

“शिक्षा मानव को बन्धनों से मुक्त करती है और आज के युग में तो यह लोकतंत्र की भावना का आधार भी है। जन्म तथा अन्य कारणों से उत्पन्न जाति एवं वर्गगत विषमताओं को दूर करते हुए मनुष्य को इन सबसे ऊपर उठाती है।”

— इन्दिरा गांधी

“Education is a liberating force, and in our age it is also a democratising force, cutting across the barriers of caste and class, smoothing out inequalities imposed by birth and other circumstances.”

—Indira Gandhi

MIP-107

Trade Secrets, Competition Law and Protection of TCE

Block

3

IP AND PROTECTION OF TRADITIONAL CULTURAL EXPRESSION

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PRINT PRODUCTION

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D.R.P (MPDD)IGNOU

March,2017 (Reprint)

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© Indira Gandhi National Open University, 2013

ISBN-978-81-266-6385-9

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Further information on Indira Gandhi National Open University courses may be obtained from the University's office at Maidan Garhi, New Delhi-110 068.

Printed and published on behalf of the Indira Gandhi National Open University, New Delhi by Registrar, MPDD, IGNOU, New Delhi.

Lasertypesetted at Graphic Printers, 204, Pankaj Tower, Mayur Vihar, Phase-I, Delhi-110091.

Ptd. At: Millenium Offsets Pvt. Ltd, A-49, Naraina Indl. Area Phase - 1, N.D. - 110028

BLOCK 3 IP AND PROTECTION OF TRADITIONAL CULTURAL EXPRESSION

'Traditional Cultural Expression' potentially covers an enormous variety of customs, traditions, forms of artistic expression, knowledge, beliefs, products of production and spaces that originate in many communities throughout the world. TCE's or Traditional Cultural Expressions are integral to the cultural and social identities of indigenous and local communities. They embody know-how and skills, and they transmit core values and beliefs. This block on traditional cultural expression will try to explain all global and national issues related with.

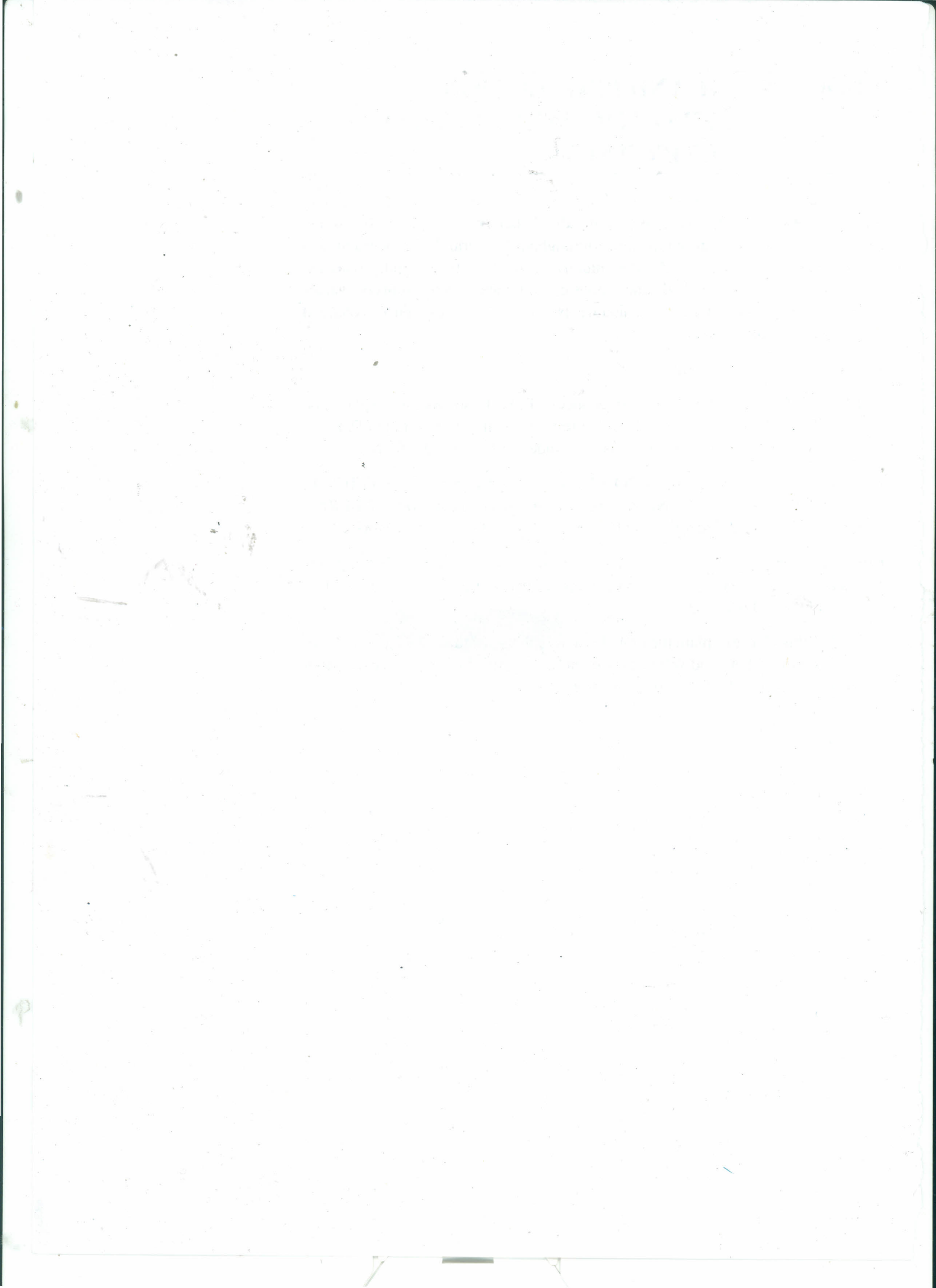
This Block consists of four units.

Unit 9 of this Course deals with the significance of TCE. It also deals and explains the fact why TCE should be protected. It further tries to explain the meaning to TCE and folklore. This unit also covers what could be included under the umbrella TCE.

Unit 10 of this course deals with WIPO, UNESCO and CBD in relation with TCE. In this unit topics like WIPO-UNESCO model provisions, provisions of BERNE Convention, Universal Declaration on Cultural Diversity 2001 etc are dealt with.

Unit 11 deals with the cement international efforts for the protection of TCE. It explains the guiding principle of WIPO-IGC, need for capacity building, documentation of TCE's, Creative Heritage Project, etc.

Unit 12 of this Course explain the global issues in the protection of TCE. It explain issues identified by IGC, and WIPO, the role and position of traditional and indigenous communities, TCE's and human right issues, etc.



UNIT 9 · SIGNIFICANCE OF AND REASONS FOR PROTECTING TCE

Structure

- 9.1 Introduction
- 9.2 Objectives
- 9.3 Reasons for the Debate on TCEs
- 9.4 Meaning of the Term 'TCEs'
- 9.5 Characteristics of TCEs
- 9.6 Subject Matter Covered under TCEs
- 9.7 Beneficiaries
- 9.8 Reasons for the Protection of TCEs
- 9.9 Goals for the Protection of TCEs
- 9.10 Relation with other IP Protection
- 9.11 Summary
- 9.12 Terminal Questions
- 9.13 Answers and Hints
- 9.14 References and Suggested Readings

9.1 INTRODUCTION

Transfer of knowledge is an important facet of globalisation which represents the worldwide networking of individuals, entities, societies, nations and supranational organisations. One of the key concerns generated by the globalised era is its impact on the language, culture and heritage of the various nations and communities of the world. The global marketplace has expanded rapidly and it has been realised that cultural diversity and the customs and ideas of indigenous cultures are assets worth fostering and cultivating. Culture is organic in nature and cultural heritage is always in a permanent form of production. Culture is reflected in everyday functioning of a person in varied forms which can be dressing style, eating habits and other various ways in which a person from a particular community interacts with the outer world. Various manifestations of traditional culture and cultural heritage are therefore often a source of creativity for indigenous, local and other cultural communities. Society plays an important role in the creation, distribution and preparation of folklore.

According to the archaeologist W.J.Thomson, who was the first one to use the term "folklore" in 1846, folklore is "the wisdom of the people". Folklore is probably the most important and well-acclaimed component of the cultural heritage of a nation. The folk identifies with the specific community whether it is tribal or non-tribal and lore specifies the collective knowledge or wisdom on a particular subject. The history of the world is longer than the history of modern legal systems. The indigenous and local communities all over the world have, over the centuries,

created a great deal of knowledge and there are various ways in which they express it to the world. Access to, use and handing down of these has been regulated mainly by local values, custom, traditions and laws. Traditional Cultural Expressions (TCEs) are often considered by communities as a single and indivisible part of their cultural heritage. Therefore, traditional and indigenous communities have long sought respect and recognition for their creative expressions ranging from stories, myths, folk tales, songs and music, to symbols, designs, paintings, sculptures, carvings, handicrafts, dances, and rituals. TCEs are now recognised as key elements of the well-being and sustainable development, as well as the cultural vitality, of the indigenous and traditional communities. TCEs are also seen as part of the “common heritage of humanity” in the sense that all humanity should share in their benefits.

Traditional music, designs, rituals, performances, oral narratives, names, symbols and signs communicate a community’s beliefs and values, reflect a community’s history, and define its cultural identity. TCEs, thus can be regarded as valuable cultural assets of the communities who maintain, practice and develop them. In India the elements of folklore exist in abundance in form of folk knowledge, folk performing art and non performing art, folk practices, folk literature. Folk Practices can be defined as day-to-day or occasionally practices of customs, beliefs, superstitions, rites and rituals, festivals, religious practices etc. There can be several Indian examples of the folk practices like some specific practices during festivals. Folk art implies broad category of the artistic depiction of a myth or folklore. Folk art can be further divided in to non-performing folk art and performing folk art. Folk non-performing arts include folk painting, sculptures, making of a variety of arts and crafts for several materials, body ornamentation through painting. Performing arts are broadly those art forms, where human body is used to enact a written or oral literature. Folk Performing arts include music, dance, drama, rhyming, theatre etc. Folk craft is the wider depiction of folk art in utility, decorative or ritualistic items. Looking at the history of Indian classical literature, Vedas can be classified as folk literature because they were the knowledge transmitted from one generation to another through speaking and hearing. It was much later in history that Vedas were written down.

WIPO uses the term “traditional cultural expressions” and “expressions of folklore” interchangeably. These terms were born from the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions in 1982. The term folklore was used in early discussions, but was replaced by the broader and more neutral term TCE in the international arena. The term “folklore” has sometimes been criticised as having something of a negative connotation, suggesting antiquated traditions to be recorded and remembered, rather than used or celebrated in modern life. Some nations, however, still prefer the term folklore or folk works, and use these terms in national copyright legislation. In these Units, the terms traditional cultural expressions and expressions of folklore have been used interchangeably and mainly the term traditional cultural expressions (TCEs) has been used.

WIPO is the main organisation where dialogue and discussions related to developing a legal framework are going on. Further, draft provisions on this area have emerged out of these discussions in WIPO IGC. Although, these draft provisions have no formal legal status, yet they cover in detail the perspectives and approaches that are guiding work in this area, and could suggest possible future frameworks for the protection of traditional cultural expressions. Traditional knowledge and

traditional cultural expressions are often seen as part of a single “integrated heritage.” Some early documents from the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Tradition Knowledge and Folklore (IGC) have even defined traditional cultural expressions as a subset of traditional knowledge. However, due to the specific legal and policy questions raised by traditional cultural expressions in the intellectual property context, WIPO has separate, work programs for traditional knowledge and traditional cultural expressions. These and other interesting aspects related to TCEs will be discussed in detail in the further Units.

9.2 OBJECTIVES

After reading this unit, you should be able to:

- explain the meaning of the term Traditional Cultural Expressions (TCEs);
- analyse the nature of TCEs;
- appreciate the objectives achieved through the protection of TCEs;
- describe the reasons for the protection of TCEs;
- describe the significance of TCEs;
- define as to what can be the subject matter of TCEs; and
- describe the goals to be achieved by protecting TCEs.

9.3 REASONS FOR THE DEBATE ON TCEs

TCEs are integral to the cultural and social identities of indigenous and local communities. They embody know-how and skills, and they transmit core values and beliefs. Products from folklore can also be economic assets as they are creations, manifestations and innovations that can be traded or licensed for income-generation. They may also serve as an inspiration to other creators and innovators who can adapt them and derive new creations and innovations. Unfortunately, however, too often cultural products have established significant market niches in industrialised countries, not benefiting adequately the countries of origin and their communities. It is pertinent to note that Article 7 of the TRIPS Agreement 1994 provides that the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. This should also happen in case of the TCEs and the cultural and traditional communities should also benefit from the commercial use of the TCEs.

There have been instances where the expressions and elements of folklore have been subjected to wide scale commercial exploitation without any economic benefit to the community who were the creators and preservers of the folklore. Further, in some cases minimal respect or regard was shown to the custodians of the folklore in the worldwide commercialisation process. As a progressive marketing strategy many of the exploiters have resorted to mass-scale distortion with the traditional expressions, thereby, hurting the cultural and social and even religious sentiments of the communities who had preserved the elements of folklore for centuries as their precious possessions. Increased recognition of the rights of indigenous peoples including the right to self-determination is also the reason as

to why there are more voices for protection of TCEs from misappropriation. TCEs depict and also are related with the biological diversity of the place where local community resides and thus the renewed debate on aspects of biological diversity in international arena is also the reason for debate on TCEs. The modern technology oriented networked era paves way for easy misuse and depiction of TCEs and there have been instances where commercial gains have been made by commercial organisations without any recognition and benefit to the local and traditional communities. The protection should act as a means of securing the diversity of TCEs and maintaining it for future generations. Thus the overarching goal of protection is related to the promotion of creativity, enhanced cultural diversity and the preservation of cultural heritage.

9.4 MEANING OF THE TERM 'TCEs'

There is still no international mandate for protection of TCEs, and there is great variation in the level of protection for indigenous and traditional works in national laws. There is still a lack of consensus internationally about the type of protection that would best apply universally to traditional works. This lack of consensus on these issues stems from the subjective and intricate nature of the expressions which can be covered under TCEs. Still there seems to be no agreed term for these expressions, although now a consensus is there in the on-going debates at international level for the term 'traditional cultural expressions'. Various terms have been used till now to describe such expressions, like:

- 'traditional cultural expressions'
- 'expressions of folklore'
- 'indigenous culture'
- 'intangible and tangible cultural heritage'
- 'indigenous heritage'

These terms potentially cover an enormous variety of customs, traditions, forms of artistic expression, knowledge, beliefs, products, processes of production and spaces that originate in many communities throughout the world. There is no widely accepted definition of them, since what is considered 'expressions of folklore' or 'traditional cultural expressions' depends upon the context and the purpose for which the definition is developed. Ultimately, the choice of an appropriate term and determination of what subject matter it covers is a question for decision at the local and national levels. Thus, there is not, at the present time, an agreed legal definition of TCEs because of the complex and subjective nature of TCEs depending on the region and the cultural community from which the definition originates.

Article 1 of the Draft Articles prepared by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 19th Session, Geneva, July 18 To 22, 2011 define traditional cultural expressions as: "Traditional cultural expressions" are any form, tangible or intangible, or a combination thereof, in which traditional culture and knowledge are embodied and have been passed on from generation to generation, tangible or intangible forms of creativity of the beneficiaries, as defined in Article 2 including, but not limited to:

- a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, [signs,] names, [and symbols];

- b) musical or sound expressions, such as songs, [rhythms,] and instrumental music, the sounds which are the expression of rituals;
- c) expressions by action, such as dances, plays, ceremonies, rituals, rituals in sacred places and peregrinations, [sports and [traditional]] games, puppet performances, and other performances, whether fixed or unfixed;
- d) tangible expressions, such as material expressions of art, [handicrafts,] [works of mas,] [architecture,] and tangible [spiritual forms]; and sacred places.]

The social process of learning and sharing knowledge, which is unique to each indigenous culture, lies at the very heart of its 'traditionality'. The term "traditional" does not mean "old" but rather it implies that the cultural expressions derive from or are based upon tradition, identify or are associated with an indigenous or traditional people and may be made or practised in traditional ways. Thus the word "traditional" signifies the social processes by which TCEs are created, developed and maintained. Due to these social processes, TCEs are regarded as collectively "owned", even though at some point an individual or individuals played a role in their development. The essence of a TCE/expression of folklore is that it represents, identifies and is recognised as characteristic of the traditional heritage of a particular community. This suggests that, to be protectable, TCE subject matter should be "characteristic" of a distinct traditional heritage of a particular community. The life styles and traditions of the folk are characterised by a common heritage. TCEs are the product of the creative ideas of the people who express such creativity through verbal, artistic or material forms, and this in turn is transmitted orally or in written form or through some other medium from one generation to another.

Traditional Cultural Expressions have a symbiotic relationship with society as they cause changes in the society and the social changes also effect and modify the traditional cultural expressions. Consequently, the nature of TCEs has been transforming over the ages.

9.5 CHARACTERISTICS OF TCEs

The term traditional cultural expression is used by the international legal community to refer to works of indigenous peoples and traditional communities, but the term does not have a precise definition. Because of the difficulty in arriving at a single definition of traditional cultural expression, it has become the practice to refer to characteristics and general criteria of TCEs. Though it is difficult to define TCEs, yet there are peculiar characteristics of the TCEs which can be listed as:

- TCEs are integral to the cultural and social identities of indigenous and traditional communities and therefore reflect a community's cultural and social identity.
- TCEs are said to be expressions of community's knowledge and consist of characteristic elements of a community's heritage.
- TCEs are often created for spiritual and religious purposes.
- TCEs are generally made by authors unknown and/or by communities and/or by individuals communally recognised as having the right, responsibility or permission to do so in accordance with the customary law and practices of that community.
- TCEs are handed down from one generation to another, either orally or by

imitation, which depicts oral nature of traditional cultural expressions and the oral transmission of those cultural expressions.

