

# Notions of Intangible Cultural Heritage: towards a UNESCO working definition.

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Significant changes have occurred in the notions of cultural heritage since 1972 and of intangible cultural heritage since the Unesco Recommendation of 1989.

Some elements are now firmly established:

**A Shift from focus solely on products (e.g. traditional songs, monuments) to living production which encompasses producers, products and the sustainability of production.**

That perspective entails that cultural heritage is not a static and ready-made product but rather a permanent production. Its contemporaneity is for instance made quite explicit in the definitions provided by Croatia and the Czech Republic. To take the specific case of traditional knowledge, what is traditional in it is the way it is produced.

I selected just a very few examples, two from IGOs and one from an indigenous NGO:

**CONVENTION ON BIOLOGICAL DIVERSITY**

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**86. In the context of knowledge, innovation is a feature of indigenous and local communities whereby tradition acts as a filter through which innovation occurs. In this context, it is traditional methods of research and application and not always particular pieces of knowledge that persist. Practices should therefore be seen as the manifestations of knowledge and innovation.**

**... 88. It is thus the combination of accumulative knowledge and potential for innovation and adaptation of traditional systems, and the equivalent knowledge base and innovative capacity of modern or scientific systems, which, if encouraged, offers unquantifiable, but probably substantial, opportunities for identifying improved techniques for conservation and sustainable use of biological resources...**

**or take WIPO: WIPO Fact-finding Missions on Intellectual Property and Traditional Knowledge, Draft issued in 2000.**

- A fundamentally important aspect of traditional knowledge is that it is “traditional” only to the extent that its creation and use are part of the cultural traditions of communities. “Traditional”, therefore, does not necessarily mean that the knowledge is ancient or static. “Traditional” knowledge is being created every day, it is evolving as a response of individuals and communities to the challenges posed by their social environment:

*“Traditional knowledge is not merely learned by rote and handed down from one generation to the next. Inherently dynamic, it is subject to a continuous process of verification, adaptation and creation, altering its form and content in response to changing environmental and social circumstances.”<sup>4</sup>*

Thus, in its use, traditional knowledge is also contemporary knowledge. This aspect is further justification for legal protection. It is not only desirable to develop a system that documents and preserves traditional knowledge created in the past and which may be on the brink of disappearance: it is also important to envisage a system that contributes to the promotion and dissemination of innovations which are based on continuing use of tradition. One is therefore not talking only about freezing and preserving knowledge that exists now, but also about preserving what exists as an indispensable and powerful tool for fostering continued traditional innovation and creativity.

And from the paper submitted by the Four Directions Council to the CBD secretariat: 1996 Forests, Indigenous Peoples and Biodiversity: Contribution of the Four Directions Council.

**“<What makes traditional knowledge> traditional is not its antiquity, but the way it is acquired and used. In other words, the social process of learning and sharing knowledge, which is unique to each ...<traditional> culture, lies at the very heart of its traditionality”**

Or from the paper presented to UNCTAD by J.Ekperere in November 2000 on behalf of the Organization for African Unity p.2.

**“What is traditional about traditional knowledge is not its antiquity but the way it is acquired and used”**

1. Shift from focus solely on products (e.g. traditional songs, monuments) to living production which encompasses producers, products and the sustainability of production.

It follows

**That therefore the protection of cultural heritage necessarily entails the protection of the social and environmental context in which it has flourished** (as Janet Blake has noted p.10, this is insufficiently acknowledged in the 1989 Recommendation)

Examples:

Mexico's response to Unesco:... **The concept of popular culture obeys a reality present in people's life in which exist not only oral tradition, handicrafts, music, dance and traditions, but also communitarian practices in fields such as social organization, traditional medicine, historical memory, ecology, alternative communication means and spaces.**

**It also consists of different social areas in which popular culture is created and recreated : indigenous communities, rural people and urban groups, e.g. the areas in which popular culture is expressed (ethnic, rural, regional and urban-popular cultures) and is renewed as a result of an intense dialectic between tradition and renovation which creates new and vital forms of cultural, artistic creation and of lifestyles.**

WIPO

Nakashima

That people who are producers of cultural heritage should be participant agents in its protection and conservation

CBD

There is always a double dimension in culture. One is what could be termed an internal dimension, that is its living practice, the practice of its producers and is related to its creativity. Then there is something like an external but equally fundamental dimension, which has to do with the assertion of identity of a group vis à vis other groups. I think this is what Traditions pour Demain, one of the NGOs consulted by UNESCO, rightly points out.

