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INTRODUCTION TO THE DRAFT PRELIMINARY STUDY ON
THE ADVISABILITY OF DEVELOPING A STANDARD-SETTING
INSTRUMENT FOR THE PROTECTION OF INTANGIBLE
CULTURAL HERITAGE

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Introduction to the Draft Preliminary Study on the Advisability of Developing a Standard-setting Instrument for the Protection of Intangible Cultural Heritage

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Introduction

One of the principles underlying UNESCO's activities since 1949 has been the preservation of cultural diversity while setting international standards and this philosophy will be key to any moves towards developing a new standard-setting instrument related to intangible cultural heritage. The adoption of UNESCO's 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore was a major step forward in providing formal recognition of intangible heritage and the need to safeguard it, representing the culmination of many years' work. It was also a significant conceptual development in that it was the first time that non-material aspects of cultural heritage were explicitly the subject matter of an international instrument. Changing geopolitical circumstances, the economic and cultural impacts of globalisation and experience gained during the ten years since the adoption of the 1989 Recommendation called for a reassessment of the 1989 Recommendation and its implementation by Member States. This led to the 1999 Washington Conference (referred to below) that, in turn, has led to the preparation of this Draft Preliminary Study following a Resolution of the 30th General Conference in November of that year.

Historical Background

The early attempts to provide international protection for folklore – or the associated 'works' or 'expressions' – were within the framework of existing copyright protection. This was in response to the perceived negative impacts of commercialisation on folklore and a desire to provide stronger controls on this by using the existing mechanisms. In 1967, at the Diplomatic Conference for the revision of the Berne Convention for the Protection of Literary and Artistic Works the first formal step was taken to provide for the international protection of expressions of folklore through copyright. As a result of conceptual and definitional difficulties relating to folklore as a subject for protection, it proved impossible to develop a new Convention. A new article was therefore added to the Berne Convention (Article 15 4(a)) that provided some guidelines for the protection of folklore. This Article reads:

"In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union."

Between 1968 and 1975, several States adopted national legislation based on copyright mechanisms to protect expressions of folklore¹ and the Tunis Model Law

¹ These included: Papua New Guinea and Tunisia in 1967; Bolivia in 1968; Chile and Morocco in 1970. Algeria and Senegal in 1973, Kenya in 1975.

on Copyright for Developing Countries was adopted by UNESCO in 1976. In this text, a specific article is dedicated to the protection of national folklore (Article 6).²

In 1973, the Government of Bolivia requested that UNESCO examine the question of adding a Protocol to the Universal Copyright Convention (adopted in 1952; amended in 1971) for the protection of the *popular arts and cultural patrimony* of all nations. This was passed on to the Culture Sector of UNESCO for study in 1975 (on the grounds that it was a broader issue than simply a copyright one). In 1978, UNESCO and the World Intellectual Property Organization (WIPO) formally agreed an approach to the international protection of folklore whereby UNESCO would examine the question of safeguarding from an interdisciplinary basis³ while WIPO would concentrate on the intellectual property aspects of protection. In 1979, UNESCO and WIPO formally agreed to conduct a joint study on (a) the cultural aspects of safeguarding folklore and (b) the application of intellectual property law (including copyright) to its protection. Joint UNESCO/WIPO work from 1979-1982 led to the eventual adoption by both organisations of the 1982 of the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit and Other Prejudicial Actions.

A survey "Questionnaire on the Protection of Folklore" was sent to Member States in 1979 with the aim of evaluating the current status of folklore and the development of new measures to ensure its authenticity and prevent distortion. This questionnaire addressed five areas regarded as indivisible⁴ – definition, identification, conservation, preservation and utilisation. In 1985, UNESCO embarked in 1985 on an interdisciplinary study of the overall safeguarding of folklore⁵ with limited attention given to the intellectual property aspects of the question. The decision was taken at this stage to develop a set of international standards in a Recommendation as a more flexible instrument than a Convention, containing general principles that Member States are invited to adopt through legislative, administrative or other means. It should be based on an interdisciplinary approach to folklore that addressed the issues of definition, identification, conservation, preservation and utilisation of folklore. As a result, the General Conference adopted UNESCO's Recommendation on the Safeguarding of Traditional Culture and Folklore at its 25th session in 1989.

It was felt that the intellectual property aspects of the international protection of folklore – to be addressed jointly with WIPO – should only be dealt with after the question of the international safeguarding of folklore had been clarified through the Recommendation text. This distinction between the intellectual property aspects of folklore protection (dealt with in the Model Provisions) and the wider issues of safeguarding has remained an apparent dilemma in the question of international protection of folklore that is not yet fully resolved to this day. It is a central question on which UNESCO's position needs to be clarified before embarking on the development of any new instrument for safeguarding intangible heritage. The decision to be taken is at exactly which point the line should be drawn between the two approaches to protection and how far UNESCO's own brief should extend.

