The World Intellectual Property Organisation (WIPO) and the Intergovernmental Committee: Developments on Traditional Knowledge and Cultural Expressions

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Introduction

The past 20 years has seen Indigenous or traditional knowledge take centre stage in discourses on the conservation of biological diversity, sustainable socio-economic development and poverty alleviation in developing countries. It is these countries that contain the majority of mega-biologically diverse regions in the world with Australia being one of two exceptions to the rule. The utility of knowledge in the conservation and sustainable use of biological resources, held by traditional custodians of land, is specifically addressed in the *Convention on Biological Diversity* 1992 (CBD). Articles 8(j),[1] 10 (c)[2] and 18(4)[3] of the CBD recognise the significance of such traditional knowledge and custom. Equally, the need to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles",[4] "encourage customary use"[5] and "methods of cooperation"[6] are emphasised in the context of prior informed consent and mutually agreed terms with a view to the fair and equitable sharing of the benefits arising out of the utilisation of such knowledge.

While the first two objectives of the CBD are to promote the conservation and sustainable use of biological diversity and its components, it is the third objective with which this article is concerned: "the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding" [Article 1].

The idea of protecting knowledge and at the same time encouraging its use leads to a discussion of proprietary rights and in particular intellectual property rights. The CBD recognises the interface with intellectual property rights, particularly patent rights, and the potential influence of those rights on the implementation of the CBD [Article 16.5]. Specifically, nations are expected to "cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to" the CBD objectives.

This article will consider the role of the World Intellectual Property Organisation (WIPO) in addressing this cooperation. The history of the Intergovernmental Committee at WIPO and their work on the subject matter of traditional cultural expressions will be reviewed. Then fast forward 22 sessions to the last session on traditional cultural expressions that Patricia Adjei attended in July 2012,[7] and this article considers the main issues, highlights and dramas that unfolded at this constructive session. Finally, this article will review the provisions regarding the protection of traditional knowledge, its implications for patent law and plant breeder's rights, and consider the expectation that a competent authority at national or regional level be established by member nations to administer the rights of traditional knowledge holders according to their customary protocols, understandings, laws and practices.

The Intergovernmental Committee

The World Intellectual Property Organisation (WIPO) is a United Nations agency which, together with UNEP, the United Nations Environment Programme responsible for the introduction of the CBD, jointly commissioned "a study on the role of intellectual property rights in the sharing of benefits arising from the use of biological resources and associated traditional knowledge".[8] This fact-finding mission, whereby consultants, Indigenous experts and stakeholders examined the issues around protection of Indigenous knowledge, led to the report *Intellectual Property Needs and Expectations of Traditional*

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Knowledge Holders, WIPO Report on fact-finding missions on intellectual property and traditional knowledge (1998-1999), Geneva, April 2001.

Together with the result of other WIPO work, including joint work with UNESCO on "expressions of folklore" dating back to 1978, the WIPO General Assembly established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC or Intergovernmental Committee) in 2000. The extensive work undertaken by the Intergovernmental Committee resulted in a range of information, practical tools and policy resources. However, this included a Gap Analysis[9] in 2008 which identified shortcomings of the current intellectual property regimes to provide appropriate protection of Indigenous or traditional knowledge.

The three themes of work undertaken by the Intergovernmental Committee cut across conventional branches of intellectual property law and do not fit into existing WIPO bodies, hence the creation of a new division to cover Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore. This Division is the Secretariat for the Intergovernmental Committee and prepares and coordinates the meetings of the Committee as one of their main functions at WIPO. Accordingly, the subject matter dealt with by the Division is traditional knowledge, genetic resources and traditional cultural expressions/ folklore.

Through the forum of the Intergovernmental Committee, WIPO Member States have been negotiating international instruments for the protection of traditional or Indigenous knowledge and culture. These instruments have been divided into two overlapping but separate streams. The stream on "traditional cultural expressions" deals with subject matter that would be covered by the copyright, designs and trade mark systems, such as stories, symbols, handicraft and dance. These "tradition based creations" have been considered to be "taking a new economic and cultural significance within a globalised information society".

On the other hand, the stream dealing with "traditional knowledge" includes the relationship with genetic resources and views such local and Indigenous knowledge through the lens of the patent system addressing knowledge related to traditional medicinal practices, plant uses and land management. This separation into two streams does not reflect the interaction and interdependence of these two 'aspects' of traditional or Indigenous culture. A "cultural expression" is one of many manifestations of the knowledge in Indigenous culture, as well as a means of preserving, transmitting, using and communicating that knowledge. As Stoianoff points out:

> *The knowledge is often "stored" and communicated through cultural expressions such as stories, song, dance and art and reflect a process of intergenerational observation and experience not unlike modern scientific method.*[10]

For many Indigenous peoples, it is not so easy to distinguish between the three subject matters that the Intergovernmental Committee has delineated. In fact, many Indigenous representatives argue that Indigenous knowledge is holistic and that all three subject matters can be intertwined. For example, an artist may use the traditional knowledge of their grandparent to create a traditional cultural expression that provides ecological and medicinal knowledge for their community.[11] However, progress has been made on the basis of this delineation and representatives from the European Union Member States reinforced their preference for separate instruments in their report to the WIPO General Assembly Forty-First (21st Extraordinary) Session held in Geneva, from 1 to 9 October, 2012.[12] The following section considers that progress in the context of traditional cultural expressions.