- TCEs are constantly evolving, developing and being recreated within the community, there by depicting the intergenerational nature of traditional cultural expressions.
- TCEs transmit core values and beliefs and embody know-how and skills and thus can be regarded as cultural and economic assets of the community.
- The importance of social milieu in defining traditional cultural expressions cannot be ignored. Social milieu has been identified as an important factor in defining traditional cultural expressions since such expressions have been considered to be unique to given locations, traditional communities and societies.

Thus, TCEs depict an extremely complex reality whose limits are difficult to define.

In developing countries and amongst indigenous groups in industrialised countries, folklore is generally regarded as communally rather than individually possessed. For those traditional communities, the proprietorial notion of folklore refers to a shared sense of responsibility, identity, and custodianship rather than ownership of folklore. TCEs are also not static but a highly dynamic, living system, which is constantly in process of innovation, creation and recreation.

9.6 SUBJECT MATTER COVERED UNDER TCEs

TCEs relate to cultural and social identities of indigenous and local communities. They are important because they are perceived as valuable sources of identity, creativity and diversity. As such, they are primarily recognised as forming the intangible component of cultural or natural heritage and they embrace various types of works and expressions including art, music, designs, names, signs and symbols, performances, architectural forms, handicrafts and narratives.

Depending on the form of expression TCEs can be divided into four groups:

- a) verbal expressions, such as: legends, folk stories and poetry;
- b) musical expressions, such as: folk songs and instrumental music;
- c) expressions by action, such as: dances, plays and shows;
- d) tangible expressions, such as: productions of folk art, especially drawings, paintings, sculptures, pottery, jewels, costumes, musical instruments as well as architectural works.

Handicrafts which are a form of tangible cultural expression clearly exemplify the benefits of combining tradition with creativity. Handicrafts are viewed as both traditional and contemporary, in keeping with the view that traditional cultural expressions reflect a living culture and evolve despite being based on traditional forms and know-how. This shows the ability of many tradition-bearing communities to combine tradition with the influences and cultural exchanges characteristic of modernity for the purpose of maintaining their identity and improving their social and economic circumstances.

They include:

- Tangible expressions such as drawings, designs, paintings, including body painting, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, baskets, needlework, textiles, glassware, carpets, costumes, musical instruments;
- Intangible expressions reflecting traditional thought forms;
- Verbal expressions or symbols such as stories, tales, epics, legends, poetry, riddles, etc.;
- Musical expressions such as songs, instrumental music;
- Expressions by action such as dances, plays, ceremonies, rituals, other performances;
- Architectural forms.

Thus, expressions of traditional culture may be either:

- a) intangible,
- b) tangible or,
- c) a combination of the tangible and intangible.

TCEs most usually are a combination of tangible and intangible cultural expressions. An example of such a 'mixed expression of folklore' would be a woven blanket (a tangible expression) that expresses elements of a traditional story (an intangible expression). TCEs for IP purposes include both tangible and intangible components. A separation between the two is artificial, as it may be said that tangible expressions are the 'body' and intangible expressions the 'soul'.

The subject matter for the protection as given in Article 1(2) of the Draft Articles, prepared by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 19th Session, Geneva, July 18 to 22, 2011, is given as:

Protection [shall] should extend to any traditional cultural expression which is the unique / indicative / characteristic product of a people or community, including an indigenous people or local community and cultural communities or nations as defined in Article 2, and belongs to is used and developed by that people or community as part of their cultural or social identity or heritage. Protected traditional cultural expressions shall be:

- a) the products of creative intellectual activity, including communal creativity;
- b) indicative of authenticity/being genuine of the cultural and social identity and cultural heritage of indigenous peoples and communities and traditional and other cultural communities; and
- c) maintained, used or developed by nations, states, indigenous peoples and communities and traditional and other cultural communities, or by individuals having the right or responsibility to do so in accordance with the customary land tenure system or law / customary normative systems or traditional/ancestral practices of those indigenous peoples and communities and traditional and other cultural communities, or has an affiliation with an indigenous/traditional community.

UNESCO, for instance, provides the following examples of the TCEs from across the world:

- the oral traditions and expressions of the Aka Pygmies of Central Africa;
- the Hudhud Chants of the Ifugao in the Philippines;
- performing arts like the Royal Ballet of Cambodia;
- social practices, rituals and festive events like the carnival of Binche in Belgium;
- the Indigenous Festivity Dedicated to the Dead in Mexico;
- the Vanuatu Sand Drawings;
- traditional craftsmanship like Woodcrafting of the Zafimaniry in Madagascar.

Self Assessment Question

(Spend 3 minutes)

1) Briefly enumerate the characteristics of traditional cultural expressions?

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9.7 BENEFICIARIES

As has been the case with the definition of TCEs, there is no universally accepted definition of the beneficiaries in context of TCEs. However, it has been argued by many stakeholders that traditional cultural expressions are generally regarded as collectively originated and held, so that any rights and interests in such cultural expressions should vest in communities rather than individuals. Some national and regional laws for the protection of traditional cultural expressions provide rights directly to concerned peoples and communities. In some jurisdictions there are instances of vesting rights in a governmental authority, often providing that proceeds from the granting of rights to use the traditional cultural expressions shall be applied towards educational, sustainable development, national heritage, social welfare or culture related programs.

Article 2 of the Draft Articles prepared by IGC for 19th session, Geneva, July 18 To 22, 2011, provides two options in regard to the type of beneficiaries for whom measures for the protection of traditional cultural expressions should be there. Option 1 includes indigenous peoples, communities and nations, local communities and cultural communities and individuals of those communities as beneficiaries. Option 2 enumerates peoples and communities, for example including indigenous peoples, communities, local communities, cultural communities, and/or nations, and individual groups and families and minorities. As per this article, such beneficiaries are included who maintain, control, use or develop the traditional cultural expressions as being characteristic or genuine indicative expressions of their cultural and social identity and cultural heritage. The WIPO 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”. What it requires is that they live to some extent traditional lifestyles and that they pass on their knowledge from generation to generation.

Beijing Treaty on Audiovisual Performances which has been adopted by the diplomatic conference on the protection of audio-visual performances held in Beijing, on June 24, 2012 also defines performer for the purposes of the treaty. This treaty has not yet come in to force. It defines “performers” as actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore. It is pertinent to note that this treaty also recognises a person who performs expression of folklore.

There have been various voices raised especially from the groups of indigenous and traditional communities to check the misuse of such expressions for business interests. Commodification of TCEs of local and indigenous communities should not even be pushed by governments for development purposes without consent of owners of TCEs. TCEs should be seen a subject of national heritage and importance and as discussed in following Unit prior informed consent of such communities should be taken before using TCEs especially if they are being used for commercial purposes. Respect for the needs of the beneficiaries and use of such expressions for their benefit should be the goal for the protection of traditional cultural expressions.

9.8 REASONS FOR THE PROTECTION OF TCEs

Traditional cultural expressions are part of the physical knowledge embodied in the land, and the ecological, social, and political knowledge of the community. TCE emanate from the society and also serve the society as a source of education and entertainment. The entertainment value certainly made the folklore, as well as its underlying message for human society and philosophy of life, readily acceptable to the people. The functional aspect of social education made folklore the integral part of the development process of society. TCEs are a source innovation and creativity and new forms of economic viable products can be one of the outputs of these. Thus the issue of fair use of such products is of great concern. Some of the reasons which highlight the need for the protection of TCEs are:

- spiritual/non-economic reasons (integrity, authenticity, spiritual meaning of certain TCEs;
- for economic reasons to promote cultural industries thereby helping in the development of the communities;
- in some cases TCEs are already protected by customary law and there is need to develop a formal legal framework for their protection;
- right to control the use of TCEs, especially by prior informed consent of local and traditional communities;
- to ensure that the use is in accordance with the traditional and customary way which is not offensive to the traditional communities;
- to ensure that there is no use of sacred or secret TCEs in way which is not acceptable to the traditional communities;
- to see that there is acknowledgement of the source/origin of used TCEs;

- authenticity need so that there is no misleading indications to consumers about origin of products; and
- to ensure that there is no interference with continuing development with the tradition of local communities.

IP law establishes a balance between protecting the rights afforded to creators and protecting the interests of the public to benefit and learn from those creations. The rights of tradition-bearers often sit uneasily within the balance struck by IP law. Indeed IP rights, as they exist now, were not designed with TCEs in mind. From a public policy perspective, IP laws generally do not take into account the needs, concerns, aspirations of indigenous peoples and traditional communities. Different legal jurisdictions throughout the world calibrate this balance differently and some do not recognise the IP rights of tradition-bearers at all. There are now calls for the enhanced protection of TCEs at the international, regional and national levels. In developing a comprehensive framework for this protection in context with IP law, it is to be seen that the objective and justifications for the reasons mentioned above are taken care of properly.

Self Assessment Question

(Spend 3 minutes)

2) What things need to be taken care of while formulating a definition of beneficiaries regarding TCEs?

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9.9 GOALS FOR THE PROTECTION OF TCEs

The protection of TCEs should not be undertaken as an end in itself, but as a tool for achieving the goals and aspirations of relevant people and communities and for promoting regional and national policy objectives. Some of the goals to be achieved by providing a legal framework for the protection of TCEs are listed below:

- a) The protection of TCE should help in safeguarding the social environment in which the traditional cultural expressions belong to. Further, such protection should benefit the indigenous and local communities and aim at promoting cultural diversity.
- b) It is very important to protect the core values which TCE depict. TCEs have intrinsic value, including religious, social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity.
- c) All the efforts for the protection of TCE should contribute to the welfare and sustainable economic, cultural, environmental and social development of such peoples and communities thereby meeting the actual needs of the communities.

The protection should not only protect and promote the rights of such people but should be guided by aspirations of such people.

- d) It is of essence of an effective framework that it should support customary practices and community cooperation. This includes the continuing customary use transmission, development and temporal transformation of the TCE.
- e) The goal of the protection should not be merely to protect the values. The aim is to promote respect for dignity, cultural integrity, and the philosophical, intellectual and spiritual beliefs of the peoples and communities that preserve and maintain expressions of these cultures and folklore.
- f) The aim is to equip the traditional communities with legal and practical framework under which they can prevent the misappropriation and misuse of TCE. Such enforcement measures should effectively check that the TCE is not being used against the defined framework respecting religious, traditional, spiritual, cultural or other related aspects of that community.
- g) The goal should be to empower the communities so that they can effectively exercise their rights against any misuse or misappropriation of TCEs.
- h) The goal is not only to encourage community innovation and creativity but also to develop channels so that the community can reap rewards also from the creative use of TCEs.
- i) The framework should promote intellectual and artistic freedom, research practices and cultural exchange on terms which are equitable to indigenous peoples and communities
- j) Promote the community development of indigenous peoples and communities and traditional and other cultural communities and should contribute to cultural diversity of the traditional cultural expressions as they are seen as part of the common heritage of mankind.
- k) It is very important to ensure and preclude the grant, use and enforcement of unauthorised intellectual property rights over such expressions. This is very important in the contemporary digital era. The goal is to stop the misappropriation and unfair use of TCE.
- l) The framework should aim at enhancing certainty, transparency, mutual respect and understanding in relations between indigenous peoples and communities and traditional and cultural communities, on the one hand, and academic, commercial, governmental, practitioners educational and other users of TCEs/ EoF, on the other.

9.10 RELATION WITH OTHER IP PROTECTION

The contemporary international system for protection of intellectual property was fashioned during the age of industrialisation in the West and developed subsequently in line with the supposed needs of technologically advanced societies. However, in recent years, indigenous peoples, local communities, and national governments, mainly in developing countries, have demanded equivalent protection for traditional knowledge systems.

“Intellectual property protection” in the context of “traditional” or “indigenous” creativity and innovation refers to protection of material against some form of

unauthorised use by third parties. In case of TCEs, the IP rights have been used in particular to provide positive protection against:

- a) unauthorised commercial exploitation of such creativity and innovation;
- b) insulting, degrading or culturally offensive use of this material;
- c) false or misleading indications that there is a relationship with the communities in which the material has originated; and
- d) failure to acknowledge the source of material in an appropriate way.
- e) unauthorised disclosure of confidential or secret TCEs.

Traditional cultural expressions can sometimes be protected by existing intellectual property rights systems, such as copyright and related rights, geographical indications, appellations of origin, trademarks and certification marks. For example, contemporary adaptations of folklore are copyrightable, while performances of traditional songs and music may come under the WIPO Performances and Phonograms Treaty. Further, the WIPO Performances and Phonograms Treaty of 1996 (WPPT) grants a right in the aural aspects of performances of TCEs. In Articles 5 to 10, the WPPT grants the right to the performer of an "expression of folklore" a range of moral and economic rights in respect of the aural component of his/her performances, whether fixed or unfixed.

Trademarks can be used to identify authentic indigenous arts, as the Maori Arts Board in New Zealand, has done. It is interesting to see that some countries also have special legislation for the protection of folklore. Panama has established a registration system for traditional cultural expressions, while the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture gives "traditional owners" the right to authorise or prevent use of protected folklore and receive a share of the benefits from any commercial exploitation. Furthermore, contemporary adaptations and interpretations of TCEs can qualify as copyright works, receiving positive rights as under copyright, and new audio and audio-visual recordings of pre-existing expressions of folklore can be protected as sound recordings under "related rights" (neighbouring rights) law. Collections and compilations of TCEs can also be protected as copyright works or under sui generis forms of protection granted to databases in some jurisdictions. Article 15.4 of the Berne Convention for the Protection of Literary and Artistic Works, 1971 provides protection for unpublished works of which the author is unknown. Although this Article does not explicitly refer to TCEs, it is clear from the records of the Diplomatic Conference at which this Article was adopted that the delegates had TCEs in mind when they referred to this category of works. Geographical indications and trademarks, especially collective marks, have also been used by indigenous and local communities in several countries to protect their TCEs, such as creative arts and crafts, against passing off.

IP-related needs in relation to TCEs can be:

- a) the major need for IP protection is to prevent unwanted and unfair use by others. Some communities may wish to claim IP in order to be able to actively exercise IP rights that prevent the use and commercialisation of their cultural heritage and TCEs by others, including culturally offensive or demeaning use. Uses which may wish to be prevented could include for example: (i) uses that falsely suggest a connection with a community; (ii) derogatory, libelous, defamatory or fallacious uses; (iii) uses of sacred and secret TCEs.

- b) Prevention of others acquiring IP rights over TCEs: communities are also concerned to prevent others from gaining or maintaining IP over derivations and adaptations of TCEs and representations.
- c) The IP protection can serve as a tool to support economic development of the communities some communities wish to claim and exercise IP in their tradition-based creations and innovations to enable them to exploit their creations and innovations commercially as a contribution to their economic development.

However, TCEs are generally considered to be in the public domain because they go back much further in time than the term of legal protection granted by the international conventions. The protection of TCEs by the conventional IP system seems not comprehensive enough due to the following shortcomings in the conventional IP system:

- a) difficulty meeting formal requirements such as novelty, inventive step or non-obviousness, or originality (for TCEs) (this may be due at least in part to the fact that TCEs often date back prior to the time periods associated with conventional IP systems, or are developed in a more diffuse, cumulative and collective manner, making specific steps such as invention or authorship difficult to establish at a fixed time);
- b) requirements in many IP laws for protected subject matter to be fixed in material form (given that TCEs are often preserved and transmitted by oral narrative and other non-material forms);
- c) the frequently informal nature of TCEs and the customary laws and protocols that define ownership (or other relationship such as custody and guardianship) and that form the basis of claims of custodianship, cultural affinity and community responsibility;
- d) the concern that protection systems should correspond to a positive duty to preserve and maintain TCEs, and not merely provide the means to prevent others from making unauthorised use (the characteristic function of IP rights);
- e) the perceived tension between individualistic notions of IP rights (the single author or inventor), as against the tendency for TCEs to be originated, held and managed in a collective environment, often making it difficult to identify the specific author, inventor or analogous creator that IP law is assumed to require); and
- f) limitations on the term of protection in IP systems (calls for better recognition of TCEs often highlight the inappropriate nature of relatively brief terms of protection in conventional IP systems, as interests and need for protection are seen as enduring beyond individual life spans for TCEs subject matter).

Forms of traditional creative expression and customary means of regulating their use, transmission, protection and preservation can be diverse. The sui generis protection of traditional cultural expressions is necessitated by the fact that:

- a) such expressions are being continuously transformed by their community of origin, whereas works created by individual authors are as a general rule completed in a form that is unique to their authors;
- b) artistic expressions of folklore do not, as a general rule, have any known creator. They pertain to the entire community, which incorporates them into

its social life, whereas the works protected by copyright belong to one or more known authors, who created them;

- c) works were protected in order to encourage authors to create new works, whereas artistic expressions of folklore are protected in order to preserve important features of the identity of national communities in danger of dying out;
- d) works are protected for a limited duration, whereas expressions of folklore require unlimited protection if the features of folklore wherein the specific nature of national identity is located are to be stratified in the social fabric.

These are the peculiar features of the artistic expressions of folklore which determine the sui generis approach to protection in respect of its scope, the ownership of the rights to be recognised, the procedures for exercising them and the penalties imposed on any violations to which they might be subject. Moreover, expressions of folklore are time-honoured and are based on social tradition, form part of the cultural heritage as a whole.