² Art. 1(2) (ix) also protects "works of applied art, whether handicrafts or produced on an industrial scale."

³ Looking at questions such as identification, conservation and preservation of folklore.

⁴ By a 1977 study presented to the Committee of Experts on the legal protection of folklore.

⁵ Through a Committee of Governmental Experts on the Safeguarding of Folklore established in 1985.

Developments since the 1989 Recommendation

In 1997, *The World Forum on the Protection of Folklore* was jointly held by UNESCO-WIPO in Phuket, (Thailand). This Forum recommended the organisation of regional meetings and the drafting of a new international agreement on the protection of folklore. Following this recommendation, a series of regional consultations on the protection of expressions of folklore was undertaken jointly by UNESCO and WIPO in 1999 in Africa, Asia and the Pacific, the Arab States, Latin America and the Caribbean. These meetings recommended the development of national legislation and international legal measures for the protection of expressions of folklore, and the establishment of a standing committee on traditional knowledge and folklore within both UNESCO and WIPO. The need for developing *sui generis* legal protection of expressions of folklore was stressed during these meetings.

A scientific evaluation and a legal evaluation on the preparation and the implementation of the Recommendation were conducted in 1992 and 1997. In 1999, a thorough historical study on the preparation of the 1989 Recommendation was undertaken. Between 1995 and 1999, eight regional seminars were convened in order to conduct a systematic assessment of this question.⁶ As a culmination of these, a conference was held jointly in Washington by UNESCO and the Smithsonian Institution entitled *A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Cooperation*. By the late 1990s, there was a general sense that the enormous geopolitical changes following the end of the Cold War and the impact of cultural and economic globalisation required a reassessment of the 1989 Recommendation and its application by Member States. At this conference, several questions were raised concerning the terminology employed in the Recommendation, its scope, its aims (seen as too researcher-orientated) and its appropriateness in view of geopolitical changes, globalisation and a new understanding of the nature of intangible heritage and the interest groups associated with it.

An *Action Plan* was drafted at this conference in which Point 12 of the recommendations to the governments of States was that they should consider “the possible submission of a draft resolution to the UNESCO General Conference requesting UNESCO to undertake a study on the feasibility of adopting a new normative instrument on the safeguarding of traditional culture and folklore.” The Draft Resolution (30 C/DR.84) submitted by the Czech Republic, Lithuania, and Bolivia (supported by Bulgaria, Côte d’Ivoire, Slovakia and Ukraine) to the 30th General Conference of UNESCO and adopted in November 1999 requests that a preliminary study be made into the question of developing a new standard-setting instrument for the safeguarding of intangible cultural heritage.

Terms of Reference of the Study

This preliminary study is based upon that Resolution and addresses the following questions.

- What kind of obligations is it desirable to place on States in relation to the protection of intangible cultural heritage?

⁶ In Central and Eastern Europe (1995); Latin America and the Caribbean (1997); Asia (1998); Western Europe (1998); Central Asia and the Caucasus (1998); Africa (1999); Pacific (1999); and Arab States (1999).

- The wider legal implications of any measures to be included in such an instrument.
- The different *levels of obligation* of a Recommendation and a Convention;
- The difficulty inherent in revising or adding a Protocol to the 1972 Convention for the Protection of the World Cultural and Natural Heritage.
- The scope of definition to be crafted and the legal mechanisms to be employed (the two are interrelated issues);
- The field of heritage to be protected and the delimitation/definition of the domain (expressions of folklore, traditional knowledge, artistic expressions, etc.).
- The need for a very clear understanding of the concept that is to be regulated by a standard setting instrument and the type of protection to be considered.
- The type of protection to be adopted e.g. intellectual property rights, customary laws, a *sui generis* system, general cultural heritage protection or a combination of these.
- The likely interaction between national legislation and such an international instrument.
- The relevance of existing international instruments – of UNESCO and other bodies – to the protection of intangible cultural heritage.
- The relevance of work of other intergovernmental bodies such as WIPO, WTO, UNEP, UNCTAD, ECOSOC, FAO, etc., to safeguarding intangible cultural heritage.
- The value of the *process* of negotiating a new legal instrument in itself.
- The way in which other programme activities of UNESCO (across all Sectors) can inform the process of developing a new instrument.

The following proposals have been put forward in relation to the question of developing a new standard-setting instrument for safeguarding intangible cultural heritage and will be taken into account in this study.

- Development of a new international Convention that employs a particular approach to answer the specific needs of intangible cultural heritage for protection.
- Development of a new international Convention for the safeguarding/protection of intangible cultural heritage that takes as its model UNESCO's 1972 Convention for the Protection of the World's Cultural and Natural Heritage.
- Revision of the 1972 World Heritage Convention (to be governed by the terms of Article 37 of the existing Convention text) and/or development of an Additional Protocol to the 1972 World Heritage Convention.
- Development of a new Recommendation that takes into account recent developments in understanding the nature of intangible cultural heritage and the legal and/or administrative measures that can be taken to safeguard it.

