

Traditional Knowledge at the International Level: Current Approaches and Proposals for a Bigger Picture That Includes Cultural Diversity*

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1.	Introduction	3
2.	Terminology	4
	<i>a) Traditional Knowledge</i>	4
	<i>b) Traditional Cultural Expressions / Expressions of Folklore</i>	6
	<i>c) Biological Diversity and Genetic Resources</i>	6
	<i>d) Access and Benefit Sharing</i>	7
	<i>e) "Biopiracy"</i>	8
3.	Why Has Traditional Knowledge Entered the International Debate?	9
4.	Competences and the Current State of Play at the International Level	13
	<i>a) Introduction</i>	13
	<i>b) CBD, Bonn Guidelines and the International Regime on Access and Benefit Sharing</i>	13
	<i>c) International Treaty of FAO</i>	16
	<i>d) WIPO</i>	18
	<i>e) TRIPS Agreement</i>	20

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5.	Unresolved Issues	22
a)	<i>What is “traditional knowledge”?</i>	22
b)	<i>What is “protection” and what are its policy objectives?</i>	23
c)	<i>What measures are to be taken?</i>	24
d)	<i>Where are measures to be taken?</i>	26
6.	Cultural Diversity	26
7.	Conclusions	34
	References	36

1. Introduction

Traditional knowledge has been an important topic at the international level for several years now. It has been the subject of discussion in numerous international fora, some of them specifically established for this purpose. So far, these discussions resulted in various international instruments, including agreements, UN resolutions and conference declarations, addressing different aspects of traditional knowledge. This notwithstanding, many issues remain yet unresolved.

Traditional knowledge entered the international debate for a number of reasons. These encompass the call for an increased recognition of the rights of indigenous peoples, including the right to self-determination; the loss of traditional knowledge and the apparent need for its protection; the destruction of the environment and the reduction of biological diversity; the North–South–relationship; and the effects of modern biotechnology, particularly genetic engineering, and the protection of the resulting innovations by intellectual property rights (IPRs). Key words frequently used in this debate are “green gold,” “biopiracy,” “exploitation of the South,” “Farmers’ Rights,” “erosion of traditional knowledge” and “fair and equitable benefit sharing.”

The issues arising with regard to traditional knowledge are highly controversial from a political point of view. At the international, national and sub-national levels, they require answers to complex legal, social, economic and scientific questions. Additional difficulties are caused by the greatly diverging views and interests of the actors involved in the debate, which include developed and developing countries, indigenous peoples, scientists, private industry and non-governmental organizations (NGOs).

The question arises whether the current international discussions adequately take into account the holistic nature of traditional knowledge “*and its intrinsic value, including its social, spiritual, economic,*

intellectual, scientific, ecological, technological, commercial, educational and cultural value.”¹ Furthermore, it needs to be clarified as to how the fragmentation of the efforts of the involved international fora can be overcome.

This paper addresses the issue of traditional knowledge at the international level as follows: First, the paper clarifies important terminology and describes the reasons why traditional knowledge has become the subject of international debate. It then provides an overview of the relevant international fora and the current state of play of the international debate on traditional knowledge. In a further part, the paper discusses some of the issues currently left unresolved with regard to traditional knowledge, including terminology, the policy objectives of the protection of traditional knowledge and general guiding principles relevant in this regard, possible mechanisms, and other issues to be addressed in this context. In a final part, the paper proposes to broaden the scope of the discussions on the protection of traditional knowledge and thus to include cultural diversity in order to better take into account the holistic nature of this knowledge.

2. Terminology

a) Traditional Knowledge

Despite the fact that traditional knowledge has been the subject matter of multiple international fora, so far, no internationally agreed definition of this term has emerged from these discussions.²

¹ WIPO-IGC, 2005b, Annex, p. 3, paragraph (i).

² The Secretariat of the CBD defines traditional knowledge as referring “*to the knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, and forestry.*” (<www.biodiv.org/programmes/socio-eco/traditional/default.asp>, last visited 11 August 2005). According to WIPO, traditional knowledge “*refer[s] to tradition-based literary, artistic or*

Despite the lack of clear terminology, several particular characteristics can generally be attributed to this form of knowledge: Traditional knowledge consists of tradition-based innovations, creations and practices³ that originate from and are used by indigenous and local communities.⁴ Traditional knowledge is transmitted from one generation to the next, usually in oral form or by way of example, whereas written sources are scarce and often in local languages. As non-static knowledge, it is constantly being improved and adapted to the changing needs of its users. Traditional knowledge is mostly held in common by the community and not the property of individuals. And finally, since this knowledge is intended to support the livelihood of its holders, its creation is not profit-driven.

scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. 'Tradition-based' refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment. Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; «expressions of folklore» in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties. Excluded from this description of [traditional knowledge] would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of 'heritage' in the broad sense.” (WIPO-IGC, 2002d, paragraph 25).

³ “Traditional knowledge is knowledge that has been developed based on the traditions of a certain community or nation. Traditional knowledge is, for that simple reason, culturally driven.” (WIPO-IGC, 2002b, paragraph 33). “Because its generation, preservation and transmission is based on cultural traditions, [traditional knowledge] is essentially culturally-oriented or culturally-rooted, and it is integral to the cultural identity of the social group in which it operates and is preserved.” (WIPO-IGC, 2002e, paragraph 28).

⁴ Traditional knowledge can also be found in Western societies such as for example “grandmother’s remedies.” Since this traditional knowledge has so far generally not been the subject of the international discussions on traditional knowledge, this paper does not address the issues that may arise with regard to this form of traditional knowledge.

b) Traditional Cultural Expressions / Expressions of Folklore

In the international context, the cultural dimension of traditional knowledge has been discussed under the headings of “folklore.” Since the term “folklore” has been criticized as having the negative connotation of “being associated with the creations of lower or superseded civilizations,”⁵ the terms “traditional cultural expressions” and “expressions of folklore” have lately been used as synonymous in the relevant international fora instead of the term “folklore.”⁶

c) Biological Diversity and Genetic Resources

“Biological diversity” is defined in Article 2 of the Convention on Biological Diversity as meaning “*the variability among living organisms from all sources including, inter alia, terrestrial, marine and other*

⁵ Blakeney, 2000; see also Visser, 2004, at footnote 4; Coombe, 2005, paragraph I.

