Hong Kong: Periplus Editions, 2003; Antons, 'Traditional cultural expressions and their significance for development', *supra* note 5, p. 294.

⁷⁷ Smallacombe, *supra* note 69, p. 155.

⁷⁸ WIPO, *Revised Objectives and Principles*, *supra* note 74, p. 17

4.2. The Beneficiaries of Protection and Their Role in the Management of Rights

It seems that the discussion about the beneficiaries proceeds somewhat differently in settler societies with large Aboriginal minorities like the US, Canada, Australia and New Zealand, on the one hand, and in young post-colonial nation states in the developing world, on the other hand. Although there is much debate about the details, settler societies with a relatively young history of colonisation and with relatively distinct Aboriginal cultures have felt a strong need to initiate a process of reconciliation, for which there is broad support in mainstream society. Aboriginal groups in such societies push for greater recognition of their rights and for a certain degree of self-determination. As pointed out by Graber,⁷⁹ the discussion in international human rights law on the status of Article 1 of the Convention on Civil and Political Rights and the distinction between 'peoples' in Article 1 and 'minorities' in Article 27 is of extreme importance here. Until recently, such debates were regarded as inappropriate in many developing countries in Asia, Africa and the Caribbean. With a few exceptions, the view here is usually that the entire population of the country is Indigenous or that there are no identifiable Indigenous people and that it would not be appropriate and not practical to differentiate among the population in accordance with time of arrival in a particular territory. The traditional communities producing TCEs are regarded as local (if relatively close to mainstream society) or as tribal (if living relatively isolated). This leads to a tendency to think of folkloristic expressions as 'national folklore' and as 'property of the nation'. The disregard of community interests is justified with the reasoning that local communities are so close to mainstream society that they become integrated in the greater national context, whereas tribal communities are regarded as backward and in need of assimilation to mainstream society. In both cases, the rights of such communities are seen as not deserving any special protection.⁸⁰

An international movement of Indigenous peoples has recently started to change this state of affairs. In addition to formal international conventions, this international movement has also aimed at informal cooperation between groups and communities with similar problems. 'Indigenism', as this development has been termed,⁸¹ goes back to the 1960s when Indigenous *Sami* from Scandinavia began to stress similarities with North American Indians.⁸² Cooperation intensified in the early 1970s, international conferences were organised and the World Council of Indigenous Peoples was established in 1975.⁸³ In 1982, the UN Working Group on Indigenous Populations within the UN Economic and Social Council was formed. The UN framework considerably extended the Indigenous movement and widened the debate from the issue of

⁷⁹ Supra note 3, p. 12. On the importance of this distinction more generally, see Robert Paine, 'Aboriginality, Multiculturalism and Liberal Rights Philosophy', *Ethnos*, Vol. 64:3, 1999, pp. 325-349.

⁸⁰ For relevant government policies in Southeast Asia see the contributions in Christopher R. Duncan, *Civilizing the Margins: Southeast Asian Government Policies for the Development of Minorities*, Ithaca and London: Cornell University Press, 2004; Prasit Leepreecha, Don McCaskill and Kwanchewan Buadaeng, *Challenging the Limits: Indigenous Peoples of the Mekong Region*, Chiang Mai: Mekong Press, 2008; Geoffrey Benjamin, 'On Being Tribal in the Malay World', in Geoffrey Benjamin and Cynthia Chou (eds.), *Tribal Communities in the Malay World: Historical, Cultural and Social Perspectives*, Singapore-Leiden: Institute of Southeast Asian Studies-International Institute for Asian Studies, 2003, pp. 7-76. See also the statements of the delegations of China, Egypt and Morocco in WIPO, Draft Report, Seventeenth Session, supra note 62, pp. 22-23.

⁸¹ Niezen, supra note 31.

