

**Commission on Intellectual Property Rights**

**CONFERENCE**

***“HOW INTELLECTUAL PROPERTY RIGHTS COULD WORK  
BETTER FOR DEVELOPING COUNTRIES AND POOR  
PEOPLE”***

**TRANSCRIPT**  
**Session 3: Traditional Knowledge  
and Folklore**

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**THE ROYAL SOCIETY**  
**6 Carlton House Terrace, London SW1Y 5AG**

## **SESSION 3: Traditional Knowledge and Folklore**

### **Carlos Correa: Chair, Commissioner - IPR Commission**

Good Afternoon. We now have a session on Traditional Knowledge and Folklore. As you know, this is a very complex and difficult issue and also an issue of great importance and concern to developing countries. The Doha Ministerial Declaration has instructed the Council for TRIPS to examine the issue of Traditional Knowledge as you probably know and also there is a committee that has been set up in WIPO in order to work among other things on this complex issue. In the Commission, we have an independent view and we are trying to have a broad checklist of the issues we need to address and, of course, this Conference is of extreme importance to us in order to get views from the speakers and from the audience. The Commission has held a workshop on this matter and there has also been a electronic conference. The outcomes of these two activities are available on the Commission's website. We have, then, three interventions. The first one will be by Professor Kamal Puri. Kamal Puri is a Professor of Law at the University of Queensland in Australia and he is also the President of the Australian Folklore Association and a New Zealand barrister and solicitor. Each of the speakers will have around ten minutes and then we will have some time for questions and submissions of opinions.

### **Kamal Puri: University of Queensland**

I must start off by thanking the Commission for giving me this opportunity to make a presentation on a topic which is very close to my heart. I should also commend the Commission for taking up this challenge of how to provide sufficient protection for the betterment of developing countries and the poor people of the world. Talking of challenge, I think I face three challenges at the present moment. One is to keep you engaged after the excellent lunch. This is a personal challenge also because at this time it is midnight in Brisbane and I should be sleeping in my bed. After twenty-two hours in the plane, if I fall down you will know why. And the third challenge is to talk about the theme of the Conference, which is how IPRs could work better for developing countries and poor people and I am going to argue that IP laws are not the approach we should take. There is another way and approach, so that is my own challenge. In that context you will see on the screen that I have got the title. "Why Model Law? Just to give you a very quick background, I have for the last couple of years been involved in drafting a sui generis law for the protection of Traditional Knowledge and expressions of culture for the specific people. My mission has been to find out another way to give protection because I have, for over ten years, agonised over this issue and I have come to the conclusion, fortunately I am not alone, that IP laws are not really the approach that should be taken when it comes to protection of Traditional Knowledge and expressions of culture. I have nine slide and this is number two. What is the issue, what are we dealing with, why or is the model IP system adequate? What are the key principles that I have kept in mind in drafting this law? UNESCO and a couple of regional organisations commissioned me to undertake this project and because it is almost complete, the law has been made. It is called Model Law. It has not, unfortunately, been made public as yet but hopefully by June this year it will become a public document. What

are the major examples of appropriation? I suppose people know about that because they have been talking about some of the examples this morning but what is the solution? Why Protect? Let us not be misled by thinking that there is legal protection. There is no legal available at the present moment anywhere in the world, except through contractual arrangements and we have heard of some examples. The film also mentioned one or two examples. There are great examples, but how many people actually have that bargaining position to have a contractual relationship, somebody who has got a superior bargaining power to have an arrangement which is satisfactory. However, this has now become, fortunately for those of us who are more in the area and more, importantly, for indigenous people themselves. It has become a mainstream issue. What sort of protection should be provided? We know, and I think for this gathering I don't need to dwell too much on this issue, that there is unauthorised commercial use, which is taking place blatantly without giving any benefit to the people who from here the knowledge has emanated. This commercial exploitation is justified on the grounds of common heritage of humankind, but people talk about public domain syndrome that I have referred to. I thought I would include a slide on the meaning or scope of Expressions of Culture and Traditional Knowledge. You may have noticed that I have abstained from using the word "folklore." I do, very humbly, request the Commission to delete that word and substitute that word by "expressions of culture". Expressions of Culture are a most important means of self-expression. They are living, functional traditions, rather than a more souvenir of the past. That is why the word "folklore" is absolutely inappropriate. We are not here talking about something that has been co modified, which is historical, but is something which is continuing and that's why Expressions of Culture are more appropriate. And they are a powerful means for bringing people and communities together and asserting their cultural identity. Maybe I am stating the obvious, but Traditional Knowledge involves information and know-how on the management of natural resources, traditional medicines, crafts and artistic designs. They involve extensive familiarity with the practical uses of biological resources and also they involve development over a long period of time. These are the characteristics of Traditional Knowledge. Why are the modern IP laws not adequate or suitable? We have now reached a stage where people do not have any qualms about this. They realise that the IP laws are not sufficient, although there are still lots of people and some of them carry a lot of clout. For example, WIPO who would say "look, let's deal with these issues using the present IP system." I would argue against that, absolutely, because I think that's not workable, because the indigenous systems is driven by three characteristics, trans-generational, non-materialistic and non-exclusive or communal ownership of rights, they are created collectively. Rights, when it comes to indigenous peoples, are not anchored to a particular individual but they rest in a clan, group or community. Basically, most indigenous knowledge and cultural expressions are **not** eligible for protection under the "modern" IP system because of the stringent requirements you come across in the present IP laws, originality, authorship, material form, novelty and limited duration. People who are well versed with the IP laws would bear me out on this, that these are major barriers for the protection of indigenous peoples' rights. So they are left out in the cold. They cannot get protection under the present law. The things which I have kept in my mind in formulating the model law are communal ownership, free and prior informed written consent of traditional owners, protection from misappropriation, debasement or destruction, development of realistic, practical and cost effective mechanisms for just compensation and/or benefit sharing, application