The Traditional Cultural Expressions Draft Instrument and 2012 Meeting

When one reviews the text of the current Traditional Cultural Expressions (TCEs) draft instrument, one must appreciate that it has taken 12 years for the text to become this almost succinct document and it may even need further amendment. The current text has 12 Articles but the first five Articles have the main contentious issues. The current draft Articles offer protection for any form of (artistic) expression, tangible and intangible traditional cultural expressions that have been passed from generation to generation. The beneficiaries of these rights may be Indigenous peoples or local communities. The text states that unauthorised disclosure, distortion, mutilation or misuse of TCEs by third parties should be prohibited. This protection may be perpetual. There may also be some exceptions such as preservation purposes for museums and archives.

The working text had been formulated by the first inter-sessional working group back in July 2010. This group of experts was nominated by the WIPO Member States, Indigenous representatives and NGOs, to work and produce definite text without the political play that occurs in the Intergovernmental Committee. This working group was a success as it was able to narrow down previous draft options under each Article and produce the text that would be used in future meetings organised by the Intergovernmental Committee.

The most recent meeting considering the Traditional Cultural Expressions draft instrument was the Twenty Second Session held in Geneva from 9 to 13 July, 2012. It was considered that "good progress on the definition of protectable TCEs, the identification of the beneficiaries and on exceptions and limitations to the scope of protection" had been made.

Indigenous Panel at the July 2012 Meeting

The first day of the July 2012 session comprised an Indigenous Panel chaired by Patricia Adjei.[13] The focus of the Panel was on the United Nations Declaration on the Rights of Indigenous Peoples and the protection of Traditional Cultural Expressions. Hailed as a highlight of the July 2012 session, reflections and constructive comments regarding the interaction between the Declaration and the draft articles on Traditional Cultural Expressions were provided by Indigenous experts including two members of the United Nations Permanent Forum on Indigenous Issues (UNPFII). This was a very successful Indigenous panel as it was the first time that the Indigenous panel had really drilled into the text on TCEs and gave specific options on drafting the Articles for the Intergovernmental Committee Member States to really consider.

Ms Valmaine Toki, the Vice-Chair of the UNPFII, was the keynote speaker and her presentation clearly highlighted the importance of increased Indigenous participation in the Intergovernmental Committee as Indigenous peoples are the ones who are the rights holders and should have more say in how this instrument will look like. Ms Toki analysed the recommendations that the UN Permanent Forum on Indigenous Issues had recommended to the Intergovernmental Committee in May 2012. Some of the main recommendations included the establishment of an Indigenous co-chair to the Intergovernmental Committee, as well as a panel of Indigenous experts who are across international human rights law to provide input into the substantive consultation process to ensure alignment of the text with international human rights norms and principles.

In previous sessions, the Intergovernmental Committee has often not considered or even been aware of the United Nations Declaration on the Rights of Indigenous Peoples which provides scope for protection of Traditional Cultural Expressions, Traditional Knowledge and Genetic Resources under Article 31of that Declaration. Some Member States are now aware of and refer to this Declaration and the rights espoused by that document. The authors submit that even though the Declaration is a non-binding international instrument, these rights should not be seen as aspirational but fundamental to the wellbeing and protection of Indigenous peoples' knowledge. It is also important to note that as the negotiations become more technical in the legal drafting of the Articles for the protection of TCEs, it is useful and advantageous for Indigenous representatives to use their experts within their Indigenous caucus to negotiate and draft relevant technical language that will best ensure alliance with international human rights law standards.

The other experts on the Indigenous panel included Mr Les Malezer, the Co-chair of National Congress of Australia's First Peoples, Dr Mattias Ahren, Head of the Saami Human rights council in Norway and the other UNPFII member, Mr Paul Kankinye Sena, the East African regional member. These experts had also been very active in leading the discussions at the meetings for the UNPFII and the negotiations for the Nagoya Protocol to the Convention on Biological Diversity. They again highlighted the need for greater Indigenous participation and inclusion of the principles from the United Nations Declaration on the Rights of Indigenous Peoples. On the text of the draft WIPO instrument on TCEs, Dr Ahren pointed out that Articles 3 and 5, which refer to the scope of protection and exceptions and limitations, are similar in meaning so should be combined into one Article. He stated that a new combined Article should include prior informed consent, benefit sharing and that the derogatory use of TCEs should always be forbidden.