Contents of the Draft Study

Identifying the scope of intangible heritage

Identification of the content and scope of intangible heritage is a major challenge facing UNESCO and other bodies concerned with its safeguarding. It is important in this endeavour that the significance of the skill and know-how of tradition-holders, the transmission of information and the social, cultural and intellectual context of its creation and maintenance is recognised. It follows from this that the human context within which intangible heritage is created must be safeguarded as much as its tangible manifestations. There is a growing awareness of the need to employ a broader anthropological notion of cultural heritage that encompasses intangibles (such as language, oral traditions and local know-how) associated with monuments and sites and as the social and cultural context within which they have been created. This has been clearly illustrated in the on-going debate surrounding the revision of the *Operational Guidelines* to 1972 Convention since 1992 where the concept of cultural landscapes was introduced (including sites of significance for both cultural and natural associations). The revised criteria for selection of both cultural and natural properties are increasingly making reference to the intangibles associated with them and the importance of local and traditional knowledge and customary rules for the management and preservation of sites.

This sense that the notion of culture needs to be broadened links up also with the question of the relationship between culture and development that has become the subject of debate in various international forums. The World Commission on Culture and Development noted in its 1995 report that the notion of culture must be broadened considerably to promote pluralism and social cohesion if it is to be a basis for development. Thus, since the intangible values inherent in cultural heritage have a role to play in development, safeguarding intangible heritage is one way in which UNESCO can fulfil the mandate set out by the Commission. Intangible heritage is important to many States in both social and cultural terms and can contribute significantly to the economies of developing countries. For some States, oral and traditional culture represents the major form of cultural heritage. The contribution that intangible heritage can make to social and economic development in such societies must be understood as an important factor in considering strengthening the safeguarding of this heritage internationally.

Terminology and scope of definition

A commonly voiced criticism of the 1989 Recommendation at the Washington conference in 1999,⁷ was the inappropriateness of the use of the term 'folklore' to describe the range of cultural heritage to be safeguarded. Indigenous peoples, for example, regard it as a term that demeans their traditional cultural heritage and does not accurately describe it.⁸ The whole area of terminology in relation to this aspect of cultural heritage is a potential minefield and requires serious study in order to avoid falling into pitfalls leading to unwelcome outcomes. These terminological difficulties stem even from the term "culture" itself although this has not prevented the

⁷ Cited n.l.

⁸ Tora, S "A Pacific perspective," paper presented to the Washington conference cited n.l.: "The terminology 'folklore' which is true for many of our indigenous cultures is not an acceptable term. Our culture is not 'folklore' but our sacred norms intertwined with our traditional way of life and where these norms set the legal, moral and cultural values of our traditional societies. They are our cultural identity."

development of a body of international law that deals with 'cultural heritage' and 'cultural rights', for example. Some candidates for terms that can be used to identify this area of heritage are set out as follows and can be used in varied combinations.

'Popular' – Favoured in some Latin American countries, this term has the advantage of underlining that the culture in question is not an elite, 'high culture.'⁹ It tends to suggest a contemporary, urban culture and thus would exclude both ancient and rural forms of culture.

'Traditional' – This is a central notion in relation to the culture in question, although it can tend to suggest a static culture that does not evolve and has no dynamism, presupposing an attachment to an unchanging past. It must, therefore, be qualified in such a way as to include the idea of a living and evolving cultural tradition.

'Living' – This cannot, of course, be a sufficient characteristic to identify this heritage. It is, however, an element that is important to stress since much is still living and practised within the cultural communities that create and maintain it and it is a central aim of safeguarding to ensure its continued existence. It also serves to counter assumptions that traditional heritage is, by definition, a 'dead' heritage.

'Oral' – Much of the culture in question is subject to an oral form of expression and transmission and so this is also a central concept to be applied. It is not, however, inclusive of all traditional cultural forms and so should be used together with other terms that, in conjunction, create an inclusive notion.

'Intangible' - This has become the term of art for UNESCO in relation to this area of cultural heritage,¹⁰ however it is problematic and must be seriously examined before it is used as the preferred terminology in any new instrument. This question is looked at in detail below.

'Cultural and intellectual property' – it is clear that this term is designed to make a connection between the subject of protection and the economic issues surrounding its control and exploitation (and, by extension, the adaptation of intellectual property rights for its protection). As a result, it is not to be recommended in a text that does not attempt to create a *sui generis* form of protection inspired by IPRs. The term 'property' has its own substantial problems when applied to any aspect of cultural heritage.¹¹

'Intangible cultural heritage':

The phrase "oral and intangible heritage" is employed in the 1998 UNESCO programme 'Masterpieces of the Oral and Intangible Heritage' that represents the most recent UNESCO activity in the area of safeguarding folklore and is explicitly related to the 1989 Recommendation.¹² This usage reflects a new understanding of

⁹ For example, the court dances of Vietnam.