of existing customary laws and systems of Traditional Knowledge protection and the end result is development of a robust sui generis (which means of its own kind) system of legal protection. Here are some major examples, which most people will be familiar with, which I have collected mainly from the Pacific, because my brief has been to look at the Pacific regions. Of course, there are examples everywhere else in the world dealing with the Appropriation of Traditional Knowledge and Expressions of Culture. I won't read the list as it is very long. To give you one particular case study, Kava plant. This is a plant which is to be found in the Pacific area, Fiji and Vanuatu and you will find that there is so much activity throughout the world to grab those monopoly rights, IPRs, of course. The Traditional Knowledge which has emanated and which is sourced from the Pacific region. Two German companies, William Schwabe and Krewel-Werke, have patented Kava as a prescription drug for treating strokes, insomnia, Alzheimer's disease etc. That is not enough. In the US, Kava has been approved as a dietary supplement. Even more significant, a well-known French company, L'Oreal, has patented use of Kava to reduce hair loss and to stimulate hair growth. More than 60% of the male population in the world has got problems with hair, me included. This is a patent that has been obtained and no wonder they are obtaining the patent elsewhere in the world. It has been said this morning, that there is a rush by all the pharmaceutical industries to vigorously hunt down Traditional Knowledge because there is money and also there is the public perception and justifiably so that these treatments or the knowledge which is obtained and used for medical medicinal purposes is going to be beneficial. So what is the answer? I think, and I suppose there would be some support for this, although I do appreciate that there is going to be a challenge that I am looking forward to. There is an urgent need to acknowledge and enforce the property rights of the owners of Traditional Knowledge and expressions of culture. The re-evaluation is now long overdue. The Western world and this Commission in particular has now got a unique opportunity to write the wrongs of the past by enacting or by recommending in this context a sui generis legislation created through consultation, which is culturally appropriate and respectful of indigenous culture and traditions. Such legislation will help the world, this Commission also, to achieve its mission, namely securing a commercial environment with a great potential for increased investment and consequently economic and cultural development in development countries and the reduction of poverty in the world. Thank you for listening.

### **Carlos Correa**

Thank you very much Professor Puri for your presentation. Our second speaker is Richard Owens. Richard has been the founding director of the Global IP Issues Delegation and the World Intellectual Property Organisation, WIPO, in Geneva and he is currently the International IPR adviser to British Music Rights.

### **Richard Owens: British Music Rights**

Thank you very much, Carlos, for that introduction. Despite my current focus on the rights of individual music artists, composers and publishers in this country, I was asked to contribute to today's proceedings because of my function, at that time, of having the rather dubious distinction of starting WIPO's work in the area of

Traditional Knowledge and Folklore and having been asked specifically to look at what is happening within WIPO at this time with regard to issues that are before us now. By way of background, the activities of WIPO's TK programme began in 1998 with a series of fact finding missions on the IP needs of holders of Traditional Knowledge, followed by a publication of a large report which some of you may have seen which is available on the WIPO website. In discussions with TK holders, local communities as well as governments around the world, we developed a report that then fed into the ensuing developments of WIPO including regional consultations on folklore in 1999 and critically, the creation in September of 2000 of the Inter-Governmental Committee on TK, Genetic Resources and Folklore, the IGC. The IGC has met twice so far, once in April/May of 2001 and then the second meeting last December. What has the WIPO IGC done or set about to do so far. The primary focus of its work seems to be on TK in relation to Genetic Resources. In the second meeting of the Committee in particular, the member states present seemed to think that the most immediate priority for work was to develop model IP clauses for inclusion in access and benefit sharing agreements, ABS agreements, which are Kerry ten Kate talked about this morning. The types of clauses that could be included would be on the source of origin of genetic resources and TK, on prior informed consent to access to just genetic resources and TK. The work will proceed in two phases. First a survey of existing contractual provisions and, second, development of the actual clauses themselves. This is not going to be something that will happen, certainly not within the next twelve months. The second focus of the IGC, at the moment, seems to be on IP aspects of documentation of TK especially, the question of incorporating TK documentation into searchable prior art. But, it is a very interesting debate that's taking place, because the purposes of documentation of TK very much dictate the form and the control over that documentation from the point of view of protection of the rights of TK holders. First, there is the desideratum of a defensive protection under which all documentation would be made available publicly to prevent third parties of obtaining patents on TK or TK based formations. A second equally valid but equally perhaps controversial objective would be to document TK for so called positive protection, i.e. to enable local communities and TK holders themselves to obtain patents or other IPRs and indeed to license, if they choose to do so, their TK for purposes of obtaining IPRs. So, this whole issue of TK documentation, and Dr Mashelkar on the Commission has been very active in India and elsewhere on this issue, is one which is of compelling interest in the whole debate. There has, so far, been a lesser focus on the question of folklore and Kamal Puri has just given one very good reason, which is that terminology itself is extremely inappropriate and colonialist, in fact it came from, as I understand it, an anthropologist in the British Empire during the 1970s. But, in any case, it is no longer the appropriate framework from an IP point of view to talk about protection of traditional handicrafts, traditional designs, expressions of creativity that emanate from a tradition based culture or environment. More particularly, there has been less focus on the folklore aspects. The existing model at international level is the 1982 model law on Expression of Folklore that was developed jointly by WIPO and UNESCO, which is widely believed now to be inadequate to the task of dealing with the complex issues before us. Second, from the point of view of *real politic*, there is just a lower political temperature at global level right now on the folklore fight than when you compare the whole question of TK in relation to genetic resources and associated TK. Although this could change, not because of folklore itself, in my view, but also because of the emerging framework for technological controls digital