*Folklore*

*Traditions pour Demain distingue les expressions culturelles qui sont tournées vers la « consommation culturelle » de celles qui sont tournées vers une expression traditionnelle participative et vivante. Le folklore fait partie de la première. Il est par conséquent le résultat d'une transformation de l'objet même de l'expression d'une tradition, d'une coutume. Sa finalité n'est pas la transmission spontanée de cette tradition ou de cette coutume, sinon la diffusion de, ou la sensibilisation à, cette tradition et à cette coutume. Le folklore est donc interculturel dans la mesure où il vise un public qui n'est pas ou n'est plus le détenteur ou l'acteur de cette tradition ou coutume.*

This double dimension is apparent in many definitions given by states, e.g. Andorra, Zimbabwe.

Now the relation of States to local identities is a contested arena. There are States who simply deny legitimacy to local identities and try to suppress them. Other States appropriate local people's identities and turn them into a national identity. This is another area in which major changes have taken place, although certainly not universally. But in general the notion that cultural diversity is not inimical to the State has gained substantial terrain. There has been significant change in the idea of the strict correspondence between one state and one cultural group, with its correlated view of cultural minorities as hindrances to development and progress.

**Examples: Ecuador; Brazil, Definition of cultural heritage (article 216 of the Federal Constitution of 1988, my translation) : « goods of a material or non-material nature, taken individually or as a whole, bearing reference to identity, to action, to memory of different groups that form Brazilian society, among which are included :**

**I- The forms of expression**

**II – The ways for creating, doing and living**

**III - Scientific, artistic and technological creations**

**IV - Works, objects, documents, buildings and other spaces used for artistic and cultural manifestations**

**V- Urban ensembles and sites with historical, landscape, artistic, archaeological, paleontological, ecological and scientific value».**

Mexico's answer to Unesco:... **There is no national culture without taking into account the real cultural heritage from a nation, e.g. the sum of heritages of all its communities, people and social groups, an heritage where popular culture is of particular salience... (my translation)**

No puede haber, tampoco, una cultura nacional sin tomar en cuenta el patrimonio cultural real de una nación, es decir la suma de los patrimonios de todas y cada una de sus comunidades, poblaciones y grupos sociales, patrimonio en donde sobresale la cultura popular.

IVth European Conference of Ministers responsible for the cultural heritage  
Helsinki, 30-31 May 1996

.Access to the cultural heritage

Access to knowledge and enjoyment of the cultural heritage must be promoted as a factor vital to personal and collective fulfilment. Contact with the cultural heritage allows individuals to locate themselves in their own historical, social and cultural environment. This applies to the cultural heritage in its widest sense, including the cultural landscape, the movable heritage and the intangible heritage, as well as the architectural and archaeological heritage.

#### B.Unity and diversity of the cultural heritage

Knowledge of the cultural heritage should be propagated at local, regional, national and international level, and must emphasise both the elements which **reflect Europe's unity and the diversity of its cultural identities**. A thorough understanding of the values inherent in heritage is conducive to appreciation of diversity, tolerance and ability to surpass mere differences. The now established concept of a common cultural heritage should lead individuals and communities to acknowledge shared responsibility for protecting it, regardless of its physical location or current political context.

UNESCO should foster this understanding that one state can encompass cultural diversity, that every country's cultural wealth relies on the different cultural heritages of its peoples' which accrue to the wealth of humanity in general.

As for the 'internal dimension', suffice it to say that what is to be decided is whether the logic of a new instrument is concerned with just present cultural heritage or with **present and future** culture heritage. By the latter I mean much more that preserving present heritage untouched for future generations, but rather to maintain it as a process that is alive.

I propose that the two preceding points could be pondered in this meeting as constituting part of the objectives of a new international instrument.

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If one examines the wide range of responses that were given to the UNESCO question: "how do you operationally define intangible cultural heritage", one remarks from the outstart that the definitions and their scope are linked to specific projects that can be best understood given the time and political context in which they were first spelled out.

This is not to say, however, that their historical origin has precluded their being used and seized by different actors and social movements for very diverse agendas. Yet, if we are to discuss working definitions, we should look (as was done in their time for the older definitions) for something more attuned to the current situation.