¹⁰ The section that deals with its programmes being the "Intangible Heritage Unit."

¹¹ See: Prott, L.V. & O'Keefe, P. J. "'Cultural heritage' or 'cultural property'?" 1(2) *Int.J.Cult.Property* (1992) 307.

¹² UNESCO Doc.155 EX/15, Paris 25 Aug.1998. This programme is aimed at selecting 'cultural spaces' (in the anthropological sense) and traditional or folkloric forms of cultural expression to be proclaimed 'Masterpieces.'

cultural heritage in contrast to all UNESCO instruments that pre-date the 1989 recommendation and that related to the protection and preservation of the material ('tangible') heritage, even if the 'intangible' elements may also have been implicitly recognised.¹³ This dichotomy between the 'tangible' (material) and 'intangible' elements of cultural heritage has developed that superficially appears attractive since the legal and administrative measures traditionally taken to protect material elements of cultural heritage may differ from those that are appropriate to 'intangible' heritage. It is, however, a false category in the sense that all material elements of cultural heritage have important intangible values associated with them that are the reason for their protection. Furthermore, it is a distinction that is unacceptable to many indigenous and local cultures that are the holders of the cultural traditions that fall into this category of 'intangible heritage' since it does not reflect their holistic view of culture and heritage.¹⁴ Furthermore, it reflects a 'Eurocentric' view of cultural heritage that has traditionally valued monuments and sites over the intangible values associated with them¹⁵ and fails to encompass the significance of the social role of this heritage.

In view of the objections voiced to the use of the term 'folklore,' there are strong arguments against the retention of the terminology 'traditional culture and folklore' used in the Recommendation. It is possible to formulate some other phraseology that employs the terms 'traditional', 'oral,' 'popular' and/or 'living' in some formulation to describe this cultural heritage. Those elements not incorporated into the actual terminology used can, of course, be brought out in the definition(s) given in the text. It is a central issue in the development of a new standard-setting instrument and one that deserves debate, especially since experts from different disciplines and backgrounds will have strong arguments in support of their favoured terminology. Although the terminology used can be greatly affected by the way in which it is defined for the purposes of the text, it remains a crucial question. A poor choice of terminology can confuse those interpreting the text and may give a false impression of its subject matter and even its aims. A phrase worth considering is 'oral and traditional cultural heritage' since it encapsulates two fundamental aspects of this heritage while placing it within the wider body of cultural heritage law. For the purposes of this study, however, I have generally used 'intangible heritage' since that is the current term of art.

Defining the subject matter

The definition given for 'folklore' in the 1989 Recommendation an important starting-point for considering the question of how to define the subject matter of any future instrument. The definition is as follows.

"Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the

¹³ As early as 1956, the Recommendation on International Principles Applicable to Archaeological Excavations (New Delhi, 5 Dec. 1956) noted in the Preamble "the feelings aroused by the contemplation and study of works of the past," a recognition of the intangible element of the cultural heritage enshrined in its meaning to people(s) beyond the object, monument or site itself.

¹⁴ Tora *op.cit.* n.18: "To the Pacific, the distinction between tangible and intangible cultural heritage is not highlighted. They are considered as one, their cultural heritage."

¹⁵ It is Asian States, for example, that historically have protected intangible as well as tangible aspects of their cultural heritage such as Republic of Korea, Philippines and Japan.

expectations of a community in so far as they reflect its social and cultural identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.”

This definition contains useful elements but suffers from a narrowness of focus does not provide a sufficiently broad definition to encompass all the aspects of ‘traditional culture and folklore’ that need safeguarding. It does not, however, express the centrality of the individual, group or community to the creation and maintenance of traditional culture. It does not refer to the social, cultural and intellectual context of its creation - including the values and know-how of the community involved – but only to the folklore product itself. It also fails to include the spontaneous act of creation that is as important as the product itself. Furthermore, its reference to traditional knowledge is too limited and it does not relate to a sufficiently broad range of interest groups.¹⁶

It should be considered whether the model of listing possible forms that it can take at the end of the definition¹⁷ is the most appropriate strategy. This inevitably concentrates on those aspects that can be easily reduced to a category while leaving out other very important elements of intangible heritage. Such listing of elements within a definition that is also of a more general nature has precedents in international cultural heritage instruments.¹⁸ In the case of intangible heritage, however, it may be that a definition that limits itself to the general character of its subject matter and avoids listing is preferable. This approach would serve to guide the text towards measures that will address the needs of each aspect of heritage mentioned in terms of general principles of protection.¹⁹ When crafting the definitions for central terms in any international instrument, one needs to bear in mind both the legal implications of the definition and the need for an operational definition that will be easily applicable.