⁶ The terms “traditional cultural expressions” and “expressions of folklore” can be defined as follows:

“(a) *Traditional cultural expressions*” or “*expressions of folklore*” are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

- (i) *verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;*
- (ii) *musical expressions, such as songs and instrumental music;*
- (iii) *expressions by action, such as dances, plays, ceremonies, rituals and other performances,*

whether or not reduced to a material form; and,

- (iv) *tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;*

which are:

- (aa) *the products of creative intellectual activity, including individual and communal creativity;*
- (bb) *characteristic of a community’s cultural and social identity and cultural heritage; and*
- (cc) *maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.”*

(WIPO-IGC, 2005d).

aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.”⁷

“Genetic resources” can be defined as genetic material – that is, any material of plant, animal, microbial or other origin containing functional units of heredity – of actual or potential value.⁸ Plant genetic resources for food and agriculture (PGRFA), a special category of plant genetic resources, are genetic material of plant origin – that is, any material of plant origin, including reproductive and vegetative propagating material, containing functional units of heredity – of actual or potential value for food and agriculture.⁹

d) Access and Benefit Sharing

The term “access and benefit sharing” and its abbreviation “ABS” refer to the issues arising in the context of access to genetic resources and traditional knowledge and the fair and equitable sharing of the benefits arising from their use.¹⁰ The three principal international instruments on access and benefit sharing are (1) the Convention on Biological Diversity (Biodiversity Convention, CBD) of 1992;¹¹ (2) the International Treaty on Plant Genetic Resources for Food and Agriculture (International Treaty) of the Food and Agriculture Organization (FAO) of 2001;¹² and

⁷ Biodiversity Convention, 1992. See generally Girsberger, 1999, pp. 18-50, and <www.scidev.net/ms/biofacts/index.cfm?pageid=421#described>, last visited 11 August 2005.

⁸ Article 2 CBD.

⁹ Article 2 FAO-International Treaty.

¹⁰ Article 1 of the CBD states as one of the three objectives “*the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.*” (CBD, 1992). Similarly, Article of the International Treaty of FAO states as one of the three objectives the fair and equitable sharing of the benefits arising out of the use of PGRFA.

¹¹ See generally <www.biodiv.org>, last visited 11 August 2005.

¹² See generally <www.fao.org>, particularly <www.fao.org/ag/cgrfa/default.htm>, last visited 11 August 2005.

(3) the legally non-binding Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of Their Utilization (Bonn Guidelines) of 2002. In the realm of the CBD, negotiations on an International Regime on Access and Benefit Sharing began in February 2005.

e) “Biopiracy”

In the discussions on access and benefit sharing and intellectual property, a catchword frequently referred to is “biopiracy.”¹³ This term is used – without uniformity – to describe a variety of circumstances, including:

- the acquisition of genetic resources or traditional knowledge without permission of their holder;
- cases where benefits arising from the commercial use of genetic resources or traditional knowledge are not shared with the provider of these resources or this knowledge;
- cases where traditional knowledge is protected by IPRs – primarily patents – without the holders of these rights having been innovative themselves, but having simply copied this knowledge;
- any IPR-protection of biotechnological innovations, which are based on genetic resources or traditional knowledge, irrespective of whether the applicable conditions for (1) access to these resources or this knowledge, (2) benefit sharing, or (3) the acquisition of these IPRs have been met or not.

¹³ Another term used in this context is “misappropriation.” This term can be defined as follows: “Any acquisition, appropriation or utilization of traditional knowledge by unfair or illicit means constitutes an act of misappropriation. Misappropriation may also include deriving commercial benefit from the acquisition, appropriation or utilization of traditional knowledge when the person using that knowledge knows, or is negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge.” (WIPO-IGC, 2005b, Annex, p. 12, Article 2, paragraph 2). “The non-exclusive nature of this description of “misappropriation” allows the term “misappropriation” to become the umbrella term and structure under which the various unfair, illicit and inequitable acts, which should be repressed, may be subsumed” (*id.*, p. 14).

3. Why Has Traditional Knowledge Entered the International Debate?

Issues such as human rights, self-determination, access to and use of natural resources, the destruction of the environment, ownership of land, racial and ethnic discrimination of minorities, self-governance, sustainable economic development, the loss of languages and dialects,¹⁴ adequate housing and access to health care, are of great importance to indigenous peoples. Since in a globally interrelated environment, these issues cannot be resolved at the sub-national or national levels alone, they naturally entered the international debate.¹⁵ This resulted in the establishment of new bodies¹⁶ and funds,¹⁷ the adoption of declarations,¹⁸ and the inclusion of provisions in international agreements;¹⁹ other efforts with regard to these issues have not been concluded to date.²⁰

¹⁴ See, e.g., <www.socioambiental.org/pib/english/languages/index.shtm>, <www.indians.org/welker/americas.htm> and <www.ncela.gwu.edu/pubs/stabilize/ii-policy/>, last visited 11 August 2005.

¹⁵ A clear sign for the acceptance of the political importance of these issues has been the proclamation of the International Decade of the World's Indigenous People (1995-2004), and its prolongation for the years 2005-2015. See generally <www.unhchr.ch/indigenous/decade.htm> and <www.ohchr.org/english/issues/indigenous/decade.htm>, last visited 11 August 2005.

¹⁶ See, e.g., the CBD's Ad Hoc Open-ended Working Group on Article 8(j), established in 1998 (<www.biodiv.org/programmes/socio-eco/traditional/default.asp>, last visited 11 August 2005); WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, established in 2000 (<www.wipo.int/tk/en/igc/>, last visited 11 August 2005); and the UN Permanent Forum on Indigenous Issues, established in 2000 (<www.un.org/esa/socdev/unpfii/>, last visited 11 August 2005).

¹⁷ See, e.g., the United Nations Voluntary Fund for Indigenous Populations (<www.unhchr.ch/html/menu2/9/vfindige.htm>, last visited 11 August 2005), and the voluntary contribution fund for the participation of representatives of indigenous communities in the IGC under discussion in WIPO (see generally WIPO-IGC, 2005a).

¹⁸ See, e.g., paragraph 19 of the Doha Declaration.

¹⁹ See, e.g., Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (available at <www.unhchr.ch/html/menu3/b/62.htm>, last visited 11 August 2005), and Articles 8(j) of the CBD and 9.2(a) of the FAO's International Treaty.

²⁰ See, e.g., Draft United Nations Declaration on the Rights of Indigenous Peoples (available at <www.ohchr.org/english/issues/indigenous/declaration.htm>, last visited 11 August 2005).

One issue of particular concern to indigenous and local communities is traditional knowledge. Different aspects of this issue have been dealt with by numerous international fora, including WIPO's Intergovernmental Committee, the Working Group on Article 8(j) of the CBD, the TRIPS Council, FAO and various other UN fora such as the UN Permanent Forum on Indigenous Issues.

A number of questions have remained nevertheless unresolved, in particular: Why is traditional knowledge of such importance to indigenous and local communities? Why does this knowledge have to be protected and what are the policy objectives of this protection? And why has this issue been at the forefront of the international discussions on indigenous issues? When addressing these questions, the following developments and factors need to be considered:

Over the centuries, indigenous and local communities all over the world have created a great deal of traditional knowledge. Access to, use and handing down of this knowledge has been regulated by local values, customs, traditions and laws:²¹ Some of this knowledge has been known only to particular individuals within a community, for example the community's shaman, and has been handed down only to particular individuals of the next generation; other traditional knowledge has been accessible by all members of a community and freely exchanged with outsiders.

More recently, traditional knowledge is being lost at an accelerating rate. The causes for this loss are manifold and include the destruction of the environment; the disappearance of the holders of traditional knowledge, that is, indigenous and local communities, and the vanishing of their local languages and dialects; the lack of interest in the continued use of traditional knowledge and its replacement by Western forms of knowledge. This notwithstanding, traditional knowledge continues to be important for millions of people all over the world for their everyday life, including to meet their healthcare and food needs.

²¹ See, e.g., WIPO-Secretariat, 2001, pp. 220-21.