It must be borne in mind that not all TCEs necessarily require the same level and kind of protection. In fact, there is a view that some of the cultural expressions should perhaps not be protected at all, as they should remain a source of cultural exchange and inspiration to the public at large. In some cases, the community may wish only to protect the "authenticity" of their genuine cultural products. In this case, trademarks, especially certification marks, can play an important role. As for example, certification marks have been registered by indigenous peoples in Australia and New Zealand to safeguard the authenticity and quality of genuine indigenous-made products.

In spite of all this, the conventional IP system has been identified by some as not only inadequate to comprehensively and appropriately protect TCEs but also as positively harmful, in some respects. First, IP rules exclude most TCEs as such from protection, relegating them to an unprotected "public domain". Concerns have been raised from certain communities and TCE holders regarding the "public domain" status of traditional cultures under intellectual property law. They contend that as most of their TCEs were never protected and are thus not part of a "public domain". They feel that the "public domain" is purely a construct of the contemporary intellectual property systems and that it does not take into account private domains established by Indigenous and customary legal systems. One point of concern is whether all historic materials should be placed in public domain and thus denied protection.

Second, follow-on creations derived from TCEs may receive protection as "new" IP, giving the right owners (whoever they may be) exclusive rights to determine the conditions under which third parties (including the TCE-holding communities themselves) may use the TCE. Furthermore, the types of rights provided by current IP law and the nature of the rights conferred do not reflect customary laws, values and protocols associated with TCEs; it is perhaps not possible for international IP law to reflect them, as they are often unique and subjective to communities, and vary from one community to the other. As a result, many stakeholders call for new sui generis systems to protect TCEs, i.e., "special" or standalone systems which would address TCE issues particularly. Several countries and regional organisations have already put in place national and regional sui generis laws and measures. Most countries have done so within their copyright laws, following largely the

Model Provisions, 1982. Others have elected to establish stand-alone IP-like laws and systems, such as the Philippines, Panama, Peru, Ghana, l'Organisation africaine de la propriété intellectuelle (OAPI), the Andean Community, South Pacific island countries and New Zealand, to name only a few.

In a nutshell, some countries are calling for a *sui generis* approach, while others consider that existing IP law offers many solutions and just needs a few changes, and then others consider that a mixture of *sui generis* mechanisms and existing IP law is the best approach. These options are discussed within the WIPO IGC, among other forums.

Self Assessment Question	(Spend 3 minutes)
3) How the protection provided to the traditional cultural expressions can help in the empowerment of the indigenous and traditional communities?	
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9.11 SUMMARY

- Culture is reflected in everyday functioning of a person in varied forms. Traditional Cultural Expressions include varied form of expressions ranging from stories, myths, folk tales, songs and music, to symbols, designs, paintings, sculptures, carvings, handicrafts, dances, and rituals.
- Traditional knowledge and traditional cultural expressions are often seen as part of a single “integrated heritage”. In the World Intellectual Property Organisation (WIPO) context, traditional cultural expressions can be considered a subset of traditional knowledge. However, due to the specific legal and policy questions raised by traditional cultural expressions in the intellectual property context, WIPO has separate, but parallel, work programs for traditional knowledge and traditional cultural expressions.
- TCEs hold economic potential – they are a comparative advantage of the communities and countries which are their custodians can, if so wished, establish a basis for community enterprises and cultural industries.
- TCEs are a source innovation and creativity and new forms of economic sustainable products can be one of the outputs of these expressions. Thus the issue of fair use of such products is of great concern. This raises the question of protection of TCE in a suitable framework which prevents misuse and also ensures respect of the communities.
- Some of these TCEs have been handed down orally, some in writing, some both orally and in writing and some through practice, imitation and observation. The process of their transmission is a continuous one and is still continuing in present-day societies and this will continue to be so in the days to come.

9.12 TERMINAL QUESTIONS

- 1) Define Traditional Cultural Expressions. Briefly enumerate as to what can qualify as the subject matter for the protection as traditional cultural expressions. Give examples.
- 2) What is the rationale behind the protection of Traditional Cultural Expressions?
- 3) Enumerate the goals to be achieved by according protection to Traditional Cultural Expressions. How far the concerns of indigenous and traditional communities should be taken care in defining such goals?

9.13 ANSWERS AND HINTS

Self Assessment Questions

- 1) Refer to Section 9.5
- 2) Refer to Section 9.7
- 3) Refer to Section 9.1 and 9.7

Terminal Questions

- 1) Refer to Sections 9.4 and 9.6
- 2) Refer to Sections 9.1 and 9.8
- 3) Refer to Section 9.9

9.14 REFERENCES AND SUGGESTED READINGS

- 1) *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* prepared by Terri Janke for the World Intellectual Property Organisation, 2003.
- 2) “*Marketing Crafts and Visual Arts: the Role of Intellectual Property - A Practical Guide*”, International Trade Centre (UNCTAD/WTO) and WIPO Secretariat.
- 3) WIPO Secretariat, “*Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*” (WIPO/GRTKF/IC/5/3).

UNIT 10· WIPO and UNESCO and CBD

Structure

- 10.1 Introduction
- 10.2 Objectives
- 10.3 Joint Efforts by WIPO and UNESCO
 - 10.3.1 Provisions in Berne Convention
 - 10.3.2 Tunis Model Law on Copyright for Developing Countries, 1976
 - 10.3.3 WIPO-UNESCO Model Provisions, 1982
 - 10.3.4 Efforts for Draft International Treaty (1982-1985)
 - 10.3.5 WIPO Performances and Phonograms Treaty (The WPPT), 1996
 - 10.3.6 WIPO-UNESCO World Forum on the Protection of Folklore, 1997
 - 10.3.7 WIPO Fact-finding Missions, 1998-1999
 - 10.3.8 WIPO-UNESCO Regional Consultations on the Protection of Expressions of Folklore, 1999
- 10.4 Initiatives taken by WIPO for the Protection of TCEs
- 10.5 Initiatives taken by UNESCO for the Protection of TCEs
 - 10.5.1 UNESCO Recommendation of 1989
 - 10.5.2 World Decade for Cultural Development (1988-1997)
 - 10.5.3 World Commission on Culture and Development
 - 10.5.4 World Culture Reports of 1998 and 2000
 - 10.5.5 Universal Declaration on Cultural Diversity, 2001
 - 10.5.6 Convention for the Safeguarding of the Intangible Cultural Heritage, 2003
 - 10.5.7 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005
 - 10.5.8 United Nations Declaration on the Rights of Indigenous Peoples, 2007
- 10.6 Nature of Deliberations at WIPO and UNESCO
- 10.7 CBD and Protection of TCEs
 - 10.7.1 Convention on Biological Diversity, 1992
 - 10.7.2 Nagoya Protocol
- 10.8 Shortcoming in the Efforts to Provide International Protection
- 10.9 Summary
- 10.10 Terminal Questions
- 10.11 Answers and Hints
- 10.12 References and Suggested Readings

10.1 INTRODUCTION

In the first unit, we discussed the importance TCEs have in the social and cultural life of the people and how this can be useful, especially in developing and under-developed countries, to improve the economic conditions of the local communities and to promote sustainable development also. This pivotal role of TCEs especially in the social and cultural life of traditional and cultural communities necessitates for a comprehensive framework for their protection so that they there is no unfair use

of TCEs. Contemporary policy debate, which arose mainly due to specific claims of misappropriation or misuse of TCEs, has led to an extensive international policy discussion over whether, and if so how, the IP protection can be provided to TCEs. The main policy question is whether the IP protection of TCEs should be enhanced or developed further. There are calls from various fronts for new international treaty in this area and the deliberations at WIPO are aimed at achieving this objective.

There have been various efforts undertaken by different agencies to devise an international framework for the protection of TCEs. Further, WIPO and UNESCO have undertaken joint efforts for the protection of TCEs. These efforts have led to adoption of some conventions and declarations related to TCEs in one or other context. UNESCO has made some important strides towards standard setting in the preservation and safeguarding of TCE, notably through the 1989 Recommendation on the Safeguarding of Traditional and Folklore and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage. It is notable that neither of these instruments contains any provisions on intellectual property rights or legal protection proper, but their importance lies in the aspect that they serve as benchmarks in the continuing efforts to secure such provisions.

Probably the first step towards establishing a political agenda for the protection of traditional cultural expressions was the African Study Meeting on Copyright, held in Brazzaville in August 1963 which advocated copyright concessions for developing countries including reductions in the duration of protection and the protection of folklore. At the time of the Stockholm Conference for the Revision of the Berne Convention, which was convened in June 1967, there were 10 African states included in the 58 Members of the Berne Union. The Stockholm Conference witnessed the first significant agitation from developing countries for an acknowledgement of their particular circumstances. In the preparations for the Stockholm Conference, it was proposed that the concerns of developing countries could be accommodated in a separate protocol. This question was the subject of some fairly acrimonious debates at Stockholm. The critical issues for developing countries were the definition of developing country translation rights and compulsory licensing. The establishment of a protective regime for folklore was a burgeoning consideration. Although a Protocol was adopted by the final plenary session of the Stockholm Conference, it did not come into force as it failed to secure the requisite number of ratifications. This Protocol became an Appendix to the Paris Act, which was adopted by the Paris Revision Conference of 1971. The enduring effect of this Protocol is potentially quite significant, given that Article 9 of the TRIPs Agreement obliges members of the WTO to comply with "Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto." Unfortunately, the Protocol and the Appendix failed to address the issue of TCE.

The question for the protection of folklore was first raised at the international level in 1973, when the Bolivian Government invited UNESCO to examine the possibility of providing for the legal protection of folklore by means of an amendment to the Universal Copyright Convention (UNESCO, 1952), as well as an agreement concerning the conservation, promotion and distribution of folklore. Difficulties arose; however, regarding the protection of folklore under copyright since the notion of 'author' central to copyright law is inapplicable to the continuous and collective nature of the creative process underlying traditional folklore. Various attempts to arrive at a solution to the problem led, in 1982, to the formulation of model legal provisions, by the World Intellectual Property Organisation (WIPO)

and UNESCO, on the protection of expressions of folklore against illicit exploitation, prescribing intellectual-property-type protection for expressions of folklore at the national level. Following the adoption by many developing countries of domestic measures for the protection of folklore, attention turned to the need for international measures to protect folklore expressions beyond their countries of origin. The debate by joint WIPO/UNESCO committees continued without finding a solution until the end of the 1990s.

The strong sentiments of the developing countries on the need for a legal mechanism for the protection of folklore found expression when many countries in the African continent made appropriate provisions within their copyright laws. An international treaty, i.e., the Bangui Agreement (March 2, 1977), which establishes the African Intellectual Property Organisation (OAPI), reflected the collective thought of many of the like-minded nations of Africa on the legal protection of creations of folklore. These legal provisions, in unambiguous terms, declared folklore as part of the cultural heritage of a nation. The Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples was adopted in an international conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, convened by the nine Tribes of Mataatua in New Zealand in 1993. The declaration asserted that protection of the rights of indigenous peoples with respect to their traditional knowledge, cultural expressions, and all other forms of cultural property was an aspect of the right to self-determination.

An important principle followed in most of these legal mechanisms is that the creations of communities are protected rather than that of the authors, thereby making a deviation from copyright laws. Despite these efforts, little progress has been made in reaching consensus on an international norm on the protection of folklore. With this brief overview, this Unit will further cover the efforts by various international agencies in relation to the protection of TCEs.

10.2 OBJECTIVES

After reading this unit, you should be able to:

- explain various efforts by different agencies for the protection of TCEs;
- various conventions adopted by UNESCO related to protection of cultural heritage;
- joint efforts by UNESCO and WIPO for the protection of TCEs;
- efforts by WIPO to build a framework for the protection of TCEs;
- analyse as to how the TCE issue is dealt in Convention on Biological Diversity;
- WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982; and
- various declarations and Conventions on the issues related to protection of TCEs.

10.3 JOINT EFFORTS BY WIPO AND UNESCO

As briefly discussed in the introduction to this Unit WIPO and UNESCO have earlier worked together on the issue of protection of TCEs. The following section

will capture such joint initiatives of these organisations for the work done related to the protection and conservation of TCEs.

10.3.1 Provisions in Berne Convention

The possibility of protecting folklore by means of copyright was raised in 1967 at the Diplomatic Conference of Stockholm for the revision of the Berne Convention. Although the issue was not fully resolved, the Berne Convention was amended to introduce optional copyright protection for folklore at the national level, in Article 15(4). The following provision was included in the Stockholm Act of the Convention, and retained in the revision adopted in Paris in 1971:

In the case of 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, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union (Article 15.4[a]).

This was aimed at providing a mechanism for the international protection of unpublished and anonymous works. Further Article 15.4(b) provided that countries of the Union designating under the provisions shall notify the Director General of WIPO by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union. This inclusion in the Berne Convention responded to calls made at that time for specific international protection of TCEs. India, which is the only country to have formally made the designation referred to in the Article, can designate an authority to protect and enforce rights in expressions of folklore of which the authors are presumed to be Indian nationals, in any other Berne Convention country.

10.3.2 Tunis Model Law on Copyright for Developing Countries, 1976

The Berne Convention was revised in 1971 especially taking in to account the needs of the developing countries and to provide them access to foreign works protected by copyright. The aim was also to ensure protection of the works of the developing countries. To assist the States to conform to these provisions a model law was adopted by a committee convened by the Tunisian government with the assistance of WIPO and UNESCO in 1976. It provides special type of protection for works of national folklore, does not require fixation, and provides unlimited protection with respect to time. This included *sui generis* protection for expressions of folklore.

10.3.3 WIPO-UNESCO Model Provisions, 1982

Pursuant to a resolution adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in Belgrade, in September-October 1980 and a decision taken by the Governing Bodies of the World Intellectual Property Organisation (WIPO) in November 1981, a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore was convened. This working group in Geneva in 1980 was followed by another in Paris in 1981 to study the Draft Model Provisions intended for national legislation prepared by WIPO, as well as possible international measures for the protection of works of folklore, and, the outcome of those

meetings was submitted to the Committee of Governmental Experts convened by WIPO and UNESCO. In 1982, Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (the Model Provisions, 1982) were adopted under the auspices of WIPO and the United Nations Educational, Scientific and Cultural Organisation (UNESCO).

The Model provisions establish two main categories of acts against which TCEs are protected, namely 'illicit exploitation' and 'other prejudicial actions'. The term 'illicit exploitation' of an expression of folklore is understood in the Model Provisions as any utilisation made both with gainful intent and outside the traditional or customary context of folklore, without authorisation by a competent authority or the community concerned. Further, 'other prejudicial actions' detrimental to interests related to the use of expressions of folklore are identified by the Model Provisions, as four cases of offences subject to penal sanction. These are:

- a) using expression of folklore beyond the limits, or contrary to the conditions of an authorisation obtained;
- b) any unauthorised utilisation of an expression of folklore where authorisation is required;
- c) creating the impressions that what is involved is an expression of folklore when, in fact, such is not the case; and
- d) expressions of folklore are distorted in any direct or indirect manner "prejudicial to the cultural interests of the community concerned"

The Model Provisions have influenced the national laws of many countries. Several States and other stakeholders have suggested that the Model Provisions require improvement and updating.

10.3.4 Efforts for Draft International Treaty (1982-1985)

From 1982-1985 WIPO and UNESCO held discussions concerning the possibility of a treaty to provide international protection of folklore. In the end the efforts for a treaty to provide international protection to folklore were determined to be premature at that point of time.

10.3.5 WIPO Performances and Phonograms Treaty (The WPPT), 1996

The WIPO Performances and Phonograms Treaty mandate international protection for performances of "expressions of folklore" for nations that adhere to the treaty. Currently about 68 nations are members of this treaty. Article 2(a) of the WIPO Performances and Phonograms Treaty of 1996 (WPPT) provides the definition of performer as:

"Performers" are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore." Thus the definition is extended to cover performer specifically to include persons performing TCEs/EoF. Although TCEs are not regarded there as works but protection is given to an artist that performs TCEs.

Beijing Treaty on Audiovisual Performances adopted in June 2012, which has not yet come in to force, also defines "performers" and the definition includes any

person performing literary or artistic work or expression of folklore. Thus inclusion of expressions of folklore in the definition of performer in such treaties gives recognition to the need for developing a proper protection for TCEs.

10.3.6 WIPO-UNESCO World Forum on the Protection of Folklore, 1997

In 1997, with joint efforts of WIPO and UNESCO, a world forum to discuss the needs and issues related to IP and folklore took place. The participants agreed on the need for a new international standard for the legal protection of folklore and proposed regional consultations as a possible next step. Further the forum advocated focusing on two issues:

- Definition of Traditional Knowledge and Traditional Cultural Expressions
- Called for fact-finding missions “to identify and explore the intellectual property needs, rights and expectations of the holders of traditional knowledge and innovations”.

In pursuance of the Plan of Action adopted their one sub regional symposium and four regional consultations were organised.

10.3.7 WIPO Fact-finding Missions, 1998-1999

In 1998 and 1999 WIPO conducted fact finding missions to identify IP needs and expectations of holders of traditional knowledge, including TCEs. They visited 28 countries, and consulted with over 3,000 people.

10.3.8 WIPO-UNESCO Regional Consultations on the Protection of Expressions of Folklore, 1999

In 1999 four regional consultations were conducted to identify issues in African, Asian and Pacific region, and Latin American and Caribbean countries. This WIPO Program for 1998-99 included four regional consultations on the protection of expressions of folklore, which were held for African countries in Pretoria, South Africa (March 1999), for countries of Asia and the Pacific region in Hanoi, Viet Nam (April 1999); for Arab countries in Tunis, Tunisia (May 1999); and for Latin America and the Caribbean in Quito, Ecuador (June 1999).

