

## I. INTRODUCTION<sup>i</sup>

Traditional knowledge (TK) has, for centuries, played an important role in the lives of indigenous peoples worldwide.<sup>ii</sup> Such knowledge constitutes a vital part of their cultural heritage, contributes to the sustainable use and preservation of biodiversity, and is fundamental to their sustainable development.<sup>iii</sup> However, there has been a growing recognition of the problems associated with the misappropriation and use of traditional knowledge for commercial (and other) purposes. In particular, the intellectual property system for patents and copyright has served to enable the taking and use of traditional knowledge by trans-national corporations, with little recourse or remedies available to indigenous and other local communities.

Indigenous and other local communities are not the only ones concerned about misappropriation, however. With the emergence of a global market place, the commercial value derived from traditional knowledge also has the potential to create economic growth opportunities for developing and least-developed countries.<sup>iv</sup> These countries are thus playing an important role in the discussions concerning TK in WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).

The serious problem of misappropriation and the recognition of the value<sup>v</sup> of traditional knowledge have in turn given rise to two general trends. First, developing countries are increasingly pursuing mechanisms aimed at preventing misappropriation and providing positive obligations for the protection for TK. This move has been largely influenced by the need to strike a balance between the actual and potential economic gains arising from the utilization of

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such knowledge, on the one hand, and the protection and safeguarding of such knowledge so as to conserve the cultural heritage of indigenous and other local communities, on the other. Second, indigenous and other local communities are increasingly becoming involved in international fora where discussions on intellectual property and traditional knowledge are taking place. In these fora, indigenous and other local communities have expressed concerns regarding, *inter alia*, the misappropriation of their knowledge and cultural heritage, as well as lack of recognition by the current intellectual property regime of their collective ownership rights over their intellectual property. In such discussions, indigenous peoples have also emphasized the recognition of customary practices and laws regulating access, control and management of their traditional knowledge.

The above developments indicate the manner in which the rights of indigenous peoples have gained increasing attention, by the international community, over the last 50 years. During this time there has also been a change in view from an initial assumption that indigenous peoples would assimilate or disappear due to modernization to recognizing and respecting the cultural diversity of indigenous peoples and their rights to land and self-determination. At the

United Nations, for example, the Permanent Forum on Indigenous Issues was established in 2000 and the United Nations Human Rights Council in April 2006 approved a Draft Declaration on the Human Rights of Indigenous Peoples which was adopted by the General Assembly in September 2007. The recognition of indigenous peoples' rights has also been expressed by the adoption of Convention 169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries. This Convention has strong language supporting collective rights and land rights of indigenous peoples.<sup>vi</sup>

With respect to the protection of traditional knowledge, several fora, in particular, the World Intellectual Property Organization (WIPO) and the Convention on Biological Diversity (CBD) are discussing "appropriate" frameworks for the protection, preservation and promotion of traditional knowledge. Within the structure of WIPO, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (IGC) is the primary arena in which both developing countries and indigenous peoples have sought to achieve their aims regarding the protection of traditional knowledge, genetic resources, traditional cultural expressions, access and benefit sharing, as well as compliance with prior informed consent (PIC) for access.

In contrast to other processes at WIPO, the IGC has made significant efforts to enhance the participation of representatives of indigenous and other local communities.<sup>vii</sup> However, after ten sessions of the IGC, indigenous and other local communities continue to reiterate their concerns and reservations regarding the work of the IGC, noting that, "the Committee's work to-date has been developed without the broad-based participation of Indigenous peoples."<sup>viii</sup> Another concern is the slow pace of work and the unwillingness of some industrialized countries, *e.g.*, the United States and Japan, to work towards

a final outcome. A more significant concern is the substantive approach and content of the IGC framework, including inadequate consideration of indigenous and other local communities' rights and views.

This focus piece carries out a comparative analysis of the proposed WIPO framework on TK with the statements/declarations of indigenous and other local communities that have participated in the process so far. The paper concludes that while the proposed WIPO framework offers a good basis for discussions towards the establishment of a legally binding instrument for the protection of traditional knowledge, much work still remains. Concerted efforts have to be made to fully ensure that the proposed framework reflects the core demands of indigenous and other local communities. Meeting this objective will require that such communities are appropriately consulted and are enabled to effectively take part in the IGC's policy-making processes.

## **II. A SHORT INTRODUCTION TO THE IGC'S WORK ON TRADITIONAL KNOWLEDGE**

The IGC began its life in 2001, following discussions at the WIPO General Assembly,<sup>ix</sup> when it was mandated to serve as a platform for discussion of issues relating to the interplay between intellectual property and traditional knowledge, genetic resources, and traditional cultural expressions. The call for the establishment of the IGC followed the recognition, on the part of WIPO Member States, of the cross-cutting effect that TK, genetic resources, and traditional cultural expressions had on conventional intellectual property rights.

The creation of the IGC followed from the roundtable meetings on "intellectual property and indigenous peoples" convened by WIPO<sup>x</sup> and from the fact-finding missions on traditional knowledge, innovations and creativity held during 1998-1999. The objective of these initiatives was "to identify and explore the intellectual property needs and expectations of new

beneficiaries, including the holders of indigenous knowledge and innovations.”<sup>xi</sup> While the process has had the full support of the WIPO secretariat, some WIPO members and observers also view it as a way to marginalize TK-related issues and prevent their discussion in the Standing Committee on Patents and the Standing Committee on Copyright and Related Rights.

The IGC’s work on traditional knowledge has largely been driven by a search for responses to concerns on the part of both indigenous and other local communities and developing countries. Two particular concerns are widely shared: first, that the existing IP architecture offers inadequate positive protection for traditional knowledge, and second, that it has actually facilitated the misappropriation of TK.

The early work of the IGC largely involved fact-finding, information-sharing on national experiences, and discussion on the outcome that should be reached. This latter aspect of the IGC’s work included discussion of protection for TK within the existing intellectual property system, as well as *sui generis* forms of protection for TK. In this regard, the framing of TK has received strong attention, and indigenous and other local communities have put forward comprehensive views on TK.