copyright goods and services made available through so-called digital rights management technologies. There is quite a bit of debate at the moment about the appropriateness of so called anti circumvention technologies which, given the similarity of subject matter between traditionally folklore based creation, handicrafts, design and music on the one hand and copyright and related rights subject matter on the other, could raise the political temperature in a way that would move things forward on this level. Where is WIPO's work heading? I think there are two main directions that we see and they are chronological. First in terms of what the IGC could produce. First is an attempt to generate better use of existing IPRs by TK holders and users. One objective would be to separate the IP from the non IP aspects of TK or objective for conservation protection of TK for non IP purposes. It is very important that there be points of attachment for TK holders into the existing IP system, identifiable owners, identifiable creators or inventors depending on which specific form of IP paradigm you are talking about and one initial important task of the IGC is to separate those out, so that however laudable the non IP objectives are they could be addressed more appropriately elsewhere, whereas the purely IP aspects, the aspects relating in the terms of the treaty establishing WIPO to human creativity and innovation, can be subject to deeper and more profound examination at international level within WIPO. A second outcome of the IGC's work would be broader use of non patent forms of existing IP and I have put copyright in related rights, because we do have resources within the right of adaptation and copyright to protect Expressions of Folklore that emanate from traditional sources but to have variations by involving the input of creativity by living custodians of TK which are not in the point of view of existing copyright structures to create an IPR in that adaptation. Likewise, the protection of related rights, the protection of producers of sound recordings and the rights of performers create, I believe, enormous opportunities for broader use of copyright. Other existing rights are equally important. We have already heard about geographic indications and Carlos Correa has written a very interesting recent paper advocating broader use of the doctrine of misappropriation by holders of TK in order to immediately have tools to exercise some form of control using IP structures, capacity building enabling TK holders to enforce their rights. WIPO, as most of you know, has a broad and notoriously well funded programme of technical assistance to developing countries which is already made available broadly in the developing world, and the incorporation of new stakeholders in the form of TK custodians, local communities etc. in this capacity building could be a very useful outcome of the work within the IGC in the near term. Finally, greater awareness of the appropriateness, almost from a moral point of view but, at least, from a public awareness point of view, of respect in TK by users and by the public. That would be the first in a chronological order type of positive outcome that could come from WIPO's work. Second, is the whole question of the sui generis protection for TK at international level. Kamal Puri has just given us one set of ideas of how that could work. There is enormous support from developing countries within WIPO for moving forward to create some form of sui generis system at international level for TK. There are, so far, few concrete proposals for models in a pure IPR sense. Kerry ten Kate talked about the references inclusion of creative, in her words, provisions on IPR in ABS laws implementing, in part, the Commission on Biological Diversity. Other examples are laws creating rights for indigenous peoples or indigenous culture examples are draft legislation on the way in Peru and recently an active legislation in the Philippines. I view this at international level as very much longer term possibility following, indeed, a chronological course where, in particular,

the gaps in existing IP protection are clearly identified more or less on the basis of consensus at international level in order that those gaps could be filled by some form of sui generis protection. But very much in my view, from a political point of view, going to happen that way. What are the potential obstacles for the work of WIPO? I am sure some of you will have different ideas and more expanded concepts of what could stand in the way. I have two. First is an intra, if you will, WIPO set of potential obstacles and the other is a more generic or macro set of potential obstacles. The first within WIPO is that the resources for the TK work could be inadequate or could be misapplied. The IGC cynically speaking could become an end to itself. These meetings cost WIPO alone several hundreds of thousands of Swiss Francs to organise and that is just to bring their own resources to bear, including inviting a small number per meeting of developing country delegates, normally governmental representative, but when you add to that all of the costs of other NGOs to participate it could become a sort of broken record talk shop that could, critically, deviate resources from the practical testing of IPRs by TK holders in the field and here the nexus between testing customary law and IP systems is critically important. We have already heard examples of some of the work that has been done and, indeed, the film we just saw eloquently showed some of the possibilities here. I am thinking of the work in India and work in Latin America and Peru. I won't name names, but the critical thing about examining customary law viz a viz IP is one of the obstacles or a number of the obstacles that tradition has thrown up as demonstrating the non applicability of existing IPRs to TK are that you have to identify a number of rights and somebody has to exercise the right. My own personal view held for several years now since we started this work is that that's where you look to customary law. You let your local communities themselves identify who is the owner of rights, the inventor, the author, whatever you want to call it in terms of the point of attachment to existing IP, and that may not be the same person or entity that exercises the rights but it may be the ultimate beneficiary of the benefits in terms of benefit sharing. We need to really look at these issues as well, practical testing of IPRs, customary law nexus to existing IP. Third risk, all stakeholders may not be adequately represented, particularly local communities, TK holders themselves may not be able to find or be able to participate in these debates which are taking place ostensibly on their behalf. Once again, forgive my cynicism, but it is rather widely stated that many of the governments who advocate protection of the IP potential and IP interests of their indigenous populations are not necessarily that nice to their indigenous populations at home. Incorporation of potential beneficiaries themselves in the WIPO process is a very important objective, but could be an obstacle to further work. On that note, I have to say that the second meeting of the IGC and the large and growing number of NGOs, non IPR specific NGOs who are coming now to the meeting and are being accredited shows that this may be less of a worry than we may think. Finally, that the WIPO work may be duplicated elsewhere. This again is less of a risk as the work progresses within the IGC where other secretariats, the CBD the FAO, UNESCO etc are participating, sharing information and it does seem to be what I would characterise as an incipient passing out of respective jurisdiction and responsibility at the same time as recognising common objectives. This could be unplaced optimism, but it does remain to be seen. This is the worst obstacle, in my view, which goes beyond the WIPO process but really looking at the way that IP protection of TK will or can evolve at international level. That expectation will simply be unrealistic. This is really tough complex stuff that has been stated at international level. An enormous amount of incremental, systematic work is going to be required

and I think it is going to be required within WIPO processes within the IPR paradigm and it is going to take a long time to really get something moving at international level. I am not talking about what could happen at regional level or at national level and the question of where the appropriate models come from, top down from the international processes, bottom up from local, national or regional approaches very much means to be seen. I don't think any of us should be under the illusion that we are going to see a quick solution, including in the Doha round. I do not believe that meaningful protection of TK at international level can emerge from the Doha round. We see that the ministerial declarations from Doha include TK in the work programme of the TRIPS Council. It is not part of the specific negotiating mandate in the way that further progress on geographical indications, for example, is but, while political pressure from interested countries could be brought to bear on this whole issue in WTO formats and, in particular, in the Doha negotiations, I think it would be really potentially damaging given the amount of work that still needs to be done just to establish the Terms of Reference to sort out these very difficult issues of ownership, nationality, possible national treatment etc. for a deal to emerge from Doha. I am a firm advocate and adherent to the need to protect TK, including as much as possible by IP, but I think trying to push it cover into the trade based processes will not bring successful results in the middle or long term. Finally, this is really after ten years from now when we have presumably gone through our exercises, we have an international structure, better use of existing IPRs, a potential sui generis system, the markets may be quite unkind to TK. This we do not know. I say this because of our recent experience in the music industry where we are trying very hard to find ways appropriately to price digital delivery of music and we are seeing that the paradigms and the market expectations that prevail in the analogue role where you buy a CD or sell a piece of sheet music if you are a music publisher are vastly different from what consumers or users may pay for the same content but in digital form. Obviously, that is an observation based very much on copyright or entertainment or cultural folklore type of TK. On the generic resources side, I think quite a different risk applies and this is one that's really eloquently put forward by Kerry ten Kate and her colleagues in the recent book of two years or so ago now on Commercial Uses of Biodiversities which is that common notary chemistry and genomics may indeed make the need for natural products incorporating or indicated by TK holders redundant. So we could be looking at a sharply decreasing demand for TK in the genetic resources area. I am not a scientist, but it does seem to me that we must keep in the back of our minds the long view which is, if TK holders want to commercialise their IP or their property, now whether they do or not is their decision but, if they do, this may not be the goldmine that many have seemed to think it may be. Thank you very much.