Outside indigenous and local communities, interest in and use of traditional knowledge was for a long time generally limited. More recently, however, Western scientists and industry have increasingly become interested in this knowledge. This interest increased for a variety of reasons, including the following: Advances made in modern biotechnology, especially in genetic engineering, have considerably increased the possibilities for using genetic resources. Furthermore, consumer demand for medicines and foodstuffs based on natural substances has also increased interest in genetic resources. In turn, this also increased interest in the traditional knowledge related to genetic resources, which may be the starting point for research and development activities of scientists and industry in fields such as cosmetics and fragrance production, pharmacology, plant breeding, and foodstuff production. For instance, the knowledge of a local healer on the pharmaceutical properties of a particular plant may help in the development of a new drug that is based on extracts of that plant. Moreover, scientists have increasingly become interested in traditional knowledge on agriculture, including for example traditional knowledge on crop protection. And finally, traditional knowledge on the management of natural resources such as the management of fish and water harvesting techniques may be of interest when taking measures, among others, to conserve the environment or for sustainable development.

This use of traditional knowledge by scientists and industry takes place outside the indigenous and local communities that hold this knowledge, and thus outside the scope of application of the local values, customs, traditions and laws, regulating access to, use and handing down of traditional knowledge. This raises complex issues, including the following: Do researchers need permission for using traditional knowledge and, if so, from whom? In case a product can eventually be marketed successfully, must the commercial benefits arising be shared, and if so, with whom? And finally, may this knowledge be freely included in scientific publications and be made available to other researchers?

Frequently, scientists and industry from outside the borders of the countries where these indigenous communities are located use traditional knowledge. It is also of importance in this context that the large majority of plants, animals and micro-organisms can be found in the tropical and sub-tropical regions of the World, whereas the North is relatively poor with biological diversity.²² Accordingly, the issues arising acquire not only an international, but also a North–South–dimension.^{23,24}

One particular concern raised in the context of the use of traditional knowledge in research and development activities is the misappropriation of this knowledge, sometimes also called “biopiracy.”²⁵ Cases have become public where traditional knowledge has been protected by IPRs, even though no innovative or creative activities have been carried out with regard to this knowledge.²⁶

These and other developments and factors have led to the international call for the “protection” of traditional knowledge.²⁷ Various international fora are currently discussing the many issues arising in this regard. Some of these fora, namely the CBD, the International Treaty of FAO, the TRIPS Agreement and WIPO, are discussed in greater detail in the next section.

²² For an overview of the distribution of the world’s biological diversity *see* <www.scidev.net/ms/biofacts/index.cfm?pageid=421#described>, last visited 11 August 2005.

²³ The international dimension is a key aspect of the work of the IGC (*see* WIPO-GA 2003, paragraph 93). *See generally* WIPO-IGC, 2004; and WIPO-IGC, 2005c.

²⁴ In the international discussions, it is often forgotten that genetic resources are not only transferred from the South to the North, but also from the North to the South and from the South to the South. This applies in particular to plant genetic resources for food and agriculture. *See generally* Fowler/Smale/Gaij, 2001.

²⁵ *See supra* Part 2.e).

²⁶ *See, e.g.*, the case of Maca as reported by Peru (Peru, 2003; and Peru, 2005).

²⁷ *See generally* Gervais, 2003.

4. Competences and the Current State of Play at the International Level

a) Introduction

Traditional knowledge is being currently discussed in various international fora and numerous international instruments contain provisions on traditional knowledge. From an environmental and conservationist perspective, it is addressed by the CBD, its Working Group on Article 8(j), and the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of Their Utilization (Bonn Guidelines) as well as FAO's International Treaty. From an IPR and trade perspective, it is addressed by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of WIPO; and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and the TRIPS Council of the WTO.²⁸ The following briefly summarizes the main activities of these international fora with regard to traditional knowledge.

b) CBD, Bonn Guidelines and the International Regime on Access and Benefit Sharing

The CBD entered into force December 29, 1993, and currently has 188 Contracting Parties.²⁹ According to Article 1, the three objectives of the CBD are (1) the conservation of biological diversity, (2) the sustainable use of its components and (3) the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. The CBD

²⁸ See generally Cottier/Panizzon, 2004 (proposing the introduction of "Traditional Intellectual Property Rights" to protect traditional knowledge); Gervais, 2002; Gervais, 2005; and Paterson/Karjala, 2003.

²⁹ See <www.biodiv.org/world/parties.asp>, last visited 11 August 2005.

covers genetic resources of plant, animal and microbial origin,³⁰ as well as “*knowledge, innovations and practices of indigenous and local communities [...] relevant for the conservation and sustainable use of biological diversity.*”³¹

Access and benefit sharing regarding genetic resources, regulated in Article 15,³² is based on a bilateral approach, that is, according to mutually agreed terms between the provider and the user of these resources.³³ Furthermore, access to genetic resources shall be subject to

³⁰ Paragraph 2 of the CBD-COP Decision II/11 “[r]eaffirms that human genetic resources are not included within the framework of the [CBD]” (CBD-COP2, 1995). The same is stated in paragraph 9 of the Bonn Guidelines.

³¹ Article 8(j) CBD.

³² Article 15 of the CBD reads as follows:

1. *Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.*
2. *Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.*
3. *For the purpose of this Convention, the genetic resources being provided by a Contracting Party, as referred to in this Article and Articles 16 and 19, are only those that are provided by Contracting Parties that are countries of origin of such resources or by the Parties that have acquired the genetic resources in accordance with this Convention.*
4. *Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article.*
5. *Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.*
6. *Each Contracting Party shall endeavour to develop and carry out scientific research based on genetic resources provided by other Contracting Parties with the full participation of, and where possible in, such Contracting Parties.*
7. *Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.”*

(CBD, 1992).

³³ See Articles 15.4 and 15.7 CBD.

the prior informed consent of the Contracting Party providing these resources.³⁴ With regard to traditional knowledge, the CBD requires that the application of this knowledge occurs with the approval and involvement of its holders.³⁵

Of the several CBD-bodies, three are of particular importance with regard to access and benefit sharing and traditional knowledge. These are:

- (1) the Conference of the Parties (COP);³⁶
- (2) the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing (Working Group on ABS);³⁷ and
- (3) the Ad Hoc Open-ended Working Group on Article 8(j) (Working Group on Article 8[j]).³⁸

To further spell out the rather general provisions of the CBD and to assist its Contracting Parties in implementing their obligations at the national level, the legally non-binding Bonn Guidelines were adopted in April 2002. Even though the provisions of these guidelines deal primarily with genetic resources, they also cover traditional knowledge associated with genetic resources.³⁹

³⁴ See Article 15.5 CBD.

³⁵ Article 8(j) of the CBD requires Contracting Parties to “*respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.*” (CBD, 1992).

³⁶ The COP is the governing body of the CBD and meets every two years, the next time in spring 2006. See generally <<http://www.biodiv.org/convention/cops.asp>>, last visited 11 August 2005.

³⁷ This Working Group was established by COP-5 in 2000 (see CBD-COP5, 2000, paragraph 11). The Working Group will meet for the fourth time in January 2005.

³⁸ This working Group was established by COP-4 in 1998 (see CBD-COP4, 1998, paragraph 1) and is the CBD’s forum especially established to deal with traditional knowledge. It will meet for the fourth time in January 2005.