As can be expected, defining traditional knowledge has been a challenge for the IGC, and this is largely due to the fact that such knowledge is complex in nature. Additionally, TK embraces different meanings for the wide variety of indigenous and other local communities who depend on it for their livelihoods. Nonetheless, despite the inability of the IGC to agree on an official definition, indigenous groups have articulated the concept of TK on the basis of what they consider its central characteristics.

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For indigenous and other local communities, traditional knowledge constitutes the very foundation of their cultural heritage, cultural identity and social integrity. It is holistic in nature, and is closely linked to the communities’ relationship to their land and natural resources for subsistence and autonomy, and should not be divided into different compartments such as ‘traditional cultural expressions’ and ‘traditional knowledge.’ Traditional knowledge is usually perceived to belong to the ‘community’ rather than individual members of the community that take the responsibility of custodianship, use or application of the traditional knowledge. In addition, for traditional knowledge holders, protection of such knowledge encompasses the preservation and safeguarding of such knowledge to ensure its continued existence and

development. For many indigenous and other local communities, the value of traditional knowledge should not be viewed primarily from a commercial perspective, but from the

spiritual and cultural values associated with it. Indigenous and other local communities view traditional knowledge, not as static, but as evolving to adapt to changing circumstances. Emphasis is also placed on a definition that recognises the trans-generational nature of TK,<sup>xii</sup> and the recognition that customary laws can be used to regulate and control the manner in which such knowledge is communicated, shared, used and applied. It is this general approach that indigenous and other local communities have put forward as the basis for discussions at the IGC.

All these discussions have been instrumental, for example, in facilitating recommendations for the amendment of existing patent systems to incorporate disclosure requirements. According to some formulations, where genetic resources and associated traditional knowledge are used in an invention, the applicant is required to furnish evidence of prior and informed consent and fair and equitable benefit-sharing.<sup>xiii</sup>

In addition, the IGC has produced a wealth of materials that have proven to be comprehensive and useful. However, only a few constitute the actual working documents and they include the following:

- The **Draft Objectives and Principles for the Protection of Traditional Knowledge**, *"Draft Objectives and Principles."*<sup>xiv</sup> The document was revised and incorporated comments provided by both IGC members, and Indigenous and other local communities, taking part as observers in the IGC, on the basis of an intersessional review processes established by the IGC.
- **Options for Giving Effect to the International Dimension of the Committee's Work.**<sup>xv</sup> The document provides technical and practical information aimed at assisting members in answering questions concerning: a binding international instrument or instruments; a non-binding statement or recommendation; guidelines or model provisions, and authoritative or persuasive interpretations of existing legal instruments.

The slow progress to date can largely be explained by the reluctance of some industrialized countries to fully engage with the subject. The tactic adopted by such countries has been to reiterate their repeated calls for "further study," and this tactic has generally impeded a full substantive discussion. This situation prompted a more focused mandate from the 2005 WIPO General Assembly, which instructed the IGC to "accelerate its work," "to focus particularly on the international dimension of intellectual property, genetic resources, traditional knowledge and traditional cultural expressions," and "to exclude no outcome," "including the possible development of an international instrument in this field."<sup>xvi</sup>

### III. INDIGENOUS PEOPLES' POSITIONS, CRITIQUES AND PROPOSALS AT THE IGC

Several indigenous and other local communities have actively participated during the IGC

meetings and have expressed their concerns and their expectations. In the beginning, the IGC meetings were attended by only a small number of NGOs representing indigenous and other local communities. That number has increased substantially. To date approximately 130 NGOs have been granted accreditation and of this number approximately 25 are NGOs representing indigenous and other local communities. These groups have become increasingly vocal, although the majority of official interventions have been made by a small core of four or five. However, there has always been significant coordination between the community representatives, as shown by the Indigenous Peoples' Forum that has met prior to the last two sessions. Thus statements by these communities have tended to reflect the discussions that have taken place among the various groups. Nevertheless, there may be differences between and within such groups that are not reflected in the official statements. The following sections address the primary areas in which indigenous and other local communities have taken positions at the IGC.

#### III.1 The Inadequacy of the Existing IP Rights System

While IP regimes have been proposed as possible alternative means that could be utilized for the protection of traditional knowledge,<sup>xvii</sup> most indigenous and other local communities have expressed serious doubts about the ability of such mechanisms to adequately protect their knowledge, innovations and practices.<sup>xviii</sup> Indigenous and other local communities have reiterated that the current IP system provides inadequate protection for their various forms of traditional knowledge and has in fact facilitated the misappropriation of their knowledge.

The example of patents has been used to illustrate the problem of misappropriation. While patent rights can sometimes be applied to protect traditional knowledge associated with genetic resources, in a majority of cases traditional knowledge fails to fulfil the patentability requirements of novelty and/or inventive step.

Additionally, lax standards on novelty or inventive step enable individuals in States, such as the United States and Japan, to patent TK, either by making small changes, or by ignoring as prior art any oral information that has not been explicitly written down. Furthermore, patent rights have been granted to TK-based inventions without the prior informed consent of the holders of such knowledge nor the adequate sharing of benefits arising from the commercialisation of such inventions.<sup>xix</sup>

Thus, modern IP rights systems have been used to grant private rights to applicants who use TK in their inventions. The consequence of such grants of private ownership highlights two issues: first, it gives applicants the exclusive right to determine conditions under which third-parties (including the communities who are holders of TK) may commercially benefit from the invention; and second, it allows applicants to exclude indigenous and other local communities from gaining protection for their intellectual property and receiving the benefits derived therefrom.