After the Indigenous panel and the resolution of a disagreement over Agenda Item 9, the delegates of the 22nd session proceeded to work intensively on

the text, making up for the time lost as a result of the disagreement.

Issues During the 22nd Session

The main driver of the Intergovernmental Committee was to streamline the text to be able to present a draft that was a more succinct "work in progress" to the WIPO General Assembly. To be able to do this, the Committee decided that there should be an informal expert group assembled to work on the text outside of the plenary. There was an expert group made up of 36 experts from all seven socio-geographic regions and only one Indigenous expert.

This expert group was assembled to tackle the most contentious issues, these being the first 5 Articles of the text which define the areas of protection and the rights given to the beneficiaries. Why are these Articles the most contentious? These Articles give the direction to the whole instrument as they outline the scope of protection, definition of the rights and the rights holders or beneficiaries as well as how these rights will be administered. Once these areas can be defined and agreed upon, the rest of the Articles will hopefully fall into line.

Patricia Adjei shared the expert role with the other Indigenous expert, Dr Mattias Ahren, when the expert group discussed Article 1 – subject matter of protection. The expert group considered several different phrases used in the draft Article and discussed whether it was necessary to include these phrases. For example, there is reference to a Traditional Cultural Expression being "any form of artistic expression". The discussion raised whether a TCE can be any type of expression, and whether artistic was too exclusive or limiting. Adjei and Ahren argued that "artistic expression" was too exclusive and it should be amended to simply "expression", otherwise examples of ceremonies, rituals and games may be excluded from the definition of TCE.

Another point that the expert group discussed was whether protection should be the result of creative intellectual activity of the beneficiaries as defined in Article 2. The experts discussed whether activity needs to include the words "creative" or "intellectual". Adjei and Ahren argued that if a TCE was not the result of creative or intellectual activity, it may be that it is not misappropriated by anyone as it probably would not be considered of any worth. So, the wording could remain or be deleted. Other experts such as the Thai expert argued that the wording was too limiting as a TCE such as a ceremony or ritual may not be considered creative or intellectual. This small slice of the type of discussion held in the expert group to make the text more succinct demonstrates the difficulties that arise when intellectual property concepts creep into the establishment of a framework for subject matter that does not conform to existing intellectual property norms. The 2008 Gap Analysis made that abundantly clear.

Another issue that goes hand in hand with any international normative process is the political positions of the different regions which are not necessarily in line with the positions of many of the Indigenous peoples. These political differences add to the reason for delay in arriving at an agreement on the text.

There are three main political positions at play in the Intergovernmental Committee. As would be expected, Indigenous representatives and organisations want a legally binding instrument which addresses issues of prior informed consent, benefit sharing and the protection of TCEs against misappropriation and misuse. While there are, of course, some differing views within the Indigenous caucus, a large percentage believe that the period of protection should be perpetual and should include all forms of Indigenous cultural expressions. Similarly, developing nations like many African States, some South American States and some Asian States, do want a legally binding instrument but the difference is that they want the State to be the beneficiary of these rights and protection. This can be seen as problematic for Indigenous peoples in countries where they are not even recognised as Indigenous peoples and communities. How will any benefit or protection be afforded to those Indigenous peoples in those States? The far extreme is some of the Developed States who prefer a softer option of a non-legally binding instrument which gives limited protection to Indigenous peoples and local communities and can include other groups such as migrant groups who may have brought and still practise their TCEs. This divergence in views is made plain in the reports of Member States to the UN General Assembly in October 2012 in the discussion of the implementation of the Development Agenda by the Intergovernmental Committee.[14]

Many countries have a variety of cultural communities as in Australia, but one has to argue that this draft instrument should not be

focused on these groups. The aim of drafting this instrument was to protect the Indigenous knowledge and culture of Indigenous peoples and local communities. It is interesting to note that Mr Ian Goss from IP Australia stated on the first day of the conference that the Australian Government holds similar views to developing nations like Brazil, South Africa and India. These Member States often make interventions that are sympathetic to Indigenous peoples compared to the developed nations. But this is not such an unusual position for Australia to take. While Australia is a "developed" nation, it is an intellectual property importing nation unlike its northern hemisphere developed nation counterparts. As an intellectual property importer, Australia has more in common with developing nations. Further, Australia's mega-diverse biological resources also provide more commonality with its developing nation mega-biologically diverse counterparts. Finally, Australia has been increasingly valuing the knowledge and cultural expressions of its Indigenous peoples and now needs to take the next steps to consolidate that recognition.

