

**TOWARDS AN INTERNATIONAL FRAMEWORK FOR THE PROTECTION
OF TRADITIONAL GROUP KNOWLEDGE AND PRACTICE**

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SUMMARY OF KEY POINTS

1. Some states, especially those that are members of the Group of Like-Minded Megadiverse Countries, would like to see more rapid progress on the creation of an international regime on traditional knowledge.
2. No such regime exists at the moment, but there is incremental progress towards such a regime.
3. Most standard-setting on traditional knowledge that takes the form of binding positive law is occurring at the level of state law-making.
4. The economic case for a treaty on traditional knowledge is not clear. Because such knowledge often functions as an input into other research it is hard to value economically. A treaty may simply depress demand for this kind of knowledge. This will suit the indigenous groups who wish simply to safeguard their knowledge. It will not suit states or indigenous groups that wish to commercialize such knowledge.
5. The desire of some states to move towards an international regime must take account of US business interests and agendas.
6. The key to any successful treaty at the international level is harmonious and cooperative relationships between indigenous groups and national governments. Work by the experts at the CBD shows that currently in many cases relations between indigenous groups and national governments are far from harmonious.
7. Any treaty on traditional knowledge would have to accommodate the diversity of traditional knowledge and different national standards of protection. The principles of reciprocity, national treatment and mutual recognition all require, at least to some degree, common standards. There are tensions between these principles and the goal of accommodating diversity.
8. A treaty could commit states to a form of positive comity in this field by obliging states to explore the use of memoranda of understanding (MOU). MOU have the advantage that they are flexible and would allow states to negotiate the enforcement of different standards of protection on an individual basis. At the same time they impose a degree of 'bindingness' on states. An incremental approach based on MOU would help to build a community of officials concerned with the enforcement of traditional knowledge, something that is vital to successful regulation in this field.
9. One of the key lessons of TRIPS for a treaty on traditional knowledge is that states should be conservative when it comes to creating new standards, but radical on the issue of enforcement. The issue of how to make an international regime on traditional knowledge enforceable has received insufficient attention.

10. At this stage of the evolution of protection for traditional knowledge a treaty should not attempt to set substantive international norms of protection (for example, by creating an international norm of misappropriation of traditional knowledge). Instead states should focus on creating a treaty that does not discourage the development of national approaches and norm-creation on traditional knowledge, but does offer the members of such a treaty a means of cooperating and coordinating on the enforcement of traditional knowledge.

11. The fundamental role of a treaty on traditional knowledge should be to coordinate the creation of an international enforcement pyramid. The various technical discussion papers produced by WIPO's Intergovernmental Committee suggest that many of the elements of this pyramid are already in place at the national level. Theoretical and empirical work shows that enforcement pyramids are widely used by business regulators because they work.

12. Specifically, this would involve members in the establishment of a Global Bio-Collecting Society that would coordinate enforcement work at the national level so as to constitute an international enforcement pyramid.

13. One possibility that should be explored is whether key organizations such as the WIPO, the FAO and the CBD might be able to establish a Global Bio-Collecting Society as a joint initiative.

14. The treaty should also establish a review mechanism and a set of indicators that could be used to evaluate the progress of states on the regulation of TGKP. A list of indicators could include progress on land rights issues related to TGKP; the implementation of a best practice declaration requirement for patents dealing with TGKP; and assistance rendered to other states on enforcement, including the number of MOU signed with other states.

15. The issue of declaring the origins of genetic resources and/or the use of traditional knowledge should be dealt with through the development of best practice guidelines. The major patent offices of developed and developing countries should participate in the formulation of such guidelines but, if necessary, it could be done by the major patent offices of developing countries.

16. The potential members of a treaty on traditional knowledge should, drawing on the experience of the fairtrade label, use the treaty as a means of developing a co-ordinated approach amongst themselves to labelling and certification.

17. A treaty would have to be careful not to undermine the work that indigenous groups and international organizations have done on broader indigenous issues.

OBJECTIVES

Over the last ten years or so more and more international organizations and policy networks have done work on protection of traditional knowledge (TK). One of the issues that has been increasingly raised is whether there should be a treaty on traditional knowledge. What such a treaty would contain and who would or would not support it are questions to which there are no very detailed answers. To some extent they are unanswerable until an international organization begins the process of standard-setting. The purpose of this paper is to put forward some concrete proposals that will, by being rejected, modified or supported, help answer the question of what an international framework for TK might look like.