Another issue that has been highlighted is that while existing IP rights are predicated on an individualistic creative process, traditional knowledge is more accurately viewed as communally generated and collectively owned. In addition, while IP rights are protected for a limited duration, indigenous and other local communities argue that protection for traditional knowledge due to its nature, i.e. knowledge that was developed in the past, evolves or adapts to changing circumstances and is passed from one generation to another, cannot be limited by a specific time period.<sup>xx</sup> In that sense, a representative from the Indigenous Peoples' Council on Biocolonialism observed that, "[w]estern property law, and in particular, IP rights, are contradictory to the laws of indigenous peoples to safeguard and protect their knowledge, which require collective ownership, inalienability and protection in perpetuity."<sup>xxi</sup>

Finally, indigenous and other local communities are also concerned that measures that seek to extend existing IP systems of protection to cover their TK might undermine their customary and traditional systems. According to them, extending western IP rights systems constitutes a lack of recognition of, and a threat to, their customs, laws, and practices regarding access to and management of their resources and their knowledge.<sup>xxii</sup>

### III.2 A Legally Binding Document?

Some indigenous and other local communities have expressed caution about the substance of any possible instrument, and have reserved judgment. They have also noted that some form of legally binding instrument is required if their needs are to be met.<sup>xxiii</sup> While communities are unique and have varying views, their statements about the nature of the instrument have several commonalities. These include, but are not limited to, a demand for an instrument that prevents misappropriation of their traditional knowledge, both nationally and across borders. Such an instrument must recognize:

- i. The holistic nature of their knowledge and collective rights to own their knowledge;
- ii. Their right to control their natural resources and manage their knowledge;
- iii. Their human right to self-determination;
- iv. Their right to prior informed consent and to ensure that such a principle is guaranteed and protected, and must be reflected in any access and benefit sharing arrangements; and
- v. The role that customary laws and customary knowledge protection systems play in the protection and preservation of their knowledge, including the ability to enable the implementation and enforcement of such laws, protocols and practices.

Thus, for indigenous and other local communities “greater emphasis is needed in the draft provisions on the recognition of indigenous peoples’ customary laws. Any regime that seeks to protect and preserve traditional knowledge must place equal emphasis on indigenous and non-indigenous sources of law.”<sup>xxiv</sup>

### III.3 Recognition of Customary Laws

In addition to demanding a legally binding instrument for the protection of traditional knowledge that is “appropriate,” i.e. one that is comprehensive in its approach and embraces the holistic nature of traditional knowledge,<sup>xxv</sup> indigenous and other local communities have also expressed the need for a wider respect of their customary laws and practices. Such laws also constitute an alternative means in respect of which appropriate protection of their traditional knowledge can be achieved. “Customary law is the law that most matters for indigenous peoples and is inalienable from their identity and integrity.”<sup>xxvi</sup> Indigenous and other local communities essentially note that much of the confusion surrounding how to define international standards could be avoided by a regime that provides recognition of customary law and requires mutual recognition across borders to enable enforcement. The IGC has responded to the request for the consideration of the role played by customary law in the protection of traditional knowledge and has initiated a “*study on the relationship between customary laws and protocols and formal intellectual property*.”<sup>xxvii</sup>

Achieving effective recognition and enforcement of their customary laws remains a challenge for indigenous and other local communities. Very few IGC members recognize customary laws in their national legislation and policies and, where recognition exists, national legislation tends to take precedence in the event of a conflict between the two areas of law. Part of the problem stems from the fact that *de jure* recognition of customary law on traditional knowledge may also implicate areas of customary

law, such as land tenure and ownership and use of mineral resources. These have been areas of prolonged and sustained tension between governments and indigenous and other local communities, embedded in a difficult discussion about the level of sovereignty and autonomy that indigenous and other local communities are entitled to as a matter of national and international law.

### III.4 Mutual supportiveness with other agreements

The demand for an instrument that is supportive of international instruments for the protection of indigenous peoples’ human rights has also been highlighted. For indigenous and other local communities, a holistic approach to the protection of TK entails ensuring that measures of traditional knowledge protection adopted within the realm of the IGC are mutually supportive with other international systems and processes discussed at the CBD and the Food and Agricultural Organization of the United Nations (FAO). Moreover, these communities have called for a commitment that will ensure that IGC members comply with their obligations under international human rights treaties and conventions, in particular, the ILO Convention No.169, concerning Indigenous and Tribal Peoples in Independent Countries.<sup>xxviii</sup> In this light, indigenous and other local communities have also linked their pursuit for the protection of traditional knowledge with their human rights to self-determination, cultural heritage, and sovereign rights over the natural resources associated with their traditional knowledge. They have expressed concern about the fact that the current draft IGC framework does not explicitly recognize the human rights linkage to their right to protection of their traditional knowledge.<sup>xxix</sup> Furthermore, they have expressed reservations about the mutual supportiveness requirement, noting that some existing instruments, such as the CBD, do not meet the needs of indigenous peoples, as they place ownership of resources in the hands of the state rather than indigenous and other local communities.<sup>xxx</sup>

#### IV. THE IGC'S DRAFT OBJECTIVES AND PRINCIPLES ON TK

WIPO has historically focused on the promotion element of its mandate on intellectual property, and the IGC was initially mandated to provide a platform for the discussions of intellectual property issues that arise in the context of protection of traditional knowledge. This has generally meant that the IGC has concentrated on the protection of traditional knowledge against misappropriation and misuse, as opposed to other objectives such as safeguarding and conserving TK.

The IGC's *Draft Objectives and Principles* are divided into the following:

- i. policy objectives, which could set common general directions for protection and provide a consistent policy framework;
- ii. general guiding principles, which could ensure consistency, balance and effectiveness of substantive principles; and
- iii. specific substantive principles, which could define the legal essence of protection.<sup>xxxii</sup>

To date, despite the comprehensive comments made during the various IGC sessions and during the intersessional commentary process, the *Draft Objectives and Principles*<sup>xxxiii</sup> remain unaltered since the seventh session of the IGC which took place from November 1–5, 2004.