³⁹ Para. 9 of the Bonn Guidelines. Provisions dealing with traditional knowledge are paragraphs 11(j), 16(c)(i), 31, 37 and 44(g). With regard to IPRs, paragraph 16(d)(ii) is of particular

The seventh meeting of the CBD-COP (COP7), held in February 2004,⁴⁰ decided to mandate the Working Group on ABS to “*elaborate and negotiate an international regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and the three objectives of the Convention*.”^{41,42} According to the terms of reference for this working group, the scope of the international regime is to include “*traditional knowledge, innovations and practices in accordance with Article 8(j)*.”⁴³ The first round of negotiations on the international regime was held at the third meeting of the Working Group on ABS in February 2005.⁴⁴

The Working Group on Article 8(j) addressed, among other issues, *sui generis* systems for the protection of traditional knowledge.⁴⁵

c) *International Treaty of FAO*

The International Treaty⁴⁶ was adopted by the 31st FAO Conference on 3 November 2001 after seven years of complex and thorny negotiations. It

importance, as it deals with measures to encourage the disclosure of the origin of traditional knowledge in applications for IPRs.

⁴⁰ See generally <www.biodiv.org/doc/meeting.aspx?mtg=COP-07>, last visited 11 August 2005.

⁴¹ CBD-COP7, 2004, Section D, para. 1.

⁴² This decision by COP-7 goes back to the World Summit on Sustainable Development (WSSD), held in August/September 2002, which calls in paragraph 44(o) of the Plan of Implementation on States to “*negotiate within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources*.” (WSSD, 2002).

⁴³ CBD-COP7, 2004, Section D, Annex, para. (c)(ii).

⁴⁴ See CBD-Working Group on Access and Benefit Sharing, 2005.

⁴⁵ See CBD-Working Group on Article 8(j), 2003. See generally <www.biodiv.org/doc/meeting.aspx?mtg=WG8J-03> and <www.iisd.ca/biodiv/wg8j-3/>, last visited 11 August 2005; Gervais, 2002, pp. 970-972; Halewood, 1999.

⁴⁶ See generally Girsberger, 2002 (discussing the provisions of the International Treaty relevant to intellectual property).

entered into force 29 June 2004 and currently has 73 Contracting Parties,⁴⁷ including Switzerland.⁴⁸

Article 1.1 states as the objectives of the International Treaty: (1) the conservation and (2) sustainable use of plant genetic resources for food and agriculture (PGRFA) and (3) the fair and equitable sharing of the benefits arising out of their use. Pursuant to Article 1.2, these objectives are to be attained by closely linking the International Treaty to FAO and the CBD.

The International Treaty covers PGRFA, a special category of plant genetic resources, and traditional knowledge relevant to PGRFA.⁴⁹ The treaty establishes in Article 10.2 a “Multilateral System of Access and Benefit Sharing” to facilitate access to PGRFA⁵⁰ and to share the benefits in a fair and equitable way.⁵¹ Access and benefit sharing according to the International Treaty is thus based on a multilateral approach. According to Article 12.4, access is to be provided pursuant to a Standard Material Transfer Agreement (sMTA), which is currently being negotiated.⁵²

⁴⁷ See <www.fao.org/Legal/treaties/033s-e.htm>, last visited 11 August 2005.

⁴⁸ Switzerland ratified the treaty on 22 November 2004; for Switzerland, the treaty entered into force on 20 February 2005.

⁴⁹ Article 3 – the provision of the International Treaty on the scope – only mentions PGRFA. However, based on Article 9.2(a), the International Treaty can be interpreted so as to cover traditional knowledge related to PGRFA as well.

⁵⁰ See Article 12 FAO-International Treaty.

⁵¹ See Article 13 FAO-International Treaty.

⁵² These negotiations can be summarized as follows: At its first meeting (9-11 October 2002), the CGRFA acting as the Interim Committee for the International Treaty established an Expert Group on the Terms of the Standard Material Transfer Agreement (see FAO-CGRFA, 2002, paragraphs 15-16; the terms of reference for the Expert Group can be found *id.*, Appendix D). This Expert Group met 4-8 October 2004 (see FAO-Expert Group, 2004). At its second meeting (15-19 November 2004), the CGRFA acting as the Interim Committee for the International Treaty established a Contact Group for the Drafting of the Standard Material Transfer Agreement (see FAO-CGRFA, 2004, paragraphs 10-11; the terms of reference for this Contact Group can be found *id.*, Appendix C). For the first meeting of this Contact Group, the Secretariat of FAO elaborated a first draft of the sMTA (available at <<ftp://ext-ftp.fao.org/ag/cgrfa/cgmta1/smta1w2e.pdf>>, last visited 11 August 2005). This first meeting took place 18-22 July 2005, and resulted in the further consolidation of the draft text (see FAO-Contact Group, 2005).

The International Treaty addresses traditional knowledge in the context of Farmers' Rights.⁵³ According to its Article 9.2(a),^{54,55} the protection of traditional knowledge relevant to PGRFA is one possible measure to protect and promote Farmers' Rights. The responsibility to realize Farmers' Rights rests with national governments and is subject to national legislation, needs and priorities. Furthermore, the wording of Article 9.2 is rather "soft." Accordingly, the Contracting Parties of the International Treaty enjoy great freedom when implementing the provisions of Article 9, including on the protection of traditional knowledge.

d) WIPO

WIPO has been active in the area of traditional cultural expressions (or folklore) for several decades. Resulting from these efforts were the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (Model Provisions) of 1982.⁵⁶ This *sui generis* model for the IP-type

⁵³ See generally Girsberger, 1999; and <www.fni.no/farmers/main.html> (last visited 11 August 2005).

⁵⁴ Article 9.2 of the FAO-IT reads as follows:

"The Parties agree that the responsibility for realizing Farmers' Rights, as they relate to Plant Genetic Resources for Food and Agriculture, rests with national governments. In accordance with their needs and priorities, each Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including:

- (a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture;*
- (b) the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture;*
- (c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture."*

(FAO-IT, 2001).

⁵⁵ Other provisions of relevance for Farmers' Rights are preambular paragraphs 7 and 8 as well as Articles 13.2(d)(ii), 13.3, 18.5, and 19.3(f).

⁵⁶ Available at <www.wipo.int/tk/en/documents/pdf/1982-folklore-model-provisions.pdf>, last visited 11 August 2005.

protection of traditional cultural expressions was elaborated by WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

More recently, WIPO also addressed intellectual property issues related to traditional knowledge. In 1998-1999, it carried out numerous fact-finding missions, which involved a wide range of stakeholders, including indigenous and local communities, non-governmental organizations, governments, researchers and private industry.⁵⁷

The IGC of WIPO was established by the 26th Session of the General Assembly of WIPO held in September 2000.⁵⁸ Its first mandate for the years 2001 to 2003 covered the discussion of IPR-issues arising in the context of genetic resources, traditional knowledge and folklore.⁵⁹ So far, the IGC has neither been able to establish a working definition of the term traditional knowledge, nor has it agreed on the policy objectives of the protection of this knowledge.⁶⁰ Nevertheless, the IGC discussed and adopted several concrete measures with regard to traditional knowledge, including the development of inventories of on-line databases and periodicals as well as a toolkit on traditional knowledge.⁶¹ Furthermore, the IGC discussed elements of a *sui generis* system for the protection of traditional knowledge.⁶²

The twenty-ninth session of the WIPO General Assembly, held in September 2003, decided to extend the mandate of the IGC for a further two years.⁶³ Under this mandate,⁶⁴ the IGC was to focus its work in

⁵⁷ See WIPO-Secretariat, 2001.