The literature on the topic of TK has grown rapidly.¹ Included in it is a focus on the value of TK (both pecuniary and non-pecuniary value) as well as an extensive analysis of the difficulties that are raised by proposals to protect TK, including the difficulties of defining the subject matter and the strengths and weaknesses of existing categories of protection, especially categories of intellectual property protection. This paper draws on this literature, but its principal purpose is to say something about the issue of the enforcement of norms relating to TK and the role that a treaty can play in an enforcement strategy. The basic thrust of the paper's analysis is that a treaty should concentrate more on the coordination of the enforcement of existing norms than on the setting of new standards. The key to better enforcement lies in the creation of an international enforcement pyramid. The coordinated use of this pyramid requires an international agency. The paper suggests one possible model for such an agency in the form of the Global Bio-Collecting Society.

TERMS and ORIGINS

The relationship between intellectual property standards and the practices of indigenous groups has become a major item of work in international fora such as the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), the Food and Agriculture Organization (FAO) and the Conference of the Parties (COP), to the Convention on Biological Diversity (CBD). Terms used to describe the outcomes of these practices are 'indigenous knowledge', 'traditional knowledge', 'folklore', with many variations on these base themes such as 'indigenous intellectual property', 'traditional knowledge, innovations and practices, and 'traditional ecological knowledge'.

¹ Overviews can be found in Graham Dutfield, *Intellectual Property Rights, Trade and Biodiversity*, Earthscan, London, 2000; Carlos Correa, *Traditional Knowledge and Intellectual Property*, Discussion Paper, Quaker United Nations Office, Geneva, 2001; *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*, WIPO, Geneva, 2001; *The Crucible II Group, Seeding Solutions*, Vol. 1, IPGRI, DHF, IDRC, Canada, 2000; C Bellman, G. Dutfield and Ricardo Meléndez-Ortiz (eds.) *Trading in Knowledge*, Earthscan, UK and USA, 2003, chaps. 16-21.

With most legal concepts it is possible to point to a settled term that has a core meaning even if there is some surrounding uncertainty over its use in all cases. In the case of TK achieving consensus on even a settled term of usage has proven elusive. A report prepared by the WIPO Secretariat neatly summarizes the situation:

“[t]here is ... a diffuse range of potentially overlapping terms in current use in international, regional and national discussions related to TK, corresponding with a wide range of policy frameworks. Terms are not neutral, and the choice of term is neither arbitrary nor irrelevant.”²

For the discursive purposes of this paper the label ‘traditional group knowledge and practice’ (TGKP) will be used as a generic term to cover the various species of knowledge (indigenous, traditional, traditional medicinal, traditional ecological etc) that have been identified. The purpose of referring to ‘group’ in TGKP is simply to capture the idea that this knowledge is part of group life and has a distinctive group context. The ‘embeddedness’ of TGKP in group life has many important implications, including the fact that the continued existence of TGKP is bound up with the continued existence of the groups that generate it. The reference to ‘practice’ is there to indicate that this knowledge is an ongoing practice that has a dimension of dynamic innovation.³

The demands for standard-setting action relating to TGKP have their origins in the fact that the membership of major intellectual property conventions such as the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and the Paris Convention for the Protection of Industrial Property (Paris Convention) changed in character after the Second World War. Many more developing countries joined these conventions.⁴ Intellectual property rights originated in European states and were used by them as tools of economic regulation. The Paris and Berne Conventions were also profoundly shaped by European states that kept their trade and producer interests in mind.⁵ It is hardly surprising, therefore, that when developing countries joined these conventions they began to formulate proposals for the reform of these conventions.

Folklore is an early instance of where developing countries became the demanders of new intellectual property rights that were of interest to them. An example is the international campaign for the protection of folklore that began in Africa in the 1960s.⁶ A number of developing countries during the 1960s and 1970s enacted provisions for the protection of folklore.⁷ These laws, however, operated with different meanings of

² See Traditional Knowledge – Operational Terms and Definitions, WIPO/GRTKF/IC/3/9, 8.

³ See Graham Dutfield, *Intellectual Property Rights, Trade and Biodiversity*, Earthscan, London, 2000, 35.

⁴ On the increase of such membership in the Paris Convention see Friedrich-Karl Beier, ‘One Hundred Years of International Cooperation - The Role of the Paris Convention in the Past, Present and Future’ 15 (1984) IIC 1, 5.