Intangible heritage encompasses both the cultural domain (in its ‘artistic’ sense) and the scientific domain (traditional scientific knowledge).²⁰ As the range of relevant topics, legal mechanisms and international instruments considered in this study bears out, it is certainly a vast area of great complexity that requires very careful definition. It is also clear that one has to find a balance when defining the subject of protection in such a way that it is sufficiently narrow in scope to avoid too broad a set of legal mechanisms without ignoring important aspects of this heritage. This is a challenging but not impossible task and one that the global significance of this heritage and its importance to the cultural communities merits attempting. The long

¹⁶ Who can include local cultural communities, NGOs, private sector craft industries, farmers etc.

¹⁷ “Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.” [Section A]

¹⁸ For example, UNESCO’s Convention on the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) gives a general definition of ‘cultural property’ followed by a very detailed list of categories of such property. (Art.1).

¹⁹ The 1985 meeting of Committee of Experts suggested three possible types of definition for ‘folklore’: by criteria (e.g. “based on tradition”); by listing (a non-exhaustive list of representative genres); and a “drafted” definition that “endeavours to put forward the most elegant possible formulation, but does not attempt to be exhaustive.” combining factors such as content, function and significance. See: Gruzinski *op.cit.* n.85 at 10.

²⁰ Folklore itself can be broadened beyond the concept of ‘traditional culture’ through distinguishing two types of folklore, artistic and scientific. See:Doc.UNESCO/PRS/CLT/TPC/11/3 of 30 Nov.1994 at p.12 para.41.

and difficult process of negotiating the 1989 Recommendation,²¹ subsequent activities related to the 1989 Recommendation²² as well as experience in other intergovernmental bodies have all led to a much more precise understanding of the nature of intangible heritage and will greatly inform such an endeavour.

It is possible from this study to begin to list the general characteristics of 'intangible heritage' that a definition should refer to as follows. This is clearly not an exhaustive list and will no doubt be greatly amended by discussions at this Roundtable.

- The spontaneous act of its creation.
- The social, cultural and intellectual contexts in which it is created.²³
- That access and use is often governed by customary rules.
- The methods of transmission, particularly oral.
- That it is transmitted from generation to generation.
- That it is an evolving, living culture.
- That it is frequently collectively held.²⁴
- That it reflects the values and beliefs of a group or society.
- Its importance to creation of identity.
- Its contribution to cultural diversity.
- Its spiritual and cultural significance.

The forms that this heritage can take are innumerable and include: traditional scientific, medicinal and ecological knowledge; techniques and know-how; symbols and designs; rituals and ceremonies; music, dance and songs; names, stories and poetry; values and belief-systems; language; and culinary traditions. Although the main subject matter of a future instrument will, of course, be intangible heritage, the material expressions of that heritage and the physical spaces associated with it are also to be included in the scope of definition.

Intangible heritage as a 'universal heritage of humanity'

The 1989 Recommendation characterises traditional culture and folklore in the Preamble as part of the 'universal heritage of humanity' in a manner similar to that of the 1972 Convention.²⁵ The 'Masterpieces' programme that is a central plank of UNESCO's activities in this area also relies on such a characterisation of 'oral and intangible heritage' as the justification for its inclusion in the list. There appears to be a conceptual difficulty in valuing intangible heritage as a

²¹ It took 16 years in total to reach a final draft.

²² The 'Masterpieces' programme will be particularly important in identifying the elements of this heritage that Member States regard as worthy of protection.

²³ McCann, A. *et al* *The 1989 Recommendation Today: a Brief Analysis* [Doc.UNESCO-SI Conf.99/INF 13] at 6 refers to a shift of emphasis amongst academic folklorists from individual items of folklore to "a more inclusive one based on the event of creation or recreation as a social act. The current academic definition of folklore is based on that act, on the knowledge and values that enable it, and on the modes of social exchange in which it is embedded."

²⁴ This encompasses not only the idea of a heritage belonging to a given group but, for example, also to a system whereby one or more member(s) of a tribe may retain an item of that heritage without the authority to alienate or otherwise dispose of it.

²⁵ "Considering that folklore forms part of the universal heritage of humanity and that it is a powerful means of bringing together different peoples and social groups and of asserting their cultural identity." [Preamble]

'universal heritage' in view of its role in the construction of identity of a specific people or group in opposition to other identities.²⁶ However, globalist concepts of cultural heritage have now been adopted into legal discourse and UNESCO's universalist task in developing standards is in parallel with such developments. It is therefore in keeping with such precedent that any instrument for safeguarding intangible heritage should employ this notion of universality.

However, it is advisable that the notion of a 'universal interest' in protecting this heritage be stressed in order to avoid the potentially damaging implications of the term 'common heritage of mankind' as used in its wider sense in international law.²⁷ What is vital is that the potential contradictions of that position are taken into account and it is advisable to make reference to intangible heritage as a 'universal heritage of humanity' in the Preamble as a justification for protection but to avoid its use within the definition itself. In this way the specific value that this heritage has for the community is safeguarded while the need for its international protection on the grounds of preserving cultural diversity is underlined. There is also the danger that such a characterisation may be used to justify actions in relation to that heritage – that as the exploitation of traditional knowledge without its holders' authorisation²⁸ – are deleterious to it.