The aims of these regional consultations were:

- to take stock of national experience relating to legal protection and to the identification, preservation, conservation and dissemination of folklore, and of the need for States to involve society as a whole more fully in the safeguarding of this heritage;
- to explore the most appropriate legal means of ensuring effective national protection of traditional artistic expressions, constantly in danger of dying out, of prejudicial distortion and unwanted economic exploitation;
- to explore possibilities of providing international legal protection for this heritage through the existing regime of treaty norms for intellectual property protection, and the need to devise a new form of international protection that is more specific, more operational and more practicable, and that will achieve a broad consensus among both the developing and the industrialised countries;

- to target the priority measures of practical assistance that the international community should take to assist developing countries in their efforts to ensure the legal protection as well as the preservation and conservation of this rich heritage of humanity.

Each of the four regional consultations adopted resolutions or recommendations which include proposals for future work addressed to WIPO and UNESCO, on the one hand, and to national governments of the respective regions on the other. Generally, there was consensus that the WIPO work plan for folklore protection should be expanded significantly to include activities at the national, regional, and international levels.

The Recommendations unanimously specify four activities for further work in this field:

- a) the provision of legal and technical assistance on the protection of folklore;
- b) specialised training in identification, documentation (including documentation standards), conservation and dissemination of folklore;
- c) the provision of necessary financial resources to relevant national and regional centres and institutions, and
- d) the development of an effective international regime for the protection of expressions of folklore.

There was a unanimous conclusion in these consultations that future work should include development of an effective regime for protection of folklore.

10.4 INITIATIVES TAKEN BY WIPO FOR THE PROTECTION OF TCES

Some of the initiatives taken by WIPO for the protection have been discussed in the above section and were mostly taken in cooperation with UNESCO. In 2001 WIPO conducted an international study on legal protection of expressions of folklore at the national level, and received responses from 64 States. The survey showed that protections vary widely and that copyright law is difficult to apply to protection of folklore in many countries. In October, 2000 WIPO General Assembly established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (GRTKF). This committee acts as a forum for debate and development of legal mechanisms and practical tools concerning protection of genetic resources (GR), traditional knowledge (TK) and traditional cultural expressions (TCEs) against misappropriation and misuse, and the intellectual property (IP) aspects of access to an benefit-sharing in genetic resources. It is the main forum in the contemporary era which is working on various fronts and has engaged various nations and stakeholders to reach at an international framework providing protection to the TCEs. The work of this committee is still going on and will be discussed in detail in the next Unit.

Self Assessment Question

(Spend 3 minutes)

- 1) What are contributions of WIPO and UNESCO regional consultations 1999 in the debate over the protection of TCEs at the international level?

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10.5 INITIATIVES TAKEN BY UNESCO FOR THE PROTECTION OF TCES

UNESCO has also taken various initiatives in one or other way related to the protection of cultural heritage. Although, the steps taken by UNESCO do not directly touch the issue of TCEs, yet the work revolves around the main subject and in one or other way has helped in providing recognition and protection to the cultural heritage. This section will describe various such initiatives taken by UNESCO.

10.5.1 UNESCO Recommendation of 1989

The General Conference of UNESCO at its 25th session in 1989 adopted a Recommendation on the Safeguarding of Traditional Cultures and Folklore. This recommendation proposed various measures to be taken at the national level for the identification, conservation, preservation and dissemination of the cultural works of indigenous peoples. This recommendation on the Safeguarding of Traditional Culture and Folklore was made in respect of the fact that TCE form part of the universal heritage of humanity. This recommendation provides a definition of TCE (folklore), which is similar to the one contained in the WIPO/UNESCO Model provisions.

10.5.2 World Decade for Cultural Development (1988-1997)

In 1986, the UN General Assembly proclaimed the World Decade for Cultural Development (1988-1997). This declaration acknowledged the cultural dimension of development, affirmed the role of enriched cultural identities and paved way for broadening participation in culture and promoting international cooperation. One of the results of this initiative was a 1991 Resolution of the UNESCO General Conference, calling for the foundation of an independent world commission for culture and development.

10.5.3 World Commission on Culture and Development

The UN General Assembly authorised the establishment of the World Commission on Culture and Development Resolution adopted by the General Assembly of the United Nations in December 1991. The Commission – composed of eminent persons from all over the world – commenced its work in 1993 and published the key report ‘Our Creative Diversity’ in 1995.

This report was crucial for two reasons. First, it introduced the concept of ‘cultural diversity’ as a global public good of utmost importance and considered a precondition for the proper functioning of democratic societies. Second, the report highlighted the threat of a homogenisation of traditional cultures under the pressure of globalising media markets.

10.5.4 World Culture Reports of 1998 and 2000

The report 'Our Creative Diversity' triggered two UNESCO-commissioned 'World Culture Reports', which further analysed the consequences of globalisation for the worldwide diversity of cultural content. The following two reports were commissioned:

- a) UNESCO, World Culture Report 1998: Culture, Creativity and Markets (Paris: UNESCO, 1998);
- b) UNESCO, World Culture Report 2000: Cultural Diversity, Conflict and Pluralism (Paris: UNESCO, 2000).

The report 'Our Creative Diversity' seemed to be rather pessimistic, the subsequent 'World Culture Reports' of 1998 and 2000 painted a somewhat brighter picture pursuant to one of the recommendations of 'Our Creative Diversity'. UNESCO convened the 1998 Stockholm Conference on Cultural Policies for Development. This Conference adopted a Plan of Action recommending inter alia recognition that cultural goods and services should be 'treated as being not like any other form of merchandise'.

10.5.5 Universal Declaration on Cultural Diversity, 2001

In November 2001, UNESCO adopted the Universal Declaration on Cultural Diversity, which is essentially an internationally non-binding instrument. Universal Declaration on Cultural Diversity, 2001 was adopted unanimously by the 185 Member States represented at the 31st session of the General Conference, 2 November 2001. The Declaration proclaimed 12 principles to be respected by the member states in the context of questions regarding cultural diversity.

Most importantly, Article 1 holds: 'Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind'. Article 1 of the Declaration further states that, "...[a]s a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature". According to Article 2, governmental policies of cultural pluralism may further the inclusion and participation of all citizens and guarantee social cohesion, which is a precondition for any democratic society.

The 2001 UNESCO Universal Declaration on Cultural Diversity broadly defines culture to cover the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.

10.5.6 Convention for the Safeguarding of the Intangible Cultural Heritage, 2003

In 2003, delegates of 190 countries adopted the Convention on the Safeguarding of Intangible Cultural Heritage (2003 UNESCO Convention). This Convention came into force in April 2006 and now features more than 100 state parties. The main purposes of the 2003 Convention are to safeguard the intangible cultural heritage, ensure respect and appreciation for the materials, raise awareness of their importance, and provide for international cooperation and assistance. The Convention focuses on the role of communities and groups in safeguarding intangible cultural heritage.

Different from the nation state focus of the 1970 UNESCO Convention, this 2003 Convention gives local and indigenous communities a central place. Intangible cultural heritage is defined in Article 2 as the practices, representations, expressions, as well as the knowledge and skills that social groups or individuals recognise as part of their cultural heritage. Paragraph 2 of the same Article specifies that traditional cultural expressions, such as oral traditions, language, performing arts and rituals are manifestations covered by this definition as long as they are intangible.

This convention envisages inventories as the major means of protecting intangible cultural heritage both on the national and international levels. On the national level, inventories must be drawn up by the contracting parties with regard to the intangible cultural heritage available on their territories. At the international level, an Intergovernmental Committee, established by Article 5, is supposed to maintain lists of the internationally most representative and the most endangered intangible cultural heritage. The purpose of these lists is to ensure better visibility of the intangible cultural heritage and greater awareness of its significance. Thus, it is clear that this UNESCO Convention serves mainly conservation purposes and it does not grant any real rights.

10.5.7 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005

Two years after the Convention on the Safeguarding of Intangible Cultural Heritage, delegates from 148 countries, most of which already joined the 2003 UNESCO Convention, adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005 UNESCO Convention). Most of the provisions of the Convention have little normative effect, because they impose neither great responsibilities nor binding commitments on the Parties. The Convention entered into force in March 2007.

The Convention's text consists of thirty-five Articles and an Annex dealing with conciliation procedures. The connection between cultural identity and cultural diversity has been expressly made in the preamble to the Convention which refers to the embodiment of diversity in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies making up humanity. Its scope of application is defined broadly and ambitiously in Article 3 as covering "the policies and measures adopted by the parties related to the protection and promotion of the diversity of cultural expressions".

A key provision of the Convention is contained in Article 5, which affirms the sovereign right of the Parties to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention. Articles 7 to 11 represent good faith obligations framed to motivate the Parties to the Convention to adopt a number of measures, including such that (i) promote access to and dissemination of cultural expressions; (ii) address specific situations where cultural expressions are under serious threat of extinction; (iii) ensure an appropriate exchange of relevant information; (iv) encourage an enhanced public awareness of the need to protect cultural diversity; and (v) the participation of the civil society. Article 9(a) of the Convention obliges the State Parties to report to UNESCO every four years on the measures taken for the protection and promotion of cultural diversity.

Articles 12 to 19 extend some duties to the international level. These address the

cooperation between the State Parties with a view of creating conditions conducive to the protection and promotion of cultural diversity. Many of the norms relate in particular to cooperation with or support of developing countries, including the establishment of an International Fund for Cultural Diversity, which is meant to cater for the culturally pertinent financial needs of developing and least developed nations. An important obligation is contained in Article 16 and creates a duty for developed countries to facilitate cultural exchanges with developing countries by granting preferential treatment to artists and other cultural professionals and practitioners, as well as to cultural goods and services from developing countries. The Convention also obliges the State Parties to cooperate and assist developing countries in specific situations, where there is a risk of extinction or serious threat for cultural expressions.

Article 21, in a nonbinding manner, encourages the Parties to promote the objectives and principles of the UNESCO Convention in other international forums and to consult each other for this purpose. The two organs foreseen under the Convention are the Conference of Parties as provided in Article 22 (as a plenary and supreme body) and the Intergovernmental Committee as provided in Article 23 (as an executive body), with specific role assigned to the UNESCO Secretariat. It can be argued that the main benefits are defined in terms of cultural cooperation and not in commercial terms. What Article 16 can facilitate are cultural exchanges, training, technical assistance and collaborations.

The 2005 convention consists not of obligations but merely of a number of good faith engagements of the parties. These include:

- a) to further public awareness of the importance of cultural diversity (Article 10)
- b) to acknowledge the role of civil society (Article 11)
- c) the promotion of international cooperation in the area (Article 12)
- d) the support of development including the invitation to make contributions to a fund for cultural diversity (Article 14)
- e) to encourage partnerships between the public and the private sectors (Article 15)
- f) to accord preferential treatment to artists from developing countries with regard to formalities hampering mobility (Article 16)
- g) to provide voluntary contributions towards the implementation of the Convention (Articles 14(4) and 18(7))
- h) to exchange information (Article 19)
- i) to promote the objectives of the Convention in other international fora.

Thus, focusing on the diversity of cultural expressions, as circulated and shared through cultural activities, goods and services, this convention aims to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner and to encourage dialogue among cultures and countries. Although both the 2003 and 2005 UNESCO Conventions deal with expressions as performed or enacted today, the latter is more aspirational than obligatory.

10.5.8 United Nations Declaration on the Rights of Indigenous Peoples, 2007

The United Nations General Assembly launched the International Decade of the

World's Indigenous People on December 10, 1994. In 2007, the General Assembly of the United Nations adopted the Declaration on the Rights of Indigenous Peoples. It is interesting to note that although the declaration was released in draft form in August 1994, it was not finalised until September 2007. With respect to the protection of intangible cultural heritage, the Declaration declared that Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and trade their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

WIPO's norm-setting and capacity-building work on defining the appropriate role of intellectual property in the protection, preservation and promotion of traditional cultural expressions are an important contribution to better understanding and implementation of the United Nation Declaration of the Rights of Indigenous Peoples and, in particular, its Article 31 that specifically deals with Indigenous Peoples' intellectual property over their cultural heritage. Thus, from the above discussion it is clear that UNESCO has made some important strides towards standard setting in the preservation and safeguarding of TCE, notably through the 1989 Recommendation on the Safeguarding of Traditional and Folklore and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage. While neither of these instruments contains any provisions on intellectual property rights or legal protection proper, they serve as benchmarks in the continuing efforts to secure such provisions. "Safeguarding" or "preservation" of cultural heritage and expressions is distinguishable from the "protection" in this sense but complements the initiatives for protection.

Self Assessment Question

(Spend 3 minutes)

2) Briefly discuss the aim of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003.

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10.6 NATURE OF DELIBERATIONS AT WIPO AND UNESCO

The efforts by both the bodies depended on their mandate and thus they were guided by their organisational aims and objectives. Thus, UNESCO's action is aimed at safeguarding through the adoption of measures to ensure the viability of the intangible cultural heritage, while WIPO's action concerns legal protection through intellectual property law. The deliberations in WIPO seek to protect TCE in a framework of IP rights. The major shortcomings of this approach are as follows:

- a) Copyright grants exclusive IP rights, whereas a concept of individual property rights is alien to most indigenous communities.
- b) Copyright protects only the rights of individuals and does not recognise collective rights.

- c) Copyright presupposes fixation, whereas traditional stories, songs, rituals, dances, and so forth often lack a fixed form.
- d) The time frame of copyright protection is too short to protect TCE that are older than the standard term copyright of protection.
- e) Even in the case of TCE still being within the period of protection, copyright is of limited help to communities wishing to prevent unauthorised use (including citation) of secret or sacred TCE. In the case of TCE that embodies spiritual and religious qualities, any use that does not conform to the customary laws of the indigenous community is often considered to be particularly offensive.
- f) Copyright presupposes originality, whereas TCE often lack originality.
- g) The importance of moral rights and work integrity is not sufficiently taken into account in copyright practice.

Whereas discussions within WIPO IGC more seek to protect TCE in a framework of private property rights, UNESCO's initiatives on cultural diversity and intangible cultural heritage are concerned with safeguarding public interests rather than private ones. The CIH and the CCD may be seen as the first responses of international law to the emerging conviction that cultural diversity is a 'global public good', which needs to be protected and promoted by policy measures on the local and international levels. However, the UNESCO policies also have several shortcomings that can be summarised as follows:

- a) The CCD does not impose great responsibilities or binding commitments on the signatory States.
- b) The CCD does not appear to consider TCE to be an issue of major importance.
- c) With regard to the CIH, the drawing up of lists enumerating precisely what the important intangible heritage is, presupposes that this heritage has been identified and fixed. However, in many cases of misappropriated TCE a lack of fixation was at the core of the conflict.
- d) The documentation of TCE may be detrimental for those indigenous peoples who want to keep their heritage secret.
- e) Finally, drawing up lists as a means of protection may be criticised since it presupposes acceptance of methodological concepts of reification and commoditisation, which have been rejected by some representatives of indigenous peoples.

10.7 CBD AND PROTECTION OF TCES

The Convention on Biological Diversity, 1992 (CBD) entered in to force on 29th of December, 1993. This convention has three primary components which are protection of biological diversity, sustainable use of its components and the equitable sharing of the benefits.

10.7.1 Convention on Biological Diversity, 1992

The objectives of CBD according to Article 1 of the convention are to promote the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic

resources. Although the CBD has had only limited success, it remains one of the more authoritative international instruments on the protection of traditional knowledge and cultural expressions. 'Biological diversity' is defined in Article 2 of Biological Diversity as the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

Articles 15 of the CBD, 1992 regulates access and benefit sharing regarding the genetic resources and is based on a bilateral approach, thereby, providing for the mutually agreed terms between the provider and the user of the resources. Further, Article 15 provides that access to genetic resources shall be subject to the prior informed consent of the contracting party providing the resources. The term 'access and benefit sharing' abbreviated as 'ABS' refer to the issues pertaining to the access to genetic resources and traditional knowledge and the fair and equitable benefit sharing arising from the use of such resources. There are three principal international instruments on ABS given as:

- a) Convention on Biological Diversity of 1993;
- b) International Treaty on Plant Genetic Resources for Food and Agriculture of the Food and Agriculture Organisation (FAO) of 2001; and
- c) Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits arising out of their utilisation (Bonn Guidelines) of 2002.

Bonn Guidelines, which are legally non-binding, were adopted in 2002 to further elaborate the general provisions of the CBD so as to assist the contracting parties in implementing their obligations at national level. Though these guidelines deal primarily with the genetic resources, they also cover traditional knowledge associated with the genetic resources.

Article 8(j) of the CBD also suggests that the term "traditional" should not be interpreted as static. The relevant part of that article states that State Parties to the CBD are required to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles." The principle of (FPIC) free, prior and informed consent also applies to elements of indigenous peoples' cultural heritage.

10.7.2 Nagoya Protocol

The local and traditional communities are often marginalised within the nation state, but they attained greater prominence with a change in environmental protection paradigms that was introduced by the Rio Convention on Biological Diversity (CBD) in 1994 and further accentuated after the conclusion of the Nagoya Protocol at the 10th Convention of Parties in October 2010. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefit Arising from their Utilisation (Nagoya Protocol) is a landmark achievement in the international governance of biodiversity. The Protocol was adopted under the auspices of the Conference of the Parties to Convention on Biological Diversity. Articles 15 and 16 set out principles and obligations of Parties related to access to genetic resources and the fair and equitable sharing of benefits arising out of utilisation of genetic resources, on the basis of prior informed consent and mutually agreed terms.

According to Article 8(j) of the CBD, parties to the convention were required 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 the wider use of this knowledge with the approval of the knowledge holders and by putting into place benefit sharing mechanisms. This link of traditional knowledge with biodiversity conservation on the one hand and with relevant local traditions and communities has also led to a debate at national and international level as to who precisely these right holders and beneficiaries are. Thus, through this Article a link is established between biodiversity and the culture and traditions of the local and indigenous communities. The recognition of rights and benefit sharing as are the hallmarks of this Convention, need to be emulated in the framework to be developed for the TCEs.