⁸² Henry Minde, 'The Challenge of Indigenism: The Struggle for Sami Land Rights and Self-Government in Norway 1960-1990' in Svein Jentoft, Henry Minde and Ragnar Nilsen (eds) *Peoples: Resource Management and Global Rights*, Delft: Eburon Academic Publishers, 2003, p. 79; Anna Lowenhaupt Tsing, 'Adat/Indigenous: Indigeneity in Motion', in Carol Gluck and Anna Lowenhaupt Tsing (eds.), *Words in Motion: Toward a Global Lexicon*, Durham-London: Duke University Press, 2009, pp. 54-58.

⁸³ Sissons, supra note 69, pp. 21-23; Ken S. Coates, *A Global History of Indigenous Peoples*, Houndmills, Basingstoke-New York: Palgrave Macmillan, 2004, pp. 1-15.

Indigenous people in settler states to self-determination and recognition of marginalised minorities more generally. The founders of the international movement of Indigenous people were now joined by ethnic communities from Asia and Africa.⁸⁴ Many of the groups that now began to attend Working Group meetings came from countries in which 'Indigenous peoples' were not officially recognised. The anthropologist Jeffrey Sissons criticized that this led to the 'possibility for almost any people with a subsistence based culture to claim membership in international indigenous forums'.⁸⁵

For many people, the adoption by the United Nations General Assembly of the Declaration on the Rights of Indigenous Peoples in September 2007 seemed to herald a new era.

However, if one reads the declarations made and statements given by various national representatives in explanation of their votes, it soon becomes clear that the old attitudes have not really changed. Bangladesh criticised the lack of a clear definition of 'Indigenous people' and abstained from voting.⁸⁶ India voted in favour of the Declaration, but provided its own definition, drawn from the earlier ILO conventions. Accordingly,

indigenous rights pertained to peoples in independent countries who were regarded as indigenous on account of their descent from the populations which inhabited the country... at the time of conquest or colonization or the establishment of present State boundaries and who... retained some or all of their socio-economic, cultural, and political institutions.

Thus, this interpretation means again that the entire population of India with roots going back to pre-colonial times is Indigenous. 'Indigenous' is, therefore, 'Indigenous Indian' as opposed to foreign elements introduced during colonial rule. The representative of Indonesia explained that 'given the fact that Indonesia's entire population at the time of colonization remained unchanged, the rights in the Declaration accorded exclusively to indigenous people and did not apply in the context of Indonesia'.⁸⁷

In spite of the non-binding nature of the Declaration, some analysts believe that there is reason for optimism and that some governments such as that of Indonesia are slowly changing their position.⁸⁸ The emergence of new representative organisations such as Indonesia's AMAN (Alliance of Indonesian *Adat* Communities)⁸⁹ seems to confirm this view. Once established such organisations seek to confirm territory occupied by Indigenous peoples under customary law but not recognised by the state via participatory mapping projects.⁹⁰ Arguments about cultural recognition and customary law thus may swiftly turn into debates about territory and land. This has the potential to come into conflict with the prerogatives of state planning for economic development and with government ministries responsible for example for forestry. Under the circumstances, it remains to be seen how far governments such as Indonesia are prepared to go in recognising rights and a degree of self-determination.

⁸⁴ See for example the conference on *Reclaiming Balance: Indigenous Peoples, Conflict Resolution and Sustainable Development*, held in Manila in 2000 with representatives from Africa, Asia, Latin and Central America, the Middle East, North America and the Pacific, in Victoria Tauli-Corpuz and Joji Cariño (eds.), *Reclaiming Balance: Indigenous Peoples, Conflict Resolution & Sustainable Development*, Baguio City, Tebtebba Foundation, 2004.

⁸⁵ Sissons, above note, p. 17.

⁸⁶ General Assembly GA/10612, 13 September 2007, at <<http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>> (last accessed on 30 October 2007), p.11.

⁸⁷ *Ibid.*, pp. 12–13.

⁸⁸ Gerard A. Persoon, 'Being Indigenous' in Indonesia and the Philippines', in: Christoph Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, Alphen aan den Rijn: Kluwer Law International, 2009, pp. 195–216.