### **Carlos Correa**

Thank you for your presentation. Our third and last speaker is Dr Pushpangaden. He is a director of the Indian National Botanic Research Institute and he was previously director of The Tropical Botanic Garden and Research Institute and the Ranjit Ghandi Centre for Biotechnology. He is a scientist. He has produced over 230 papers and several books. He has about 36 patents, he is one of the patent owners within the room and he is also currently the President of the National Society of Pharmacology among other activities.



## **Dr Pushpangadan:** Indian National Botanic Research Institute

Thank you for the nice introduction Professor Correa. Traditional Knowledge and Folklore, this is the topic. Let me first thank the Commission on Intellectual Property Rights for inviting me to be here with you and share my experience in experimenting a benefit sharing model in India.

What is Traditional Knowledge? Many people are talking about Traditional Knowledge. This is a system of knowledge developed by certain local indigenous communities living close to nature for thousands of years. Out of their trial, error or experimentation, observation, then are making use of the local resources, the management of the resources, the use of new devices. But this knowledge system had never been thought of as a marketable commodity. It was cared and shared by the community and now, at the end of the 20<sup>th</sup> century they found suddenly that all the knowledge systems are subject to market commodity and in this context how best the CBD or the IPR system is going to help them. The Convention on Biodiversity signed by the countries of the world in 1992 became an international law probably on 29 December 1993 and many of the countries including my own country ratified it. It has given some provisions like the biodiversity is the sovereign property of the respective nations and access to that would need the prior approved consent and also nobody is stopping the traditional communities to continue to practice what they doing and also somebody appropriating their knowledge. It should be compensated by equitable sharing of the benefits accrued from the use of the biodiversity or their associated knowledge system. So CBDs, of course, these are the various permissions used by the CBD. I am not going into detail on that because I want to speak about the experiment that I have conducted in India. Of course the preamble Article 8j 10c was written in this very glossy document but by how many of the Third World countries. You must remember that the biodiversity is rich in most of the Third World countries and these very countries have a very rich cultural diversity and knowledge system which is now at the verge of extinction for us because of the modernisation inside the traditional lifestyles of many of these people are fast disappearing. If you look at the traditional communities, they are simply ignore the knowledge system or the traditional communities because their concept, the concept of traditional communities with respect to the IPRs is something very strange. It is beyond their comprehension to think that their knowledge is something of a commoditacable property. Why are the outsiders are going to be traditional communities? There are various reasons; collecting information, knowledge of current use, previous use, potential use of plants, animals, soils and minerals, knowledge of preparation, processing or storage of useful species or knowledge of formulations involving more than one ingredient of traditional medicine or knowledge of the ecosystem conservation, method of protecting or preserving the biodiversity, how can they make it a marketable commodity. Classification of plants; people have their own way of classifying, not like the biological nomenclature classification system of botany, they have folk taxonomy. We share with companies certain information, which can be converted into valuable products. There is a fundamental problem. When the CBD in 1993, it became international in 1994, we have under the TRIPS. Of course, I am not going for controversy but efforts have been made to bring the confliction because the private property as well as the IPRs of the private

companies. Now I am coming to the benefit sharing model that we have experimented in India. India, as you know, is a big biodiversity country. We have a subcontinent and almost all the known types of climatic conditions in this world are available there. The coldest place, the Dobra Valley is  $-59$  degrees, we have the driest in Ladakh, the highest mountain peak Everest in the subcontinent, you have the temperate climatic condition of the Himalayas in Kashmir, just like European countries, we have desert conditions, the highest rainfall in the world is in India, Assam, then the desert conditions, subtropical, tropical, mountain, you name any kind of climatic conditions and you will find them in the subcontinent of India. 525 biomes and in these very biomes in addition to the mainstream of the people living there we call tribal communities. We have 550 tribal communities living in and around the forest system, living there for thousands of years. They have a Traditional Knowledge system. And this is what, in fact, way back in 1980, it was found that the inroads of civilisation is encroaching on the knowledge system of the tribal communities, not only encroaching because the market commodotisation of their resources had led to the depletion of the forests that is undermining the resource base of the tribal communities who have lived there for thousands of years. The knowledge system, the distilled knowledge of thousands of years are disappearing. Something should be done and the Government of India initiated a Ministry of Environment and Forests to initiate a coordinated research project for all India to study analyse, and document the multidimensional life, culture and tradition knowledge system of the recourse utilisation. This was launched in 1982 and initially I was the chief coordinator. We have our own 27 centres spread over the country. I was then assigned to the regional research laboratory consular body, CSIR, you have one other members of this Commission, Dr Mashelkar, sitting there and I was a scientist there, and I was given the responsibility as the principle investigator and also to coordinate the work. During the course of the investigation I visited Southern India, where you have the Western Ghat mountain system and one tribe known as Kani tribe are still living there. I was leading a team in November 1987 to the mountains and we were exhausted with the travelling and two Kani boys accompanied me. They said "Why don't you try these fruits. If you eat it, you will have no fatigue at all. You can walk the mountain without even food." I was surprised. I took some fruits and ate. To my surprise there was a sudden spark of energy within another twenty minutes and the next two days, without food, I along with my scientist tried this fruit. Actually my work was there for about two weeks. I then asked the boys, "Can you tell me something". Then they said, "This is our secret". This is the particular tribe who are the minor forest-produce traditional collectors and they said that when they go to the forest in this particular time there is nothing to eat so they carry this fruit. "It is for our survival. Why do you want it?" I said this is very good, it can be made useful to the whole world. They asked what they would get out of that. Then I told him, "I am a scientist, if we discover a marketable product I will certainly see to it that you will get an equal share. He didn't know what a share was. I said, "Suppose I get a thousand of these rupees, you would get 500 rupees". He has agreed, we show the plan, I carry the fruits, leaves, everything back to my laboratory and I had to call the pharmacologist. I said this is for anti-fatigue, what you can do. He said you can put the mice in the swimming tank ....**reverse tape**.... what they did, they did a swimming test, the mice were allowed to sink. One was the control, and one was given the fruit which I had, and the third one was given an anti-fatigue synthetic medicine, an amphetamine which is a banned steroid. We were sitting from 3 o'clock, I was continuously watching. After