10.8 SHORTCOMINGS IN THE EFFORTS TO PROVIDE INTERNATIONAL PROTECTION

A serious flaw of the existing international endeavours to develop TCE safeguards lies in their fragmentation. As mentioned above, numerous organisations and institutions are undertaking activities in this field without a conceptual framework that would enable them to inter relate the various elements within a coherent structure. Since WIPO and UNESCO are the most important fora for TCE protection and promotion, it is unfortunate that the work of these two specialised agencies of the United Nations system is not sufficiently coordinated. As mentioned in the previous Unit, although a successful first effort at cooperation between WIPO and UNESCO resulted in the Model Provisions of 1982, cooperation between the two fora since then has, with the exception of the jointly organised World Forum 1997 and regional consultations 1999, not continued. Another reason for this failure is dissension at the level of the individual States regarding the attribution of competences amongst respective governmental departments related to IP protection against those responsible for cultural policy. Although the cooperation between WIPO and UNESCO in 1982 in the adoption of the Model Provisions on the protection of TCEs succeeded, yet this cooperation, though carried on further, did not yield similar productive results later on. Today, as is clear from the discussions above, exchanges between WIPO’s IGC and UNESCO are limited to sending observers to each other’s conferences.

Self Assessment Question

(Spend 3 minutes)

3) Briefly enumerate the provisions included in the Convention on Biological Diversity which relate to the area of protection of TCEs.

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10.9 SUMMARY

- UNESCO has made some important strides by adopting various conventions which mainly work towards standard setting in the preservation and safeguarding of TCE.

- The discussions within WIPO are more inclined towards protection of TCE in a framework of private property rights. They aim at providing intellectual property type protection for TCEs.
- UNESCO's initiatives on cultural diversity and intangible cultural heritage are more concerned with safeguarding public interests rather than private ones.
- Some provisions of Convention on Biological Diversity also hint at preservation of Traditional Cultural Expressions and traditional knowledge.
- In 1982, the joint efforts by the World Intellectual Property Organisation (WIPO) and UNESCO, led to the adoption of model legal provisions on the protection of expressions of folklore against illicit exploitation, prescribing intellectual-property-type protection for expressions of folklore at the national level. These provisions were adopted mostly by various developing nations in their laws in one or other form.

10.10 TERMINAL QUESTIONS

- 1) Enumerate the definition of folklore as given in the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (the Model Provisions, 1982).
- 2) 'UNESCO convention of 2005 related to cultural diversity is more aspirational than being obligatory.' Comment.
- 3) Briefly give the nature of work done by UNESCO in the field of protection of and promotion of cultural heritage and cultural diversity.

10.11 ANSWERS AND HINTS

Self Assessment Questions

- 1) Refer to Sub-section 10.3.8
- 2) Refer to Sub-section 10.5.6
- 3) Refer to Section 10.7

Terminal Questions

- 1) Refer to Sub-Section 10.3.3
- 2) Refer to Sub-Section 10.5.7
- 3) Refer to Sections 10.3 and 10.5

10.12 REFERENCES AND SUGGESTED READINGS

- 1) WIPO & UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (the Model Provisions, 1982).
- 2) Website of United Nations Educational, Scientific and Cultural Organisation (UNESCO).
- 3) UNESCO World Report '*Investing in Cultural Diversity and Intercultural Dialogue*', 2009.

UNIT 11 CURRENT INTERNATIONAL EFFORTS FOR THE PROTECTION OF TCE

Structure

- 11.1 Introduction
- 11.2 Objectives
- 11.3 WIPO – Intergovernmental Committee
- 11.4 General Guiding Principles of the WIPO-IGC
- 11.5 Nature of Current Draft Text on TCEs in IGC
- 11.6 Need for Capacity Building
- 11.7 Documentation of TCEs
- 11.8 Creative Heritage Project
- 11.9 Indian Stand in IGC on Protection of TCEs
- 11.10 Summary
- 11.11 Terminal Questions
- 11.12 Answers and Hints
- 11.13 References and Suggested Readings

11.1 INTRODUCTION

From the discussions in the last Unit, it is clear that still there is no comprehensive international mandate for protection of TCEs. Further, there is great variation in the level of protection for indigenous and traditional works in national laws. There is still a lack of consensus internationally about the type of protection that would best apply universally to traditional works. The issue has taken on new dimensions since the World Intellectual Property Organisation (WIPO) established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) that began working in 2001 toward a solution to the protection of TCEs. IGC has done substantial work in the area and it seems that in the near future it will come out with a comprehensive legal framework acceptable to all stakeholders.

The IGC, WIPO commissioned two gap analysis studies on the protection of traditional cultural expressions/expressions of folklore (TCEs/EoF) and on the protection of traditional knowledge (TK). The gap analysis study on TCE was aimed at describing what gaps exist at the international level regarding the protection of TCEs and what considerations need to be taken care of while addressing those gaps. Further, the analysis was also aimed at finding the options which existed and the options which might be developed to address any identified gaps. The gap analysis studies were also aimed at analysing the legal and other options, whether at the international, regional or national level for the protection of the TCEs. At present, the international community, through WIPO's IGC, is in the process of building that consensus with the on-going development of the Draft WIPO Instruments.

Further, there is need to build capacity of various stakeholders to understand and identify the various issues related to TCEs. The documentation of the TCEs is an important aspect. The information and communication technology age and the fast digital networks can facilitate the misappropriation of TCEs. There is need to document the TCEs so as to prevent their unfair use and exploitation. In the documentation process, there can be various legal issues involved and it is very important to undergo this process taking into account the specific needs and local demands of the traditional and local communities which are the generators of the TCEs. Traditional and indigenous communities have long sought respect and recognition for their creative expressions ranging from stories, myths, folk tales, songs and music, to symbols, designs, paintings, sculptures, carvings, handicrafts, dances, and rituals. Existing international and national legal systems are not typically compatible with indigenous culture and law, and they do not sufficiently address the concerns of indigenous people for protection of their creative heritage. Thus, the need of capacity building of various stakeholders so that they understand and properly take care of the fragile issues related to the protection of TCEs.

India has also taken some steps and representatives from India participate in various discussions related to development of an international framework for the protection of TCEs in the WIPO, IGC. Further, an Asia Pacific Policy forum meet was organised at Cochin to discuss issues including TCEs in which representatives from twenty one nations, representatives from African Intellectual Property Office and WIPO representatives were present. This Unit will discuss in detail the efforts undertaken by IGC. Further, the steps taken by WIPO in raising awareness and building capacity to tackle such intricate issues will be discussed.

11.2 OBJECTIVES

After reading this unit, you should be able to:

- define in detail the efforts by IGC of WIPO for the protection of TCEs;
- explain the scope and aim of the 'Creative Heritage Project';
- Indian stand on the protection of TCEs;
- role played by indigenous communities, NGOs and other stakeholders for the protection of TCEs;
- explain the need for capacity building of various stakeholders for the protection and promotion of TCEs; and
- need for the documentation of TCEs.

11.3 WIPO – INTERGOVERNMENTAL COMMITTEE

In October, 2000 WIPO General Assembly established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. This committee acts as a forum for debate and development of legal mechanisms and practical tools concerning protection of genetic resources (GR), traditional knowledge (TK) and traditional cultural expressions (TCEs) against misappropriation and misuse, and the intellectual property (IP) aspects of access to an benefit-sharing in genetic resources. The call for the establishment of the IGC followed the recognition, on the part of WIPO Member States, of the cross-cutting effect that TK, genetic resources, and traditional cultural expressions had

on conventional intellectual property rights. The creation of the IGC followed from the roundtable meetings on “intellectual property and indigenous peoples” convened by WIPO and from the fact-finding missions on traditional knowledge, innovations and creativity held during 1998-1999. The IGC met for the first time in 2001 and has so far held 19 sessions.

The IGC is not like a typical WIPO committee. The key difference is that it has a two-year, but renewable, life-span. The main reason why the IGC was given a two years life-span was for WIPO Member States to accelerate the pace of discussions and find agreement on pressing questions within stipulated time frame. Since 2003, the mandate of the IGC has been renewed, and redefined, consecutively for two-year periods. The early work of the IGC largely involved fact-finding, information-sharing on national experiences, and discussion on the outcome that should be reached.

In 2009, the WIPO General Assembly provided a new mandate to the eight-year-old IGC to move to “text-based negotiations” with the aim of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of genetic resources, traditional knowledge, and traditional cultural expressions. It is pertinent to note that developing countries fought hard to reach this outcome. It took lengthy and intense discussions in the previous sessions of the IGC and in the 2009 General Assembly session, where positions of developed and developing countries were highly polarised. At the fourteenth session of the IGC in April 2009, countries failed to reach agreement on the future work plan for the IGC. Informal deliberations took place on the basis of an African Group proposal that sought to bring diverging positions together concerning the list of issues under discussion and set a specific time frame for text based negotiations. Developed countries were adamant in opposing new language for the mandate of the IGC. The African Group, Brazil, Indonesia, India and most other developing countries strongly supported the African Group proposal. On the other hand, the EU, South Korea, Japan and the US adamantly opposed text-based negotiations towards an internationally legally binding instrument(s). Further, Australia, Canada and New Zealand accepted text-based negotiations, but not the objective of concluding international legally binding instruments. After a series of discussions, the General Assembly of WIPO renewed and reviewed the IGC mandate, giving it clear guidance to start text-based negotiations with a specific objective, time frame and road map. Thus, it can be said that the developing countries achieved a major success in evolving the new mandate for the IGC. However, many challenges lie ahead. A major challenge is the lack of real engagement of developed countries in the IGC.

This new mandate also called for the IGC to develop a “clearly defined work programme” for 2010 and 2011. Under its mandate for the 2010-2011 biennium, the IGC engaged in “text-based negotiations” with the objective of reaching an agreement on a text of an international legal instrument. The IWG meetings were meant to “provide legal and technical advice and analysis” to the IGC’s work. The first IWG, from 19 to 23 July, 2010, was chaired by Thailand and focused on traditional cultural expressions (TCEs). The agreed format for the IWG - one national expert per country operating in his or her personal capacity, interacting with indigenous experts and NGOs representatives to address the three issues one at a time - saw focused, technical discussions that were much more productive than the more general IGC meetings have been in the past.

The new mandate, recognising the progress made by the IGC during its work in

2010 and 2011, calls for its text-based negotiations to be expedited with the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs. The assembly of Member States of WIPO at its fortieth (20th Ordinary) session September 26 to October 5, 2011 decided to renew the mandate of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) for the 2012-2013 biennium. The Committee will, during the biennium (2012/2013), work on text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs.

Again in October, 2012, the assembly of Member States of WIPO at its forty-first session agreed and decided to continue intensive negotiations and engagement with all stakeholders in 2013. These negotiations will be aimed at concluding the text(s) of an international legal instrument(s) which will ensure effective protection of GRs, TK and TCEs. Thus the mandate of IGC has been renewed again. It is hoped that the discussions and deliberations soon reach to an agreeable consensus amongst the stakeholders.

Intergovernmental and non-governmental organisations, including many representing the interests of indigenous and other traditional communities, also participate actively in its sessions. Observers participate actively in the work of the IGC - over 260 NGOs are accredited to the IGC, many of which represent the interests of indigenous peoples and local communities. Non governmental organisations that have been involved in the IGC include, for example, International Centre for Trade and Sustainable Development (ICTSD), Genetic Resources Action International (GRAIN), Center for International Environmental Law (CIEL), Third World Network (TWN) and the World Conservation Union (IUCN). Intergovernmental organisations such as the South Centre, the United Nations Conference on Trade and Development (UNCTAD), United Nations Environment Programme (UNEP) and United Nations Educational, Scientific and Cultural Organisation have also been involved in the IGC process.

11.4 GENERAL GUIDING PRINCIPLES OF THE WIPO-IGC

There are certain general guiding principles which have underpinned much of the discussion of the Inter-Governmental Committee, WIPO, since its inception and in international debate and consultations before the Committee's establishment. These legal principles have thus become important to ensure that the debate on the TCEs is inclusive and leads to a comprehensive framework. The protection of TCEs needs to be respectful and consistent with international and regional instruments and without prejudice to specific rights and obligations already established under binding legal instruments. Thus, it becomes important to discuss these guiding principles as it will help understand the overarching fabric which runs through the whole of the process aimed at providing a framework for the protection of TCEs. These principles are as follows:

- a) The principle of flexibility and comprehensiveness highlights that protection should respect the diversity of TCEs/EoF and the wide range of needs of the beneficiaries of protection, should acknowledge diversity in national circumstances and legal systems, and should allow sufficient flexibility for national authorities to determine the appropriate means of achieving the

objectives of protection. It is unlikely that any single "one-size-fits-all" or "universal" international template will be found to protect TCEs comprehensively in a manner that suits the national priorities, legal and cultural environment, and needs of traditional communities in all countries. An attempt to bring uniformity in this regard may not be able to accommodate values, aspirations and local jurisprudential aspects of the laws of the traditional communities. Thus, the need to draw on a wide range of legal mechanisms to achieve the intended objectives of protection. Protection has accordingly drawn on a comprehensive range of options, combining proprietary, non-proprietary and non-IP measures, and using existing IP rights, *sui generis* extensions or adaptations of IP rights, and specially-created *sui generis* IP measures and systems, including both defensive and positive measures.

In this context, one can see that the draft provisions are construed in a wide and flexible language so that they take into concerns of communities in relation to which precise legal mechanisms may be used to achieve or implement the provisions at the national or regional levels. This approach has been found in earlier international intellectual property related instruments as well as instruments related to indigenous and traditional communities.

- b) The other guiding principle recognises the basic fact that the debates at IGC should be responsive to aspirations and expectations of relevant communities. This implies that the protection of TCEs/EoF should recognise and apply indigenous and customary laws and protocols as far as possible, promote complementary use of positive and defensive protection measures, address both cultural and economic aspects of development, prevent insulting, derogatory and offensive acts in particular, promote cooperation among communities and not engender competition or conflicts between them, and enable full and effective participation by these communities in the development and implementation of protection systems. Further, the aim is to develop a framework which respects and takes care of the local laws and culture of the communities.
- c) The need for an equitable balance between the rights and interests of those that develop, preserve and sustain TCEs/EoF, and of those who use and benefit from them is also one of the important principles. The need is to reconcile diverse policy concerns; and, the need for specific protection measures to be proportionate to the objectives of protection, actual experiences and needs.
- d) Respect for and consistency with international and regional agreements and instruments also is an important principle because it will lead to preparation of a framework acceptable to all stakeholders. The framework to protect TCEs should be in harmony with international and regional instruments without prejudice to specific rights and obligations already established under binding legal instruments.
- e) The focus is to give recognition to the specific nature and characteristics of cultural expression namely their collective, communal and inter-generational character. It can be noted that TCEs/EoF are not necessarily always the expression of distinct local identities; nor are they often truly unique, but rather the products of cross-cultural exchange and influence. TCEs have seen to be cross-cultural and thus cut across the boundaries of the nations.

- f) As briefly discussed in the first unit, the traditional knowledge and TCEs can be said to be the part of integrated cultural heritage. Thus while developing a framework for the protection of TCEs, there is need of complementarity with protection of traditional knowledge.
- g) The debate over protection of the TCEs should take in to account certain over-arching rights and obligations, particularly international human rights and systems of indigenous rights, and not prejudice the further elaboration of such rights and obligations. Thus the respect for rights of and obligations towards indigenous peoples and other traditional communities should be there. It is very important to take care of the human rights while documentation and commercialisation of the TCEs.
- h) Another important principle relates to the respect for customary use and transmission of TCEs. The protection should aim at promoting the use, development, exchange, transmission and dissemination of TCEs by the communities concerned in accordance with their customary laws and practices. Customary use, practices and norms should guide the legal protection of TCEs as far as possible, on such questions as ownership of rights, management of rights and communal decision-making, equitable sharing of benefits, exceptions and limitations to rights and remedies.
- i) A 'Principle of effectiveness and accessibility of measures for protection' implies that measures for the acquisition, management and enforcement of rights and for the implementation of other forms of protection should be effective, appropriate and accessible. Such measures should take into account the cultural, social, political and economic context of indigenous peoples and traditional and other cultural communities.

These above discussed set of principles form the core of the values and considerations which are being taken into account by the international deliberations on the issue of development of legal framework for the protection of TCEs.

11.5 NATURE OF CURRENT DRAFT TEXT ON TCEs IN IGC

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is making significant progress in identifying and clarifying the relevant issues and in developing policy and practical responses to them. The Committee, comprising States and non-governmental organisations and representative of indigenous and local communities, has also expressed the need for practical and empirical information on the usefulness of the intellectual property system in this area as a basis for its policy and practical work.

The current texts on TCEs before the IGC comprise draft principles and objectives that could shape sui generis instruments on TCEs. This approach to protection could recognise, amongst other things, collective interests in TCEs which are "characteristic" of a distinct cultural identity. These interests would be respected for as long as a traditional community continues to be associated with the TCE. These drafts include compliance in certain circumstances with the "free, prior and informed consent" (FPIC) principle and the recognition of customary laws and practices. In line with the views of many indigenous and traditional communities, the draft provisions do not require the assertion of new exclusive property rights over TCEs, but accommodate this option should communities wish to take it up.

Similarly it seems that the prior registration or documentation of TCEs is not a precondition for protection.

The drafts draw upon a wide range of community, national and regional experiences, and have been developed over several years by and in consultation with Member States, indigenous peoples and other traditional and cultural communities, civil society organisations and a range of other interested parties. Successive drafts of the objectives and principles have been and are the subject of open commenting processes by the IGC. Various stakeholders participate in the discussions and give comments and suggestions on these drafts. The drafts directly incorporate proposals made by many participants in the commentary processes, including indigenous communities.