⁵⁸ WIPO-GA, 2000b, paragraphs 27-71, particularly paragraph 71. See generally WIPO-GA, 2000a. See also Wendland, 2002.

⁵⁹ See generally WIPO-IGC, 2003b.

⁶⁰ These issues are currently discussed in the IGC (see WIPO-IGC, 2005b).

⁶¹ See generally WIPO-IGC, 2002a; WIPO-IGC, 2002c; and WIPO-IGC, 2003a.

⁶² WIPO-IGC, 2002e.

⁶³ See generally WIPO-GA, 2003.

⁶⁴ See generally *id.*, paragraphs 93-95.

particular on the international dimension of the issues arising. The WIPO General Assembly of September 2005 is again to decide on the extension of the mandate of the IGC.

The reform of the Patent Cooperation Treaty (PCT) began in October 2000.⁶⁵ One issue being discussed in this reform is the declaration of the source of genetic resources and traditional knowledge in patent applications.⁶⁶ So far, no decisions on these proposals have been taken by the Working Group.⁶⁷

Traditional knowledge is also being addressed by WIPO's Standing Committee on the Law of Patents (SCP) in its work on a Substantive Patent Law Treaty (SPLT).⁶⁸ In its current text, the draft SPLT contains references to traditional knowledge in Articles 2(2), 13(4) and 14(3).⁶⁹ Substantive discussions on these paragraphs, however, have been postponed to a later date.

e) TRIPS Agreement

The TRIPS Agreement, one of the main pillars of the WTO, entered into force January 1, 1995. Currently, 148 States are Members of the WTO⁷⁰ and thus bound by the TRIPS Agreement. Article 7 thereof states 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*

⁶⁵ See generally <www.wipo.int/pct/reform/en/index.html>, last visited 11 August 2005.

⁶⁶ This issue was introduced by Switzerland in May 2003 when it submitted its proposals to the WG on PCT-Reform to amend the PCT-Regulations (see generally Switzerland, 2003, Annex).

⁶⁷ See WIPO-PCT, 2003a, paragraphs 92-96; and WIPO-PCT, 2003b, paragraphs 124-144.

⁶⁸ See generally <www.wipo.int/patent/law/en/harmonization.htm> (last visited 11 August 2005).

⁶⁹ See WIPO-SCP, 2003.

⁷⁰ See <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> (last visited 11 August 2005).

*conducive to social and economic welfare, and to a balance of rights and obligations.”*⁷¹

The TRIPS Agreement does not contain specific provisions on traditional knowledge; this notwithstanding, its provisions basically also apply to traditional knowledge, including in particular the provisions on geographical indications (Articles 23-24), patents (Articles 27-34), and trade secrets (Article 39).

The issue of traditional knowledge was explicitly included in the agenda of the TRIPS Council at the fourth Ministerial Conference of the WTO held in Doha, Qatar, in November 2001. In paragraph 19 of the Doha Ministerial Declaration, the Ministers instruct the TRIPS Council to examine, among others, the protection of traditional knowledge.⁷² Up to now, the main focus of the examination foreseen in paragraph 19 was on disclosure requirements under patent law.⁷³

The above presentation demonstrates vividly the fragmentation and lack of coordination in dealing with traditional knowledge issues at the international level. While the significance of traditional knowledge has been acknowledged, the lack of coherence in the approaches in fact thwarts its effective protection.

⁷¹ TRIPS Agreement, 1994.

⁷² Paragraph 19 of the Doha Ministerial Declaration reads as follows: “*We instruct the Council for TRIPS, in pursuing its work program including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration, to examine, inter alia, [...] the protection of traditional knowledge and folklore [...]. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.*” (WTO-Ministerial, 2001).

⁷³ See generally Girsberger, 2004, and WTO Secretariat, 2002. Among the communications submitted by Members are documents IP/C/W/400/Rev.1, IP/C/W/420, IP/C/W/423, IP/C/W/429/Rev.1, IP/C/W/433, IP/C/W/434, IP/C/W/438, IP/C/W/441, IP/C/W/442, and IP/C/W/443 (available at <www.wto.org/english/tratop_e/trips_e/art27_3b_e.htm>, last visited 11 August 2005).

5. Unresolved Issues

The protection of traditional knowledge raises many complex legal, social, political, economic and scientific issues. In the international discussions, a considerable number of these issues – some of them of very fundamental nature – remain yet unresolved. Furthermore, it needs to be considered how the current fragmentation of the international discussions can be overcome to conclusively take into account the holistic nature of traditional knowledge, in particular its close link with culture in general. The following discusses several of these issues, namely: What is traditional knowledge? What is “protection” and what are its policy objectives? What and where are measures to be taken?

Further issues need to be resolved when discussing specifically the protection of traditional knowledge. Depending on the policy aims and measures chosen, they include the determination of the right holder, the legal nature and contents of the rights granted, and the territorial applicability, term of protection and enforcement of these rights.⁷⁴

At the international level, several fora have been addressing these issues. The results achieved so far make evident that much more analytical work is required and additional information needs to be compiled in order to find and realize measures that allow protecting traditional knowledge effectively and efficiently.

a) What is “traditional knowledge”?

As seen above,⁷⁵ no internationally agreed definition of the term “traditional knowledge” has been established. This is not only due to the differing views of the stakeholders involved, but also due to the enormous diversity of traditional knowledge that exists worldwide.

⁷⁴ For an in-depth analysis of similar issues arising in the context of Farmers’ Rights see Girsberger, 1999, pp. 171-327.

⁷⁵ See *supra* Part 2.a).

The diversity of traditional knowledge notwithstanding, it appears that without at least a basic understanding of the subject matter, it will be difficult to focus the discussions on the protection of traditional knowledge and to render them result-oriented. Accordingly, it seems necessary to establish at least a working definition of this term. This definition, however, would have to be sufficiently general and broad to cover the diversity of traditional knowledge. In this regard, the definitions advanced in the CBD and WIPO seem good examples at hand.⁷⁶

b) What is “protection” and what are its policy objectives?

Various international fora are discussing the protection of traditional knowledge.⁷⁷ No consensus, however, exists on the meaning of the term “protection”;⁷⁸ among others, this term can take the meaning of “preservation,” that is, the safeguarding against the loss or dissipation of traditional knowledge;⁷⁹ prevention of the misappropriation of traditional knowledge;⁸⁰ regulating access to traditional knowledge; ensuring the fair and equitable sharing of the benefits arising from the use of traditional knowledge in research and development activities of science and industry

⁷⁶ See *supra* n. 2.

⁷⁷ See, e.g., para. 19 of the Doha declaration and the discussions in the Intergovernmental Committee of WIPO.