⁸⁹ *Adat* is the commonly used term for customary law in Indonesia. For a detailed discussion see Lowenhaupt Tsing, *supra* note 85, pp. 40–64.

⁹⁰ Evi Mariani, 'Mapping home and hoping for recognition' *Jakarta Post*, 17 July 2010.

The attitude of governments towards questions of national unity, multiculturalism, Aboriginality and the recognition of minority and/or indigenous rights is, therefore, a crucial factor in the discussion about potential beneficiaries of any form of TCE protection. Differences about national policy priorities in this regard can be expected between national governments concerned about national unity and a unified administration of rights and representatives of Indigenous and local communities in favour of greater decentralisation and local powers for decision-making and resource allocation. These differences become clear if one examines the amendments suggested to the latest version of the Revised Objectives and Principles.⁹¹ Article 2 of the draft defines the beneficiaries. While the original draft of the article spoke simply of 'traditional cultural expressions/expressions of folklore', the delegation of Morocco proposed to add the word 'national'. It reminded the IGC during the Sixteenth Session of the term 'national' folklore and thought that there should also be 'national' TCEs.⁹² The same proposal came also from Egypt, which argued that there was only one single community and cultural harmony in the country.⁹³ Similar broad definitions focusing on the nation instead of on Indigenous communities have also been proposed by Caribbean nations such as Barbados and Jamaica.⁹⁴ The 'national folklore' that played such a prominent part in the Tunis Model Copyright Law is, therefore, back on the agenda. Similarly, while the draft principles spoke of 'indigenous peoples and traditional and other cultural communities' as beneficiaries, Iran proposed to add 'individual groups, families, tribes, nations' to the definition arguing that national legislation in this regard was important and could not be ignored. Here too, Morocco suggested to add 'the nation', because the term 'traditional communities' was much too broad and should be defined in a clearer and more precise way.⁹⁵

Indonesia in its comments also stressed the role of the government. Governments should be mentioned as facilitators of TCE/EoF protection, the government should be the beneficiary if TCE owners could not be identified and the local government should be responsible to identify relevant TCE owners. Indonesia regarded the role of the state as facilitating the protection of the community, although this could be extended further to the role of right holder, but 'only if it benefited the communities'.⁹⁶

The second part of Article 2 provides two sets of eligibility criteria. The previous draft required from beneficiaries, in the first set of criteria, to be entrusted with the custody, care and safeguarding of TCEs in accordance with their customary law and practices. Criticised here as problematic are the notion of being 'entrusted' in accordance with 'customary law and practices'. The delegation of India and a representative of the Arts Law Center pointed out that evidence for 'being entrusted' could be difficult to provide and that this should be presumed.⁹⁷ Also, in view of the difficulties to document and provide evidence of customary law, it was better to speak of 'customary law or practices'.⁹⁸

In the second set of criteria, beneficiaries were required by the previous draft to maintain, use or develop the TCEs/EoFs as being characteristic of their cultural and social identity and cultural heritage. Amendments suggested here include the notion of 'control' by the community,

⁹¹ WIPO, Revised Objectives and Principles, *supra* note 74, p. 20.

⁹² WIPO, IGC, Sixteenth Session, *Draft Report*, WIPO/GRTKF/IC/16/8 Prov. 2 of 30 September 2010, pp. 36-37.

⁹³ *Ibid.*, p. 46.

⁹⁴ WIPO, Draft Report, Seventeenth Session, *supra* note 62, pp. 13 and 17.

⁹⁵ WIPO, Revised Objectives and Principles, *supra* note 74, p. 20.

⁹⁶ *Ibid.*, p. 22.

⁹⁷ WIPO, Draft Report, Seventeenth Session, *supra* note 62, p. 19.