11.6 NEED FOR CAPACITY BUILDING

There is need to integrate the efforts aimed at building capacity of various stakeholders at community, national, regional and international level. The general awareness can be built through fact finding missions, case studies and surveys of the experiences at the various levels. Various capacity building strategies should focus on the stakeholders including indigenous and local communities, policy makers and professionals working in the field. The efforts for the capacity building must be undertaken in consultation with indigenous and local communities. This will ensure full respect for their values, customary laws and traditions. The aim should be to create in the community awareness and an appreciation of the value of its TCEs, for their own benefit, thereby, giving them an opportunity to contribute to the wider society. The efforts for the capacity building of the policy makers should aim at providing policy-makers with the means and the skills to consider the technical, legal and policy dimension of the issues at hand, including the creation of appropriate legal frameworks and infrastructure. The aim should be to develop means of protection for TCEs to achieve the goals and aspirations of local communities. The professionals can be related to different fields like representatives, NGOs, students, lawyers, administrators, enforcement authorities, etc. The aim should be to build knowledge of IP and skills for feasible/enforceable implementation mechanisms. These professionals should further help in developing skills in the stakeholders in order to enable them to negotiate, advocate for, or enforce TCE protection. There will be various benefits which will ensue after the capacity building efforts are properly put into effect. Some of those benefits can be:

- Pooling of expertise and resources, including financial and human resources
- Common approaches to awareness building
- Sharing legal and non-legal tools
- Central point to share information
- Channel of dialogue between countries, policy makers and professionals
- Common dispute resolution mechanisms and benefit-sharing
- Platform for testing new ideas and approaches, before insertion at international level

Self Assessment Question

(Spend 3 minutes)

- 1) What is the nature of current text being discussed at IGC, WIPO regarding traditional cultural expressions?

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11.7 DOCUMENTATION OF TCES

Traditional cultural expressions are common to all people. Its value is no less than any other part of our history and heritage and as such must be documented and preserved as a legacy for future. Documentation of TCEs refers to any form in which TCEs are recorded, including in databases, inventories and registers. Documentation may be undertaken by communities, or their authorised representatives, governments, museums and research institutes and may be 'public' or 'private';

- Documentation can serve many purposes, such as preservation, promotion, research and development, revitalisation, education and awareness-raising, resource management, and access and benefit-sharing.
- For these purposes, documentation can be very helpful, and can recognise and celebrate the intellectual contributions of creators from all cultures, nurture and empower communities, enhance mutual understanding and promote respect for cultural diversity. Countries, communities and others could undertake documentation for these purposes.
- Documentation may also assist in identifying TCEs that have commercial potential and in connecting communities with potential investors. The protection of publicly available TCEs is not aimed at their 'freezing' but rather at their use for appropriate and equitable research and development and resulting innovation and creativity, for human welfare. The survival of the culture of some communities may depend on income and employment that can flow from cultural production. Communities should, however, have control over if and how their secret-sacred TCEs are accessed and used by external parties.
- Documentation may also have explicit IP functions, namely defensive protection (such as, providing evidence of prior art in patent searches) and assertion of rights (as part of legislative systems for the positive protection of TK and TCEs).

Several States have called for the documentation of expressions of folklore and the establishment of inventories, databases and lists. Cultural heritage programs at the international, regional and national levels frequently establish registers, lists and inventories of intangible and tangible cultural heritage as useful tools for identification, promotion and safeguarding. For example, Brazil has established a Registry of Intangible Heritage and the Convention on the Safeguarding of the Intangible Cultural Heritage of UNESCO, 2003 envisages the establishment of national and international inventories and lists. Article 12 of the 2003 UNESCO Convention specifically provides that to ensure identification with a view to safeguarding, each State Party shall draw up, in a manner geared to its own situation, one or more inventories of the intangible cultural heritage present in its territory. These inventories shall be regularly updated. Unfortunately, evolving and living cultures cannot be reduced to diagrams on a printed page or data on a CD, and not all traditional

cultures can be expressed in a fixed form. Moreover, many countries would not have the needed resources to develop a reliable inventory system, even if such a system could be developed.

However, it is not clear to what extent the documentation of TCEs, and the establishment of registries, lists and inventories, could play a role in relation to the IP protection of the TCEs. There have been concerns also raised that documentation of TCEs can easily facilitate their unfair use and exploitation by unauthorised users. As discussed, many initiatives are underway to document TCEs. These initiatives are valuable as part of cultural heritage safeguarding programs, but they also run the risk of making the TCEs available to the public and vulnerable to misappropriation and misuse. For example, traditional music recorded for preservation purposes can be subsequently sampled and commercialised without the knowledge of the tradition bearers. Some views against documentation are:

- Documentation of TCEs can, however, be controversial, as it is not itself necessarily a form of protection. 'Preservation' and 'IP protection' may be related but they are distinct.
- From an IP perspective, documentation can threaten TCEs and facilitate their unwanted disclosure and exploitation.
- Concerning IP issues, documentation and registration systems raise questions relating to the process of documentation why, and by whom documentation or registration is carried out.
- Issue of ownership of the data, control, legal effect, 'public domain', competing claims, and
- Issue of access to the documented material and the terms on which that access has to be provided.

The practical assistance, training programs and guidelines on documentation issues related to TCEs available from WIPO, such as the WIPO Creative Heritage Cultural Documentation Training Program and related rights management software, the publication entitled "Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives," the WIPO database of protocols and best practices, and the WIPO Toolkit on IP management before, during and after the documentation of TCEs, provide for a comprehensive framework and guidance for the protection of TCEs.

As previously noted, expressions of folklore are often intangible and orally maintained. This is one of the reasons why the fixation requirement for copyright protection is criticized, and why most sui generis systems do not require fixation. Expressions of traditional cultures are also 'living', constantly being adapted and recreated. Requiring some form of prior documentation and/or registration seems to stand in contradiction to the oral, intangible and 'living' nature of many expressions of traditional cultures.

The copyright system, whose principles and forms of protection are most closely relevant to EoF/TCEs, does not permit the imposition of any formalities and protection is automatic upon the creation of a work. There is no prior examination, as is the case in industrial property. As noted in Unit 2, earlier drafts of the Model Provisions, 1982 provided for a registration system for folklore, but this was later deleted because it was felt that registration/documentation was more relevant to preservation than IP protection. The Tunis Model Law, 1976 rules out any

possibility of demanding fixation for a work of folklore. The drafters felt that works of folklore are often by their very nature in oral form and never recorded, and to demand that they be fixed in order to enjoy protection puts any such protection in jeopardy and even, according to the commentary to the Model Law, risks giving the copyright to those who fix them. It must be noted that fixation is not a requirement of the 1982 Model Provisions.

Apart from the huge costs involved in documenting and recording TCEs, the copyright that may vest in the documentation and recordings may (i) not vest in the communities themselves (unless they are the authors or have taken assignment of the rights) and (ii) in any event extends only to the ways in which the TCEs are expressed and not to the values. TCE is usually documented for reasons other than legal protection, such to preserve or disseminate it, or to use it in relation to environmental management or for classification purposes. In fact, when documentation of TCE means that it is more widely available to the general public, it can increase the need for legal protection, particularly when wider availability is made possible by means of the internet; documentation in the absence of adequate legal protection could mean the originating community unwittingly loses control over its TCE. Thus, documentation should, therefore, not take place in a policy or legal vacuum. An effective strategy, probably intellectual property based which effectively takes care of the concerns of the local and traditional communities, should guide and underpin any documentation exercise.

11.8 CREATIVE HERITAGE PROJECT

New technologies offer enhanced means to safeguard and restore intangible cultural heritage, especially elements of cultural heritage which are in danger of erosion and disappearance. They can also facilitate educational and scholarly opportunities, as well as enhanced cultural exchange. The recording and digitisation of TCEs is valuable for cultural heritage safeguarding and promotion programs, but can unwittingly make the TCEs vulnerable to unauthorised use and exploitation. Strategic management of IP, during TCEs recording, digitisation and dissemination projects, is therefore advisable. This is the focus of WIPO's Creative Heritage Project.

The Global IP Issues Division of the World Intellectual Property Organisation (WIPO) in 2008 launched an initiative called the "Creative Heritage Project". This project is aimed at encouraging the current process of discussion of how cultural institutions take intellectual property rights into consideration. This project is aimed to develop best practices and guidelines for managing intellectual property issues when recording, digitizing, and disseminating cultural heritage.

The Creative Heritage Project comprises mainly of three broad things:

- a) Intellectual Property assistance which involves information and advice on IP management during digitisation projects;
- b) Information Technology assistance involving technical support for the recording and digitisation of traditional cultural expressions, and the establishment of digital collections and web sites;
- c) WIPO Creative Heritage Digital Gateway which is a portal on WIPO's web site through which access to the sites of indigenous communities and cultural institutions can be obtained.

The goal of the WIPO Creative Project is to provide a framework of IP guidelines

for documenting, recording and digitizing intangible cultural heritage. WIPO's Creative Heritage Project provides IP and IT assistance to communities wishing to record their TCEs as part of an IP strategy. The main tools for achieving this are:

- Providing practical guidelines when recording and digitizing TCEs for communities
- Holding consultations on managing IP issues for cultural institutions
- Creating database of practices relating to digitisation of cultural heritage
- Conducting pilot training programmes on the related issues and
- Documentation toolkit
- Holistic approach Surveys of existing practices/policies
- Database of codes, guides, policies, protocols relating to IP and the digitisation of cultural heritage
- Providing other resources like case studies, articles, laws, etc.

Indigenous peoples and traditional communities have a growing interest in being more directly involved in recording, presenting and representing their own cultures to the public. They also wish to own, control and access cultural heritage materials held by cultural institutions. To answer these needs, WIPO, under its Creative Heritage Project is offering hands-on training in documentation, recording and digitisation of intangible cultural heritage for indigenous and local communities and museum staff of developing countries.

WIPO's Creative Heritage Project is developing resources for the strategic management of IP rights and interests by cultural institutions, so as to both preserve and protect cultural heritage. Examples of such resources include surveys on practical experiences with IP in the archival practices of institutions and of indigenous and local communities; a searchable database of codes, policies and practices; and a draft publication on IP management and TCEs for museums, archives and libraries. The main concern is that the valuable processes of preservation and safeguarding (such as the recording, documentation, digitisation, dissemination, circulation and publication of TCEs) can sometimes fail to take adequate account of the rights and interests of source communities. This further runs the risk of unintentionally making TCEs freely available for use by others. The issue will be more serious when such use of TCEs is against the wishes of the source community; for example, culturally sensitive materials may be commercially exploited by others.

Self Assessment Question

(Spend 3 minutes)

2) What role can be played by proper documentation and recording of cultural expressions and folklore can play in protection of TCEs?

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11.9 INDIAN STAND IN IGC ON PROTECTION OF TCEs

Indian position on TCEs can be gauged through various submissions in discussions at IGC, WIPO. In IGC, the document on TCE is mainly negotiated by Ministry of Human Resource Development from the Government of India side. As per Indian position, the main objective of according IP protection to TCEs is to prevent their misappropriation and to ensure economic returns to the communities who had been nurturing and developing them. Therefore, it is essential to incorporate the provisions of both economic rights and moral rights in the framework for the protection of TCEs. The economic rights would help in sustainable development of traditional communities and will further contribute in capacity building and, thereby, conservation and positive development of the TCEs. Moral rights would be helpful in providing for appropriate recognition and acknowledgement by others of the TCEs. The stand taken by India seems to be reasonable and comprehensive and takes care of both the moral and economic rights view of the situation.

It is also clear that traditional IP laws like copyright or design laws are not applicable to TCEs since it is difficult to establish the conditions of originality and novelty requirements. Thus, there is a need of a new group of IPRs which encompass all such forms of traditional wisdom and expressions of folklore. The duration of protection for TCEs should be unlimited as is the case of geographical indications. The protection should endure for as long as the TCEs continued to meet the criteria for protection. As is the case with any other IP rights, there should be exceptions and limitations to the rights accorded to TCEs, since protection mechanisms should not to unduly restrict the use of TCEs. The safeguards against misappropriation and misuse of the TCEs are required which will become the means to bring deserving economic returns to the holders, preservers and developers of such TCEs. Misappropriation of TCEs should be considered illegal and inappropriate, if acquired by theft, bribery, inducement, fraud, misrepresentation, deceit, or breach of confidence or fiduciary relationship. Acquisition of information, including recording for commercial use such as for broadcasting, telecasting, advertisement, without the prior informed consent of the holders and traditional users of such TCEs, would amount to misappropriation. This would also include unauthorised disclosure of secret or spiritual TCEs. Commercialisation of TCEs without just and appropriate compensation should also be considered an illegal and unacceptable act. Equitable compensation should be paid to the communities concerned. However, this would only be possible with a legally binding international instrument.

Further, there is need to develop accessible, appropriate and adequate enforcement and dispute resolution mechanisms, border measures, sanctions and remedies, including criminal and civil remedies, in cases of breach of the protection for TCEs. Keeping in view of the interests of the traditional communities, customary laws and processes and alternative dispute resolution should be used, as far as possible, in enforcement procedures. An agency could be constituted for the management of the rights of the community concerned, which could be tasked with, among other things, advising and assisting communities with regard to the enforcement of rights and with instituting civil, criminal and administrative proceedings on their behalf when appropriate and requested by them. The international regulation should address the scope, object and nature of protection of TCEs. India has through its submissions made it clear that protection of TCEs

needed to be tackled at the international level in order to be effective. Thus, Indian stand favours that there is a need for a legally binding international instrument on the subject. These provisions could be structured flexibly so that the national regulations could take care of the diversity of the problems while implementing the international obligations. The manner in which the obligations would be implemented should be left to the discretion of national regulation. The rights and benefits arising from the protection of TCEs under national measures or laws, which would give effect to international agreements, should be available to all eligible beneficiaries who were nationals or habitual residents of a prescribed country as defined by international agreements. Eligible foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who were nationals of the country of protection, as well as the rights and benefits specifically granted by the international instruments. Thus, as per the Indian stand in discussions of IGC, India aims at a legally binding treaty which provides effective protection on TCEs. Protection provided should include prior informed consent and access and benefit sharing.

Further, India took lead in organising the Asia-Pacific Policy Forum on Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore in Cochin, India, from April 4 to 6, 2006. It was attended by representatives and experts of 21 countries, namely Bangladesh, Bhutan, China, Indonesia, Islamic Republic of Iran, Malaysia, Mongolia, Myanmar, Nepal, Pakistan, Papua New Guinea, Republic of Korea, Samoa, Singapore, Sri Lanka, Thailand, Vietnam and Nigeria. There was participation from some representatives of the African Union, the African Regional Intellectual Property Organisation and the Andean Community, as well as representatives of the World Intellectual Property Organisation. The Cochin Declaration was adopted at the Forum. The Policy Forum constituted two Working Groups, one focusing on protection of traditional cultural expressions/expressions of folklore (TCEs/EoF) (Working Group 1) and one focusing on the protection of traditional knowledge strictosensu (TK) (Working Group 2). This helped in facilitating a Cochin Declaration which contains draft treaty language proposals on the issues. Any mechanism put in place at any later time in India should be simple, supportive, sensitive and sustainable. Such mechanism should be guided by following:

- Addressing the need for a comprehensive national strategy within the framework of cultural and economic development.
- Provide legal assistance and promote the use of classical IP system by TCE holders as a complementary legal mechanism.
- Proper identification and documentation of a country's TCEs would be a useful exercise. The success of traditional knowledge digital library (TKDL) of India can be emulated in case of TCEs also.
- The government policies should stimulate growth and promote the wide use of TCEs among the people.
- Necessary infrastructure must be provided to support the private and informal sectors of the economy where much of the use of TCEs begins to promote cultural industries.
- The most important thing is that such framework should aim at empowering the traditional communities and using the TCEs in a fair manner while respecting their spiritual and cultural basis.

It is pertinent to note that traditional cultural industries represent the highest

employers of labour in most developing and underdeveloped countries, and they have immense potentials for employment generation and wealth creation. It is therefore important in Indian context as well, to deliberate and develop a national, social and economic policy not only to focus on the protection but also the promotion of these industries.

Self Assessment Question

(Spend 3 minutes)

3) Briefly discuss the stand taken by India in discussions at IGC, WIPO regarding the protection of Traditional Cultural Expressions.

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11.10 SUMMARY

- There is now demand for the enhanced protection of TCEs at the international, regional and national levels from various stakeholders. This has resulted in a complex policy debate over the TCEs at the international level.
- Some countries are calling for a sui generis approach for the protection of TCEs, while others consider that existing intellectual property law can be modified a little to incorporate for the protection of TCEs. Some of the countries also believe that a mixture of sui generis mechanisms and existing IP law is the best approach for the protection of TCEs.
- The IGC, WIPO is acting as a major platform for the negotiations for a framework for the protection of TCEs.
- The guiding principles of the IGC in context of TCEs have developed in due course of time with negotiations with varied stakeholders and thus there are guiding principles like flexibility, comprehensiveness, appreciating the collective and inter-generational character of TCEs, respecting regional, international and indigenous concerns of the various stakeholders.
- India took lead in this matter by organising an Asia Pacific Policy forum meet at Cochin in which representatives from twenty one nations, representatives from African Intellectual Property Office and WIPO representatives were also present. Cochin Declaration was adopted which contains draft treaty language proposals on the issues of protection of TCEs.
- India's stand so far has been that WIPO should move towards negotiations for a substantive treaty for protection of Traditional Cultural Expressions. Protection provided should include, amongst others, disclosure of origin, prior informed consent and access and benefit sharing provisions.