six hours the control collapsed, after eight hours the one with the amphetamine collapsed, and the mouse which had eaten my fruit was still swimming after eighteen hours, I could believe it, it was midnight. I was there the whole night and the next morning I called the chemist and I said do something. He said they are steroids nobody is interested. Immediately chemical investigations found there were no steroids they were glycolipids and we have six compounds isolated from this fruit which has been filed for patent. To make it a single compound and modern marketable drug it took fifteen years and according to the calculations \$700 million. I then consulted physicians and many others, then only the concept of the integrated approach to develop a drug. Because Ayurveda, for example, in India we had two strains of systems for medicine, one is called the classical system and the other is the aural system. I am talking about the indigenous system of medicine in relation to modern medicine. The classical system is Ayurveda, Siddha, Unani, Amchi, Tibetan systems. And this is the urban elite system in the past, and is a highly organised qualified system which has its sound theoretical foundations and philosophical explanation, but it was only for the urban elite. 80% of the villages that depend on the traditional physicians. And in forests, tribal communities have their own physicians. We have conducted this research all over the country for 16 years, 600 scientists worked on it. India has 17,500 species of flowering plants. Out of this we know the major communities know hardly 3,000 species with scientific research. To our surprise we found that tribal communities used 10,000 species of plants and you will find out what they are using, 325 uses of neem. There are many others that need to be investigated. You will find 350 edibles. You see, unlike us, tribals don't have established food habits. They have what nature provides for them, fruits, nuts and tender shoots or roots. Whatever it may be, they are perfectly in tune with nature and what nature provides. If you look at the people who live in the forests, their health is better than our city dwellers because they live with nature and go along with nature. This is the traditional system of medicine. Out of the 8,000 species we have experimented on only one plant. In scientific screening we have found that this plant compound is not only anti-fatigue, it is immune enhancing and has other properties. In fact, a Japanese company came to us and asked us why we couldn't sell the plant to them. That was way back in 1990. The Government of Kerala said no we cannot sell the plant, but protect the whole knowledge system. After much discussion, finally, I must tell you I was working with an autonomous body at that time, with the CSIR, so I could undertake the research without any government interference. Then I moved to another institute, the Tropical Botanical Garden, again an autonomous body. This process of benefit sharing started before the CBD came into being; it was 1987. Fortunately, by the time we developed the herbal drug it was 1994, we had already ratified the CBD. So I told the governing body that we have ratified an instrument of international regulations for the access to biodiversity and benefit sharing. This is an opportunity for us. I had developed a drug based on a lead from the Kani community. They asked what I wanted to do, I said they did not understand what was benefit sharing. I told them that 50 percent of the benefit that we are going to get when the transfer of technology for the commercial production to be given to the tribal community. Of course, they agreed and signed it and then the problem arose. The tribal community is nomadic, unorganised, forest dwelling tribe. They didn't know how to receive it. This was the knowledge of the whole tribe. Of course, there were many problems, but finally they formed a trust, The Kani Drug Welfare Trust and in 1999. It was not a political exercise. I had to face the wrath of the political people. Finally, in 1999 we transferred this amount. It was actually the

licence fee of 1 million Indian rupees, it was given to 50 people and the royalties came in continuously for the tribal community. And in addition to the benefits they received, we also told the tribals can cultivate this plant do the processing, they could earn more money. To conclude, I will talk briefly about safeguarding the IPRs of indigenous and local communities by benefit sharing. As a model, we have experimented and it is going successfully now and the lifestyle of the tribal communities has improved because they now have a regular income. Now we have to know how to protect the Third World countries if they don't have the expertise and capability. How to empower the people, but you empower the particular Third World country by having that sort of inventory documentation, not only documentation, associated knowledge system. Suppose you publish, it would be public property, how best can it be done. Of course, Dr Mashelkar has talked many times about how to protect the aural tradition. We are fighting the case with the turmeric and other things, there are many aural traditions that are not documented, so you cannot prevent that, but how can it be protected. So, document detailed information and make it available to the Patent Office so that they should know that it is already knowledge of a traditional community. If you want to develop a marketable product, prior approval of the tribal community and equitable sharing of the benefits should be ensured. So this is the moral requirement on access, the prior informed consent should be there, negotiations should be there, then when you develop with the transfer and communication between the tribal or traditional communities and the company should be undertaken, and our understanding of each other should be there and develop the marketable product. But I think that whatever IPs arise, we can use a better way provided we empower the tribal people, traditional people, about their rights and with their capability that what they have the knowledge and associated knowledge system I am sure that we will be able to protect the interests of the Third World provided we take adequate steps to empower people with the knowledge, legal expertise and scientific expertise. Thank you very much.

### **Carlos Correa**

Thank you very much for your presentation and the examples you have given to us. We have now a very good basis for our discussion. As I have already mentioned, this is a very complex issue. As you have noticed, there are very different positions and options to deal with in TK and Folklore or Expressions of Culture. We have some who argue that IP is not the means to solve the problem. There are other mechanisms that should be used. There are others that emphasise that there might be sui generis IP based ways of dealing with TK and finally there are those who affirm that it is possible to apply existing IP systems to TK. We have a wide range of possibilities and perhaps the most important thing is to be clear in the first place about the objective of any kind of protection for TK. As in the previous session, we have allowed three minutes for questions or comments and we hope that we have a debate that may shed some light on this very difficult issue.