An example: As is well known, the notion of 'folklore' was originally linked to a cultural movement concerned with the construction of a German national identity. It became widely used in Central Europe as different countries were struggling to stress a national identity within encompassing Empires such as the Austro-Hungarian administration. This political dimension of 'folklore' was promoted by an urban educated middle-class nationalist movement seeking to establish its cultural roots in the popular traditions. As a political statement, it retained much of its effectiveness in those countries, with the possible exception of those that were part of the former USSR, that favored the notion of "ethnos". It is noteworthy that 'folklore' was used in same kind of connection to middle-class nationalist movements in such unlikely places as Brazil and Lagos, Nigeria at the end of the nineteenth-century. But in those countries it has since lost its appeal, and sounds condescending.

For all its historical relation to nationalist movements in Central Europe, the inclusion of the term "Folklore" in the 1989 UNESCO Recommendation had, nonetheless very positive effects. And yet it carries, at least in a number of countries that did not build on the same tradition, a connotation of an upper-class distinction between high culture and popular culture. It is interesting to note that the 1989 Recommendation retains the term folklore but makes it a synonym for traditional and popular culture:

*For purposes of this Recommendation: Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, etc.*



To go back to the historical moment today, I would call attention to some relevant contemporary characteristics:

- the growing acknowledgement of the general importance of local culture. Examples: European Union recognition of this and consequent fostering geographical and origin indications.

- the issue of traditional knowledge and in particular indigenous and local people has become much more important than had been anticipated. This could be connected particularly to the Convention for Biological Diversity, issued in 1992, particularly the Preamble and some of its articles notably 8j. A first ad hoc meeting on the issue was convened in Madrid, in 1994, and a second in Seville in March 2000. CBD at COP4 (Bratislava) decided to form an ongoing Working Group to advise the Parties on matters connected with traditional and local knowledge. Representatives of indigenous peoples should have observer status and fully participate in the meetings of the above-mentioned working Group (SBBTTA on art 8j) in CBD.

World Bank, WIPO

- the acknowledgement of the inter-relation of ecological knowledge, genetic resources (agricultural or otherwise) and the way of life of local and indigenous people. Examples: farmers' exemption.
- As a result, there is a better understanding of the claims of indigenous and local people that originally seemed to conflate issues of traditional knowledge with more general issues, such as land rights.
- presence of indigenous and local organizations in UN Fora and the demands for agency and control.
- the recognition of the importance of such issues as equity and control by producers of cultural goods, and in particular agreement on mechanisms such as Prior Informed Consent (control) and sharing of benefits (equity).
- Example: **Decision 486 Comision de la Comunidad Andina. Regimen Común sobre Propiedad Industrial art 3. Los países Miembros reconocen el derecho y la facultad para decidir de las comunidades indígenas, afroamericanas o locales, sobre sus conocimientos colectivos.**
- On the other hand some issues are under much debate: one of them is whether the system of IPRs (itself a sui generis outcome of historical conditions) is the appropriate way for protecting systems that are subject to different logics. More specifically, although there seems to be growing consensus about the necessity for sui generis intellectual rights for traditional knowledge, there is still much debate on whether privatizing traditional knowledge through intellectual property rights will not impair its creativity by altering its form of production and ultimately destroy what it aims to protect. In fact a significant movement that started in SouthEast Asia with the Third World Network and has now spread to English-Speaking African

Countries and Latin America advocates in its Community Intellectual Rights Act (note the conspicuous absence of the term property) that traditional knowledge should be maintained in the public domain. While traditional people should share in the commercial benefits of products derived from that knowledge, no one would be able to monopolize it (Nijar). It should be noted that for that second condition to be held, UNESCO and WIPO need to set an international agreement that internationalizes the public domain (Carneiro da Cunha 1999). Otherwise, the public domain of one country can be privatized in the other, as well-known examples (turmeric, neem, ayahuasca) have shown.

Consonant with this position, there is also a debate whether the relation of people to their culture or tradition should be one of “property”. The idea of *custodianship* or *sole custodianship* that seems to be widespread in SADC (South African Development Community Countries that encompasses 14 countries) might appear as an alternative. It has to be thought in conjunction with the whole public domain proposal and has to have a clear safeguard related to power to decide.

In several anthropological quarters (e.g. M. Strathern, R. Coombe, M. Brown, Ph. Descola) a similar critique of the ‘property’ figure appears. In its light the terms “heritage”, patrimoine, patrimonio might not be the most appropriate because of the connotations of “property” that they carry.

The issue of how to protect intellectual rights is still under a lot of debate, but one could frame some of the difficulties by noting that we are trying to organize the interface between one globalized IPR system and many different local regimes. That the IPR present system, itself a sui generis historical product relies on the premise that monopoly for a certain amount of time fosters creativity. Rather than having traditional knowledge lie on the procustean bed of IPRs, the question would be to find the best ways to foster creativity and dissemination of traditional knowledge.