Application of IP rules to the protection of intangible heritage

Examination of the question of developing a new standard-setting instrument for safeguarding intangible heritage has inevitably involved consideration of the value of the intellectual property system for protecting this heritage. This is particularly true in view of the history of the development of protection of 'folklore' and the continued interest in various international forums in applying intellectual property approaches – or *sui generis* rules derived from them – to the protection of the economic and moral rights of tradition-holders. In this study, the various intellectual property rules (divided into copyright, neighbouring rights and industrial property rules) have been evaluated as to their usefulness as a means of protection and their limitations identified. Several international treaties that deal with intellectual property rules (either explicitly or by reference) have also been evaluated in these terms. The potential of *sui generis* approaches derived from intellectual property rules to plug gaps in the protection of this heritage has also been looked at. In considering the application of intellectual property rules to the protection of this heritage and the rights of its holders, there are two possible approaches: (a) to aim to strengthen the application and enforcement of those existing rules that have a beneficial effect; and (b) the development of new *sui generis* approaches adapted from the intellectual property system to suit the needs of this heritage and its holders. At the UNESCO/WIPO Regional Consultations held in 1999, the lack of proper legal mechanisms to protect this heritage at both national and international level was noted and that this may require the development of new *sui generis* rules. Elements that

²⁶ See: Crawford, J. *The Rights of Peoples* (Clarendon Press, Oxford, 1988); and Graves-Brown, P. *et al Cultural Identity and Archaeology* (Routledge, London, 1996).

²⁷ In this sense, it relates to the economic exploitation of common space areas such as the deep seabed and the moon. For further on the implications of this for cultural heritage, see: Blake, J. "On defining the cultural heritage," 49 *ICLQ* (2000) 61 at pp.69-71.

²⁸ A point made clear in both the *Suva Declaration* cited n.77 and the *Mataatua Declaration* cited n.335.

have been suggested for such *sui generis* national legislation and/or international protection include.

- The recognition of traditional forms of ownership through a contractual or legislative arrangement that delegates an officially recognised body the right to determine who should be the 'author' (in copyright terms) and granted the right to exercise control over and derive economic benefit from a traditional cultural form.
- A prohibition placed on non-traditional uses of secret sacred material and on debasing, destructive or mutilating uses.
- Economic compensation paid to traditional owners of folklore for any commercial exploitation, including punitive damages for unauthorised exploitation.
- The obligation for respect of attribution of source and other moral rights relating to traditional cultural heritage such as the prevention of distortion.
- A requirement for informed prior consent in patent applications relating to the exploitation of traditional knowledge.

IP and associated *sui generis* measures can certainly address many of the concerns of tradition-holders in relation to the economic exploitation and misuse of their intangible heritage. However, they do not address this heritage in its wider social and cultural context as UNESCO ought to do given its broad mandate and they do not deal with important questions associated with the recording, conservation, preservation and revitalisation of this heritage. It is essentially too narrowly focused to be a useful approach for UNESCO and would involve the Organisation in activities that go beyond its mandate. However, there is no bar to incorporating certain *sui generis* approaches into a new UNESCO instrument, although these are likely to be derived more from customary rules and relating to the moral rights of holders rather than specifically their economic rights (beyond copyright for which UNESCO does have a mandate).

WIPO is currently considering the intellectual property related aspects of protecting traditional knowledge (of which 'expressions of folklore' are seen as sub-group) that may lead to the development of an international treaty on the subject. It is therefore important that any future UNESCO work towards developing a new standard-setting instrument for safeguarding intangible heritage should take account of this and other international deliberations (in bodies such as UNEP and UNCTAD) on the intellectual property aspects of the question. UNESCO should concentrate its efforts on providing general protective measures that promote access to existing moral and economic rights for tradition-holders. In general, UNESCO should leave the development of *sui generis* protection of intangible heritage based on intellectual property rights to specialist agencies such as WIPO that has a specific mandate in this area.

Traditional knowledge and indigenous heritage – activities of other IGOs

When considering the potential development of a new international instrument for safeguarding intangible, it has been important to review the activities to date in various intergovernmental and other bodies – in particular UNESCO and WIPO – in relation to different aspects of intangible heritage. This is particularly true in relation to both indigenous heritage and traditional knowledge that have been the subject of much debate in different international bodies. This study has been undertaken within

the context of a growing interest in many quarters in safeguarding intangible heritage. Several intergovernmental organisations – amongst them WIPO, UNEP, WTO, UNCTAD, WHO, ECOSOC and FAO - have recently addressed questions relevant to safeguarding aspects of intangible heritage, in particular traditional (often local and indigenous) knowledge. Other parties interested in this question include organisations representing indigenous groups and other tradition-holders, NGO's working in such areas as sustainable development and environmental protection and industries that rely on traditional culture and knowledge. The central role that traditional knowledge has to play in preserving biological diversity and promoting sustainable development has also been recognised as has the contribution that traditional, local cultures and folklore have to make to the preservation of global cultural diversity and to cultural pluralism.