A perusal of the wording of the draft framework, its accompanying commentaries, coupled by the extensive comments made on the text by members of the IGC and indigenous and other local communities are reflective of the IGC's efforts to ensure broad participation. While indigenous and other local communities have expressed their appreciation regarding the aims of the IGC's *Draft Objectives and Principles*, they have nevertheless raised concerns regarding the nature of their participation. Indigenous and

other local communities have reiterated that the draft text fails to fully reflect their concerns, and that it is still anchored in the existing IP system. Many groups have expressed their concerns in general opening statements and/or statements relating to specific agenda items of the IGC sessions, and only a handful have submitted comments during the intersessional review process.<sup>xxxiii</sup> Despite the initiatives on the part of the IGC to enhance participation, there have only been a few who have had the capacity and access to contribute substantively to the process, either by suggesting drafting language or commenting on specific provisions of the text. Still, in the areas where indigenous and other local communities have expressed their interests, they have pointed to several gaps and omissions.

##### IV.1 The IGC Approach to the Existing IP Rights System

The text still tries to place TK within the existing IP rights framework, applying its underlying concepts and justifications. As previously noted, indigenous and other local communities have generally viewed this approach with scepticism. In particular, the existing IP system is viewed with suspicion as an enabler of misappropriation, fuelling demands, not just for positive protection for TK, but for changes in patent laws to prevent such misappropriation.

The incorporation of disclosure requirements in patent applications, where the invention involves TK, is an area where both the indigenous and other local communities and developing countries highlight as an appropriate measure to curb the misappropriation of TK. In an attempt to prevent misappropriation of TK by third parties, objective (xiv) of the *Draft Objectives and Principles* aims to "curtail the grant or exercise of improper intellectual property rights over traditional knowledge and associated genetic resources, by requiring, in particular, as a condition for the granting of patent rights, that patent applicants for inventions involving traditional knowledge and associated genetic resources disclose the source and country of origin of those resources,

as well as evidence of prior informed consent and benefit-sharing conditions have been complied with in the country of origin.”<sup>xxxiv</sup>

This objective addresses a core demand of indigenous and other local communities on the proper relationship between TK and the existing IP system. No groups commented on this version of the objective, however. Still, disclosure has been one of the key demands of both developing countries and indigenous and other local communities.

#### IV.2 The IGC Approach to the Outcome of the Process

Politically, the mandate of the IGC aims at excluding no outcome. Thus, the question of whether the outcome of the IGC will be a binding international instrument or a non-binding declaration or something else is still open. The *Draft Objectives and Guidelines* therefore take no position on this. However, the formulation of the framework suggests that the *Draft Objectives and Guidelines* on the table can be the basis for a future treaty if necessary. The *Draft Objectives and Guidelines* incorporate treaty-like language. For example, Article 1 (1) stipulates that “[t]raditional knowledge shall be protected against misappropriation.” Furthermore, Article 7 (2) states that “The holder of traditional knowledge shall be entitled to grant prior informed consent for access to traditional knowledge...” Nevertheless, industrialized States remain opposed to any suggestion that a binding instrument is an appropriate outcome of the IGC.

#### IV.3 The IGC Approach to Customary Law

The recognition of customary law remains elusive within the document, and deeply unpopular with Member States. The document contains the objective of supporting traditional knowledge systems to “respect and facilitate the continuing customary use, development, exchange and transmission of traditional knowledge by and between traditional knowledge holders.”<sup>xxxv</sup> This has elements of a recognition of customary law, but does not establish it as a legal basis for

further provisions in the agreement. No communities commented on this, but it seems clear that this does not go far enough in recognizing a role for customary law in the proposed framework/instrument. The Saami Council also noted that guiding principles should also include a reference to customary law, which is missing.<sup>xxxvi</sup> The Saami Council also objected to the wording in Principle (h), which makes the recognition of customary law subject to national law.

#### IV.4 The IGC Approach to Mutual Supportiveness with Other Agreements

The issue of the relationship to other agreements remains complex. Many States are clearly relying on the CBD as a stepping stone in moving the IGC process forward. However, the CBD relies on state sovereignty over genetic resources, a concept that makes it difficult for indigenous and other local communities to consider a similar formulation for TK. In this regard, *Draft Objective* (ix), “Respect for and cooperation with relevant international agreements and processes,” has been criticized for not specifically recognizing international human rights agreements regarding indigenous and other local communities.<sup>xxxvii</sup>

In relation to the *Draft Guiding Principles*, certain indigenous and other local communities have also expressed concerns in relation to the last paragraph of the general guiding principle (f) which states that “nothing in the principles of the international regime should be interpreted to limit the sovereign rights of States over national resources...” Such a provision, the Saami Council argued, places emphasis on sovereign rights of States over their natural resources, to the exclusion of the recognition of indigenous and other local communities’ rights over natural resources. According to the Saami Council, “[t]hese two principles have to be balanced against each other.”<sup>xxxviii</sup>

Subjecting the principle of prior informed consent to “relevant national laws” as stipulated in Article

7 (1) of the *Draft Substantive Principles* has also been criticized by indigenous and other local communities. For certain communities, “[t]he concept of free, prior and informed consent can be described as a bundle of rights, many of them human rights, such as, again, indigenous peoples’ right to self-determination and our land and resource rights. Per definition, human rights can never be subject to national legislation.”<sup>xxxix</sup>

## IV.5 Specific Substantive Areas

### IV.5.1 Scope and Nature of Misappropriation

Misappropriation of TK by third parties and the failure on the part of the current IP regime to prevent such misappropriation has been matter of concern for indigenous and other local communities. As highlighted earlier, the patent system has facilitated the granting of IP rights to invention where TK has been used without the consent of the holders of TK, or the sharing of benefits from the utilization thereof.

Article 1, “Protection against Misappropriation,” of the *Draft Substantive Provisions* adopts a broad approach. The provisions incorporate a list describing acts of misappropriation that range from instances where traditional knowledge is acquired by means of bribery or theft, or where TK is used for a commercial benefit and the recognized holders of the knowledge were not appropriately compensated. Misappropriation also concerns cases where the principle of prior informed consent is not respected, and where TK is used in a manner that is spiritually or morally offensive to traditional knowledge holders.