⁵ See P. Drahos with John Braithwaite, *Information Feudalism*, Earthscan, London, 2002.

⁶ See K. Puri, ‘Cultural ownership and intellectual property rights post *Mabo*: putting ideas into action’ 9 (1995) *Intellectual Property Journal*, 293, 337.

⁷ See ‘Introductory Observations’ in the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions’, UNESCO/WIPO 1985, para 5.

folklore and defined its scope in various ways. The diversity of these early approaches has continued to be a dominant characteristic of property rights protection for TGKP in general. A joint initiative of UNESCO and WIPO in the early 1980s led to the adoption in 1982 by a committee of governmental experts of the ‘Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions’. An earlier initiative of the Tunisian Government, UNESCO and WIPO produced the Tunis Model Law on Copyright for Developing Countries, 1976.⁸ These model laws had little influence on western copyright regimes.⁹ The example of folklore was part of a general pattern of standard setting in which powerful developed states were able to set standards that suited their economic interests in the emerging global knowledge economy while developing states were, at best, able only to get satisfaction in the form of model laws.¹⁰ Obtaining enforceable international norms on the access to, use or protection of knowledge, especially technological knowledge, has been a constant problem for developing states ever since they have gained entry to the international organizations that determine the rules of the global knowledge economy.

The calls for a treaty that sets binding norms in the field of TGKP are another example of this more general pattern. This time, however, developing states are no longer the only agents working towards a new international regime for the use of economically valuable knowledge. Civil society actors during the 1990s were successful in bringing global publicity to bear on the issue of ‘biopiracy’ with the result that the issue caught the attention of a much wider set of policy makers and a wider public.¹¹ The protracted negotiations over the European biotechnology directive and especially the role of the European Parliament is perhaps the best example of the way in which the issue has become part of larger policy circles. Policy makers know that they imperil their broader agendas if they ignore the issue.

THE CONCERNS AND NEEDS OF DEVELOPING COUNTRIES

Each developing country has its own complex national dynamic when it comes to the regulation of TGKP. However, two basic lines of argument have been influential in the discussions on whether an international treaty is needed on TGKP. The first relates to the issue of fairness. TRIPS is seen by many developing countries as an economic bargain that conferred few immediate benefits on them.¹² Moreover, as considerable scholarship

⁸ A copy of the model law is contained in vol. 10 (2) of the Copyright Bulletin UNESCO, 1976.

⁹ For countries that have adopted the model see J. G. Weiner, ‘Protection of Folklore: A Political and Legal Challenge’ 18 (1987) IIC, 56, 87.

¹⁰ P. Drahos, ‘Developing Countries and International Intellectual Property Standard-Setting’ 5 (2002) Journal of World Intellectual Property, 765.

¹¹ Gervais observes that one reason why traditional knowledge has become an important international issue has to do with the increasing political influence of aboriginal communities. See Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (2nd edn.) Sweet and Maxwell, London, 2003, 57.

¹² At least in the short term this perception has some force in that TRIPS causes rents to flow from users of knowledge assets protected by intellectual property rights to owners of those rights. See *Global Economic Prospects and the Developing Countries*, World Bank, Washington DC, 2002, 137.

has shown, TRIPS was very much the product of aggressive trade politics by the US in partnership with key players from international business.¹³ TRIPS has come to be seen very much through the prism of procedural unfairness. The push for treaty on TGKP stems, at least in part, from the desire of developing countries for fair treatment. If the knowledge assets of developed countries are to be protected by means of an international agreement then the knowledge assets of developing countries ought also to be similarly protected. The obligation of fair and equitable sharing of benefits that is part of the CBD appears to arise out of a more general notion of fair treatment of the knowledge assets of all countries, a notion that can be said to have gained the acceptance of the members of the CBD.¹⁴

The second line of argument is based on an appeal to efficiency considerations. Developing countries are rich in knowledge assets, such as those to be found in traditional societies, and genetic resources. Currently, many of these assets are not, for a variety of reasons, protected by intellectual property rights, or they are poorly protected. The absence of a set of full and enforceable set of property rights in TGKP means that the proprietors of this knowledge face the same kinds of disincentives and problems that face other kinds of investors in knowledge assets. They have no incentive to invest in the further development of these assets and they cannot participate in the commercialization and trade of existing assets. Related to this argument is what might be termed an autonomy or sovereignty argument. An international regime in TGKP would give developing countries control over the use of their knowledge assets, including the capacity to ensure that some assets did not become the subject of commercial exploitation.