⁹⁸ WIPO, Revised Objectives and Principles, *supra* note 74, p. 23. On the difficulties of reviving customary laws see also Martin Chanock, 'Branding Identity and Copyrighting Culture: Orientation towards the Customary in Traditional Knowledge Discourse', in: C. Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, Alphen aan den Rijn: Kluwer Law International, 2009.

although this was criticised in the Intersessional Working Group as prejudicial to the rightful beneficiaries, because in reality most communities were not in a position to control use and exploitation of their TCEs and this was precisely the reason for the discussion over special instruments.⁹⁹ The other amendment to the second set of criteria concerns the requirement that TCEs must be characteristic of the beneficiaries' cultural and social identity and cultural heritage, which the delegation of Brazil wanted to replace with 'authentic and genuine'.

The different views on the role of national authorities versus self-determination¹⁰⁰ are also visible from the streamlined and shortened version of the article that the IWG has drafted. In its first draft¹⁰¹, it provided two options: Option 1 listed 'indigenous peoples, local communities and cultural communities' as beneficiaries, whereas Option 2 was seeking to benefit generally 'peoples and communities' followed by the examples of 'indigenous peoples, local communities, cultural communities and/or nations'. There were also two options with regards to the laws and practices that are to govern the TCEs. Under Option 1, TCEs were entrusted or held simply in accordance with 'the relevant law and/or practices'. Under Option 2, the TCEs were held under 'their law and/or practices', which would be a reference to forms of customary/local laws, in particular if the first option of beneficiaries (that does not mention 'nations') was chosen.

In a similar process as with the Draft Principles, this Draft Article 2 has meanwhile been amended during the Seventeenth IGC session¹⁰², so that the first option in the first part now also includes 'nations' and (in brackets) 'individuals of those communities', whereas the second option has been enlarged by reference to 'individual groups and families and minorities'. The two alternatives in the second part have also been amended, so that it is now clear that 'law and/or practices' in the first option are 'the relevant national/domestic laws and/or practices'. In the second option, 'their laws and or practices' is now wider and 'including customary law and community protocols', so the importance of customary law has been reduced. As in the discussion of the Draft Principles, the widening of the concept to include 'nations', 'families' and 'minorities' and 'national laws' was advocated by delegations from countries like Indonesia, Iran, China, Egypt and Morocco.¹⁰³

The same issues returned in Article 4 of the Revised Provisions on Management of Rights. Prior authorisation to use (which Australia would like to replace with 'to do acts within the rights of indigenous peoples') in the previous version was meant to come directly from the community concerned where the community so wishes or from an agency acting at the request, and on behalf of the community. Here, the delegation of Mexico proposed to replace the term 'community' with 'indigenous peoples and communities and each of the groups, families, tribes, nations, traditional and other communities or countries' and with 'indigenous people and community or the traditional and other cultural communities or the nations' respectively.¹⁰⁴ The streamlined IWG Draft Articles would here simply refer back to the definition of beneficiaries in Article 2.¹⁰⁵ However, it triggered further discussions in the Seventeenth Session of the IGC with regards to the establishment of a national/competent authority responsible for the collection and distribution of benefits. Here again, delegations from countries like Iran and Algeria were favouring national approaches while representatives of Indigenous organisations supported by

⁹⁹ Intervention by Heng Gee Lim, WIPO, Record of Deliberations at the First Intersessional Working Group (IWG 1), WIPO/GRTKF/IC/17/INF/7 of 27 September 2010, p. 23, fn. 286.

¹⁰⁰ Graber, *supra* note 3, p. 5.

¹⁰¹ WIPO, Draft Articles on the Protection of Traditional Cultural Expressions/Expressions of Folklore Prepared at IWG 1, WIPO/GRTKF/IC/17/9 of 15 September 2010, p. 5.

¹⁰² WIPO, Draft Report, Seventeenth Session, *supra* note 62, Annex II, p. 5.

¹⁰³ WIPO, Draft Report, Seventeenth Session, *supra* note 62, pp. 19-23.

¹⁰⁴ WIPO, Revised Objectives and Principles, *supra* note 74, p. 35.