### ***Towards a working definition.***

I think it is in that light that we should think about a definition that should make clear both its objectives (or intent), the means and its scope.

As for intent, as already mentioned above, the point would be to foster traditional cultural production.

As for means, to privilege the cultural producers as beneficiaries and agents.

Then there is scope, which is far from being an unanimity.

### **SCOPE**

What does it encompass? Human remains? Languages?

The broader scope is probably Erica Daes’

WIPO separates definition from working definition

So does CBD and UNCTAD adopts the same definition

UNESCO is perfectly entitled to do the same, but should not narrow its focus beyond its general mandate.

## WIPO Fact-finding Missions on Intellectual Property and Traditional Knowledge, Draft issued in 2000.

### What is “Traditional Knowledge”?

#### □ Use of appropriate terminology

An initial difficulty in this area is the use of appropriate terminology. It became evident in all the FFMs that parties consulted ascribe various meanings to the notions “traditional knowledge”, “traditional knowledge, innovations and culture”, and “traditional knowledge, innovations and practices”, the terms used by WIPO for purposes of the FFMs.

WIPO’s past work in this area began in 1978 and was initially limited to so-called “expressions of folklore”. In cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO), three meetings of experts convened by WIPO led to the adoption in 1982 of the “Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions” (“the Model Provisions”). Section 2 of the Model Provisions defines the term “expressions of folklore” as “productions consisting of characteristic elements of the traditional *artistic* heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community” (emphasis added). However, since adoption of the

Model Provisions in 1982, international legal instruments in other fields have increasingly used terms such as “traditional knowledge, innovations and practices” (Article 8(j), Convention on Biological Diversity, 1992) or “indigenous knowledge, cultures and traditional practices” (Preamble, Draft UN Declaration on the Rights of Indigenous Peoples), which refer generally to a broader range of subject matter (for example, traditional agricultural, biodiversity-related and medicinal knowledge) than that which is covered by the term “expressions of folklore” in the Model Provisions.

For many informants on the FFMs, the relationship between “traditional knowledge” and “folklore” was unclear. Discussions

were also held on the distinction between “indigenous” and “traditional” knowledge, and some informants use other terms such as “indigenous” and/or “traditional technologies”. Lack of terminological clarity can confuse and obscure what is already, terminology aside, a complex enquiry. The FFMs demonstrated the need for terminological clarity. An appropriate term or terms describing the subject matter for which protection is sought should be selected. As importantly, from the IP perspective of WIPO, a clear definition or description of what is meant (and not meant) for IP purposes by the term or terms selected is desirable (see **Box 1**).

#### Box 1

##### **Intellectual Property Needs and Expectations**

- The selection of an appropriate term or terms to describe the subject matter for which protection is sought.
- A clear definition or description of what is meant (and not meant) for IP purposes by the term or terms selected.

However, the context in which traditional knowledge is generated and preserved is important to its meaning. Therefore, any definition of traditional knowledge must reflect the internal cultural cognitive categories of the particular community and must necessarily be developed on a case by case basis. It would be incorrect to assume that all indigenous communities are homogenous. Only the most general definitions can be formulated.<sup>11</sup> In addition, as noted in the “Terminology” chapter, WIPO acknowledges the right of indigenous groups, local communities and other TK holders to decide what constitutes their own knowledge, innovation, cultures and practices, and the ways in which they should be defined.

**WIPO’s use of the term “traditional knowledge”:** For purposes of its work in this area, WIPO uses the term **“traditional knowledge” to refer to tradition-based literary, artistic or 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.** The notion **“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; have generally been developed in a non-systematic way; and, are constantly evolving in response to a changing environment. Categories of traditional knowledge 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 TK would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and **“heritage”** in the broad sense. See further in chapter on **“Terminology”** above.

**WIPO’s use of the terms “expressions of folklore” or “folklore”:** In its work devoted specifically to folklore, WIPO uses the term **“expressions of folklore”**, or simply **“folklore”**, to refer more narrowly to the artistic aspects of **“traditional knowledge”**. WIPO is aware that the term **“folklore”** is believed to have a pejorative meaning by many commentators. As this is, however, the term that has been used at the international level for many years, WIPO has retained it for the present. The term **“expressions of folklore”** is more fully defined in the chapter on **“Terminology”** above. For WIPO’s activities on folklore, see further under **“Protection of “Expressions of Folklore”** below.