These two general arguments, the fairness argument and the efficiency argument, have led to the identification of a number of specific concerns and needs including the following:¹⁵

Monitoring concerns: The difficulty of tracking the use of genetic resources, and TGKP, especially given that many genetic resources from developing countries have ended up in developed country collections and are outside the scope of the CBD;

Enforcement concerns: Concerns about the lack of enforceability of some proposed solutions (such as voluntary codes of conduct) have led to specific

¹³ M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*, Brookings Institution Press, Washington D.C., 1998; Peter Drahos with John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?*, Earthscan, London, 2002; D. Matthews, *Globalising Intellectual Property Rights*, Routledge, London and New York, 2002; S. Sell, *Private Power, Public Law: the Globalization of Intellectual Property Rights*, Cambridge University Press, Cambridge, 2003.

¹⁴ See Mitzi Gurgel Valente Da Costa, *Genetic Resources and Intellectual Property Rights*, First Meeting of Like-Minded Megadiverse Countries, available at www.megadiverse.org.

¹⁵ A full list of the concerns that have been articulated by states in the context of the WTO includes issues related to food security, culture, environment, development and the coherence of international and national law. See *The Protection of Traditional Knowledge and Folklore: Summary of Issues Raised and Points Made IP/C/W/370*, 8 August 2002.

policy proposals such as the proposal that patent applicants declare the origins and use of genetic resources and TGKP; and

Capacity concerns: Some developed country policy proposals are built on problematic assumptions about the capacities of indigenous groups. For example, the freedom of contract principle is likely to have uneven effects where groups lack information relevant to the bargaining process and where they do not have the capacity to enforce rights gained under the contract.

Some states, like the Group of Like-Minded Megadiverse, Countries have concluded that they should “promote the development of a sui generis regime to protect traditional knowledge”. Within other quarters there are notes of caution, suggesting that “a single all-encompassing sui generis system of protection for traditional knowledge may be too specific and not flexible enough to accommodate local needs”.¹⁶

These basic concerns of developing countries have led to a number of initiatives the most important of which are summarized in the section that follows.

EXISTING INITIATIVES

WIPO - the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge (IG)

In 2000, the WIPO General Assembly established the IG as a forum for the discussion of intellectual property issues in relation to access to genetic resources and benefit sharing, the protection of traditional knowledge and expressions of folklore. The IG’s work programme has produced an impressive number of discussion papers, surveys of national laws and data obtained by means of surveys, consultations and fact-finding missions. The technical dimensions of the issues have received a thorough exploration in a number of papers prepared by the Secretariat. The IG has produced a number of practical outcomes, including the following:¹⁷

A toolkit for the management of intellectual property in the context of documenting traditional knowledge and genetic resources;

A practical guide for the protection of traditional cultural expressions;

A database of contractual provisions relating to intellectual property and access to genetic resources;

¹⁶ Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy, London, 2002, 80.

¹⁷ This summary is taken from ‘Overview of Activities and Outcomes of the Intergovernmental Committee’, WIPO/GRTKF/IC/5/12, April 3, 2003.

Inventories of periodicals and on-line databases relating to TK (relevant to prior art in patent examination);

A proposal to incorporate some periodicals within the Patent Cooperation Treaty system; and

A proposal for the revision of the International Patent Classification to contain categories for TK subject matter (a proposal that has been worked on by the Committee of Experts of the Special Union for the International Patent Classification);

At the Fifth Session of the IG, the Delegation of Zambia suggested on behalf of the African Group that the IG should draft and present to the General Assembly a legally-binding international instrument to protect genetic resources, traditional knowledge and folklore.¹⁸

WTO

Issues relating to TGKP have steadily made their way into the work of the WTO by various routes. The Committee on Trade and Environment that was established in 1995 to examine the relationship between trade measures and environmental objectives looked at the interrelationships between TRIPS and the CBD. Similar issues have surfaced as part of the built-in review processes of TRIPS in Article 27(3)(b) and Article 71.1.