¹⁰⁵ WIPO, Draft Report, Seventeenth Session, *supra* note 62, Annex II, p. 10.

some national delegations were in favour of decentralised approaches focusing on communities. The delegation of the EU and its member states suggested supervision of the competent authority by WIPO, whereas the representative of Knowledge Ecology International (supported by the delegations of South Africa and the USA) proposed a more general obligation of transparency in the management of financial benefits.¹⁰⁶

The issue is likely to remain controversial. Representatives of Indigenous organisations have complained that they have no immediate input in the drafting process. They only participate as observers. While they are allowed to make contributions and proposals, they need to find the support of national delegations for their proposals, which otherwise will be dropped.¹⁰⁷ It is correct that some countries (such as Bolivia) have a strong representation of the Indigenous population among the political elite.¹⁰⁸ Such countries, however, are the exception. If the wider version of the terminology, including nations, families etc., prevails, the discussion will continue at the national level, in particular in young postcolonial nation states that provide only very limited recognition for Indigenous or local community rights. If the gap between national and local interests is too wide, there is a chance that the protection remains unimplemented or that Indigenous and/or local communities disengage, because they find that there is too little to gain from the system.¹⁰⁹ The findings of a Ford Foundation project carried out in Indonesia by a team of lawyers and anthropologists also seems to support this view.¹¹⁰

Similarly as with the notion of 'unique' TCEs 'belonging' to communities, it is equally important for the identification of beneficiaries to recall the relatively permissive boundaries of ethnic communities and their territories in particular in many developing countries. Communities here frequently live on both sides of borders that were drawn by colonial powers or postcolonial nation states without their involvement.¹¹¹ Thus, the 'relevant laws and/or practices' of the WIPO IWG may well be the laws of several countries or provinces. As a result, there have recently been a number of cross-border disputes about cultural heritage and intellectual property across the borders of Southeast Asian countries such as Indonesia and Malaysia.¹¹² The concept of cultural property that is now frequently used by communities and by nation states for claims based on tradition and identity has its origin in UNESCO Conventions such as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. However, since the drafting of this Convention in 1970, the concept has expanded from the repatriation of tangible cultural objects to include intangible subject matter as is evidenced by the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage of 2003.¹¹³ It has further been expanded from a

¹⁰⁶ *Ibid.*, pp. 28-30

¹⁰⁷ See the clarification of the Chair, *Ibid.*, p. 12.

¹⁰⁸ Graber, *supra* note 3, p. 10.

¹⁰⁹ See also Christoph Beat Graber's explanation of the importance of procedural fairness, *supra* note 3, p. 14.

¹¹⁰ Peter Jaszi, *Traditional Culture: A Step Forward for Protection in Indonesia*, Washington College of Law Research Paper No. 2010-16, Washington: American University Washington College of Law, 2010; Lorraine V. Aragon and James Leach, 'Arts and Owners: Intellectual property law and the politics of scale in Indonesian arts', *American Ethnologist*, Vol. 35 Number 4, 2008, pp. 607-631.

¹¹¹ Thongchai Winichakul, *Siam Mapped – A History of the Geo-Body of a Nation*, Honolulu: University of Hawai'i Press, 1994; Grant Evans, *A Short History of Laos: The Land in Between*, Chiang Mai: Silkworm Books, 2002; Søren Ivarsson, *Creating Laos: The Making of a Lao Space between Indochina and Siam, 1860-1945*, Copenhagen: NIAS Press, 2008.

¹¹² Stephen Fitzpatrick, 'Malaysia 'Steals' Bali Dance', *The Australian*, 26 August 2009; 'Malaysia Urges Indonesia to Drop Plans to Sue over Folk Song', *Jakarta Post*, 8 October 2007; Christoph Antons, 'What is "Traditional Cultural Expression"?', *supra* note 13, p. 54; Christoph Antons, 'The International Debate about Traditional Knowledge and Approaches in the Asia-Pacific Region', *supra* note 32, pp. 113-114; Christoph Antons, 'Traditional knowledge in Asia: Global agendas, local subjects', *supra* note 32, pp. 74; Antons and Antons-Sutanto, *supra* note 66, pp. 382-383.