**WIPO’s Use of Certain Terms**

In summation, WIPO’s focus is on **“traditional knowledge”** as described above. From its perspective, **“expressions of folklore”** are a subset of the notion **“traditional knowledge”**. **“Traditional knowledge”** is, in turn, a subset of the broader concept of **“heritage”**.

□ **The nature of traditional knowledge**

After the FFMs and other related activities, we are able to make some preliminary observations on the nature of traditional

knowledge of particular relevance to an IP perspective:

- Traditional knowledge is not limited to any specific field of technology or the arts. Traditional knowledge systems in the fields of medicine and healing, biodiversity conservation, the environment and food and agriculture are well known. Other key components of traditional knowledge are the music, dance, and **“artisanat”** (i.e. designs, textiles, plastic arts, crafts, etc.) of a people. Although there are creations which may be done purely to satisfy the aesthetic will of the artisan, many such creations are symbolic of a deeper order or belief system. When a traditional singer

performs a song, the cadence, melody, and form all follow rules maintained for generations. Thus, a song's performance entertains and educates the current audience, but also unites the current population with the past.

- Understanding the interplay between practical knowledge, social history, art, and spiritual or religious beliefs provides a valuable foundation for developing an understanding of the people which hold this knowledge. While modern arts and sciences often place individual accomplishment over community development, traditional knowledge systems celebrate the community's cooperative effort.
- Intertwined within practical solutions, traditional knowledge often transmits the history, beliefs, aesthetics, ethics, and traditions of a particular people. For example, plants used for medicinal purposes also often have symbolic value for the community. Many sculptures, paintings, and crafts are created according to strict rituals and traditions because of their profound symbolic and/or religious meaning.
- Traditional knowledge is a multifaceted concept that encompasses several components. Traditional knowledge is, generally, not produced systematically, but in accordance with the individual or collective creators' responses to and interaction with their cultural environment. This may apply to all forms of knowledge, however, whether "traditional" or "modern". In addition, traditional knowledge, as representative of cultural values, is generally held collectively. This results from the fact that what can sometimes be perceived as an isolated piece of literature (a poem, for example) or an isolated invention (the use of a plant resource to heal wounds, for instance) is actually an element that integrates a vast and mostly coherent complex of beliefs and knowledge, control of which is not in the hands of individuals who use isolated pieces of knowledge, but is vested in the community or collective. Furthermore, most traditional knowledge is transmitted orally from generation to generation, and thus remains largely undocumented.
- A fundamentally important aspect of traditional knowledge is that it is "traditional" only to the extent that its creation and use are part of the cultural traditions of communities. "Traditional", therefore, does not necessarily mean that the knowledge is ancient or static. "Traditional" knowledge is being created every day, it is evolving as a response of individuals and communities to the challenges posed by their social environment:

*"Traditional knowledge is not merely learned by rote and handed down from one generation to the next. Inherently dynamic, it is subject to a continuous process of verification, adaptation and creation, altering its form and content in response to changing environmental and social circumstances."*<sup>iii</sup>

Thus, in its use, traditional knowledge is also contemporary knowledge. This aspect is further justification for legal protection. It is not only desirable to develop a system that documents and preserves traditional knowledge created in the past and which may be on the brink of disappearance: it is also important to

envisage a system that contributes to the promotion and dissemination of innovations which are based on continuing use of tradition. One is therefore not talking only about freezing and preserving knowledge that exists now, but also about preserving what exists as an indispensable and powerful tool for fostering continued traditional innovation and creativity.

More generally, WIPO learned from the FFMs that TK is a rich and diverse source of creativity and innovation. The FFMs revealed that traditional knowledge systems are frameworks for continuing creativity and innovation in most fields of technology, ranging from traditional medicinal and agricultural practices to music, design, and the graphic and plastic arts. Stakeholders consulted during the FFMs consider TK to be a constantly renewed source of wealth, both as an economic asset and as cultural patrimony. This was the case in both developing and developed countries visited during the FFMs.

WIPO learned from the FFMs that the IP issues related to TK cut across the conventional branches of IP law, such as copyright and industrial property. In many cases, TK holders do not separate “artistic” from “useful” aspects of their intellectual creations and innovations; rather, both emanate from a single belief system which is expressed in daily life and ritual. (In fact, the “artistic” and “useful” dichotomy is not as stark in the IP system as some would allege. See below under “The artistic/useful dichotomy”). The FFMs also revealed that numerous indigenous and local communities have protocols for the protection of TK and TK-based innovations under customary law. (See further under “Informal IP regimes and customary law” below.)