The review of Article 27(3)(b) was required to begin in 1999. Article 27(3)(b) allows Members to exclude from patentability plants, animals, biological processes for the production of plants or animals and plant varieties. Once the review of Article 27(3)(b) commenced it became clear that there were a variety of views as to what the review might encompass. Some developing countries such as India, the African Group, Thailand, Ecuador and Egypt took the view that the review was a substantive review that could have as one of its outcomes a modification of the provisions of the sub-paragraph.¹⁹ Review, in effect, included the possibility of re-negotiation. Following this line of argument developing countries put forward proposals that called for the harmonization of TRIPS and the CBD on matters relating to the use of genetic resources and the protection of TK. The US has taken the view that there is no conflict between TRIPS and the CBD, pointing out that the provisions of the two treaties are not generally related and where there is a relationship there is sufficient flexibility allowing states to fulfil their obligations under both.²⁰ The argument that applicants for patents should in their applications specify the source of any genetic materials and/or traditional knowledge has been characterized by the US as leading to a “legal and administrative nightmare”. The US proposal on this issue has been to argue that issues related to use of genetic materials and traditional knowledge should be dealt with at the *point of access* to those materials

¹⁸ See Chair’s Conclusions: Fifth Session of the Intergovernmental Committee.

¹⁹ See WTO, IP/C/M/25, December 22, 1999.

²⁰ See Council for TRIPS, IP/C/W/209, 20 September 2000.

rather than at the *point of commercialization*. The regulatory principle generally favoured by the US in this field is the principle of freedom of contract.²¹ On the issue of documenting traditional knowledge the US has been supportive, suggesting that it will be important to ensure that TK databases be accessible to patent examiners. More generally, the US has taken the view that TRIPS should reflect its domestic position on patentability– “virtually anything is patentable”.²²

Developing countries have put forward a range of proposals during the review process, arguing amongst other things, that the exclusions in 27(3)(b) should be clarified or even extended to exclude all life forms, that information relating to the origins of a biological invention become part of the patent application process and that the principle of informed consent to be found in the CBD should be incorporated into TRIPS.²³

The Ministerial Declaration that was adopted on 14 November 2001 at Doha instructed the Council for TRIPS to examine the relationship between TRIPS and the CBD and the protection of traditional knowledge and folklore.²⁴ The Declaration requires that this examination be guided by Articles 7 and 8 of TRIPS and that it “take fully into account the development dimension”.

The review of Article 27(3)(b) continues to be part of the work programme of the Council for TRIPS.

CBD – the COP

The Conference of the Parties (COP) is the governing body of the CBD. Through its meetings and decisions it has created a work programme for the implementation and review of the CBD. At COP-II in 1995, the COP began a process of investigating the links between intellectual property rights and the various provisions of the CBD. Decision II/12 requested the Executive Secretary to begin a process of liaising with the WTO, to consult with indigenous groups and undertake a study of the impact of intellectual property rights on biodiversity and benefit sharing.

Since that time an extensive and complex work programme has grown around the issue of intellectual property rights and their role in the implementation of the CBD. The CBD is a framework convention, meaning that it sets out broad general principles that the parties agree to be guided by and work towards in a long-term process based on the

²¹ See The Protection of Traditional Knowledge and Folklore: Summary of Issues Raised and Points Made, Note by the Secretariat, IP/C/W/370, 10.

²² See *Hughes Aircraft Co. v. United States*, 148 F.3d 1384, 1385 (Fed. Cir. 1998).

²³ A detailed summary of the various proposals is to be found in Table 1 in Carlos Correa, *Traditional Knowledge and Intellectual Property*, Discussion Paper, Quaker United Nations Office, Geneva, 2001, 24-25.

²⁴ See Para. 19, WT/MIN(01).DEC/1

exchange of information, consultation, reporting of progress and coordination with other international organizations.²⁵

In the case of intellectual property and the CBD, the COP has encouraged the parties to consider various options. At COP-III in 1996, the COP in Decision III/17 invited the parties to

(e) Consider the development of intellectual property rights, such as sui generis systems/approaches, or alternative forms of protection that could promote achievement of the Convention's objectives, consistent with the Parties' international obligations;

At COP-IV in 1998, Decision IV/9 established a working group on the implementation of Article 8(j) of the CBD and required that working group to develop a work programme based on the structure of the elements in the Madrid report.²⁶ COP-V extended the mandate of this working group, emphasizing the need for case studies on the protection of indigenous knowledge (see Decision V/16). COP-V also set up an Ad Hoc Open-ended Working Group to assist Parties and stakeholders to develop guidelines on access to genetic resources and benefit-sharing. The fair and equitable sharing of benefits is one three primary objectives of the CBD (See Articles 1 and 15). Decision IV/8 of the COP established a panel of experts on access and benefit-sharing appointed by Governments and this panel has produced general papers discussing the role of intellectual property rights in access and benefit sharing arrangements.²⁷