⁷⁸ UNESCO’s Preliminary-Draft Convention on the Protection and Promotion of the Diversity of Cultural Expressions defines in Article 4(7) “protection” as “*the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions*” (UNESCO, 2005).

⁷⁹ WIPO-IGC, 2003b, paragraph 17.

⁸⁰ WIPO’s more recent work on the protection of traditional knowledge focused on the protection against misappropriation (see generally WIPO-IGC, 2005b). Article 1(2) of the Substantive Provisions states that “[a]ny acquisition, appropriation or utilization of traditional knowledge by unfair or illicit means constitutes an act of misappropriation. Misappropriation may also include deriving commercial benefit from the acquisition, appropriation or utilization of traditional knowledge when the person using that knowledge knows, or is negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge” (*id.*, Annex, p. 12).

and its commercialization; and providing incentives for the continued creation, improvement and use of traditional knowledge.⁸¹

Generally, positive and defensive protection of traditional knowledge is distinguished: Positive protection would establish legal entitlements for the holders of traditional knowledge, whereas defensive protection would “*curtail illegitimate acquisition of industrial property rights over traditional knowledge or associated genetic resources.*”⁸²

Depending on the meaning of “protection,” different policy objectives apply. These include the promotion of the conservation, preservation and safeguarding of traditional knowledge; the prevention of its misappropriation; the promotion of further innovative and creative activities of the holders of traditional knowledge; ensuring that access to and use of traditional knowledge is subject to prior informed consent and mutually agreed terms; and the promotion of fair and equitable benefit sharing.⁸³

c) *What measures are to be taken?*

Depending on the meaning of “protection” and the corresponding policy objectives, different legal, administrative or policy measures need to be taken.⁸⁴ If, for example, the objective is to prevent the further loss of traditional knowledge, a database presents a viable mechanism, whereas existing forms of IPRs are unlikely to be appropriate. In contrast, if the objective is to encourage the continued innovative and creative activities of the holders of traditional knowledge, existing forms of IPRs or

⁸¹ In this context, it is worth noting that Art. 8(j) of the CBD uses the wording “respect, preserve and maintain” instead of the term “protection.”

⁸² WIPO-IGC, 2005b, Annex, p. 10, Principle (d). *See generally* <www.wipo.int/tk/en/tk/index.html>, last visited 11 August 2005.

⁸³ *See generally* WIPO-IGC, 2005b, Annex, pp. 3-7.

⁸⁴ *See generally* Girsberger, 2004 (discussing the disclosure of the source of genetic resources and traditional knowledge in patent applications as a measure under patent law increasing transparency in access and benefit sharing with regard to genetic resources and traditional knowledge).

specifically designed *sui generis* forms of such rights may serve well to achieve the objective: “*Protection may combine proprietary and non-proprietary measures, and use existing [intellectual property] rights (including measures to improve the application and practical accessibility of such rights), sui generis extensions or adaptations of IP rights, and specific sui generis laws.*”⁸⁵

All measures available for the protection of traditional knowledge, however, have their benefits and shortcomings. Databases, for example, contain traditional knowledge as it existed at the time of collection. To be of continued use, databases thus need to be updated regularly. In the case of IPRs, specific criteria of protection must be fulfilled; patentable inventions, for example, must be new, non-obvious and useful. Accordingly, all traditional knowledge not fulfilling these criteria will be left without protection. As any other rights, IPRs must be enforceable in order to be of value to their holders, thus necessitating a functioning legal system. These examples make evident that not all measures available are equally well-suited to protect traditional knowledge in all circumstances. Their benefits and shortcomings must thus carefully be considered when choosing the measure or measures to protect traditional knowledge.

The question arises whether one single measure will allow for the protection of traditional knowledge (a “one size fits all” solution) or whether a multitude of such measures is necessary instead. Considering the great diversity of traditional knowledge, the varying interests of its holders and the differing policy objectives its protection may have, one single measure will hardly be sufficient for the effective and efficient protection of traditional knowledge. The same applies to approaches based on IPRs only. Consequently, the solution chosen should consist of a variety of legal, administrative and policy measures, including measures related to IPRs in a well-balanced system.⁸⁶

⁸⁵ WIPO-IGC, 2005b, Annex, p. 10, Principle (d).

⁸⁶ See generally *id.*, pp. 12-50, discussing the protection of traditional knowledge from misappropriation by repressing “*unfair acts in certain spheres of human intellectual activity without creating distinct private property titles over the knowledge which is being protected*”

d) *Where are measures to be taken?*

The question arises where and by whom measures to protect traditional knowledge are to be taken. Are measures taken at the local or national level appropriate, or are internationally agreed measures required instead? As was described above,⁸⁷ the issues arising with regard to traditional knowledge have a clear international dimension. Thus, internationally agreed measures seem necessary. These include voluntary guidelines, joint recommendations, legally binding international agreements and databases. To date, however, no consensus on this issue has been reached in the discussions of the relevant international fora.

A further question arising is what international forum should take these measures. This question emerges because the fora involved have differing competencies. In light of this, the following distribution of work seems most appropriate: With regard to environmental and conservationist aspects, the CBD and FAO seem to be in the foreground, whereas intellectual and trade-related aspects are best dealt with in WIPO and the TRIPS Council.

6. Cultural Diversity

As the preceding sections show, existing discussions regarding the protection of traditional knowledge are taking place in various fora but lacking a *coherent* setting. A further element of fragmentation is added to the picture when one becomes aware, that these discussions – and the academic literature analyzing it – are still incomplete since they do not

against those illegitimate acts.” (Id., p. 14). The proposed approach does “not require the creation of exclusive property titles on TK, which are perceived by many TK holders as inappropriate [...]. Many TK holders have expressed the concern that new forms of protection of TK against misappropriation should not impose private rights on their TK. On the contrary, these principles give effect to an underlying norm against misappropriation by third parties, and thus against the illegitimate privatization or commodification of TK, including through the improper assertion of illegitimate private property rights. Instead they leave open the scope for using alternative legal doctrines in formulating policy on these issues as suggested by several Committee participants.” (Id., p. 18).

⁸⁷ See *supra* Part 3.

sufficiently include linkages with recent initiatives to protect cultural diversity on the international level.

By coupling traditional knowledge with folklore, WIPO's IGC since 2000⁸⁸ has been emphasizing the necessity to include cultural aspects in the concept of traditional knowledge and has thus made a first step in the direction of a holistic view of the subject matter. However, the integration of the cultural dimension into reflections on efficient methods for protecting traditional knowledge proves to be particularly difficult. In this regard, three points should be considered:

First, the value of traditional knowledge must not be reduced to its potential use for pharmaceutical or agricultural application, including methods of medical diagnosis and treatment or farming and plant breeding, etc. The translation of such knowledge between generations within a local community is usually based on a social and ritual matrix.⁸⁹ Anthropologists have shown that acquiring traditional knowledge may presuppose a special relationship of trust and close collaboration.⁹⁰ Whereas such conditions of knowledge translation involve "culture" in the broad sense of the term, examples of a sacred dance in Santo Domingo⁹¹ and folklore music in Ethiopia⁹² or experiences with aboriginal art in Australia⁹³ demonstrate that traditional knowledge may also consist of a variety of artistic expressions including dances, drawings, paintings, sculptures or music.⁹⁴ In principle, traditional knowledge in the sense of folklore can take any form of artistic expression.