There are, of course, many other States that are sympathetic and considered "friendly nations" to the Indigenous peoples and their representatives. These States normally support the interventions made by Indigenous peoples as when an observer wishes to include or extract text from the draft Articles, it must be supported by a member state of WIPO. So, the spirit of goodwill and negotiation should merge these three main stances to produce an instrument that provides strong protection for Indigenous knowledge and culture.

Highlights

The work done in the expert group outside of the plenary was aimed to tighten and streamline the text so that it could be presented to the WIPO General Assembly for consideration. This expert group was also seen as being quite successful. Even though the progress was slow, it was constructive. The expert group was able to narrow down the three options under Article 2 on beneficiaries from the previous seven groups of beneficiaries to just two groups: that is, to include Indigenous and local communities or as determined by national law. One sticking point, however, was that the French expert had a strong distaste for the wording "peoples" under "Indigenous peoples". One could argue that it may have something to do with their Constitution and relationship with their current Departments and Territories which have Indigenous peoples like French Polynesia and some Caribbean nations. Nonetheless, the expert group was seen to be very constructive and productive.

Another interesting highlight was the strong and powerful leadership of the Jamaican Chair of the Intergovernmental Committee, Ambassador Wayne McCook. There was definitely no nonsense with Mr McCook as Chair and he was able to persuade member states to negotiate and come to agreement on points of differences. This persuasive and diplomatic approach really helped to encourage a cooperative mood and goodwill in the informal expert group. This, in turn, also led to more supportive interventions in the plenary, in favour of Indigenous peoples' rights and wishes.

Resolution?

In the proceedings of the Intergovernmental Committee, discussion took place in relation to observers' participation and part of that process included hearing the report from the UN Permanent Forum on Indigenous Issues (UNPFII) in relation to such observers' participation.[15] The report comprised 13 recommendations to highlight the need to bring the Intergovernmental process in line with Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples*. The UNPFII commended the WIPO for the Voluntary Fund to fund Indigenous representatives to participate at the Intergovernmental Committee meetings and the Indigenous IP law fellowship program. This then led to the discussion regarding the tabled document prepared by the secretariat addressing suggestions raised by the Indigenous Caucus at the Twenty-First Session of the Intergovernmental Committee, held from 16 to 20 April, 2012. In essence, the six suggestions presented by the Caucus revolved around establishing a separate category of participant in the Intergovernmental Committee, namely that of the Indigenous Peoples, separate to observers and delegates. This set of recommendations has yet to be progressed.

Further, the Intergovernmental Committee decided that the text of "The Protection of Traditional Cultural Expressions: Draft Articles" be transmitted to the WIPO General Assembly as a "work in progress" for the 1 to 9 October 2012 meeting to consider. In accordance with the Intergovernmental Committee's mandate, the WIPO General Assembly is to take stock of and consider the text and progress made, and decide on convening

a Diplomatic Conference. The WIPO General Assembly also considers the need for additional meetings. The Intergovernmental Committee, in February 2012 and April 2012 respectively, similarly decided to transmit texts on genetic resources and traditional knowledge, respectively, to the General Assembly.

Since the presentations of the authors at the Indigenous Knowledge Forum in August 2012, the WIPO Assembly has met and determined a work program into 2013 with the first Intergovernmental Committee themed meeting (Meeting 23) to be held in relation to genetic resources from 4 to 9 February. Meeting 24 from 22 to 26 April, 2013 will consider traditional knowledge and Meeting 25 in July 2013 will consider TCEs. To give a sense of the nature of what each program will be focusing on, the following section will consider the draft articles from the document designed to protect traditional knowledge.

The Protection of Traditional Knowledge: Draft Articles

The document submitted to the General Assembly in October 2012 represents the results at the conclusion of the Intergovernmental Committee's 21st session in April 2012. Those facilitating the drafting produced a document which merged options where possible, and explicitly identify elements of convergence and divergence. The main policy issues, which one might consider would be the focus for resolution during the 2013 work program, were represented by the identified elements of divergence.

Even so, the draft articles still provide the framework of protection to be afforded to traditional knowledge. The key elements that have been identified comprise:

(1) The need to satisfy the meaning of traditional knowledge and its scope.

(2) The identification of the beneficiaries.

(3) The scope of protection encompassing elements of confidentiality and moral rights in the protection against misappropriation and misuse.

(4) The nature of sanctions and remedies not too dissimilar to those used in intellectual property law.

(5) The need for disclosure in the patent and plant variety rights regimes.

(6) The establishment of an administrative body or competent authority to manage the data, or the rights conferred or the enforcement, dispute resolution and national treatment.

(7) The creation of databases.

(8) Accommodating trans-boundary co-operations where knowledge and biodiversity extend across artificial borders.