COP VI resulted in the adoption of the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefit Arising out of their Utilization. The Parties to the Convention were invited “to use the Guidelines when developing and drafting legislative, administrative or policy measures on access and benefit-sharing, and contracts and other arrangements under mutually agreed terms for access and benefit-sharing”.²⁸

In a comment on this paper Sam Johnston of the United Nations University offered the following useful and insightful summary of the complex output of the parties to CBD on this issue:²⁹

TGKP has in one form or another been a central element of the work of the CBD and even during the negotiations of the instrument. As result a wide variety of bodies associated with the Convention have considered the matter, including, the principal scientific advisory body (SBSTTA), the Panel of Experts on ABS, the Working Group on ABS, the Working Group on Article 8(j) and related

²⁵ Article 26 of the CBD requires national reporting.

²⁶ (UNEP/CBD/COP/4/10/Add.1)

²⁷ See, First Meeting of the Panel of Experts on Access to Genetic Resources and Benefit-sharing, Final Report: UNEP/CBD/COP/5/8.

²⁸ See Decision VI/24.

²⁹ Received by email from Sam Johnston and reproduced with his permission.

provisions and the Conference of the Parties. Over half of the decisions of the 136 decisions of the COP have some bearing on the issue.

Despite all this attention, progress on the issue has been limited. The following are the salient features of the various decisions:-

1. The COP has made numerous calls for information, case studies and best practices. Some of the more important topics that information and work has been requested on are:-
 - a. Impacts of IPRs;
 - b. Role of customary laws;
 - c. Relationship between disclosure requirements and international obligations;
 - d. Efficacy of disclosure requirements; and
 - e. Feasibility of an international certificate of origin system.

2. The COP has developed a close working relationship with WIPO, in particular the IGTKGRF. WIPO has been requested to prepare advice on the following issues:-
 - a. the use of genetic resources and IPRs;
 - b. Country of origin and IPRs;
 - c. TK and IPR; and
 - d. Evidence of prior informed consent.

- This relationship is so close that it is arguable that the COP has in effect deferred developments on TGKP largely to WIPO.

3. The COP has recognized that there is a close relationship between the CBD provisions on TGKP and various WTO Agreements, in particular the TRIPs Agreement. As a result they have requested that the Executive Secretary work with the Secretariat of the WTO and apply for observer status in the TRIPs Council (which despite three separate requests by the COP has been refused by the Members of the TRIPs Council - principally by the US on the grounds that the CBD and the TRIPs Agreement do not deal with the same subject matter)

4. Parties have been invited to encourage disclosure of the country of origin of genetic resources.

5. Parties have also been invited to encourage disclosure of origin of TK.

The WSSD call for the negotiation "within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources" has had a dramatic impact on the work of the CBD, reinvigorating those Parties that wish to see progress on TGKP.

TGKP will as a result loom large at the upcoming COP 7. Although it is unlikely that any real substantive progress will be made at COP 7, some are hopeful that a process to explore the establishment of a negotiation process for a protocol dealing with TGKP, within the context of ABS, will be feasible.

Permanent Forum on Indigenous Issues (Permanent Forum)

The Permanent Forum was the outcome of a resolution by the Commission of Human Rights in 2000 that was adopted by the Economic and Social Council. The Permanent Forum has a mandate to “discuss indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights”.³⁰ One of its specific tasks is “to promote the integration and coordination of activities relating to indigenous issues within the United Nations system”.³¹ The Permanent Forum has not been in operation for that long, but in the Second Session of the Forum:

7. Many indigenous representatives expressed grave concern over bio-piracy and genetic engineering, and called for the protection of genetic resources and a moratorium on bio-prospecting. The protection of traditional knowledge and indigenous intellectual property was a high priority for indigenous peoples and could be coupled with free, informed and prior consent.³²

Similarly on the agenda item under Health, Indigenous Peoples’ Organizations recommended that “The Forum should promote indigenous health care, which also requires protection against patents on indigenous medicinal plants”.³³

UNCTAD

From 30 October to 1 November 2000 UNCTAD held the “Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices”.³⁴ The meeting of some 200 experts from 80 countries produced a set of recommendations to UNCTAD for further work in this area. On the issue of an international framework the Expert Meeting made the following observation:

“[n]ational sui generis systems by themselves will not be sufficient to protect TK adequately. There is therefore a need to explore an international mechanism that

³⁰ See E/RES/2000/22.