The drafting of this provision also incorporates the intellectual property principles of unfair competition. According to Article 4, “traditional knowledge holders should also be effectively protected against other acts of unfair competition, including acts specified in Article 10*bis* of the Paris Convention.”

Despite attempts to be broad in its determination of acts misappropriation, concerns have been

raised against Article 1. For some indigenous and other local communities, the scope of misappropriation as expounded in the draft substantive principle adopts an approach that is too limited. Such an approach, it is argued, leaves “a substantial part of the traditional knowledge that conventional IP regimes consider to be in the so-called public domain continuously without protection.”<sup>xl</sup> For others, such a provision fails to effectively address the acts of misappropriation which have raised concerns for indigenous and other local communities, i.e., acts that are culturally offensive.<sup>xli</sup> Furthermore, it is also argued that wording like “wilful” and “clearly” used in Article 3 (v) could be interpreted in a manner that places an onerous burden on the traditional knowledge holder to prove that an offence was intended.<sup>xlii</sup>

### IV.5.2 Duration of protection

The “Duration of Protection” stipulated in Article 9 of the *Draft Substantive Provisions* is also an element essential for the protection of traditional knowledge which, in the opinion of indigenous and other local communities, is not adequately clarified in the draft document. The *Draft Substantive Provisions* imply unlimited term for as long as the knowledge continues to qualify as traditional knowledge. The Saami Council has found this satisfactory<sup>xliii</sup> but few other groups have commented on this issue. For holders of traditional knowledge, such knowledge is inalienable and trans-generational in nature and should be offered protection that is not limited by a time period, as is the case with respect to conventional intellectual property rights. While several IGC members have also supported this view,<sup>xliv</sup> others stress a discussion on the duration of protection is still premature considering that members have not yet clarified the scope of rights.

### IV.5.3 Exceptions and Limitations

The exceptions and limitations requirement is another element being discussed as a measure to

limit protection of traditional knowledge, applying the justifications and norms underlying the existing IP system. Article 8 on “Exceptions and Limitations” stipulates that “... national authorities may exclude from the principle of prior informed consent the fair use of traditional knowledge which is already readily available to the general public, provided that users of that traditional knowledge provide equitable compensation for industrial and commercial uses of that traditional knowledge.” Some indigenous and other local communities argue that the wording “already readily available to the general public” reaffirms the mistaken belief that traditional knowledge that is not protected by modern intellectual property measures is in the public domain or “can be exempted from their prior informed consent.”<sup>xlv</sup> For these groups the principle of public domain contributes to a further misappropriation of their traditional knowledge and fails to respect the principle of prior informed consent.

This position has received support from some Member States. Egypt, speaking on behalf of the Africa Group, noted:

Regarding Principle B.8 on exceptions and limitations, the Group’s preliminary opinion was that this was a matter which should be approached with caution and should preferably be decided by the TK holders themselves. Limitations and exceptions were necessary in existing IP systems as they concerned private rights granted for a limited duration and from which often a material benefit could be derived. This was not necessarily the case when protection of TK was sought.<sup>xlvi</sup>

Despite measures to ensure that the proposed WIPO framework on TK reflects the demands and interests of the various stakeholders involved in the IGC process, gaps continue to exist. On the one hand, the IGC framework continues to focus

on the protection of traditional knowledge against misappropriation and misuse, as opposed to other objectives such as safeguarding and conserving TK. On the other hand, indigenous and other local communities continue to reiterate issues, such as the nature of their participation and the fact the draft does not adequately address concerns such as their right to self-determination. While any process such as the IGC will inevitably be unable to address all the issues favoured by all the stakeholders, the IGC is striking in how far it is from meeting the core demands of the acknowledged primary beneficiaries of the treaty: indigenous and other local communities.

#### **V. WHY HAS THE IGC NOT FULLY REFLECTED THE VIEWS OF INDIGENOUS AND OTHER LOCAL COMMUNITIES?**

Despite the IGC’s initial endeavours to adopt measures of protection of traditional knowledge that are reflective of the needs and expectations of TK holders and to involve indigenous and other local communities in its policy discussions, the concerns and demands of these communities continue to receive insufficient attention. There are several reasons that explain why the IGC has not succeeded in fully reflecting the demands of indigenous and other local communities.

First, being a Member State driven committee, Member State interests dominate. Given that domestic interest groups’ goals are not necessarily congruent with those of the Member States, the IGC finds itself challenged in its attempt to strike an equitable balance of the interests at stake. On the one hand, some of its members demand a focus on traditional knowledge protection mechanisms consistent with existing intellectual property systems, and on the other hand, indigenous and other local communities demand recognition of *sui generis* forms of protection that do not incorporate the current IP regimes.

Second, the IGC, like most intergovernmental committees, tends to be characterised by the interplay of politics and positions with regard to

the larger work and mandate of WIPO. There is an evident lack of consensus between developing and industrialized countries on whether or not an international instrument for the protection of traditional knowledge should be legally binding or not. Members continue to disagree on various substantive provisions, such as a definition of traditional knowledge. Some members reiterate the view that existing IP regimes already provide for the protection of traditional knowledge while others counter and highlight difficulties encountered in applying conventional IP measures to protect traditional knowledge. One of the sources of disagreement lies in the fact that some countries view the IGC as a convenient dumping ground for difficult issues that they would otherwise have to address in other committees such as the Standing Committee on Patents and the Standing Committee on Copyright and Related Rights. From their viewpoint the IGC's function is to serve as a discussion forum that will not lead to any substantive outcome. At the same time, this tactic ensures that any time that TK-related issues are raised in other committees, these States refuse to discuss these issues and argue that the issues are best addressed in the IGC.

Perhaps the most challenging issue, substantively, is the fact that only a small portion of WIPO Member States has enacted legislative measures for the protection of TK. This not only includes positive measures of protection, but also measures to prevent misappropriation at the domestic level. Indigenous and other local communities are seeking protection at the international level that has, for the most part, not been provided for at the national level. This has made it difficult to draw from national experiences in trying to craft an international agreement. It has also made it easy for some industrialized countries to suggest that the entire subject matter of TK requires further study and exploration of national experiences and thereby avoid engaging with the very real problem of cross-border misappropriation.