Of these issues, the work program for 2013 has identified four areas of particular focus, namely, the articles dealing with Subject Matter of Protection, Beneficiaries, Scope of Protection and Limitation and Exceptions. One of the crucial issues to consider is the definition of the subject matter of protection, namely, traditional knowledge. The convergent text in Article 1 attempts to provide a generalisation that could be all encompassing.

> *1.1.1 For the purposes of this instrument, "traditional knowledge" [refers to] includes know-how, skills, innovations, practices, teachings and learnings [developed within a traditional context]/[developed with an indigenous people or local community]/[and that is intergenerational]/[and that is passed on from generation to generation].*

Being drafted as an inclusive definition permits a wide interpretation that need not require the identification of every type of traditional knowledge. However, the divergent text represents the views of delegates who require a more prescriptive definition despite the claim to the contrary.

> *Optional Additions to the Facilitators' Text*
>
> *(a) [is knowledge that is dynamic and evolving and]*
>
> *(b) [resulting from intellectual activity]*
>
> *(c) [and which may be associated with agricultural, environmental, healthcare and medical knowledge, biodiversity, traditional lifestyles and natural and genetic resources, and knowhow of traditional architecture and construction technologies]*
>
> *(d) [and which may subsist in codified, oral or other forms]*
>
> *(e) [traditional knowledge is part of the collective, ancestral, territorial, cultural, intellectual and material heritage of [indigenous peoples and local communities] beneficiaries as defined in Article 2.]*

(f) [and are inalienable, indivisible and imprescriptible.].

It must be noted that these six separate elements do provide a better understanding of what might be encompassed by the concept of traditional knowledge. Further, an alternative definition has also been provided:

> *For the purposes of this instrument, traditional knowledge includes [collectively] generated and preserved from generation to generation or intergenerational know-how, skills, innovations, practices, teachings. [They exist or develop inter alia by indigenous or local communities.].*

The issue with such a definition is the reference to "collectively generated". While "ownership" of the knowledge may well be collective, it is not necessary that the generation of the knowledge be collective and so such a definition might exclude knowledge generated by a particular member of the community even though it is being generated for the benefit of the community.

The identification of traditional knowledge that is to receive protection under the draft articles is further limited by reference to the beneficiaries identified in Article 2. In the convergent text offered by the Facilitators' Option:

> *1.2 Protection extends to traditional knowledge that is associated with beneficiaries as defined in Article 2, [collectively] generated, shared/transmitted and preserved [and [integral]/[closely linked]] to the cultural identity of beneficiaries as defined in Article 2.*

Once again, the divergent text provides a more detailed list to add to the general statement found above. It is more prescriptive and more limiting in scope.

(a) [the unique product of or is distinctively] associated to the beneficiaries or

(b) [integral]/[linked] identified/associated with [to] the cultural identity of beneficiaries

(c) [not widely known or used outside the community of the beneficiaries as defined in Article 2, [for a reasonable period of time]

(d) [not in the public domain]

(e) [not protected by an intellectual property right]

(f) [not the application of principles, rules, skills, know-how, practices, and learning normally and generally well-known]

(g) whether the list should be cumulative or not (and therefore whether to include the term "and" or "or" after the next-to-last item in any list comprising any combination of (a) to (f) above)

(h) whether the provision should include a reference to "generation-to-generation"/"interge nerational".

The proposed requirement of not being in the public domain introduces an intellectual property concept into a field that does not really fit into such regimes. To then require that the knowledge is "not protected by an intellectual property right" sends a confused message. Surely it is up to the beneficiaries to identify what is their traditional knowledge? What these draft provisions are trying to do is to exclude from protection knowledge that would have become generally known. This does not really accord with the way some countries have treated the traditional knowledge of their Indigenous or local communities. Take, for example, India's Traditional Knowledge Digital Library: the majority of the information stored is arguably in the public domain, does that make the knowledge less deserving of protection? Clearly, decisions need to be made about the breadth of what is meant by traditional knowledge.

As for the identification of the beneficiaries to receive protection, draft Article 2 provides under the convergent text:

> *Beneficiaries of protection of traditional knowledge, as defined in Article 1, are Indigenous peoples and communities and local communities.*

There is no definition of either Indigenous peoples and communities or local peoples. Does this mean that such terms are self-evident? The United Nations has not adopted an actual definition of "Indigenous peoples". The approach taken in the United Nations Declaration on the Rights of Indigenous Peoples provides in Article 33 that this is a matter of self-identification as opposed to definition:

> *1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous*

individuals to obtain citizenship of the States in which they live.

2. *Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.*

The UNPFII has reported "that there are more than 370 million [I]ndigenous people spread across 70 countries worldwide" and that while there is no official definition, there are factors that provide a 'modern understanding' of the term.[16] Those factors have their origin in the working definition that has been produced by Jose R. Martinez Cobo in his Study on the Problem of Discrimination against Indigenous Populations. That working definition is reproduced below.