### **Marilyn Strathern: Cambridge University**

I must be one of those anthropologists to the British Empire that Richard Owens referred to. This is no more than a footnote to the three very stimulating papers that

we have had. I really would like to press home the point that in this field we have an unparalleled opportunity to think afresh about protection regimes whether or not in IPR. Not just about regimes for protection but for the dissemination and transfer of knowledge without perpetuating stereotypes. I have three very short comments on stereotypes. Kamal Puri has already done folklore for us for which I thank him. We are probably stuck with the notion of traditional but we should not confuse that with what is old fashioned or irrelevant. We are actually referring to living knowledge. It just happens that the modes of transmission pay great attention to the sources of the knowledge. The second point then is if we can regard such knowledge as contemporary and coeval and part of the modern world, it starts unlocking our minds a fraction and makes us think of other parallels and analogies. For example, some of the current debates on the borders of IPR about scientific authorship are all about problems to do with multiple authorship, recognition, acknowledgement and so forth, separate from economic entitlements. I say this finally because of another stereotype that gets locked into the TK debate. This is the stereotype over what we call collective or communal. The problem is that the notion of collective or communal rights is an ancient European notion. We have had it for about 400 years. When we can't think of private property, we think of communal property. The problem is that actually in the real world, things are far more complicated than that. We are dealing with multiple claims, with negotiations and so forth and where the simple notion of group ownership is a misnomer. I would like to put it to the Commission that it will have come indeed a long way if it can start tackling the stereotype of communal and collective ownership. Thank you.

**Felix Addor:** Swiss Federal Institute of IP

I would like to make the link again between TK and geographical indication. There are many similarities for both of them. It is a group right TK and it will be a group right geographical indication. It is not fully right if we were told that in Doha there is a negotiation mandate for geographical indication. There is only one for the register for wines and spirits. This is already contained in the actual TRIPS agreement, so it is nothing new. On the question of having an extended protection for geographical indications other than wines and spirits, the TRIPS Council showed it examined this question with priority. That's what the Doha declaration says. What is the issue about very briefly? There are some very well-known geographical indications such as Basmati rice, Darjeeling tea, Ceylon tea, Swiss chocolate or Bokhara carpets so not only cultural and food products which are very important because these products have unique features that are the result of their geographical origin. Everybody should be happy with this fact. The problem is that, as soon as such a product is put on the market and if it becomes popular with the consumers and gains in reputation, there is of course free riding, which means there are market players with much more power who try to exploit the reputation. This is not only damaging for the original producers but also for the consumers who are misled into thinking that they are buying an authentic product with specific features, which they haven't. The problem of the TRIPS agreement is that it is imbalanced. It protects wines and spirits on a higher level than all the other products. If you have a wine, for example, called a Bordeaux wine, which is produced in Spain, then this is misleading the consumers and it is, according to Article 23 of TRIPS not possible to have such a denomination. There isn't a problem if you have Basmati rice from Geneva, or if you have Ceylon

tea Texan style. So here we think there is an interest that is an issue, which is in the interest of all countries because there should be no country not having any product with original features that these countries want to export to the market. So this really is not a North South interest. But it is an interest going through all the world community. At the moment, it is the country of Switzerland, together with India, Pakistan, Sri Lanka, Iceland the Czech Republic, Venezuela and Thailand only to mention some of them who really try to have a constructive discussion on the issue. And my wish would be that this Commission also tries to bring a bit more life in the dark of this highly important topic. Thank you.

### **Carlos Correa**

These first two presentations show to some extent the different options. The first one made a reference to the need to think afresh this issue and to demystify it and to think about communal property and the second presentation is going the other way and emphasising the possibility of applying existing IPRs to the case of Tradition Knowledge. I would like to ask Professor Puri, if I may? You mentioned that, in your view, the IPR route is not the most suitable one in order to protect the interest of TK. You mentioned the urgent need to acknowledge and impose the Property Rights of the owners. You also mentioned the need to enact sui generis legislation. Would it be possible for you to develop, somehow, which would be the content of this sui generis legislation. What is your thinking? Is the IP concept a different concept? How could this work?

### **Kamal Puri**

What has been done under the proposed model law? As I mentioned in my short presentation, this is only for the Pacific region. I do appreciate what Richard Owens mentioned that ideally you need an international system but he dubbed as top down or you may have bottom up which is, of course, not going to have much impact. Presuming that there would be resources available to one particular country to take an initiative. What the Pacific region has done, which includes actually 26 states and territories in the Pacific, they have almost felt tired of waiting and waiting for something to fall from the heavens or from WIPO or some other international body. They have taken the initiative, of course they do need the blessing of international organisations because that is from where the funding comes, but they thought that there is something that needs to be done, particularly where this issue is a very live issue. Coming to the question that the Chair raised, what the model law proposes to achieve is not the same as the IP system as we understand it today. It is a different kind of system that I have developed. It is not a perfect system at all. I am unashamedly ready to admit but show me a law that is perfect. You have to make a start and I have been advocating for a long time, that we need to look at some other method of protecting TK and Expressions of Culture. As if to call my bluff, UNESCO and two regional organisations asked me to come up with the goods. I had, as you can imagine, a very restless period for quite some time to come up and deliver and I am glad to say that some concrete proposal has been put forward. It has been debated and re-debated, reviewed, commented upon, criticised, modified and so on and that process still goes on. Hopefully, it will culminate in some useful result, I

hope in June. What the system provides is this. That the ultimate authority or the ownership rests in the traditional owners. So they use what we and I and the person trained in the present system of law. What I have done is to converse as much as humanly possible with the communities, with the people in the Pacific and to find out what sort of system they would prefer and the answer seems to be that they would prefer that the ownership should rest with the traditional owners. They are the people who will be in the drivers' seat. I have kept away from any political or administrative system that is supported or funded by the state. It is a system that actually grows out of the customary laws and practices and which the Pacific region has followed for times immemorial. For the administrative structure, I can't use my computer but I have got the administrative structure nicely set out on a power point. What I am trying to say is this. You have a system which I sincerely believe is workable, where the traditional owners will be the people whose permission would be necessary, would be essential, would be a prerequisite for using TK and Expressions of Culture. The model law tries to set up a mechanism to achieve that.

### **Carlos Correa**

So this is a non IP mechanism.