While participation of indigenous and other local communities in the IGC has improved, measures to ensure active and effective participation need to be strengthened, if the equitable inclusion of their demands is to be achieved. The sections below outline some of the issues to be addressed.

## V.1 Participation issues

Despite the accreditation of indigenous and other local community organizations and their active involvement in the IGC processes, their effective participation will continue to be limited by the structure of the IGC, which is member driven. While they feel that the work of the committee has been developed without really taking into account the broad based participation of indigenous peoples,<sup>xlvii</sup> initiatives by the committee to increase participation cannot be overlooked. Such initiatives include the creation of the Voluntary Fund whose objective is to increase participation of indigenous and other local communities in the work of the IGC, and the establishment of a panel of indigenous peoples composed of experts from indigenous and other local communities.<sup>xlviii</sup> The panel plays an important role because the experts discuss and share the experiences and concerns of holders and custodians of traditional knowledge.

While the Voluntary Fund is still very much in the early stages of operation, the number of actively participating indigenous groups remains low. One barrier may be the complexity of accreditation and the long lag time between when an application is made and attendance can begin. Essentially, an application must be made before the upcoming meeting, so as to attend the subsequent meeting. The gap between application and attendance can potentially last up to a year.

Another issue that may pose a barrier for those without access to the Fund is simply the cost of the meeting. Whereas most other committee meetings at WIPO last a week at the most, the IGC usually sits for a minimum of 10 days, requiring

significant investment from delegations and representatives coming from outside Geneva. Few self-funded organizations are capable of sending a proper delegation to Geneva for the entire period of the meeting, reducing their capacity and effectiveness at the meeting.

## **V.2 Relationship between Member State Delegations and Indigenous and Other Local Community Representatives**

The often tense relationship between indigenous and other local communities and the Member States in which they reside is perhaps another reason why the IGC has not fully reflected their aspirations. In some cases there exists a conflictual relationship at the national level regarding such issues in the policy-making processes affecting indigenous and other local communities, recognition of land rights, the right to self-determination, and application and enforcement of customary law. This conflict is sometimes carried onto the international level.

More generally, for the majority of indigenous and other local communities a comprehensive framework for the protection of TK can only be achieved if their right to self-determination, land rights and customary laws are recognized, and if they are actively involved in the policy-making processes. This may clash with the more limited mandate of delegates to the WIPO IGC.

In other instances, indigenous and other local communities have formed part of national delegations, which has enhanced national access, but has also meant that such representatives have not been able to speak beyond the already established national positions, if at all. Finally, in some cases there has been a growing recognition and appreciation for enhancing participation of indigenous and other local communities in the development of policies and legal frameworks regarding TK, but still some frustration exists on the part of indigenous and other local communities as to the real effectiveness of their participation in the decision-making processes at the national level.

## **V.3 Relationship between Indigenous and Other Local Communities and Geneva-based NGOs**

The relationship between the indigenous and other local communities and the Geneva-based NGOs could also be a factor contributing to the slow results from the IGC process. Geneva-based NGOs have played an important role in raising awareness on the public interest implications of excessive IP rights as well as working hard to support the objectives of developing countries. At WIPO, they have also actively supported demands of developing countries for the broadening of the WIPO mandate to incorporate the development agenda and in raising concerns regarding access to knowledge issues. However, the participation of NGOs in the IGC has been cautious, at best. In part, this has been because NGOs have deferred to representatives of indigenous and other local communities. In addition, it may also be the case that the IGC presents a challenge to their normal mode of opposition regarding the unjustified expansion of intellectual property rights.

In this scenario, potentially strong allies for indigenous and other local communities have been missing from the discussion. While a few organizations<sup>xlix</sup> have been present in the IGC discussions from the beginning, their overall participation has been less active than in other WIPO committees. Nonetheless, it is imperative that farmers' organizations, environmental organizations, academic groups, libraries, and public health and research groups become more extensively involved in the discussion and have greater interaction and coordination with indigenous and other local communities at the IGC.

## VI. SOME SUGGESTIONS FOR IMPROVEMENT

While participation of indigenous and other local communities in the IGC has improved, measures to ensure active and effective participation need to be intensified. In this light, the following suggestions could be considered as potential measures to be integrated in the future work of the IGC:

- The indigenous and other local communities may need to be more strategic in deciding what they want to achieve in the IGC framework on TK considering the limitations of the IGC in making practical progress on substantive issues. Proposals that recommend bringing all elements of the protection of TK into the IGC might complicate the basic goal that indigenous communities and developing countries are aiming to achieve in the discussions at the IGC. It may be appropriate for discussions on the larger issues of sovereignty and autonomy to be addressed in domestic or other international fora while the IGC deals with the somewhat narrower issue of protection of TK. Focused discussions, both before and during the IGC, can help in narrowing the differences among indigenous and other local communities and their governments in a manner that furthers both their interests.
- IGC Member States should include in their delegations, and as expert advisors, representatives of indigenous peoples. In adopting this approach IGC Member States would be operationalizing the principle of broad participation in its policy and decision-making processes, considering that matters of concern to indigenous and other local communities are being discussed. IGC Member States should strive to coordinate indigenous and other local communities attending the sessions with both national delegates as well as regional groups.

- Geneva-based NGOs should hold consultation meetings with indigenous representatives. Further, NGOs permanently accredited to WIPO should open up their delegations to appropriate partner indigenous actors. Likewise, NGOs should try to assist indigenous groups with information and expertise on how to access the Voluntary Fund.

## VII. CONCLUSION

It is imperative that the IGC not only works towards enhancing participation of indigenous and other local communities in its processes but that the participatory mechanisms it adopts must ensure that these communities actively and effectively take part in the processes designed to develop law and policy to protect their rights. Failure to achieve such an objective will undermine not only all the efforts done to bring the various stakeholders to the table, but it will also undermine the development of a framework that is balanced and representative of their concerns and their respective systems of protection.