In summary, the FFMs showed the richness and diversity of TK on a global scale, both in terms of its inherent creativity and as potential subject matter for IP protection.

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From the Annex, an example. It seems that in SADC (South African Development Community Countries) that encompasses 14 countries, the idea of custodianship is now prevalent.

The discussion highlighted that the Maasai, who are predominantly pastoralist farmers, are the **holders and custodians** of valuable knowledge systems; and in the face of rapid knowledge and language loss, the urgent need to record and document Maasai history, culture, life practices and language. The fact that emphasis on tribal identities is discouraged in Tanzania was also central to the discussion.

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OF THE UNITED NATIONS WORKING GROUP

ON INDIGENOUS POPULATIONS

The intellectual property of indigenous peoples may be usefully divided into three groups: (i) folklore and crafts; (ii) biodiversity; and (iii) indigenous knowledge.

Folklore and crafts include various forms of oral literature, music, dance, artistic motifs and designs crafts such as basketry, beading, carving, weaving and painting. Indigenous peoples have expressed their concern about the commercial exploitation of their folklore and crafts as well as about the reproduction by outsiders of certain cultural manifestations and objects of religious importance.

The biodiversity of the traditional territories of indigenous peoples may also be considered as part of the intellectual property of indigenous peoples requiring protection. Biodiversity refers, inter alia, to plant varieties which have been developed through experiment and cultivation for use as food, medicine or materials for houses, boats or other kinds of construction or use.

There is concern that, as the biodiversity, especially of tropical forest regions, is destroyed through environmental mismanagement and population pressures, certain crops or products which can no longer be produced locally will be propagated under license without recognition of the original cultivators.

Indigenous knowledge refers to the knowledge held, evolved and passed on by indigenous peoples about their environment, plants and animals, and the interaction of the two. Many indigenous peoples have developed techniques and skills which allow them to survive and flourish in fragile ecosystems without causing depletion of resources or damage to the environment. The various forms of sustainable development practiced by indigenous peoples in forests, mountain and valley areas, dry-lands, tundra and arctic regions derive from a successful application of technology in agro-forestry, terracing, resource management, animal and livestock controls, fish harvesting and in other areas. In particular, many indigenous peoples have a knowledge of plants suitable as medicines and this traditional medicine has been and continues to be in many cases a source for Western pharmacology. As noted by the World Commission on Environment and Development: "Tribal and indigenous peoples" lifestyles can offer modern society many lessons in the management of resources in complex forest, mountain and dry-land ecosystems.

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CBD COP-5 HIGHLIGHTS  
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ARTICLE 8(J) AND RELATED PROVISIONS: Delegates first considered the recommendations of the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions (UNEP/ CBD/COP/5/5). A number of indigenous representatives supported continuing the INTERNATIONAL INDIGENOUS FORUM's mandate to work with the CBD, and requested support to enable effective participation. The indigenous representatives called for, inter alia: full and direct participation of indigenous women and communities in all levels of CBD policy formulation and implementation; recognition of the collective dimensions of indigenous knowledge; assistance in protecting and reversing the loss of their languages, cultures and traditions;



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recognition of the link between indigenous knowledge and territories; use of mutually agreed terms and prior informed consent; and direct involvement of indigenous technical experts. One representative emphasized the integration of cultural and environmental paradigms, incorporating land and territorial rights, worldviews and ways of life, political and economic decisions, and cultural and social relations between humans and biodiversity.

Many speakers generally supported the recommendations and continuation of the working group. Many delegations requested full and effective participation of indigenous peoples in CBD processes. The EU underlined the need to develop legal and other systems to protect traditional knowledge and, with INDIA, highlighted collaboration with the World Intellectual Property Organization. MEXICO considered poverty alleviation as the main objective of Article 8(j) and, with VENEZUELA, stressed the importance of benefit-sharing. NORWAY requested a reference to indigenous people as social, cultural and political entities in line with ILO Convention #169 and, with the NETHERLANDS, suggested strengthening relations with the future UNFF. INDIA highlighted national efforts to protect traditional knowledge, such as traditional knowledge digital libraries. BOLIVIA, CUBA and others stressed linkages with ABS. ETHIOPIA, on behalf of the G-77/CHINA, referred to CBD Article 16.5, stressing the promotion of appropriate forms of intellectual property protection and stated that sui generis laws are applicable. The NETHERLANDS supported pilot activities and workshops during the intersessional period. UGANDA stressed the need for capacity-building and training. The US emphasized empowering indigenous communities to exercise control over their knowledge. UNCTAD referred to its relevant work on trade and development issues, including a workshop in October 2000.