⁸⁸ See *supra* Part 4.d).

⁸⁹ Coombe, 2005, paragraph II.

⁹⁰ For citations of relevant anthropological scholarship see Coombe, 2005.

⁹¹ Scafidi, 2001, pp. 828-830; see also Wüger, 2004, pp. 186 f.

⁹² Endeshaw, 1996, pp. 232-234 and Wüger 2004, pp. 189 f.

⁹³ Blakeney, 1995; Puri, 1998, pp. 45 f.; Haight Farley, 1997, p. 32; Wüger, 2004, pp. 187 ff.

⁹⁴ Whereas existing discussions often blur definitions of "art", "culture" and "folklore" we insist on the necessity of clear distinctions between these terms. "Culture" may be defined as "collectively shared complexes of values, beliefs or behaviors" (see UNESCO, 1998, pp. 22 and 29). The term "art" is distinct from "culture" and should be reserved to describe creative expressions including

Second, such expressions of folklore often have been practiced by indigenous communities for centuries without being formally protected within a framework of intellectual property (IP) rights.⁹⁵ In a globalizing world, differences between modern law and legal systems of indigenous peoples have become one of the major challenges for an effective protection of folklore. Whereas modern copyright law is based on the concept of individual exclusive rights, indigenous peoples conceive expressions of folklore within a concept of collective ownership. An aboriginal artist, for example, may not become the “author” of the paintings he creates, since the depicted sacred stories belong not to him but to the tribe or local community he is a member of. He is merely entrusted to use the sacred symbols and stories for certain precisely defined applications, and this only after having passed a process of initiation according to the rules of the tribe. Aboriginal law strictly prescribes the content as well as techniques of such paintings, and the community may perceive errors as violating their religious feelings.⁹⁶

Third, although commercialization of certain aspects of traditional knowledge may create new economic opportunities, certain indigenous peoples may conceive appropriation or commoditization of intangible cultural heritage as deeply offensive. Thus, the value of traditional cultural expressions should not be reduced to its capacity of generating economic gain. On the other hand, pleading that indigenous peoples should not be “polluted” with monetary issues would be cynical, since such abstention would simply mean to accept the inevitability of a continuing loss of cultural resources, languages and life-forms. Finding the right balance between the respect for religious feelings of indigenous

visual art, music, performing art, moving images etc. A distinction between “art” and “folklore” can be drawn on the basis of innovation. Whereas “art” is innovative in the sense that it offers society new perspectives on the world, folklore and expressions of folklore rest on traditions which have been translated from one generation to the next without aiming at innovative change. For a more complete appraisal of these definitions see Graber, 2003, pp. 11-14; and within a setting of sociological systems theory see Graber, 2004, pp. 96-99.

⁹⁵ See Visser, 2004, pp. 209 ff.

⁹⁶ Blakeney, 1995; Wüger, 2004, p. 185.

communities on the one hand, and endeavors fostering poor people's ability to using their cultural heritage as a source of income on the other hand, proves to be very difficult. Moreover, sensitivities regarding the fear of commercialization may vary considerably among different groups.

In sum, it must be taken into account that the knowledge of indigenous peoples encompasses also a very important cultural dimension, which exceeds any utilitarian understanding and poses questions which may not be resolved within existing concepts of modern copyright law, notwithstanding a close analogy between many forms of folklore and literary and artistic works.⁹⁷

In literature, different approaches are being proposed: Cottier/Panizzon consider a new form of IP protection to be necessary in order to fully recognize the social and - as we would add - the cultural and artistic value of traditional knowledge.⁹⁸ While these authors are exploring the feasibility of adapting existing systems of IP protection to the specific situation of indigenous communities, other authors such as Coombe, Girsberger and Taubmann, are expressing reservations about the application of IP regimes to traditional knowledge.⁹⁹ In our view, more sophisticated research is necessary in order to develop an adequate policy response to the holistic nature of traditional knowledge including its cultural dimension. To cope with the following particularities of traditional cultural expressions will be particularly challenging:

- collective ownership,
- importance of moral rights and work integrity,
- lack of a fixed form,
- low originality of present expressions of folklore, and

⁹⁷ See Wüger, 2004, p. 185.

⁹⁸ Cottier/Panizzon, 2004, p. 371.

⁹⁹ See Coombe, 2005, paragraph V; Girsberger, 2003; Taubman, 2005.

- duration of protection.

The biggest gap in existing research probably is the almost complete absence of reflections regarding the human rights dimension of traditional knowledge and cultural expressions.¹⁰⁰ Human rights may be involved e.g. when indigenous communities oppose to the reproduction of sacred paintings or the inclusion of a ceremonial dance into a modern choreography because they perceive such practices as a violation of their religious freedom.¹⁰¹ Other aspects of human rights become salient when one starts to conceive linkages between expressions of traditional knowledge and freedom of expression and information¹⁰² or the protection of cultural heritage as a requirement of the obligation of States to protect the right to participate in cultural life of the arts and sciences.¹⁰³

Research should engage in reflections on how the protection of collective moral rights of indigenous communities could be realized within the existing human rights doctrine. Here it seems very important to include recent developments in modern legal doctrine recognizing that human rights are not only individual defenses against State interference but enshrine a collective aspect without thus becoming collective rights.¹⁰⁴ Hence, with regard to freedom of expression and information, it is necessary to distinguish an *individual* aspect of this freedom from an *institutional* aspect. Whereas the former stresses the rights of individual persons, the latter puts its accent on the general interest to freely exchange opinions and information in the public *discourse* (as an institution).¹⁰⁵ Accordingly, freedom of expression and information not

¹⁰⁰ With a few exceptions including Coombe, 2005, paragraph VI.

¹⁰¹ Religious freedom is protected on the global level by Article 18 of the United Nations International Covenant on Civil and Political Rights (CCPR).

¹⁰² As protected on the global level by Article 19 CCPR.

¹⁰³ As protected on the global level by Article 15 of the United Nations International Covenant on Economic, Social and Cultural Rights.

¹⁰⁴ For more information regarding the acknowledgement of an institutional dimension of human rights and particularly of freedom of expression and information see Graber, 2005, pp. 82 ff.

¹⁰⁵ Graber, 1996, pp. 139 f.

only protects individual rights but provides the basis for public discourse in order to foster free intellectual debate in a society including indigenous communities.¹⁰⁶ From the institutional perspective, a sufficiently diverse offer of cultural information is a prerequisite for individuals' capacity to form their free opinion on issues of cultural importance. Thus, the claim to protect and promote traditional cultural expressions as elements of cultural diversity might be appraised on the basis of human rights doctrine.