The IGC is one of the very few platforms where the knowledge issues of concern to indigenous and other local communities are being addressed. While there are criticisms that can be made, it is imperative that the process be strengthened rather than weakened. Indigenous and other local communities are the major beneficiaries of this process but unlike many, their goals are ones based, not on expansion of existing benefits, but on the restoration of rights that have been neglected or lost. The precedent that the IGC will set in reaching a substantive agreement on the protection of traditional knowledge may finally enable the full exploration of alternatives beyond the existing intellectual property system for *all* peoples, not just indigenous and local communities.

<sup>i</sup> An earlier version of this paper by Palesa Tlhapi Guye of CIEL was published in the South Centre/CIEL IP Quarterly 2<sup>nd</sup> Quarter 2007 available at [http://www.ciel.org/Publications/IP\\_Update\\_2Q07.pdf](http://www.ciel.org/Publications/IP_Update_2Q07.pdf).

<sup>ii</sup> In regards to terminology, this paper refers to indigenous “peoples” or “communities” interchangeably. Also, the reference to “groups” usually relates to delegations participating in the IGC. This terminology also recognizes the rich diversity among indigenous peoples around the world, and does not purport to attribute a position to all groups.

<sup>iii</sup> Carlos Correa, “Traditional Knowledge and Intellectual Property: Issues and Options surrounding the protection of traditional knowledge,” Quaker United Nations Office Discussion Paper, November (2001), available at <http://www.iucn.org/themes/pbia/themes/trade/training/TK%20and%20Intellectual%20Property.pdf>.

<sup>iv</sup> WIPO/RT/LDC/1/14, paragraph 10. See also WIPO/GRTKF/IC/4/8, paragraph 9.

<sup>v</sup> Indigenous peoples’ perception of the value of traditional knowledge differs from the manner in which the term “value” is interpreted under modern intellectual property laws. For some indigenous peoples the value of traditional knowledge is spiritual and not commercial. See statement by the representatives of Tupaj Amaru at WIPO/GRTKF/IC/7/15/Prov.2, paragraph 142.

<sup>vi</sup> Other international human rights treaties or general comments also protect indigenous peoples’ rights, namely Article 27 of the International Covenant on Civil and Political Rights and general recommendation 23 of the Convention on the Elimination of Racial Discrimination. The Inter-American Court of Human Rights has also recognized the fundamental right of indigenous peoples over their lands, including with respect to the linkages between land and culture.

<sup>vii</sup> The Voluntary Fund and the increasing number of indigenous groups being granted observer status evidence enhanced participation of indigenous peoples at the IGC. See WIPO Press Release PR/412/2005, “Director of WIPO Welcomes Signs of Progress in Recognition of Indigenous People’s Rights” (9 August 2005), available at <http://listbox.wipo.int/wilma/pressinfo-en/2005/msg00037.html>.

<sup>viii</sup> Joint Statement of the Indigenous Peoples Council on Biocolonialism (IPCB), Call of the Earth/Llamado de la Tierra (COE), & International Indian Treaty Council (IITC) during the 10<sup>th</sup> session of the IGC, available at [http://www.ipcb.org/issues/intellect\\_prop/files/igc10\\_tk.html](http://www.ipcb.org/issues/intellect_prop/files/igc10_tk.html).

See also WIPO/GRTKF/IC/7/Prov 2 paragraph 135, statement by representative of Saami Council.

<sup>ix</sup> WO/GA/26/6, paragraphs 13 and 14.

<sup>x</sup> WIPO Magazine, “Indigenous Peoples Discuss Issues at First Round table” (July/August 1998) available at [http://www.wipo.int/wipo\\_magazine/en/pdf/1998/wipo\\_pub\\_121\\_1998\\_07-08.pdf](http://www.wipo.int/wipo_magazine/en/pdf/1998/wipo_pub_121_1998_07-08.pdf).

<sup>xi</sup> WIPO/IPTK/RT/99/2.

<sup>xii</sup> Ogiek Peoples Development Program (OPDP), (2007), available at [http://www.wipo.int/tk/en/igc/pdf/ogiek\\_tktce.pdf](http://www.wipo.int/tk/en/igc/pdf/ogiek_tktce.pdf).

<sup>xiii</sup> Anne Perrault and Maria Julia Oliva, “Prior Informed Consent and Access to Genetic Resources”, ICTSD/CIEL/IDDRI/IUCN/QUNO Dialogue on Disclosure Requirements: Incorporating the CBD Principles in the TRIPS Agreement On the Road to Hong Kong WTO Public Symposium, Geneva, April 21 2005, pages 1-5, available at [http://www.ciel.org/Publications/PIC\\_PerraultOliva\\_Apr05.pdf](http://www.ciel.org/Publications/PIC_PerraultOliva_Apr05.pdf).

See PCT/R/WG/4/13, a Submission by Switzerland at WIPO’s Working Group on the Reform of the Patent Cooperation Treaty. See also WT/GC/W/564, a proposal by Brazil, India, Pakistan, Peru, Thailand and Tanzania, at the TRIPS Council, calling for the amendment of TRIPS Agreement to incorporate mandatory disclosure requirements.

<sup>xiv</sup> WIPO/GRTKF/IC/8/5, WIPO/GRTKF/IC/9/5, WIPO/GRTKF/IC/10/5, and WIPO/GRTKF/IC/11/5(c).

<sup>xv</sup> WIPO/GRTKF/IC/6/6, WIPO/GRTKF/IC/8/6, WIPO/GRTKF/IC/9/6, and WIPO/GRTKF/IC/10/6.

<sup>xvi</sup> WO/GA/30/8, paragraph 93.

<sup>xvii</sup> WIPO GRTKF/IC/6/14, paragraph 76, statement by the delegation of the United States.

<sup>xviii</sup> The concern was also shared by some developing countries such as Zambia. See WIPO/GRTKF/4//15 paragraph 100 and 147, statement by the delegation of Venezuela.