Many delegations supported the work programme for the working group. The EU said that it should be recognized in national programmes and strategies, and SWEDEN said it should focus on legal protection. ECUADOR noted the lack of time frames and, with INDONESIA, underscored the importance of undertaking work in stages. NORWAY offered a list of priority tasks such as capacity-building and participation. CANADA called for clarification of how the guidelines should be developed, and prioritization of the work programme's tasks. The UNITED KINGDOM highlighted capacity-building aspects. COLOMBIA stressed the importance of information processing, benefit-sharing and sui generis systems. SPAIN highlighted the definition of legal and policy frameworks at the national level. The US stated that the work programme must stay within Article 8(j)'s mandate. SWITZERLAND, with the NETHERLANDS and the UNITED KINGDOM, called for careful consideration of the timing of future meetings.

<sup>ii</sup> S. Le Gall, Letter to WIPO, January 9, 2000.

<sup>iii</sup> D. Nakashima, "Conceptualizing Nature: The Cultural Context of Resource Management", 34 (1998) Nature Resources, UNESCO 8, p. 18.

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Opening Address by  
Prof. Dr. Erica-Irene A. Daes  
CHAIRPERSON - RAPPORTEUR  
OF THE UNITED NATIONS WORKING GROUP  
ON INDIGENOUS POPULATIONS

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The biodiversity of the traditional territories of indigenous peoples may also be considered as part of the intellectual property of indigenous peoples requiring protection. Biodiversity refers, inter alia, to plant varieties which have been developed through experiment and cultivation for use as food, medicine or materials for houses, boats or other kinds of construction or use.

There is concern that, as the biodiversity, especially of tropical forest regions, is destroyed through environmental mismanagement and population pressures, certain crops or products which can no longer be produced locally will be propagated under license without recognition of the original cultivators.

Indigenous knowledge refers to the knowledge held, evolved and passed on by indigenous peoples about their environment, plants and animals, and the interaction of the two. Many indigenous peoples have developed techniques and skills which allow them to survive and flourish in fragile ecosystems without causing depletion of resources or damage to the environment. The various forms of sustainable development practiced by indigenous peoples in forests, mountain and valley areas, dry-lands, tundra and arctic regions derive from a successful application of technology in agro-forestry, terracing, resource management, animal and livestock controls, fish harvesting and in other areas. In particular, many indigenous peoples have a knowledge of plants suitable as medicines and this traditional medicine has been and continues to be in many cases a source for Western pharmacology. As noted by the World Commission on Environment and Development: "Tribal and indigenous peoples" lifestyles can offer modern society many lessons in the management of resources in complex forest, mountain and dry-land ecosystems.

Mr. Chairman,

Indigenous peoples have the right to special measures for protection, as intellectual property, of their traditional cultural manifestations, such as literature, designs, visual and performing arts, medicines and knowledge of the useful properties of fauna and flora.

The Convention on Biological Diversity was a crucial step. It recognizes the need for States to "respect, preserve and maintain" the ecological knowledge of indigenous peoples and local communities, and to ensure that the benefits of commercial applications are shared equitably. The Convention has been almost universally ratified, which enhances its importance as a legal foundation for future elaboration. In my opinion, nothing prevents States from adopting special

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measures to protect indigenous knowledge which does not fall within the current definition of "industrial property". Nevertheless, there has been some dispute over potential conflicts with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

I was very gratified to read an editorial opinion in the April 9, 1998, issue of the important international science journal "Nature", which concludes that the Agreement on Trade-Related Aspects of Intellectual Property Rights, "if left unmodified on the questions of indigenous knowledge and community rights risks enhancing social disparities and thereby fostering social conflict". I not only agree but would like to add that there is an even greater danger of stifling the significant collaborations which have begun to develop between the world's indigenous peoples and scientific institutions.

I learned also with a sense of satisfaction that the Fourth Conference of the Parties to the convention on Biological Diversity, held in Bratislava this past May, decided to establish an ongoing Working Group to advise the Parties on matters connected with traditional and local knowledge. I am particularly pleased that the conference of the Parties decided that the representatives of indigenous peoples should have observer status and fully participate in the future meetings of the above-mentioned working Group. In this respect, I should like to state that, in my capacity as Chairperson of the United Nations Working Group on Indigenous Populations, since 1984, I have pursued a policy of fully including indigenous peoples as well as Governments and NGO's concerned in the annual sessions of this Working Group and have found that it promotes mutual respect, collegiality, flexibility and constructive cooperation. With the establishment of this new Working Group by the Fourth Conference of the Parties to the Convention on Biological diversity, there exists a high-level mechanism for building a consensus on the general approach which should be taken by States and international agencies.