> ***Working Definition of Indigenous Peoples by Jose R. Martinez Cobo***
>
> *Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.*
>
> *This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:*
>
> - *Occupation of ancestral lands, or at least of part of them.*
> - *Common ancestry with the original occupants of these lands.*
> - *Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.).*
> - *Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language).*
> - *Residence in certain parts of the country, or in certain regions of the world.*
> - *Other relevant factors.*
>
> *On an individual basis, an Indigenous person is one who belongs to these Indigenous populations through self-identification as Indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.*[17]

What of those nations that have freed themselves of their colonial past? Can one make a distinction between the citizens of African nations or Asian nations for instance? For example, the concept of indigeneity is problematic for India with the term "tribal" or "local" peoples being preferable,[18] and hence the utility of adding the term 'local communities' to the definition of beneficiaries in draft Article 2. It is therefore understandable why the divergent text added the following categories to clarify the nature of the beneficiaries identified in draft Article 2:

(a) [traditional communities].

(b) [families].

(c) [nations].

(d) [individuals within the categories listed above].

(e) [and, where traditional knowledge is not specifically attributable or confined to an Indigenous people or local community, or it is not possible to identify the community that generated it, any national entity that may be determined by national law]/[and/or any national entity that may be determined by national law].

(f) [who develop, use, hold and maintain traditional knowledge].

(g) e ven when traditional knowledge is held by [individuals] within the categories.

However, the alternative draft text proposes to circumvent the need for such elaboration by leaving it up to each nation to specify categories additional to Indigenous peoples or communities and local communities.[19] While this may lead to inconsistencies internationally, it would permit the particular characteristics of the relevant nation to

be taken into account and therefore have a more meaningful outcome that should avoid potential future conflict.

The next provision to be addressed is draft Article 3, the scope of protection. Here two options have been provided, each taking a different perspective. In relation to the first option for paragraph 3.1, an intellectual property perspective is taken with confidentiality rules being applied to secret traditional knowledge while more of a moral rights protection is applied to non-secret traditional knowledge knowingly used outside the traditional context. As can be seen below, this creates two levels of protection depending on whether the knowledge is secret or not – one which requires prior consent and the other which does not provided certain standards are met.

Option 1

3.1 [Member States]/[Contracting Parties] should provide] adequate and effective legal, policy or administrative measures [should be provided], as appropriate and in accordance with national law, to:

(a) prevent the unauthorized disclosure, use or other exploitation of [secret] [protected] traditional knowledge;

(b) where [protected] traditional knowledge is knowingly used outside the traditional context:

(i) .acknowledge the source of traditional knowledge and attribute its holders/ owners where known unless they decide otherwise;

(ii).encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its holders/owners;

(iii) [encourage]/[ensure, where the traditional knowledge] [is secret]/ [is not widely known] traditional knowledge holders and users to establish mutually agreed terms with prior informed consent addressing approval requirements and the sharing of benefits [arising from the commercial use of that traditional knowledge] in compliance with the right of local communities to decide to grant access to that knowledge or not.

While option one requires the nation to provide "adequate and effective legal, policy or administrative measures", the second option requires national laws to confer rights/power on the Beneficiaries to control, use, maintain, protect and preserve their traditional knowledge. This includes the ability to authorise or deny access, the right to fair and equitable sharing of benefits on mutually agreed terms, the right to prevent misappropriation and misuse, the right to prevent use without acknowledgement and attribution, the right to "ensure that the use of the traditional knowledge respects the cultural norms and practices of the holders/owners", and the mandatory disclosure of identity of knowledge holders and country of origin when the knowledge is used to obtain intellectual property registrations such as patents and plant breeder's rights.[20] Option 2 does not create two classes of protection but rather tends to follow the principles espoused in the *Convention on Biological Diversity* and the *United Nations Declaration of the Right of Indigenous Peoples*.

Draft paragraph 3.2 goes on to deal with the meaning of the term "utilisation" and effectively adopts meanings consistent with patent concepts. The utilisation that accords with the traditional knowledge comprising a product or process is envisaged including "when traditional knowledge is used for research and development leading to profitmaking or commercial purposes".

The scope of protection and associated sanctions are further elaborated in draft Article 3bis. Specifically, access and use of traditional knowledge requires prior informed consent and use in accordance with terms provided by the beneficiary, including benefit sharing (Article 3bis.1). Obligations are placed on users to acknowledge the source of the knowledge as required by the beneficiary and ensure due respect is given to the culture and practices of the beneficiary (Article 3bis.2). The nation of the beneficiary is to provide adequate measures for enforcement (Article 3bis.4) including the ability for injunctions and compensation when traditional knowledge access or use infringes the beneficiary's rights (Article 3bis.3). A limitation already identified in this draft article recognises the importance that protection should not impact independent invention or prevent the generation, sharing, preservation, transmission and customary use of traditional knowledge by beneficiaries in a traditional and customary context (Article 3bis.5).