³¹ See E/RES/2000/22.

³² The same concerns were voiced by indigenous organizations in the Second Session under Agenda Item 4(e) (Culture). See E/C.19/2003/L.2/Add.6.

³³ See E/C.19/2003/L.2/Add.4.

³⁴ Papers from the meeting are available at http://www.unctad.org/trade_env/index.htm

might explore minimum standards of an international *sui generis* system for TK protection.³⁵

This report was in turn considered by UNCTAD's Commission on Trade in Goods and Services and Commodities. The Commission made a set of recommendations the thrust of which were to promote capacity building in this field, to encourage coordination and cooperation amongst the international actors.³⁶

In April of 2002 UNCTAD and the Indian Government sponsored the 'International Seminar on Systems for the Protection and Commercialization of Traditional Knowledge' (held in New Delhi on 3-5 April). The seminar produced a communiqué that listed the elements that might be incorporated into an international framework on traditional knowledge in the following terms:³⁷

(i) local protection to the rights of TK holders through national level *sui generis* regimes including customary laws as well as others and its effective enforcement *inter alia* through systems such as positive comity of protection systems for TK (ii) protection of traditional knowledge through registers of TK databases in order to avoid misappropriation (iii) a procedure whereby the use of TK from one country is allowed, particularly for seeking IPR protection or commercialization, only after the competent national authority of the country of origin gives a certificate that source of origin is disclosed and prior informed consent, including acceptance of benefit sharing conditions, obtained (iv) an internationally agreed instrument that recognizes such national level protection. This would not only prevent misappropriation but also ensure that national level benefit sharing mechanisms and laws are respected worldwide.

Food and Agriculture Organization

The FAO has produced a treaty in the form of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) (adopted by FAO Member countries in November 2001) that contains standards that are relevant to TGKP. Article 9 of the Treaty recognizes the contribution of "local and indigenous communities and farmers of all regions in the world" to the conservation and development of plant genetic resources. The implementation of farmers' rights requires the "protection of traditional knowledge that is relevant to plant genetic resources for food and agriculture", as well as the rights of participation in the benefits and decision-making related to PGR (See Article 9.2). In essence, the treaty establishes a principle of farmers' rights and provides some guidance as to the areas in which contracting parties should act, but it does not provide detailed standards for these areas. It is not even clear if contracting parties are necessarily obliged to act in these areas since the provision simply says that contracting parties "should" act

³⁵ See 'Outcome of the Expert Meeting' TD/B/COM.1/EM.13/L.1, 9 November 2000, p.7.

³⁶ See <http://www.unctad.org/en/special/cldos5.htm>

³⁷ See Report of the International Seminar on Systems for the Protection and Commercialization of Traditional Knowledge, New Delhi, 3-5 April 2002.

in this area rather than “shall”. The provisions of the treaty are also circumscribed by the scope of the treaty. This treaty is aimed at preventing the loss of agro-biodiversity rather than biodiversity in general. Article 3 of the Treaty states that the treaty “relates to plant genetic resources for food and agriculture”. Clearly, the treaty relates only to a subset of the issues that are raised by TGKP.

Group of Like-Minded Megadiverse Countries

In February 2002 a group of 12 countries representing roughly 70% of the world’s biological diversity met in Cancun, Mexico and formed the Group of Like-Minded Megadiverse Countries.³⁸ The Cancun Declaration that launched the Megadiverse Group (MDG) contains a sweeping agenda that includes the pursuit of a new international regime for the fair and equitable sharing of benefits that arise from the use of biodiversity. Central to this regime would be the requirement that patent applicants disclose the origins of biological materials and show that they have fulfilled the obligation of prior informed consent. The MDG also wants to promote the development of a sui generis regime to protect traditional knowledge and jointly tackle the problem of illegal acquisition of genetic resources. The Cancun Declaration also committed the MDG to exploring the establishment of a funding mechanism in order to pursue its goals and projects.