What is lacking, I believe, is sufficient technical guidance for governments in the drafting of special legislation in this field. This is one of the challenges I would like to place before you at this roundtable. Permit me, first, to review briefly some important recent developments in international standard-setting.

As Special Rapporteur of the United Nations Sub-Commission on the Protection of Indigenous Peoples' Heritage, I have elaborated a draft body of Principles and Guidelines that largely reflect the main suggestions of indigenous peoples themselves.

The principal issues of my draft on Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples are:

- Indigenous peoples should be recognized as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future;
- Indigenous peoples are recognized as collective legal owners of their Knowledge, in perpetuity;
- The right to learn and use indigenous knowledge can be acquired only in accordance with the laws or customary procedures of the indigenous peoples concerned, and with their free and informed consent;
- The duty and responsibility of States, educational and scientific institutions and the United Nations system to help indigenous peoples themselves develop the technical capacity to document and, if they choose, develop and apply their own knowledge commercially.

The key principles of collective ownership in perpetuity, and of acquisition only in accordance with indigenous peoples' own laws, are among others affirmed in some articles, including articles 29 and 30 of the draft United Nations Declaration on the rights of Indigenous Peoples,

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which is currently under consideration by an ad hoc Working Group established by the United Nations Commission on Human Rights.

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CBD COP-5 HIGHLIGHTS  
FRIDAY, 19 MAY 2000

ARTICLE 8(J) AND RELATED PROVISIONS: Delegates first considered the recommendations of the Ad Hoc Open-ended Working Group on Article 8(j) and Related Provisions (UNEP/ CBD/COP/5/5). A number of

indigenous representatives supported continuing the INTERNATIONAL INDIGENOUS FORUM's mandate

to work with the CBD, and requested support to enable effective participation. The indigenous representatives called for, inter alia: full and direct participation of indigenous women and communities in all

levels of CBD policy formulation and implementation; recognition of the collective dimensions of indigenous

knowledge; assistance in protecting and reversing the loss of their languages, cultures and traditions; recognition of the link between indigenous knowledge and territories; use of mutually agreed terms and prior

informed consent; and direct involvement of indigenous technical experts. One representative emphasized the integration of cultural and environmental paradigms, incorporating land and territorial rights, worldviews

and ways of life, political and economic decisions, and cultural and social relations between humans and biodiversity.

Many speakers generally supported the recommendations and continuation of the working group. Many delegations requested full and effective participation of indigenous peoples in CBD processes. The EU underlined the need to develop legal and other systems to protect traditional knowledge and, with INDIA, highlighted collaboration with the World Intellectual Property Organization. MEXICO considered poverty alleviation as the main objective of Article 8(j) and, with VENEZUELA, stressed the importance of benefit-sharing. NORWAY requested a reference to indigenous people as social, cultural and political entities in line with ILO Convention #169 and, with the NETHERLANDS, suggested strengthening relations

with the future UNFF. INDIA highlighted national efforts to protect traditional knowledge, such as traditional knowledge digital libraries. BOLIVIA, CUBA and others stressed linkages with ABS.

ETHIOPIA,

on behalf of the G-77/CHINA, referred to CBD Article 16.5, stressing the promotion of appropriate forms of

intellectual property protection and stated that sui generis laws are applicable. The NETHERLANDS supported pilot activities and workshops during the intersessional period. UGANDA stressed the need for capacity-building and training. The US emphasized empowering indigenous communities to exercise control

over their knowledge. UNCTAD referred to its relevant work on trade and development issues, including a

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workshop in October 2000.

Many delegations supported the work programme for the working group. The EU said that it should be recognized in national programmes and strategies, and SWEDEN said it should focus on legal protection. ECUADOR noted the lack of time frames and, with INDONESIA, underscored the importance of undertaking

work in stages. NORWAY offered a list of priority tasks such as capacity-building and participation.

CANADA called for clarification of how the guidelines should be developed, and prioritization of the work

programme's tasks. The UNITED KINGDOM highlighted capacity-building aspects. COLOMBIA stressed

the importance of information processing, benefit-sharing and sui generis systems. SPAIN highlighted the definition of legal and policy frameworks at the national level. The US stated that the work programme must

stay within Article 8(j)'s mandate. SWITZERLAND, with the NETHERLANDS and the UNITED KINGDOM,

called for careful consideration of the timing of future meetings.