Traditional and indigenous knowledge and heritage have also been referred to in international treaties and agreements and have been the subject of the activities of several IGOs. Article 8(j) of the UN Convention on Biological Diversity (1992), for example, explicitly refers to the importance of local and indigenous knowledge, innovations and practices and the associated lifestyles for the preservation of biological diversity. It places an obligation on Parties to respect, preserve and maintain these as far as possible while encouraging the equitable sharing of benefits from this knowledge. ECOSOC has developed two texts of significance for indigenous (intangible) heritage: the UN Draft Declaration on the Rights of Indigenous Peoples (1994/5) and the Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples (1995). The 1994 TRIPS Agreement²⁹ of the WTO also has relevance to traditional knowledge and the rights of knowledge holders, although it is mostly viewed as damaging to their interests.³⁰ UNCTAD has recently been active³¹ in relation to the implications of the protection of traditional knowledge for producer communities and for the economies of developing countries. WIPO launched a major programme relating to *Genetic Resources, Traditional Knowledge and Folklore* in 1998/9 with two Roundtables and a series of nine fact-finding missions on the intellectual property system, traditional knowledge and customary rules. At the WIPO General Assembly in Autumn 2000, an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established and its work may eventually lead to a new international treaty on the subject.

This work being undertaken in other intergovernmental organisations in relation to aspects of intangible heritage should be taken into account and it is advisable not to duplicate this work. The aspects of traditional knowledge and indigenous heritage already addressed in other intergovernmental bodies include: indigenous knowledge contributing to biodiversity and issues of access to genetic resources and benefit-sharing (UNEP and the CBD Secretariat); intellectual property-related aspects of genetic resources, traditional knowledge and expressions of folklore (WIPO); farmers' and plant breeders' rights (FAO); traditional medicinal and botanical knowledge (WHO); and indigenous rights and heritage (ECOSOC).

²⁹ *Agreement on the Trade-Related Aspects of Intellectual Property* of the 1994 Uruguay Round of the GATT Agreement of the World Trade Organisation.

³⁰ In the requirement for reciprocal recognition of patents, for example.

³¹ *Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices*, UNCTAD Commission on Trade in Goods, Services and Commodities. Geneva, 30 Oct.-1 Nov. 2000. [UNCTAD Doc. TD/B/COM.1/EM.13/2].

It has been argued that, since indigenous and local peoples view their heritage in a holistic manner, it is inappropriate to provide protection in discrete legal categories.³² Certainly, UNESCO must explicitly recognise this characteristic of indigenous heritage in its work, but it also has to be pragmatic in terms of the interaction between its own international instruments and those of other intergovernmental bodies and direct duplication of the same work is not advisable. For this reason, UNESCO should address the question of safeguarding intangible heritage primarily from the cultural perspective, taking account of such issues as the sacred character of certain sites associated with intangible heritage and ensuring respect for customary rules of access. Beyond those economic rights enshrined in copyright law, however, it is not in UNESCO's mandate to develop (*sui generis*) legal mechanisms for protection of the economic rights of holders of traditional knowledge.

Developing a new standard-setting instrument

Existing cultural heritage and intellectual property instruments are inadequate to the task of safeguarding a broad enough conception of intangible heritage and a new standard-setting instrument elaborated by UNESCO would represent a major step in plugging this gap in protection. It is also the means by which internationally agreed standards for protection can be developed along with the necessary dynamic for international co-operation in this important area. Amongst the aims and objectives of such an instrument might be:

- Revitalisation of the living creative process of traditional culture.
- Enabling cultural communities to continue to create, maintain and transmit it in the traditional context.
- Identification of customary rules and approaches for safeguarding that can be employed.
- Raising awareness of the value (to particular societies and to the world) of intangible heritage.
- Taking account of the religious significance and social/cultural function of a site or monument as well as the linguistic and oral traditions that surround it.
- Avoidance of 'fossilisation' of intangible heritage through the means of safeguarding.
- Prevention of the unauthorised use and distortion of expressions of intangible heritage.

Various options regarding the type of instrument that could be developed by UNESCO for the safeguarding of intangible heritage have been put forward. The idea of drafting an Additional Protocol to the 1972 Convention or of revising that text has been considered and discounted by this study since it would prove as difficult to achieve as drafting a new Convention. The elaboration of a new Recommendation (in isolation) to "plug the gaps" of the 1989 Recommendation is an option that is likely to be considered only if it is felt that a new Convention should not be developed. Experience of the 1989 Recommendation, amongst others, suggests that it is an ineffective means of creating State practice compared with a Convention. It is, however, worth considering the drafting of a new Recommendation alongside a

³² Such as environmental, biological, cultural etc. For more on this idea, see: Barsh, R.L. "How do you patent a landscape? The perils of dichotomizing cultural and intellectual property." § *Int.J.Cult. Property* (1999) 14 at p.15.