### **Kamal Puri**

It is not an IP system at all. The rights are perpetual. They are not limited in time at all. The rights will remain with the traditional owners because these are rights which are very different from what we in the West talk about IPRs. This is their culture, this is their identity, this is something which actually is for their survival. So these are rights not limited by duration. These rights are different from IPRs because you don't need any tangible expression of those rights. These are rights which are different because the rights belong to the clan, to the group, to the family, to the community. They are communal rights. I do appreciate what Professor Strathern mentioned about the misnomer and so on, but I honestly believe this system is workable where you give the rights to the community, whereas the present system, we know, does not cater to their needs.

### **Francisco Cannabrava:** Permanent Mission of Brazil to the WTO/WIPO, Geneva

I would like to thank the panel for their very interesting and very complimentary views. I would like to refer briefly to the excellent presentation by Mr Richard Owens with sharp comments on the process in WIPO. The only remark that I would actually make is about the issue of documentation. There is quite a lot of pressure from developing countries that the issue of documentation of TK is not taken necessarily from the perspective of defensive and offensive approach, but within the patent system, although this discussion is included in the debate, many countries, in the case of Brazil also, advocate that the use of documentation could even serve as a basis for the further development of a sui generis system of protection of TK and I would be very interested to hear the views of the panel, in particular Mr Owens about this possibility of using documentation and, of course, that would mean attributing

certain rights to the owners of the information contained. Could revert to the traditional communities that own the knowledge included in this documentation. So I would like to have a few comments on that. Regarding the use of existing IPRs, I think it is generally recognised that they do have limitations. No one, at least in WIPO, would say no to the possible advantage of getting some benefits from the protection of existing IPRs but it is generally recognised that there are many difficulties. In the case of patents, there was quite a lot of discussion here on what are the limitations and the case of geographical indications. Unfortunately it is no different and here I would like to refer to the intervention made by my colleague, Felix Addor. Just to take the example of the Swiss chocolate, for example. If we are considering that as a sort of fact in TK, I am going to respect the fact that Nestle is a big traditional community but the problem is they make chocolate, with Brazilian and African Cocoa, so where is the geographical content, and where is the knowledge there that is protected. I am half joking here, but there is half an element of truth here. Even TK would have some limited aspects of protection. We are talking about certain characteristics relating to a certain region. There are limitations there that still would not fit adequately the characteristics of TK and even that we would not consider as the most adequate way of protecting it.

### **Richard Owens**

Thank you, Francisco, for your up-dating of my time-dated knowledge of the WIPO processes. This is an important new arts, whatever system is developed for effective protection of TK at international level, either through a sui generis regime, better use of existing rights or a culmination of the two. Without documentation of subject matter nobody can exercise anything. Once again, referring to recent experience we are having in the music industry, as our entire subject matter base moves on line, at least in the industrialised world, all of our rights, all of our documentation, the traditional ways we have managed movement of product, movement of rights in this global bloodstream of commerce is also having to migrate on line. Unfortunately, two little known aspects of digital rights management research are to be able to track and monitor not only the movement of the content but the movement of the rights and the license agreements and owners transfers of rights, set it up to monitor the term of protection when it expires and have ways in the content that would take account of expiration of the term of protection. I think that the type of work that is being done at the very front end of technological research by the music industry, I need just refer to one very good example the MPEG 21 process which, without going into further detail, everybody in this room should look at. It is looking at documentation of digital information across platforms. It is absolutely critical. I agree with you that if we get to the end of the work where we have a sui generis system of protection, without documentation of the TK, particularly TK in digital form both subject matter, rights, ownership of rights and the metadata, it would be very, very difficult to envisage a system that works across national borders. So yes, documentation is a first priority, regardless of where we end up on the form of the rights or the structure of the system that emerges at international level.



**Ruchi Tripathi:** ActionAid (NGO)

The first point is while we have the debate whether traditional indigenous community knowledge should be protected through IP or not, in the meanwhile could the Commission at least recommend that all patent applications make it mandatory for disclosure of the source of genetic material and the knowledge as well as prior informed consent, so at least there is less danger of bio piracy while the discussions go on. Secondly, I would like to ask a question on the Kani tribal case. The benefits arise from the commercialisation of the patent and hence the benefit sharing, so why did you consider going in for a patent of the knowledge and the product instead of just producing it and commercialising it and sharing benefits, because in India we have had an ayurvedic industry based on TK for many years which doesn't have patent applications on its products and they haven't commercialised their no benefit sharing arrangements. The third point is on the whole documentation process. I would like to make a brief comment. I was in Geneva a year back along with a farmer from Pakistan and we met the American patent lawyer, the trade negotiator, and his suggestion was also why don't you document your knowledge and the farmer asked the American lawyer "Don't you have knowledge in your own country to have patented Basmati" and she said its not practical for her. She is a poor farmer. She is growing Basmati the whole day. For her to start documenting the characteristics of the rice, the way its grown, the way its cooked, just the practicality of it is mind boggling for just those three points.

**Robin Simpson:** National Consumer Council of the UK representing Consumers International, the Global Federation of Consumer Organisations

Under the system that is being put forward, there seems to be an assumption that authorship of some skill or tradition can be attributed to a particular recognisable community. It occurs to me and I am sure to many others that, of course, several communities could claim authorship over the same knowledge. They may be neighbouring communities that have learnt if from each other. Nobody knows who thought of it first because it happened a long time ago, or it could be spontaneous development of knowledge in different regions or even different continents. If we are to attribute authorship to one group and the privileges that go with that, might that not lead to disputes and there may be other problems which I haven't thought of? Would you like to comment on that please?

**Jamie Love:** Consumer Project on Technology (NGO)

Can the panellists explain what they know about the new negotiated convention on judgements? The proposed trade convention on jurisdiction and enforcement of foreign judgements. There are several provisions in this proposed treaty that would give very strong enforcement to sui generis rights or rights that are exacted through contracts. Articles 4, 6, 10, 12, 13 in the convention all bear on these, the enforceability of various rights. The basis framework is that countries that sign the treaty agree to enforce judgements from other countries and the general idea of the treaty is that the subset of law in the different countries is irrelevant. The countries that sign the treaty all agree to enforce each others' judgements irrespective of

differences and sub setting of law. In the area of IP in Article 12 on Exclusive Jurisdiction in the latest draft there was a change made that appeared to accommodate sui generis regimes. It used to be that patents and trademarks would have exclusive jurisdiction in the country of registration but now it has been changed to say “or other or similar rights.” So now there is this new phrase in the treaty referring to “similar rights.” That would seem to give exclusive jurisdiction under the Hague Convention. To disputes including infringement claims and some of the bracketed language, to sui generis claim to the country of registration. This has been brought up in discussions before the Patent and Trademark office in the WIPO session on the Judgements Treaty last January. I don’t really see that, except for in Carlos Correa’s paper that was presented at the last WIPO meeting on TK, I haven’t seen it really discussed much by people in this community because it would seem to have a big impact on the ability to enforce these rights across borders, since the practical matter would be that if you had a claim that a pharmaceutical company had committed a tort against a registered sui generis right in say an African country then that judgement would be enforceable in up to 50 different countries against the company under the terms of the treaty.