11.11 TERMINAL QUESTIONS

- 1) Discuss the role played by Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) established by WIPO in devising an international legal framework for the protection of Traditional Cultural Expressions.

- 2) Do you think that the international discourse on the protection of TCEs at the IGC of WIPO still seems to be a far from reaching a consensus on the protection of TCEs? If yes, then give reasons.
- 3) What is Creative Heritage Project? What is the aim behind the launch of the Creative Heritage Project?

11.12 ANSWERS AND HINTS

Self Assessment Questions

- 1) Refer to Section 11.5
- 2) Refer to Section 11.7
- 3) Refer to Section 11.9

Terminal Questions

- 1) Refer to Sections 11.1 and 11.3
- 2) Refer to Sections 11.1, 11.3 and 11.5
- 3) Refer to Section 11.8

11.13 REFERENCES AND SUGGESTED READINGS

- 1) Website of World Intellectual Property Organisation (WIPO) for the drafts and on-going work of WIPO IGC (Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore) on TCEs.
- 2) *Consolidated Analysis of The Legal Protection of Traditional Cultural Expressions/Expressions of Folklore*, WIPO, 2003.
- 3) *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives*, written for the World Intellectual Property Organisation (WIPO) by Molly Torsen and Jane Anderson, 2010.

UNIT 12 GLOBAL ISSUES IN THE PROTECTION OF TCE

Structure

- 12.1 Introduction
- 12.2 Objectives
- 12.3 Issues Identified by IGC, WIPO
- 12.4 Issues in Defining TCEs
- 12.5 Role and Position of Traditional and Indigenous Communities
- 12.6 Objectives of Protection
- 12.7 Forms of Behaviour in Relation to the Protectable TCEs to be Considered Unacceptable/Illegal
- 12.8 Type and Term of Protection to be Provided
 - 12.8.1 *Sui generis* System for Protection
- 12.9 Relationship between Customary Laws and Protocols and the Formal Intellectual Property System
- 12.10 TCEs and Human Rights Issues
- 12.11 Effect of Globalisation and Technological Advancement
- 12.12 Other Issues
- 12.13 Way Ahead/Future Prospects
- 12.14 Summary
- 12.15 Terminal Questions
- 12.16 Answers and Hints
- 12.17 References and Suggested Readings

12.1 INTRODUCTION

From the previous Units it is clear that the issue of protection of TCEs has been an issue of debate at various international fora since decades. But, no comprehensive international legal framework has been adopted till date for the protection of TCEs. This is mainly because of the reason that there have been various intricate issues related to TCEs which have varied implications on the different stakeholders and thus no workable consensus has been formed till date. The protection of traditional cultural expressions is complex and raises fundamental policy and legal questions. The core of these issues arise from the basic nature of TCEs that they are dynamic, fluid, and constantly evolving. Further, these expressions are mostly in intangible form and even if in tangible form the processes associated with them are not documented properly. The creation of cultural heritage is more a process than the product of that process. Forms of traditional cultural expression and customary means of regulating their use, transmission, protection and preservation are diverse. Concerns have been also expressed that attempts to codify and

institutionalise protection of cultural identity are undesirable and that a flexible and inclusive approach is preferable. The actual experience with TCEs protection has shown that it is unlikely that any single “one-size-fits-all” or “universal” international framework will be found to protect TCEs comprehensively in a manner that suits the national priorities, legal and cultural environment, and needs of traditional communities in all countries. Collection and protection of TCEs raise unique intellectual property law related challenges and, in response, institutions and researchers in many countries are developing new frameworks for understanding the legal, cultural and ethical implications of collecting and protecting TCEs. There is another related peculiar problem concerning the fact that even within a community, there are restrictions on who can handle or disseminate certain form of TCEs. Some of the works that are considered sacred or intended to be kept secret by the traditional communities are governed by traditional laws and customs. The identification and inventory mechanisms and the documentation requirement therefore create a dilemma for those even within the community to decide between obtaining protection and losing their secrecy vows.

This is an era increasingly marked by the globalisation of trade and culture. In this networked and globalised era, we are witnessing a convergence between the formal intellectual property system, on the one hand, and “informal” systems for protection of traditional cultural expressions, innovations and creativity, on the other. This convergence results from two consequences of current globalisation processes, namely, the growing relevance of intellectual property to an increasing number of countries and users, and the expanding recognition that TCEs is a valuable economic and cultural asset within the global information society. This has led to unfair use and misappropriation of these cultural assets of the societies by various agencies. The misappropriation of TCEs is a global problem and thus requires a global response. The response should be satisfactory, effective and robust and probably should come from the international IP system covering every aspect of the problem effectively. The issues related to TCEs at sub-national, national, international and supra national level are controversial and they require answers to complex social, legal, scientific and economic questions. Further, there is divergence in viewpoints and interests of the various actors involved in the debate, which include developing and developed countries, indigenous people, scientists, private industry and non-governmental organisations. Thus, the issues arising with regard to TCEs clearly have an international dimension. Thus, internationally agreed measures including voluntary guidelines, joint recommendations, legally binding international agreements and databases are needed.

From the above discussion, it is clear that there are still many challenges concerning how to develop legislation to implement the new international framework for the protection of traditional cultural expressions. There are still various issues which call for more thoughtful and inclusive discussions on the issue of framing an international framework for the protection of TCEs. These issues also suggest the need for a deeper exploration and careful assessment of the various alternative models and proposals that may be used to achieve the underlying objectives. The challenges posed through the issues discussed further in detail in this Unit are the main challenges faced by the policymakers at various levels and forums while developing a comprehensive framework for the protection of TCEs. The policymakers at national and international level should take account of the varying needs and interests of all the stakeholders which should be involved in developing a framework for the protection of TCEs.

12.2 OBJECTIVES

After reading this unit, you should be able to:

- critically analyse various issues which are at centre stage regarding TCEs;
- explain the concerns of the indigenous and traditional communities;
- appreciate the local and contextual nature of TCEs and opinions for protection of TCEs under sui generis system;
- describe as to what framework can be used for the protection of TCEs;
- international and national implications of the international framework for the protection of TCEs; and
- identify as to what can be the defining elements of future course of action for the protection of TCEs.

12.3 ISSUES IDENTIFIED BY IGC, WIPO

In the previous Unit we noticed the pivotal role being played by the IGC, WIPO regarding the discussions and deliberations to devise a legal framework for the protection of TCEs. The deliberations which started at WIPO Intergovernmental Committee (IGC) included various stakeholders from different countries across the globe and other stakeholders like non-government organisations, which helped in identifying and locating various issues which come in way of an international legal framework for the protection of TCEs. IGC at its tenth session identified ten key questions relating to the protection of traditional cultural expressions. These are:-

- a) A definition of traditional cultural expressions (TCEs)/(EoF) that should be protected reflecting the concerns of all the stakeholders.
- b) Who should benefit from any such protection or who hold the rights to protectable TCEs/EoF?
- c) What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?
- d) What forms of behaviour in relation to the protectable TCEs/EoF should be considered unacceptable/illegal?
- e) Should there be any exceptions or limitations to rights attaching to protectable TCEs/EoF?
- f) For how long should protection be accorded? What should be the term for the protection of TCEs?
- g) To what extent do existing IPRs already afford protection? What gaps need to be filled?
- h) What sanctions or penalties should apply to behaviour or acts considered to unacceptable/illegal?
- i) Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?
- j) How should foreign rights holders/beneficiaries be treated?

These are the specific issues which have been identified by IGC so that focused discussions on these issues between various participants help in achieving a consensus on the various issues amongst the participants in the discussions at IGC. There are other issues like the importance of traditional and folk culture for safeguarding national identity; the absence of a system for folklore education; the lack of finances to support the promotion, research, and dissemination of folklore and the need to develop infrastructures for disseminating folklore in public mass media. There seems to be overall lack of coordination between central authorities and institutions working towards the safeguarding of traditional culture and folklore not only at international level but at national level also.

12.4 ISSUES IN DEFINING TCES

Although now there appears to be some level of consensus regarding the terminology to be used, earlier the terminology used in national and international discourse could be described as fluid. It can be seen that some jurisdictions protect both traditional cultural expressions and traditional knowledge in a single instrument, while others use a range of laws and instruments to address the two areas distinctly. The initial appearance and evolution of traditional knowledge as “folklore” in national and international discourse; the eclipsing of “folklore” by “traditional knowledge”; the re-emergence of folklore as traditional cultural expressions/expressions of folklore as part of the folklore/traditional knowledge bifurcation; and the convergence of folklore and traditional knowledge; are all reflective of this fluidity in the discourse. Further, the dynamic and evolving nature of TCEs is more apparent through the examples of works like folk tales, folk songs, instrumental music or dances and the different rites and rituals of people. Thus, the concept or definition to be developed should take into consideration that TCEs have a dynamic, evolving and iterative nature.

By attempting to define TCEs in a rigid and formal manner, there is a risk of freezing or restricting the rights at the time of defining them, hence not fully taking into account their evolutionary nature of TCEs. There is one view also that protection must not be in any way contingent upon registration. Conditioning the protection on registration might not be the effective way for protecting TCEs keeping in view the traditional collective aspects of cultural expressions. There can be two parts to defining protectable TCEs: first, developing an appropriate definition of TCEs, and second, determining the full scope of the protectable subject matter. Both represent a challenge given the complexity of the issues and the particularities and needs of traditional communities. The provisions defining the subject matter of the international instrument should reflect the idea that ECTs/EoFs have a dynamic, evolving and iterative nature. Accordingly, expressions that may characterise more recently established communities or identities should not be left unprotected, as they equally qualify as TCEs/EoFs.

12.5 ROLE AND POSITION OF TRADITIONAL AND INDIGENOUS COMMUNITIES

Traditional cultures are of immense cultural, historical, spiritual and economic value to traditional communities and indigenous people all over the world. Generally, indigenous peoples do not view their heritage in terms of property which has an owner and is used for the purpose of extracting economic benefits. Rather heritage is seen by traditional and indigenous people as a cultural and spiritual aspect of

their existence in the local community and individual responsibility. It has now been recognised that TCEs are one of the key elements of the identity, livelihoods, well-being and sustainable development of such local traditional communities. Traditional cultural expressions hold immense potential economic value and they can help in establishing a basis for community enterprises and cultural industries. This essential feature of TCEs can contribute to poverty reduction and economic development. The challenge is, however, to achieve a balance between protection of traditional cultures from misappropriation and promotion of their use on equitable and culturally appropriate terms. The challenge also lies in ensuring that the communities who are their custodians and guardians can benefit economically from their traditional knowledge and traditional cultural expression, while maintaining respect for those aspects of traditional cultures that communities do not wish to be exploited commercially.

One of the key findings of extensive fact-finding and consultations conducted by the WIPO since 1998 has been that the discussion of policy and legal options for the improved protection of expressions of traditional cultures should be guided as far as possible by the real needs articulated by indigenous and local communities and, most importantly, their actual experiences with the intellectual property system. This finding is still valid and the concerns of the indigenous and local communities must play a pivotal role in defining and finalising an international framework for the protection of TCEs. Some model of protectionism is necessary to assist these communities. Ranging from simple efforts for increasing resources for the creation of relevant cultural and linguistic content to creating governmental agencies dedicated to protecting property rights through formal registration, there can be variety of ways to ensure that enforceable rights inevitably benefits the creators of the works. Any mechanism or legal regime should take care of the local aspirations possibly by adopting a following course of action:

- Incorporating comprehensively the values and aspirations of the communities or holders of the TCEs.
- Recognising the rights of communities over their TCEs.
- Promoting respect for indigenous customary laws and practices.
- Developing and promoting cultural trade taking into account the economic and sustainable development needs of the community.
- Prohibiting unauthorised acquisition and use of IP rights over TCEs.
- Putting in place appropriate regulatory mechanism for access and control without allowing such mechanism to become a hindrance to the beneficial exploitation of the materials amongst the traditional and local communities.

For instance, the discussions of IWG of IGC which met for the first time from 19 to 23 July, 2010, on beneficiaries (Article 2), indigenous experts were strongly in favour of stipulating “indigenous peoples” as the beneficiaries of the new protection regime, arguing that the new instrument must be consistent with the UN Declaration on the Rights of Indigenous Peoples. Other experts expressed a preference for terms such as “nations” and “local and traditional communities.” The latter term is used in the draft protocol on the Protection of Traditional Knowledge and Expressions of Folklore that was adopted within the framework of the African Regional Intellectual Property Organisation (ARIPO). A compromise solution proposed by the African Group was to simply mention that the owners of the rights would be the “holders” of the TCEs.

IGC has taken various steps, including establishment of Voluntary Fund, to ensure participation of indigenous and traditional communities in deliberations of IGC. It is imperative that the IGC not only works towards enhancing participation of indigenous and other local communities in its deliberations and discussions but that the participatory mechanisms it adopts must ensure that these communities actively and effectively take part in the processes designed to develop law and policy to protect their rights. Broad and effective participation of indigenous and other local communities in all discussions and negotiations on traditional cultural expressions must be ensured.

The theme of 2011 International Day of the World's Indigenous People was 'Indigenous designs: celebrating stories and cultures, crafting our own future'. This theme also showed that there is a story and a personal experience behind every piece of cloth, textile or artwork from an indigenous individual or community. It also captures a range of issues such as the danger of extinction and need for preservation and revitalisation of indigenous cultures, but can also be used to highlight businesses who are taking inspiration from indigenous peoples, and communities. This theme is very apt timely as member States of the World Intellectual Property Organisation (WIPO) and accredited observers, many of whom represent indigenous people, are engaged in text-based negotiations towards the development of an international legal instrument or instruments to ensure the effective protection of traditional knowledge and traditional cultural expressions.

Self Assessment Question

(Spend 3 minutes)

- 1) What are the issues/ limitations in arriving at the consensus regarding the definition of traditional cultural expressions?

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12.6 OBJECTIVES OF PROTECTION

TCEs form part of the universal heritage of humanity and they can act as powerful means of bringing together different peoples and social groups and of asserting their cultural identity. They have social, economic, cultural and political importance. TCEs have a role in the history of the people, place in contemporary culture and they define the future also. The existing protection of TCEs is most closely associated with copyright law. Generally, there are two approaches to copyright protection. This duality is sometimes referred to as economic versus moral rights-based systems. There is an opinion that IP right protection should be extended to TCEs to acknowledge its commercial value. This opinion, however, is not clear in identifying any justifiable reasons why TCEs should be eligible for such protection. If the purpose of the IP protection of TCEs is to correct the inequities in economic development or to ensure sustainable development of certain communities by providing a new financial resource, a discussion should be conducted as to whether or not IP protection of TCEs is an appropriate way to achieve these purposes in the first place.

However it might be problematic to enable only a certain generation to enjoy the benefits derived from TCEs that has long been passed down. Moreover, there will

be no financial incentive for the generations after the expiration of the IP right to maintain and pass down the TCEs. On the other hand, from the viewpoint of public interests, it is also inappropriate to grant an IP right that will stay valid forever as it unfairly limits the scope of public domain. There is another opinion that TCEs should be protected as moral rights considering values that have long been fostered in an indigenous population or local community. If moral rights protection is made applicable to TCEs, right holders should be protected against any acts infringing their moral rights.

12.7 FORMS OF BEHAVIOUR IN RELATION TO THE PROTECTABLE TCEs TO BE CONSIDERED UNACCEPTABLE/ILLEGAL

The protection of TCEs raises more complex issues and thus there can be varied forms of behaviour in relation to protectable TCEs which can be regulated through a legal framework. It had been noted that insulting, degrading and/or culturally and spiritually offensive use of TCEs is a form of behaviour which is regarded as unacceptable or illegal more by indigenous peoples and traditional and other cultural communities. There can be variety of behaviors, such as “distortion”, “disrespect”, “denigration”, “piracy”, “copying”, “unauthorised collection”, “exploitation”, “disclosure”, “abuse”, “unfair use”, “failure to pay equitable compensation”, and “commercialisation”.

In a communication society, cultural creation is based on reciprocal cultural exchanges and dialogues. It must be noted that from the copyright perspective, most of the TCEs can be considered to be in the public domain. The process of modern cultural creation requires, on many occasions, the influence and even certain uses in good faith of existing TCEs. There is need to look into detail the existing mechanisms, including legal, both IP and non-IP and non-legal measures, which are available to address these specific issues so as to develop a criteria which guides as to what conduct needs to be regulated under the framework and up to what extent.

12.8 TYPE AND TERM OF PROTECTION TO BE PROVIDED

It is trite that any type of protection of TCEs under intellectual property law should be subject to certain limitations, to protect the public interest. At the same time, the protection of TCEs should not prevent the traditional communities themselves from using, exchanging and transmitting among themselves their TCEs in traditional and customary ways and in developing them by continuous recreation and imitation.

Further there will be other legal challenges for TCEs which include issue of originality, their availability in public domain, the fixation requirement if protection be given under the copyright law, issue of fair use and exceptions, degree of the rights given to the beneficiaries and other stakeholders and jurisdiction problem for customary, national, regional and international level. Thus, the debate at international level primarily focuses on options including providing sui generis system and devising a strategy under intellectual property law under international legal framework for the protection of TCEs.

12.8.1 *Sui Generis* System

Tunisia was the first country to provide protection for TCEs within its copyright law in 1967. A number of other countries mainly in Africa and South America followed this. This reflects the interest of the culturally rich countries and indigenous communities in preservation of culture, promotion of culture for socio-economic development and preservation against unauthorised commercial exploitation. The WIPO-UNESCO Regional Consultation on the Protection of Expressions of Folklore for Countries of Asia and the Pacific, in 1999, observed that the countries of Asia and Pacific were very rich in cultural heritage and there was widespread exploitation for commercial and business interests. Due to this unfair use, important elements of TCEs were being lost in the absence of a proper legal framework to protect TCEs at national and international level. Further, the existing intellectual property rights regimes proved to be inadequate in checking such unfair use and thus an effective protection of TCEs required *sui generis* legislation. Thus, the consultation meeting pointed that it was imperative for the national governments to give more attention and resources to the aspects of conservation, preservation, development and legal protection of the TCEs.