Convention in order to stimulate the development of national legislation through positive interaction between the two texts.

If the decision to be taken concerns the nature of the Convention to be developed and the type of obligations that it should impose on State Parties, there are three possible options:

1. First, a Convention based on *sui generis* approaches to protection inspired by intellectual property rules and addressing the specific needs of intangible heritage. This is unlikely to prove very useful since intellectual property approaches (and hence a *sui generis* system developed from IP rules) are too limited in their scope. Furthermore, such a Convention would also face fierce resistance from those Member States that oppose any adaptation of the traditional intellectual property system that would make its negotiation an extremely lengthy and difficult process.

2. Second, a Convention based broadly on the principles and mechanisms of the 1972 Convention and adapted to the needs of intangible heritage and the holder communities. The study points out several elements of the 1972 Convention that make it an interesting model on which a new Convention might be based. These include:

- the establishment of a World Heritage Fund and the financial measures that accompany it;
- the system of international co-operation it establishes;
- a dedicated secretariat to oversee the operation of the Convention and the formally established role of advisory bodies in relation to the operation of the Convention.³³
- The establishment of an expert body equivalent to ICOMOS or IUCN (possibly built around the Jury for the 'Masterpieces' programme). This would be an important step in developing international machinery for safeguarding of intangible heritage, placing it on an equivalent level of importance with tangible elements of cultural heritage.
- The general principle of protection on which the Convention is predicated as a heritage of significance to humanity (in the case of intangible heritage for its role in preserving cultural diversity) that places a general duty to protect it placed on all States Parties.

However, the specific nature and needs of intangible heritage and its holders would require adaptation of central aspects of the 1972 Convention such as: the notion of 'outstanding universal value'; the mechanisms for nomination³⁴ and monitoring; and the criteria for selection which would need extremely careful drafting. On the other hand, in comparison with more general instrument the identification of its scope would be simpler and this would also limit the possible range of legal measures for protection. If it were accompanied by a Recommendation

³³ Points 57 and 61 of the *Operational Guidelines* set out their role in evaluating nominations by Parties as to whether they satisfy the criteria and conditions of authenticity and integrity. ICOMOS evaluates cultural properties while IUCN evaluates natural properties; they will jointly evaluate cultural landscape nominations.

³⁴ It is crucial that the system for nomination allows for bodies other than States to nominate intangible properties (as the Masterpieces programme allows) and that the nomination process takes account of the oral character of many holder communities' cultures.

(as the 1972 Convention is) it would be possible to set out the legal, administrative and other measures for safeguarding required at national level. Since many of the needs of this heritage can be met through national-level actions, there is an attraction in this approach. A major criticism of this model is that it does not provide broad-based protection to all elements of intangible heritage but simply to those specific examples nominated and selected for listing. This can be regarded as an inappropriate approach for a heritage many of whose important elements are of a mundane character.

3. The third form of Convention would be an instrument employing a mixture of more general cultural heritage approaches to protection with the addition of some *sui generis* measures. The advantage of such an instrument would be in aiming to safeguard intangible heritage in general rather than a limited number of listed examples and would be able to treat it in a holistic manner that safeguards traditional knowledge, for example. However, for this reason, it would present a much more complicated problem of identifying the exact scope of what is to be the subject matter of the instrument and the type of obligations to be placed on Parties. The implementation of a more general Convention of this type is also likely to be less straightforward. Although the primary legal approach of such an instrument might be 'traditional' cultural heritage protection measures, intangible heritage has specific needs that are not answered by these measures that have been developed for the material heritage. For this reason, certain *sui generis* approaches will also be employed in addition to general protective measures in order to address important problems of protection that lie beyond their remit. Examples of such approaches are given above and the potential problems of developing a *sui generis* system have been considered. However, in the context of a more general instrument it is easier to select those *sui generis* measures that are less likely to cause strong opposition.

Safeguarding intangible heritage involves keeping cultural traditions alive and ensuring the transmission of know-how and skills to future generations. This may require that aspects of the way of life of tradition-holders are supported and safeguarded as well as their heritage. This would place an obligation on Parties that could prove problematic to governments where those ways of life run counter to State policy or even sovereignty. For this reason, difficult choices will have to be made as to how far an instrument goes in supporting the customary lifestyles of these communities and the elements that make them up. This is true, for example, in the case of indigenous and tribal peoples whose continued creation and maintenance of traditional culture depends largely on a special relationship to traditional lands and the exploitation of the natural resources of those lands. In order to be acceptable to Member States, safeguards concerning issues such as self-determination, land rights, resource rights, the application of customary laws will need to be built in to a general instrument if it aims to protect traditional ways of life. This is a compromise that interest groups will not like but one that will be necessary for such an instrument to have any chance of adoption as an official text of the Organisation.