**Salem Mezhoud:** United National Association

I have been listing to Professor Puri and Richard Owens on the need for a sui generis law. We can see two groups. The need for protection and real politic. Professor Puri mentioned a few cases and we should always bear them in mind. Like the Kava plant and various things and quinine and the whole history of the utilisation of quinine. This has been going on for a long time and we can see the pluralist monopolies over the spices, for instance, throughout the 16<sup>th</sup>/17<sup>th</sup> century and if it had not been for one Frenchman stealing the clove plant from the British, I think, or the Dutch, nobody else would have broken the monopoly of cloves. Stealing made it into the public domain. Apart from quinine, everybody is talking about the anti-malarial thing now in China which has been kept secret, of course, it is not even in patent domain let alone the public domain. Probably Richard Owens is closer to your own profession. Remember the flack Paul Simon took when he recorded the music with the South African group. Everybody else has been doing it ever since of course, although the individual artists have been getting the copyrights for the musical tradition which it came from, it isn’t getting very much. Especially world music selects one singer from each culture and then forgets about all the rest. To come back to this need for protection, I am very pleased to hear the description “model law” from Kamal Puri. We can look at other examples, which probably have precedence in this, and Richard Owens said that protection should not come from trade. There have been other sui generis legislations elsewhere and I am thinking of the ILO Conventions for instance Convention 57 and then Convention 169, which were specifically designed to protect the rights of India’s peoples. The interesting thing is that Convention 57 was deemed totally obsolescent and was replaced by 169 and to this day I think only a handful of countries have actually ratified it. I remember sitting with one of the ILO guys in charge of that a few years ago when he said that 57 is obsolescent and we want to promote 169. He announced that to the UN and suddenly a member of the Government came to him and said “Oh, we wish to ratify Convention 57” and he told him that actually 57 is dead, we want to promote 169 now. He didn’t care for many years and the suddenly when the other one was obsolescent he wanted to ratify it. So 169 still hasn’t come into force. Secondly, I

am thinking of the Declaration of the Rights of Indigenous Peoples, which is much, more encompassing in scope. Not just IPRs but other things. Then you look at the attitude of the governments toward it and you see there are groups of countries that have been supportive, others that have been deemed lukewarm and others totally cold. There is the group which, I think, was called CANZUS, which is Canada, United States and New Zealand and Australia which have been quite negative in that respect and I think Great Britain came close second in many ways. Again, I turned up one day in Geneva and someone told me of a new representative from the Mission from Brazil who was actually very good and very supportive in terms of human rights and then the next day I saw him in action in the Indigenous Peoples' Forum and he was very, very negative. So I asked him why he was supportive of others and not indigenous people and he said "Yes, but all these riches in the Amazon, you have to take care of them". So those riches are much more important to the Government of Brazil than the rights of indigenous people there. Sweden was very supportive of the declaration until the declaration contained the clause which said that the indigenous peoples' territories should be demilitarised then, of course, that's against the militarisation of Swedish territory. The Africa group was very supportive of indigenous peoples because they thought there were no indigenous peoples in Africa until some of them turned up and then they turned all against it. The question is, how do we reconcile the theory and the practice and how could we coerce, in fact, since the Commission is a Government group, how do we then make this legislation actually a *real* and not dictated by *real politic*?

## **Kamal Puri**

In answer to the question "What about attribution if there are conflicting claims being made for the ownership of TK and Expressions of Culture". Yes, there would be and there are going to be problems. I don't think that any law you pass will be enforced without any problems. So the model law has anticipated to the extent humanly possible to think of all possible scenarios. There is a mechanism that is called the Dispute Resolution Tribunal which will look into those claims. These are not insurmountable issues at all. These problems can be solved. Similarly, the model law does envisage the establishment of a clearinghouse, it does envisage the establishment of other bodies that are actually controlled by traditional owners and I am quite optimistic that these problems as they arise can be resolved. There are going to be major problems but my difficulty has been when do we start. Do we stay put and wait for something to happen which will never happen. It hasn't happened for twenty years. You have got so much literature; literally it would cover the whole table. You have so much material that has been produced, but what is the result? Zero. That is why I urge that there is need to make a start somewhere. It will be an imperfect start and there would be problems. That is how the law has developed. You have all legal systems developing and it has to be neutered and then one day it will be beneficial to the people we are talking about.

## **Richard Owens**

I think it is an interesting idea that Jamie Love put forward. Mercifully, I have not yet had to delve into the Hague Agreement. I really can't comment on this point but I will certainly be looking at this.

## **Dr Pushpangadan**

There was one question from the audience regarding the patenting of the TK system. I also mentioned ayurveda. Ayurveda is a documented system. It is a written tradition of classical texts, nobody can patent any formulation based on ayurveda. People have taken the lead from ayurveda and many biodynamic compounds are isolated and patented, even drugs were made, whereas this ayurveda knowledge system was an oral tradition and not known to the outside world. What we did, we documented it, if it is published it will become public property. So we did a scientific investigation and made practice so that it is protected and then made a marketable product and we made... equal party to that 50/50 person sharing out the benefits whereas if you look in history you will find during the course of the last 50 years, many transactional companies have taken a lead from traditional communities, oral tradition based on their developed products. There are 30 drugs there, some so-called wonder drugs. Nobody paid a penny back to the tribals. So, this is the first instance where we had seen that tribals' knowledge is not only acknowledged in terms of this property should be shared equally.

## **Carlos Correa**

Thank you to the speakers and to the audience. I think we have had an exciting session. Everyone can see how difficult this issue will be for the Commission to deal with. There are still a number of aspects, which are extremely complex. There have been some interesting ideas that, for sure, we are going to consider. Thank you for your help.