¹¹³ Logan et. al., *supra* note 26, p. 6.

concept relevant for state parties¹¹⁴ of the convention to include first nations and Indigenous communities. This increases the likelihood of conflicts between communities and across borders, because different from the tangible national treasures of previous heritage protection, the current intangible cultural heritage including knowledge and skills can be held simultaneously by many people in different places and on different sides of borders. Governments that have mixed intellectual and cultural property introduce the state focus of the previous heritage concept into intellectual property laws such as copyright and they put the national government in charge of such rights.¹¹⁵ With cultural/intellectual property then subject to national regulation, it has the potential to generate disputes between neighbouring nation states and communities with identical claims to culture.

As a way forward, Christoph B. Graber suggests in cases of such disputes a WTO Commission to verify and formally adopt decisions about TCEs made at community level.¹¹⁶ Easier to establish may be an agency at regional level, for example in the context of ASEAN, SAARC, Mercosur, ARIPO or OAPI. At least, this will ensure that regional cross-border issues about similar forms of heritage and cultural property are addressed first, before the discussion moves to the international level. Success at this level might be greater, although Indigenous groups will have to ensure representation in such a regional model.

4.3. The Scope of Protection and Exceptions/Limitations

Yet another still contentious area is the scope of protection and the extent to which exceptions and limitations should apply. The scope of protection is regulated in Draft Article 3 of the Revised Principles and Objectives in a layered manner.¹¹⁷ It gives holders of registered TCEs 'of particular value or significance' the rights to prevent forms of use that may affect their economic and moral rights, to prevent the use of signs, names and symbols for commercial purposes and as a kind of trade mark and to prevent the illegitimate fixation, representation, publication, communication or use of TCEs. For non-registered TCEs, it seeks to guarantee moral rights such as attribution and prevent passing off and some form of remuneration or benefit-sharing, where the use is for 'gainful intent'. Finally, for secret TCEs, Draft Article 3 seeks to guarantee prevention of disclosure.

The representatives of Indigenous organisation such as the Sami Council have criticised that Draft Article 3 is worded in the negative instead of spelling out clearly the property rights of Indigenous peoples as right holders. They are also concerned about the registration/notification requirements that may well be impossible to observe for spiritual or cultural reasons and also because of concerns about unauthorised use.¹¹⁸ Finally, they take the view that benefit-sharing should not only apply where there was 'gainful intent'.¹¹⁹ The delegation of New Zealand agreed and proposed to consider alternatives to registration or registration systems that minimise risks. The delegation of Australia, on the other hand, expressed concern about the prohibition on the acquisition of IP rights over TCEs, which should actually still remain an option for individual Indigenous creators. It asked whether only the acquisition in unfair circumstances be covered. It also stressed the need to examine the impact on both Indigenous communities and the public domain of state claims to non-attributed TCEs. The USA was concerned about coverage of derivative works/adaptations and its impact on the public domain and freedom of expression of

¹¹⁴ Ana Filipina Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, Cambridge: Cambridge University Press, 2008, pp. 206-211.

¹¹⁵ Antons, *Asian Borderlands*, supra note 15, pp. 6-8; Antons, 'What is "Traditional Cultural Expression"?', supra note 15.

¹¹⁶ Graber, supra note 3, pp. 14-15.

¹¹⁷ WIPO, Revised Objectives and Principles, supra note, Annex, pp. 24-28.

¹¹⁸ WIPO, Draft Report, Sixteenth Session, supra note 96, p. 35. See also Graber, supra note 3, p. 5.