The call for *sui generis* protection of TCEs generally arises from shortcomings of existing IP rights. Various surveys of national experience with the IP protection of TCEs have mentioned the following shortcomings in the conventional IP system in relation to TCEs:

- a) difficulty meeting formal requirements such as novelty, inventive step or non-obviousness, or originality (for TCEs) (this may be due at least in part to the fact that TCEs often date back prior to the time periods associated with conventional IP systems, or are developed in a more diffuse, cumulative and collective manner, making specific steps such as invention or authorship difficult to establish at a fixed time);
- b) requirements in many IP laws for protected subject matter to be fixed in material form (given that TCEs are often preserved and transmitted by oral narrative and other non-material forms);
- c) the frequently informal nature of TCEs and the customary laws and protocols that define ownership (or other relationship such as custody and guardianship) and that form the basis of claims of custodianship, cultural affinity and community responsibility;
- d) the concern that protection systems should correspond to a positive duty to preserve and maintain TCEs, and not merely provide the means to prevent others from making unauthorised use (the characteristic function of IP rights);
- e) the perceived tension between individualistic notions of IP rights (the single author or inventor), as against the tendency for TCEs to be originated, held and managed in a collective environment, often making it difficult to identify the specific author, inventor or analogous creator that IP law is assumed to require); and
- f) limitations on the term of protection in IP systems (calls for better recognition of TCEs often highlight the inappropriate nature of relatively brief terms of protection in conventional IP systems, as interests and need for protection are seen as enduring beyond individual life spans for TCEs subject matter).

Under the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002, 'traditional owners' have the right to authorise or prevent, amongst others, the adaptation, transformation and modification of the protected TCEs. An external user must receive consent to make new derivative work. However, if the work is used for commercial purposes, the rights holder must share benefits with the traditional owners, acknowledge the source of the TCE and respect moral rights in the TCE. The Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge of Panama, 2000 establishes a registration system for TCEs. A special office has been created there within the country's IP office to approve the applications and maintain the register. Further, the procedure before the IP office does not require the services of a lawyer and there are no application fees. Thus, keeping in view that TCEs are part of the physical knowledge embodied in the land, and the ecological, social, and political knowledge of the community, there is strong voice from various stakeholders for the *sui generis* protection of TCEs.

Examples of other *sui generis* systems which have already been established at national or regional levels for the protection of expressions of folklore/TCEs are:

- a) the Tunis Model Law on Copyright for Developing Countries, 1976 (the Tunis Model Law);
- b) the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 (the Model Provisions, 1982);
- c) The Bangui Agreement on the Creation of an African Intellectual Property Organisation (OAPI), as revised in 1999 (the Bangui Agreement);
- d) the Indigenous Peoples Rights Act of 1997 of the Philippines (the Philippines Law); and,
- e) the Indian Arts and Crafts Act, 1990 of the United States of America (the U.S.A. Law).

As already discussed, the debate about the protection of TCEs often centers on whether adequate and appropriate protection is best provided through either the conventional IP system or through an alternative *sui generis* system. The practical experiences of many States reflect that existing IP rights and *sui generis* measures are not mutually exclusive but are complementary options. A comprehensive approach is likely to consider each of these options, and apply them judiciously to achieve the objectives of protection, accepting the practical reality that the boundaries between these options are not rigid. Effective protection may therefore be found in a combined and comprehensive approach, with a menu of differentiated and multiple levels and forms of protection.

12.9 RELATIONSHIP BETWEEN CUSTOMARY LAWS AND PROTOCOLS AND THE FORMAL INTELLECTUAL PROPERTY SYSTEM

There are certain peculiar characteristics of TCEs which pose distinct challenges in providing effective protection to TCEs through framework of contemporary intellectual property framework. Further, these peculiar characteristics necessitate

a different and comprehensive framework incorporating the protection for varied forms of TCEs: Certain issues have been identified in this area and require further consideration, and these could be include:

- i) The traditional concepts of group ownership in customary laws and the non-unitary nature of traditional property ownership in the intellectual property laws. Thus the major issue is regarding importance of community/collective rights versus individualistic western concepts on which the contemporary system of IP is based.
- ii) There are various cultural expressions which belong to oral cultures and constitute living heritage. Even customary law not written and if written there is a lack of homogeneity in the customary laws of various traditional owners within and between communities.
- iii) TCEs are dynamic, living and evolving in nature whereas IP protection is generally given to static expressions which can be documented.
- iv) The possibly adverse effects that systems for the legal protection of cultural expressions may have upon traditional communities, whether traditional or urban, and their art; and,
- v) The relationship between customary systems of protection and overlapping protection provided by existing intellectual property laws.
- vi) The importance of relationships of TCEs with the surrounding geographical, social and cultural environment: the land, animals, plants, other humans, spirits, and ancestors, etc.

Self Assessment Question

(Spend 3 minutes)

2) Briefly discuss the different forms of behaviour from which protection to the traditional cultural expressions is needed.

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12.10 TCES AND HUMAN RIGHTS ISSUES

The two most relevant fields of law, when one talks about the protection and promotion of TCE are the Intellectual Property Rights (IPR) and the human rights. In addition to the fragmented activities of UNESCO, WIPO and numerous other institutions, human rights have recently become more prominent in the discussion on TCE protection at the international level. This is mainly due to various issues which originate especially during the process of documentation and commercial use of TCEs.

There may be a case where indigenous communities oppose the reproduction of ceremonial dance in a modern play because they perceive such practice as a violation of their religious freedom or in violation of their local customs. Other linkages may include: freedom of expression and information and protection of cultural heritage and TCEs; protection of collective moral rights of the indigenous

communities. Further, there would be various delicate human rights issues involved in the process of documentation of the TCEs which have become more prominent due to digital networks in this technology driven era. It has been stated again and again in various conferences and declarations that all human rights are universal, indivisible, independent and interrelated. The most relevant provisions in this regard are Article 15 of the International Covenant on Economic, Social and Cultural Rights (CESCR). Article 15 (1)(c) recognises that the everyone has a right to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author. As per recent interpretation by the Committee on Economic, Social and Cultural Rights, this Article provides a linkage between copyright and indigenous cultural expressions. Thus, it seems that there is obligation to respect and protect this right. It can be further seen that cultural issues have also been taken care of by Human Rights Committee by relating them to Article 27 of the International Covenant on Civil and Political Rights (CCPR). The Article 27 has been used as a basis for protecting the cultural identity of individuals by application of a broad definition of culture to protect the cultural identity of indigenous people. However, it is important to note that in its comment on Article 27 of CCPR, the Human Rights Committee noted that only individuals may invoke Article 27 and denied ethnic groups to file a complaint. This approach has been criticised by several scholars and also by indigenous people organisations on the reasoning that any attempt to legally protect the indigenous and cultural communities would be futile if it is not based on concept to group rights.

12.11 EFFECT OF GLOBALISATION AND TECHNOLOGICAL ADVANCEMENT

The rapid increase in technological development has reduced the distances, offered a new means of global communication, and led to a gradual integration of national economies into one borderless global economy. The economic globalisation has had significant social and cultural effects in both developed and developing societies. It is a fact that the globally interconnected world has increased the risk of the knowledge and creativity of indigenous peoples being continuously appropriated and commercialised by global players without any possibility for the peoples concerned to prevent it. The digital environment reduces transaction costs involved in communicating and processing information.

Technologies have often been seen as a peril for traditional cultural expressions (TCE) and as an inhibitor of their protection. The new technologies are indeed viewed as the face of globalisation forces – both as driving and deepening the process of globalisation itself and as a means of spreading its effects. Another reason for the perceived negative effects of new technologies lies in their very nature, since they allow, among other things, instantaneous access to information, reproduction of the original without loss of quality and data transport with the speed of light at an ever decreasing price. Thus there are arguments against documentation of TCEs because such documentation and recording can help in easy misappropriation of these expressions. There have been numerous instances where multinational corporations and other people have got easy access to the cultural expressions due to recording and documentation which helped them to commercialise these for their benefits at the cost of the indigenous and traditional communities.

There are other global issues which are come in way of achieving at a consensus in the work of the committee. One issue that arose several times during the discussion concerned how the protection of TCEs might impact the public domain. Developed countries expressed concern that an extensive protection would limit the amount of material available in the public domain. As the possibility of tangible outcomes becomes more real, one of the major sticking points will inevitably be the depth and scope of protection, as well as the extent of exceptions. On term of protection, developing country experts and indigenous experts argue in favour of an indefinite protection for TCEs, while developed countries tend to prefer that protection be limited in time. In copyright and patent law, protection eventually expires, thereby creating a public domain of expressions and inventions that can be freely reproduced. In addition, there are important exceptions to the protection regimes, including exceptions for academic research. In the current system, folklore and traditional knowledge belong for practical purposes to the public domain, which is why pharmaceutical companies and music producers can exploit them for their own ends without sharing any benefits with source communities. If the committee decides to create instruments for the protection of folklore and traditional knowledge, it remains an open question whether this protection will be subject to limitations and exceptions. It is thus conceivable that as a result of this process some traditional culture and knowledge will have legal owners or custodians, whose authorisation folklorists and ethnologists will require before conducting research.

For policymakers addressing the protection of TCEs at national level, the following series of questions may help illustrate the policy options:

- a) the threshold question of whether the protection required is a form of IP protection at all, whether as presently available or under adapted, expanded or *sui generis* IP systems;
- b) whether the goal of protection is essentially positive or defensive protection, or a strategy combining the two;
- c) what options are presently available under conventional IP systems, including unfair competition, and what options exist for adapted, expanded or *sui generis* elements of existing IP to protect TCEs;
- d) what options are presently available in contract or in non-IP systems relevant to meeting the desired goals, such as cultural heritage, consumer protection and marketing laws;
- e) whether, in respect of unprotected TCEs, IP policy objectives as well as cultural and other policies (relating to cultural diversity, creativity and the preservation of cultural heritage, for example) lead to an interest in exploring new, specific *sui generis* systems for their IP protection;
- f) what mechanisms exist in other local, national or regional systems, including indigenous and customary systems, and what practical or conceptual lessons can be learned from them;
- g) what policy framework and which policy options are relevant in elaborating systems for the specific *sui generis* protection of TCEs, should this be the route chosen;

- h) how such *sui generis* systems relate to conventional IP systems particularly in respect of overlapping subject matter; and,
- i) how national systems interact through bilateral, regional or international legal frameworks.

Self Assessment Question

(Spend 3 minutes)

3) The technology driven information era can pave way for easy misappropriation of the traditional cultural expressions. Comment.

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12.13 WAY AHEAD / FUTURE PROSPECTS

The range of possible issues, objectives, principles and options for protecting TCEs that policymakers, legislators, communities and others could consider is vast. The protection of TCEs raises a number of complex legal and cultural policy questions, and there are several legal and non-legal tools that could be used, depending upon the objectives and principles that are sought to be achieved. Thus the legal framework designed for the protection of TCEs must be designed keeping in view social, cultural, anthropological, psychological, economical and traditional overtones of the communities.

There has to be a comprehensive step by step process to provide protection to TCEs. The following can be the practical phases that policymakers, legislators, communities and other stakeholders could follow in order to navigate their way through these issues and options and to set overall directions:

- a) Phase One: Identification of traditional cultural expressions for which protection is sought and gather information on the spiritual, social, economic and other values they hold for the communities and groups that regard themselves as their holders and custodians. This identification process is a critical phase and will impact the further course of action. It will help in deciding the subject matter to be protected under this framework and the acts from which the subject matter needs protection.
- b) Phase Two: Determination of the national developmental goals and the needs of the communities and groups concerned. Are the goals and needs related to IP (or more concerned with other policy goals such as preservation of cultural heritage?). Is the protection aimed at positive or defensive protection, or a combination of the two?
- c) Phase Three: Identification of policy considerations that may be relevant to framing overall directions (examples: promotion of cultural diversity; stimulation of cultural industries for economic development; preservation of cultural heritage; safeguarding of a vibrant and multicultural public domain: protection of cultural rights; protection of indigenous peoples' human rights, etc).
- d) Phase Four: To the extent that IP is relevant to meeting the desired objectives, identify options available under conventional IP systems, as well as options for adapted or modified elements of existing IP.

- e) Phase Five: Analyse options available in non-IP systems relevant to meeting the desired goals, such as cultural heritage, consumer protection and marketing laws, and indigenous and customary laws.
- f) Phase Six: Determine whether a stand-alone *sui generis* system is necessary, or whether uses that can be made of existing rights and modifications to them, meet the needs identified and strike the right balances. If so, how would a *sui generis* system relate to conventional IP systems particularly in respect of overlapping subject matter?
- g) Phase Seven: Establish how national systems would interact with each other to provide regional and international protection, through bilateral, regional or international legal frameworks.
- h) Phase Eight: Identify which practical and operational measures and programs may be necessary to support the ability of communities to make full use of the system established for the protection of expressions of traditional cultures (awareness-raising programs, institution building, training, etc).

Although some countries have provided specific legal protection for expressions of folklore, it appears that there are few countries in which it may be said that such provisions are actively utilised and functioning effectively in practice. The lack of proper legal structure and ambiguity puts the indigenous people and traditional communities at disadvantage and most of the times they are not able to realise the benefits and the recognition of their works. Thus it is imperative to work according to the above discussed strategy so that a mechanism for protection and redressal can be put to place for the benefit of the rights holders.

The protection of TCEs is being discussed by a number of international forums which include in particular WIPO and UNESCO. These efforts have not yet brought the necessary results for the effective and efficient protection of TCEs. It can be seen that there is fragmentation, with each forum focusing on its area of work, without giving importance to the developments in other relevant fora and lack of coordination in dealing with TCEs issues at the international level. There is no doubt that the significance of TCEs has been acknowledged, yet the lack of effective cooperation and coherence in the approaches for giving effective legal protection to TCEs thwarts their effective protection. The positive side is that the discussions at IGC are heading towards possible solution and the mandate of IGC has been extended again, thereby, giving a ray of hope for the development of an effective legal framework for the protection, promotion and development of TCEs.

It is still not really clear whether the current international discussions can adequately take in to account the holistic nature of TCEs which comprise of its intrinsic value, including its social, spiritual, cultural, educational, economic, intellectual, scientific, ecological, technological, and commercial value. Certain specific suggestions for improving use of existing rights and for strengthening the effective implementation of specific systems include:

- a) awareness-raising programs and specialised training for indigenous peoples and local communities in accessing, understanding and using formal IP systems and other legal tools available to them;
- b) public information activities aimed specifically at indigenous peoples and local communities, and other activities carried out by national IP offices and other agencies designed to explain IP rules and systems clearly, and to facilitate access to the national IP offices and the IP system;

- c) the possible reduction of filing and renewal fees for indigenous peoples and traditional communities;
- d) the establishment and strengthening of the institutional structures necessary to implement legislative provisions and other measures;
- e) where possible, making use of existing or new collective management societies;
- f) national consultations among producers of handicrafts and other expression of folklore;
- g) the establishment of legal and structural linkages between systems for the legal protection of traditional cultural expressions and researchers and archives; and,
- h) the use of alternative dispute resolution (ADR).

12.14 SUMMARY

- The range of traditional cultural expressions is such that no one form of law, be it an existing intellectual property law or *sui generis* law, will be adequate to address all the different types of cultures and expressions in existence.
- There is need to undertake comprehensive strategy for the protection of TCEs which includes policy and legal initiatives at various levels. It seems inappropriate for countries to come up with a one-size-fits-all system for the protection of TCEs. Thus, any international framework for the protection of TCEs will have to be flexible enough to accommodate the jurisprudential diversity of traditional societies.
- There is need to use democratic processes in including local and traditional communities so that a framework combining the safeguarding of traditional culture and folklore with the peaceful coexistence of people can be devised.
- Political and legal flexibility in the existing international arrangements and negotiations to design and implement positive and defensive systems to protect traditional cultural expressions should be used to arrive at a consensus for developing a legal framework in this regard.

12.15 TERMINAL QUESTIONS

- 1) What are the various legal and policy issues identified by IGC, WIPO which need to be resolved to devise a framework for providing protection to the TCEs?
- 2) Discuss the link between the protection of TCEs and the issues related to human rights and role of various indigenous and traditional communities.
- 3) Explain the *sui generis* system for the protection of TCEs. Give examples of such protection provided to indigenous people at national level in various countries.

12.16 ANSWERS AND HINTS

Self Assessment Questions

- 1) Refer to Section 12.3

- 2) Refer to Section 12.7
- 3) Refer to Section 12.11

Terminal Questions

- 1) Refer to Section 12.3
- 2) Refer to Section 12.5 and 12.10
- 3) Refer to Section 12.8

12.17 REFERENCES AND SUGGESTED READINGS

- 1) Website of World Intellectual Property Organisation (WIPO) for the drafts and on-going work of WIPO IGC (Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore) on TCEs.
- 2) WIPO Secretariat, *“Traditional Cultural Expressions of Folklore – Legal and Policy Options”* (WIPO/GRTKF/IC/6/3).
- 3) WIPO Secretariat, *“Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)”*.
- 4) WIPO Secretariat, *“Final Report on National Experiences with the Legal Protection of Expressions of Folklore”* (WIPO/GRTKF/IC/3/10).

THE HISTORY OF THE

REIGN OF

CHARLES THE FIRST

BY

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MPDD/IGNOU/P.O.1K/MARCH 2017 (REPRINT)

ISBN: 978-81-266-6385-9