The issue of the protection of traditional knowledge and cultural expressions appears most of all in the work of WIPO, especially within the IGC, which, since 2000, is its specialized forum for such research and discussions.¹⁰⁷ As the second international forum of relevance, UNESCO has been active in developing new instruments of international law. In 2003, it adopted a Convention for the Safeguarding of the Intangible Cultural Heritage (CIH). The purpose of this convention is to raise

¹⁰⁶ The institutional level of Article 19 CCPR has been recognized in opinions of the Human Rights Committee. See General Comment No. 10 Article 19 (Nineteenth Session, 1983), in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, 07/04/2000, HRI/GEN/1/Rev.4; Concluding Observations of the Human Rights Committee: *Lebanon*, 01/04/97, CCPR/C/79/Add.78., paragraphs 24 ff.; Concluding Observations of the Human Rights Committee: *Italy*, 21/09/94, CCPR/C/79/Add.37; A/49/40, paragraphs 4 f. See also Graber, 2003, pp. 104-107.

¹⁰⁷ WIPO's IGC has been addressing the cultural dimension of traditional knowledge in several instances. These include the following: Draft objective (i) of the protection of traditional cultural expressions, or expressions of folklore states that protection should "*recognize that indigenous peoples and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including 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*" (WIPO-IGC, 2005d, Annex, p. 3). The draft Commentary on General Guiding Principle (a) on the protection of traditional knowledge emphasizes that the protection of traditional knowledge should "*recognize the inseparable quality of traditional knowledge and cultural expressions for many communities.*" (WIPO-IGC, 2005b, Annex, p. 9). Moreover, the draft Commentary on General Guiding Principle (i) on the protection of traditional knowledge refers to the close link between traditional knowledge and the community's cultural identity: "*Protection of traditional knowledge should respond to the traditional context, the collective or communal context and inter-generational character of its development, preservation and transmission, its relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values, and constantly evolving character within the community*" (*Id.*, p. 11).

awareness of and safeguard the intangible cultural heritage of the communities, groups and individuals concerned.¹⁰⁸ The scope of the CIH is limited to the protection of the *intangible cultural heritage*, although its preamble stresses the “*deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage.*”¹⁰⁹

Article 2 CIH defines the intangible cultural heritage as the practices, representations, expressions, as well as the knowledge and skills, that social groups or individuals recognize as part of their cultural heritage. According to Article 2 paragraph 2, this heritage is manifested, *inter alia*, in oral traditions and expressions, performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe, and traditional craftsmanship. The use of the notions “heritage” and “traditional” does not imply that CIH is limited to cultural manifestations of the past, but rather includes living cultural heritage.¹¹⁰ Chapters III and IV of CIH provide that safeguarding of the intangible cultural heritage shall mainly be undertaken through measures such as inventories, ensuring its better visibility and awareness of its significance. The safeguarding of the intangible cultural heritage is understood to develop human creativity and to promote cultural diversity.

The protection of the diversity of cultural expressions is the purpose of a new convention which is presently being negotiated within UNESCO. The draft of the new convention (Draft CCD), which will be presented for adoption to UNESCO’s General Conference in October 2005, in paragraph 8 of the preamble, “*recognizes the importance of traditional*

¹⁰⁸ Article 1 CIH.

¹⁰⁹ In this respect two UNESCO instruments are relevant namely the Convention concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972, (entered into force on 17 December 1975) and the Convention on the Protection of the Underwater Cultural Heritage 2001 of 2 November 2001 (not yet in force).

¹¹⁰ Such a dynamic understanding of “traditional” acknowledges that intangible cultural heritage is not only transmitted from generation to generation but constantly recreated by communities and groups in interaction to their natural and social environment and in response to their historical conditions of existence. Thus, it provides people with a sense of identity and continuity.

knowledge.” Furthermore, paragraph 13 of the preamble recognizes that diversity of cultural expressions, including “traditional cultural expressions,” is an important factor that allows peoples and individuals to express and to share with others their ideas and values. Finally, paragraph 15 of the preamble, Article 2 (principle 3) and Article 7.1(a) refer to indigenous people.

Linkages between the two conventions exist on the ground that cultural heritage constitutes an important source for the ongoing creativity and production of cultural expressions in the present. Hence, the protection of cultural heritage is a premise for the protection of cultural diversity. This interdependence between heritage and diversity is emphasized in the preambles of both conventions. Whereas the CIF asks Contracting States to consider “*the importance of the intangible cultural heritage as a mainspring of cultural diversity,*” the Draft CCD recalls that “*cultural diversity forms a common heritage of humanity.*”

Whereas within UNESCO there seems to exist a coherent setting for the various legal instruments protecting cultural heritage and diversity the same cannot be said with regard to the initiatives of UNESCO and *other* international fora in the field of traditional knowledge protection. A major proof for the fragmentation of the international discussion on this issue is the fact that it has not yet been possible to institutionalize cooperation between UNESCO and WIPO.¹¹¹ Although a first effort of cooperation between the two organizations succeeded in 1982 in the adoption of Model Provisions on the protection of traditional cultural expressions, mentioned above,¹¹² this cooperation was not carried on. The reason for this failure is dissension at the level of the individual States regarding the attribution of competences among governmental

¹¹¹ WIPO’s IGC mentions the cultural dimension of traditional knowledge in IGC 8/6, para. 18(ii): “appropriately complement work under way in other contexts, such as on indigenous rights, conservation and benefit sharing associated with biodiversity, and intangible cultural heritage and cultural diversity, without pre-empting outcomes in those fora on the crucial issues they are addressing;”

¹¹² See *supra* n. 56.

departments rather than conflicts between international organizations.¹¹³ Today, exchanges between WIPO's IGC and UNESCO are limited to sending observers to each others' conferences. This fragmentation is particularly deplorable since intellectual property rights are key to "*sustaining those involved in cultural creativity.*"¹¹⁴

7. Conclusions

The protection of traditional knowledge is being discussed by a number of international fora. These are in particular WIPO, UNESCO, the WTO and the CBD. So far, these efforts have not brought the necessary results allowing for an effective and efficient protection. A number of reasons can be made responsible for this lack of results: Basic issues have not been clarified, including the establishment of a generally agreed definition of the terms "traditional knowledge" and "traditional cultural expressions/expressions of folklore," and the determination of the policy objectives of the protection of traditional knowledge.

It also seems questionable whether the current international discussions on the protection of traditional knowledge take adequately into account the holistic nature of this knowledge "*and its intrinsic value, including its social, spiritual, economic, intellectual, scientific, ecological, technological, commercial, educational and cultural value.*"¹¹⁵ Furthermore, the efforts of the various international fora involved in the discussion on the protection of traditional knowledge appear too fragmented, with each forum focusing on its area of work and competence, without giving adequate consideration to the developments in other relevant international fora.

This is why the present paper proposes, as next steps, to clarify these basic issues and to broaden the scope of the discussions on the protection

¹¹³ Very often there is no direct contact between national delegations in CBD, WIPO, WTO, FAO and UNESCO. This is particularly true for developing countries (i.e., for Brazil and India).

¹¹⁴ See paragraph 17 preamble of the Draft CCD.

¹¹⁵ WIPO-IGC, 2005b, Annex, p. 3, paragraph (i).

of traditional knowledge to include cultural diversity and thus to better take into account the holistic nature of this knowledge. Furthermore, it considers closer cooperation and increased exchange of information among the international fora involved in these discussions to be crucial. Only such coherent approach will allow finding viable mechanisms and measures to protect traditional knowledge effectively and efficiently, and thus to fully take into account the needs and interests of the holders of this knowledge, that is, indigenous and local communities.

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