¹¹⁹ WIPO, Draft Report, Sixteenth Session, supra note 96, p. 42.

both people within Indigenous/local communities and others. The Delegation of India thought that there was a need to clearly recognise collective ownership and not just rights to prohibit and that mere equitable remuneration was inappropriate in view of the exclusive rights of the community, which should also have the right to assign a TCE rather than merely to give free, prior and informed consent.¹²⁰

The current streamlined version of Draft Article 3 by the IWG no longer mentions registration. It provides three alternatives. In the first alternative, secret TCEs are relatively uncontroversial and should receive the strongest protection against unauthorised fixation, disclosure, use, or other exploitation. Nevertheless, in the course of the Seventeenth Session of the IGC, this article again generated lengthy discussions about the beneficiaries. Some delegations requested again that 'nation' was added to Indigenous, local and cultural communities, whereas others wondered how nations could possibly hold secret traditional cultural expressions or the moral rights foreseen in Article C of the provision.¹²¹ The article now has a bracketed paragraph that beneficiaries shall only obtain equitable remuneration or benefit-sharing where a good faith/proven effort was made to locate them. Lack of acknowledgment of traditional sources in the view of some delegations should be excused where omission is dictated by the manner of use. The remaining two alternatives are streamlined versions of these principles.

The current Draft Article 5 on exceptions and limitations provides a copyright-style list of exceptions, which has in fact become longer in comparison to the Model Provisions. Apart from a relatively uncontroversial subsection 1 that is meant to ensure that communities themselves are not restricted in using their material, there was discussion at the Seventeenth Session of the IGC¹²² about a proposal by the USA, which made the exceptions subject to national law and introduced the 3-step-test for them. The proposal was opposed as too broad by some national delegations and representatives of Indigenous organisations. It received qualified support from EU member states, who also asked for a link between national/domestic legislation, on the one hand, and the Berne Convention and WIPO Copyright Treaty, on the other hand, in the parallel subsection 2. The delegation of New Zealand referred to difficulties experienced with the implementation of the 3-step-test in this context and proposed an alternative subsection 2 that focused on exceptions and limitations being compatible with fair practice and not being offensive and providing acknowledgment of Indigenous/local communities where possible

5. Conclusions

The protection of TCEs/EoF via the principles of intellectual property law has been on the negotiation agenda of international organisations such as UNESCO and WIPO for thirty-five years. Much progress has been made in understanding the nature of the material, the interests of the beneficiaries and the difficulties involved in protecting it. In the early days of the debate, governments in the developing world tended to see 'national folklore' as yet another potential element of the national development plans popular at the time. The various communities maintaining the cultural heritage were rarely mentioned. The potential differences between Indigenous/local individual creators and their communities were not paid attention to, because a paternalistic state was taking care of it all anyway. Copyright held or exercised by the national government or its agencies was the preferred mode of protection. In some countries, the national approach to copyright in folklore was further mixed with the cultural property principles drawn from the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import,

¹²⁰ *Ibid.*, pp. 38-42.

¹²¹ WIPO, Draft Report, Seventeenth Session, *supra* note 62, pp. 23-28.

¹²² *Ibid.*, pp. 30-33.

Export and Transfer of Ownership of Cultural Property, concluded in 1970. Mostly, the copyright approach to folklore seems not to have worked and provisions have often remained unimplemented or were not used by relevant communities.

The 1982 UNESCO/WIPO Model Provisions were a step forward, because they considered a *sui generis* approach and they acknowledged the role of individuals and communities producing the material. For the first time, they also foresaw the potential for communities to decide about appropriate forms of use by themselves rather than leave the decision to a 'competent authority' of the nation state. By the early 1990s, however, it was clear that none of these previous models had been particularly successful and that the Model Provisions had failed to gain the support of national governments.¹²³ In this situation, the TCE debate was revived, however, in the broader context of the debate about traditional knowledge related to biodiversity, medicine and agriculture, which had its roots in the Convention on Biological Diversity. Because of this context, the focus on Indigenous and local communities became now more widely accepted and it coincided with an increasingly strong international Indigenous movement. The new context also brought the concept of traditional knowledge as part of a much broader understanding of cultural heritage, of which TCEs are merely a sub-part. This holistic view of the subject matter is often advocated by human rights, environmental and cultural heritage lawyers, social scientists and Indigenous representatives, but also by some governments.¹²⁴