Draft Article 4 continues on the element of sanctions and remedies including the exercise of rights to ensure application of the instrument. The text provides an obligation on the nation to adopt appropriate legal policy or administrative measure to effect the instrument and then provides several optional provisions elaborating on those measures. The language here is similar to what one might find in the TRIPs agreement regarding enforcement – for example, both civil and criminal, border control, and dispute resolution. In addition, a dispute resolution mechanism for disputes between beneficiaries at national, regional, or international levels is suggested. Further, draft Article 4bis provides for a disclosure requirement in line with negotiations regarding genetic resources subject matter. The expectation is that the patent legislation and plant breeder's rights legislation should be amended accordingly. Applicants under these regimes would be required to disclose from where they obtained the traditional knowledge used in their invention including whether prior informed consent for access and use was obtained otherwise there is a risk of not obtaining registration. However, what has not been clearly stipulated is what the consequences are for non-compliance, if at the time of application the authorities were unaware there was an issue.

Draft Article 5 deals with administration. The convergent text appears to favour the establishment of a competent authority with free, prior informed consent from, and/or in consultation with, the traditional knowledge holders or beneficiaries. It has been suggested that such an authority's identity should be communicated to the Secretariat of the WIPO and, in turn, should comprise authorities originating from Indigenous peoples. The alternative administration offered is to place obligations on researchers and others to seek prior informed consent on mutually agreed terms but perhaps have the nation establish a database collecting information about such arrangements. It seems to the authors that this arrangement still requires some form of competent authority to be in place. Meanwhile, draft Article 5bis considers the application of collective rights and proposes a competent authority be established for this purpose.

Draft Article 6, Exceptions and Limitations, is another provision of interest in the 2013 work plan. The key exception considers "measures for the protection of traditional knowledge should not restrict the generation, customary use, transmission, exchange and development of traditional knowledge by the beneficiaries, within and among communities in the traditional and customary context" [paragraph 6.1]. Meanwhile, in relation to all other limitations or exceptions, the text imports intellectual property type concepts such as copyright's fair use or fair dealing, independent development, and public domain exceptions subject to a moral rights style of protection. There is even a suggestion of a patent style compulsory licence in times of epidemics (for example, alternative paragraph 6.4). However, it is suggested that limitations and exceptions do not apply in relation to secret traditional knowledge (for example, paragraph 6.4).

The duration of protection is another issue of concern with two very different options proposed in draft Article 7:

Article 7 – Duration

Option 1

[Member States]/[Contracting Parties] may determine the appropriate term of protection of traditional knowledge [which may] [should]/[shall] last as long as the traditional knowledge fulfils/satisfies the criteria of eligibility for protection according to Article 1.

Optional additions to Option 1

(a) traditional knowledge is transmitted from generation to generation and thus is imprescriptible

(b) the protection [should]/[shall] applied and last for the life of indigenous peoples and local communities

(c) the protection [should]/[shall] remain while the immaterial cultural heritage is not accessible to the public domain

(d) the protection of secret, spiritual and sacred traditional knowledge [should]/[shall] last forever

(e) the protection against biopiracy or any other infringement carried out with the intention of destroying wholly or partially the memory, the history and the image of indigenous peoples and communities.

Option 2

Duration of protection of traditional knowledge varies based upon the characteristics and value of traditional knowledge.

Clearly more work is required here to achieve some level of consensus. Further, a similar dilemma appears to apply in relation to draft Article 8 on the need for formalities with a preference being expressed against such a need. Meanwhile, alternative options recognise that in the interests of transparency, certainty and conservation of traditional knowledge, some level of formality may be required such as through the maintenance of registers of records of traditional knowledge by national/regional authorities.

As for implementation of this regime for the protection of traditional knowledge, the draft text recognises the need for: transitional measures to deal with actions that occur prior to but continue after this instrument comes into force [draft Article 9]; consistency with the general legal framework, for example the *Nagoya Protocol on Access to Genetic Resources* and the *Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* [draft Article 10]; national treatment along the lines of other intellectual property regimes, that is providing foreign beneficiaries the same rights as the beneficiaries who are nationals in the country of protection [draft Article 11]; and trans-boundary co-operation designed to encourage co-operation between member states [draft Article 12]. Such co-operation recognises that knowledge is not restrained by artificial borders. However, it also makes plain the need for codification of the information to facilitate access and benefit sharing. Databases once again become important to create, maintain and share information, for example, between intellectual property offices and other authorities.

Conclusion

Many critics argue that it has taken too long to establish workable models for the protection of traditional knowledge and cultural expression, but given the progress made in 2012, the authors believe that we are finally on the road to substantive texts that will provide sufficient protection for Indigenous peoples and local communities. If there is the continued good will and spirit of cooperation in the Intergovernmental Committee, then the Traditional Cultural Expressions text, the Traditional Knowledge text and the Genetic Resources text may be finalised within the next few years.