<sup>xix</sup> *Ibid.* at paragraph 160, statement by representative of Indigenous Peoples’ Biodiversity Network (IPBN).

<sup>xx</sup> WIPO/GRTKF/IC/6/14, paragraph 99, statement by the representative of *Coordinadora de las Organizaciones indígenas de la Cuenca Amazonica* (COICA).

<sup>xxi</sup> WIPO/GRTKF/IC/10/7 Prov. 2 paragraph 37, statement by the representative of Indigenous Peoples’ Council on Biocolonialism.

<sup>xxii</sup> *Ibid.* at paragraph 96, statement by the representative of the Tualip Tribes. See also, paragraph 106, statement by the delegation of Nigeria on behalf of the African group.

<sup>xxiii</sup> WIPO/GRTKF/IC/9/14 Prov 2, paragraph 50, statement by the representative of RAIPON. Some communities have however expressed their reservation regarding the IGC draft framework forming the basis for the establishment of a legally binding instrument. See Joint Statement of the Indigenous Peoples Council on Biocolonialism (IPCB), Call of the Earth/Llamado de la Tierra (COE), & International Indian

Treaty Council (IITC) during the 10<sup>th</sup> session of the IGC available at

[http://www.ipcb.org/issues/intellect\\_prop/files/igc10\\_tk.html](http://www.ipcb.org/issues/intellect_prop/files/igc10_tk.html).

<sup>xxiv</sup> WIPO/GRTKF/IC/6/14, paragraph 228 and WIPO/GRTKF/IC/7/15/Prov. 2, paragraph 139, statements by the representative of Kaska Dena Council.

<sup>xxv</sup> WIPO/GRTKF/IC/7/15/Prov.2, paragraph 24, statement by the representative of Call of the Earth.

<sup>xxvi</sup> *ibid.* at paragraph 39.

<sup>xxvii</sup> WIPO/GRTKF/IC/3.

<sup>xxviii</sup> WIPO/GRTKF/IC/10/7/Prov. 2, paragraph 172, statement of the representative of the Indigenous Peoples of St. Lucia.

<sup>xxix</sup> WIPO/GRTKF/IC/11/5 (b), page 17, comment by the Secretariat of the Permanent Forum on Indigenous Issues stating that policy objective (ix) “does not specifically mention important instruments such as human rights instruments and the Declaration on the Rights of Indigenous peoples.” The Secretariat of the Permanent Forum on Indigenous also suggested that these specific instruments and declarations be mentioned under policy objective (ix).

<sup>xxx</sup> Joint Statement of the Indigenous Peoples Council on Biocolonialism (IPCB), Call of the Earth/Llamado de la Tierra (COE), & International Indian Treaty Council (IITC) during the 10<sup>th</sup> session of the IGC available at

[http://www.ipcb.org/issues/intellect\\_prop/files/igc10\\_tk.html](http://www.ipcb.org/issues/intellect_prop/files/igc10_tk.html).

<sup>xxxi</sup> WIPO/GRTKF/IC/10/5.

<sup>xxxii</sup> Annex to WIPO/GRTKF/IC/11/5(c).

<sup>xxxiii</sup> See <http://www.wipo.int/tk/en/ngopapers.html>. See also <http://wipo.int/tk/en/igc/issues.html#comments>.

<sup>xxxiv</sup> WIPO/GRTKF/IC/11/5(c), page 4.

<sup>xxxv</sup> Annex to WIPO/GRTKF/IC/11/5 (b), page15.

<sup>xxxvi</sup> *ibid.* at page23.

<sup>xxxvii</sup> WIPO/GRTKF/IC/10/INF/2, comments by the Secretariat of the Permanent Forum on Indigenous Issues, available at [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_10/wipo\\_grtkf\\_ic\\_10\\_inf\\_2.doc](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_10/wipo_grtkf_ic_10_inf_2.doc).

<sup>xxxviii</sup> WIPO/GRTKF/IC/7/15/Prov 2, paragraph 135, statement by the representative of the Saami Council.

<sup>xxxix</sup> Annex to WIPO/GRTKF/IC/11/5 (b), page 35.

<sup>xl</sup> *ibid.* at page 31.

<sup>xli</sup> WIPO/GRTKF/ 4/15, paragraph159, statement by the representative of the Inuit Circumpolar Conference (ICC).

<sup>xlii</sup> Appendix to WIPO/GRTKF/IC/11/5(b), page 21.

<sup>xliii</sup> Annex to WIPO/GRTKF/IC/11/5(b), page 38.

<sup>xliv</sup> WIPO/GRTKF/IC/7/15/Prov 2, paragraph 110. Brazil stated that the rights of indigenous communities over their knowledge were inalienable, unrenounceable and imprescriptible. See also WIPO/GRTKF/IC/11/5/(b), at page 39, regarding comments by South Africa on Article 9 calling for the protection of traditional knowledge to be held in “perpetuity.”

<sup>xlv</sup> WIPO/GRTKF/IC/11/5/(b), comments by the representatives of the Saami Council and Tulalip Tribes, pages 37 and 38.

<sup>xlvi</sup> WIPO/GRTKF/IC /7/15, paragraph 120.

<sup>xlvii</sup> WIPO GRTKF/ICF/10/7Prov2, paragraph 171, statement by Indigenous peoples Council on Biocolonialism.

<sup>xlviii</sup> WIPO/GRTKF/IC/7/15, paragraph 63.

<sup>xlix</sup> Non-governmental organizations that have been involved in the IGC include, for example, International Centre for Trade and Sustainable Development (ICTSD), Genetic Resources Action International (GRAIN), Center for International Environmental Law (CIEL;) Thrid World Network (TWN) and the World Conservation Union (IUCN). Intergovernmental organizations such as the South Centre, the United Nations Conference on Trade and Development (UNCTAD), United Nations Environment Programme (UNEP) and United Nations Educational, Scientific and Cultural Organization have also been involved in the IGC process.

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