The WIPO IGC started with such a wide definition of the subject matter, but soon moved back to a more intellectual property inspired approach that distinguished again between TK and TCEs and the separate subset of genetic resources. After much preparatory work and collection of information, the IGC has now entered 'text-based negotiations' supported by intersessional working groups. TCEs are regarded as the 'most mature' subject matter. Since the economic interests and controversies about TCEs are comparatively limited, it may indeed be the best hope for the conclusion of a treaty. Obstacles remain, however. Many developed countries are still opposed to the conclusion of a binding treaty and they want further clarification of the concepts. This concerns, for example, the definition of the subject matter. While parties seem to have largely settled the debate about the TK/TCE divide, discussion continues about the questions how to define 'authenticity' and the role of individual creators vis-à-vis their communities.

Perhaps the most difficult issue is the division of roles between communities and state agencies with regards to the management of rights. Many governments in the developing world have difficulties in recognising the concept of 'Indigenous peoples' which they regard as divisive. Questions about the recognition of local or Indigenous communities are difficult political questions about decentralisation, self-determination, national unity and control over resources. Although many countries have signed the UN Declaration on the Rights of Indigenous Peoples, they have done this with many reservations. In view of the 'national folklore' proposals that some delegations have made during the IGC deliberations, it is unlikely that a treaty with a community focused definition of beneficiaries only will be concluded. Presumably, it will leave the choice to individual countries and many will opt for a centralised administration of TCEs. This could lead to conflicts at the regional and international level between states that claim the rights to TCEs of communities that live in fact on both sides of borders. The fusion of cultural property concepts and intellectual property laws leads to exaggerated claims in some developing countries that import the 'cultural patrimony' approach of cultural heritage laws into intellectual property. It remains important to bear in mind the relatively recent mapping of national territories in much of the developing world and that the strict enforcement of national and territorial borders is a recent phenomenon that is often not in accordance with cultural

¹²³ Halewood, *supra* note 7, p. 968.

¹²⁴ Graber, *supra* note 3, p. 20 fn. 95.

boundaries. Proposal for a supervisory role of the WTO or other international organisations may be difficult to implement, because of the entrenched interests of national governments, on the one hand, and Indigenous and local communities, on the other hand. TCEs are only a relatively minor part of the negotiation package of TK/TCE/GR and this diminishes the prospect of achieving solutions that strongly differ from those advocated for TK and GR. Some form of oversight at the regional level may have better prospects to succeed here.

Finally, the lessons from the introduction of intellectual property laws in the developing world over the past few decades must also be observed. Registration requirements, as useful as they may be to identify beneficiaries, create city-centred bureaucracies that may no longer be alien for local businesses, but that are far removed from the sphere of local and rural communities. Geographical indications and certification marks face similar problems but rural communities may overcome these in a collective manner, in which case such 'branding' of their TCEs can prove a very useful and simple manner of using the IP system. Equally, registration systems by regional organisation may be able to provide greater reliability than national systems and help to mitigate regional and international disputes over TCEs.

In sum, the thinking about intellectual property of TCEs has come a long way since the beginning of the debate in the 1960s. Whatever the outcome of the current negotiations, the perhaps biggest achievement at this stage is the enhanced respect and sensitivity for this material and its cultural context that in practical terms is slowly changing the attitudes of buyers and users of TCEs. The Indigenous struggle to gain greater recognition in nation-based solutions to the TCE issue from an economic perspective, however, is likely to continue for the foreseeable future. From the viewpoint of the governments of many developing countries, where traditions are still very much alive, it is appropriate that the international debate has been extended to include TK/TCEs used at the national level and by mainstream communities. From the point of view of many Indigenous representatives, however, this wider understanding of the subject matter and the beneficiaries works to the disadvantage of their specific concerns with regards to securing the survival of their traditional cultural expressions and the benefits from their use.