These next few years will be crucial and hopefully can produce an instrument or instruments that will afford better protection for Indigenous knowledge and culture internationally. These are exciting times for Indigenous peoples and we shall await a robust suite of instruments that gives the appropriate protection to Indigenous knowledge and culture internationally.

1 Article 8(j) CBD: "Each Contracting Party shall, as far as possible and as appropriate:… (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices".

2 Article 10(c) CBD: "Each Contracting Party shall, as far as possible and as appropriate: …

(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements".

3 Article 18(4) CBD: "The Contracting Parties shall, in accordance with national legislation and policies, encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of this Convention. For this purpose, the Contracting Parties shall also promote cooperation in the training of personnel and exchange of experts".

4 Article 8(j) CBD.

5 Article 10(c) CBD.

6 Article 18(4) CBD.

7 Documented in Provisional list of participants at IGC 22 at: http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_22/wipo_grtkf_ic_22_inf_1_prov_2.pdf, pg. 17.

8 WO/GA/26/6, WIPO General Assembly, Twenty-Sixth (12th Extraordinary) Session, Geneva, 25 September to 3 October, 2000, *Matters Concerning Intellectual Property And Genetic Resources, Traditional Knowledge and Folklore*, 2.

9 WIPO Secretariat, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, The Protection Of Traditional Cultural Expressions: Draft Gap Analysis, WIPO, Thirteenth Session Geneva, 13 to 17 October, 2008. Available at: http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_13/wipo_grtkf_ic_13_4_b_rev.pdf (12 August 2012).

10 N.P. Stoianoff, "Navigating the Landscape of Indigenous Knowledge – A Legal Perspective", *Intellectual Property Forum*, Issue 90, 7 September 2012, 23 at 25.

11 This is well described in T. Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights*, (Michael Frankel & Company and Terri Janke, 1998), inside cover.

12 WO/GA/41/15, Contribution to the Implementation of the Development Agenda Recommendations, WIPO General Assembly Forty-First (21st Extraordinary) Session held in Geneva, from 1 to 9 October, 2012, 5.

13 The Report of the Indigenous panel by the Indigenous chair is documented at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_23/wipo_grtkf_ic_23_ref_grtkf_22_6_prov_2.pdf, p. 9.

14 WO/GA/41/15, Contribution to the Implementation of the Development Agenda Recommendations, WIPO General Assembly Forty-First (21st Extraordinary) Session held in Geneva, from 1 to 9 October, 2012.

15 Permanent Forum on Indigenous Issues, Recommendation of the Permanent Forum, Comprehensive Dialogue with World Intellectual Property Organisation, E/C.19/2012/L.4 to 14 May, 2012.

16 UNPFII, "Who are Indigenous Peoples"? Fact Sheet. Available at: www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf.

17 Extract provided at http://indigenouspeoples.nl/indigenous-peoples/definition-indigenous.

18 For example, rather than referring to Indigenous communities, the Constitution of India, at s.371 and Schedule 6, provides that tribal communities are able to have separate Autonomous Council for self-governance in accordance with their customary laws. Further, in other parts of India the central government has the power under Schedule 5 of the Constitution to create scheduled areas to protect tribal interests. Outside of these areas tribes are subject to the laws of India.

19 Alternative draft Article 2: Beneficiaries of protection of traditional knowledge, as defined in Article 1, are indigenous peoples and communities and local communities and similar categories as defined by national law.

20 Option 2:

"3.1 Beneficiaries, as defined in Article 2, [should]/[shall], [according to national law], have the following [exclusive] [collective] rights:

(a) [enjoy], control, utilize, maintain, develop, preserve and [protect] their traditional knowledge;

(b) authorize or deny the access to and use of their traditional knowledge;

(c) have a fair and equitable share of benefits arising from the [commercial] use of their traditional knowledge based on mutually agreed terms;

(d) prevent misappropriation and misuse, including any acquisition, appropriation, utilization or practice of their traditional knowledge without [their prior informed consent and] the establishment of mutually agreed terms;

(e) prevent the use of traditional knowledge without acknowledgment and attribution of the [source and] origin of their traditional knowledge and its holders/owners, where known;

(f) ensure that the use of the traditional knowledge respects the cultural norms and practices of the holders/owners; and

(g) [require [in the application for intellectual property rights involving the use of their traditional knowledge] the mandatory disclosure of the identity of the traditional knowledge holders and the country of origin, as well as evidence of compliance with prior informed consent and benefit sharing requirements, in accordance with the national law or requirements of the country of origin in the procedure for the granting of intellectual property rights involving the use of their traditional knowledge.]".