Since its formation in Cancun the MDG has held a Ministerial Meeting in Cusco, Peru in November 2002 and an Experts Meeting on Institutional Building in Kuala Lumpur, Malaysia in July 2003. The MDG is distinctive in that it is a group of countries that is trying to co-ordinate on issues across fora rather than being a group within a forum (this was an explicit recommendation of the Cusco Declaration). For the time being the forum that is of most importance to the Group’s objectives is the CBD. The meeting of experts in Kuala Lumpur produced a Draft Action Plan that recommended the establishment of two ad hoc task forces.³⁹ The first task force is to work on access and benefit sharing, traditional knowledge and intellectual property rights and second on biosafety and biotechnology. The five priority areas that were listed for action under the Draft Plan are an international regime to promote fair and equitable sharing of benefits derived from the use of genetic resources, capacity building, traditional knowledge, intellectual property rights and biosafety and biotechnology.

SUMMARY OF EXISTING INITIATIVES

³⁸ Brazil, China, Colombia, Costa Rica, Ecuador, India, Indonesia, Kenya, Mexico, Peru, South Africa and Venezuela. Since then Bolivia, Malaysia and the Philippines have joined the group. See Cancun Declaration of Like-Minded Megadiverse Countries.

³⁹ See Experts Meeting on Institutional Building, Draft Action Plan, Group of Like-Minded Megadiverse Countries, GMC/2003/KL/FINAL/021, 23 July 2003.

There is as yet no treaty on the protection of TGKP, although clearly some states, most notably those that belong to the MDG, would like to see faster progress towards an international regime of some kind. Some treaties, especially the CBD and the ITPGRFA contain standards that are relevant to the protection of TGKP. Taken together, these standards cannot be said to amount to a comprehensive *sui generis* international regime for the protection of TGKP. There are signs, however, of incremental progress. An example of this is the process that is underway to reform the International Patent Classification System to include references to traditional knowledge.⁴⁰ TK has also been the subject of regional initiatives.⁴¹ In terms of hard binding law most activity has taken place at the national level.⁴²

US STRATEGY

The Global IP Ratchet and IFAC

Any assessment of the feasibility of a treaty must take into account US strategy. In a survey of global business regulation that covered more than 20 fields of business regulation Braithwaite and Drahos concluded that “[t]he most recurrently effective actors in enrolling the power of states and power of the most potent international organizations (e.g. the WTO and IMF) are large US corporations”.⁴³

Over the last 20 years there has evolved in the US a centrally co-ordinated process of standard-setting for sectors of key importance to multinational companies – intellectual property rights, services and investment. Developing countries have had no answer to this centrally co-ordinated strategy. Whenever they are successful in mounting resistance in one forum such as the TRIPS Council, they encounter a forum-shifting response in which the US shifts the negotiating agenda from that forum to another. The global intellectual property ratchet is precisely the product of this centrally co-ordinated strategy of forum shifting.

Driving the global intellectual property ratchet is a networked private governance that is formally woven into US policy and law-making at the highest levels. The Advisory

⁴⁰ This process is being undertaken by the Committee of Experts of the Special Union for International Patent Classification. For a summary of WIPO’s efforts on this issue see Manuel Ruiz, *The International Debate on Traditional Knowledge as Prior Art in the Patent System: Issues and Options for Developing Countries*, T.R.A.D.E., Occasional Paper 9, South Centre, October 2002, 10-16.

⁴¹ For example, the Common Regime for the Access to Genetic Resources of the Andean Community of Nations (Decision 391 of 1996) and the Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources (developed by the Organization of African Unity).

⁴² See, for example, the report of country experiences in the Report of the International Seminar on Systems for the Protection and Commercialization of Traditional Knowledge, New Delhi, 3-5 April 2002, 10-12.

⁴³ See J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge University Press, Cambridge, 2000, 27.

Committee for Trade Policy and Negotiations, the committee that was so important in the context of TRIPS remains at the apex of a private sector advisory system that advises and influences US trade policy. This system is made up of 33 advisory committees that have provision for approximately 1,000 members.⁴⁴ It is a three-tiered system with ACTPN at the top, six policy advisory committees in the second tier and 26 sectoral, functional and technical advisory committees in the third tier.

In the case of agreements that relate to intellectual property the technical detail of these agreements is monitored by a third tier committee, the Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC). The membership of IFAC is made up of 20 members drawn from Industry Sector Advisory Committees and another 20 drawn from the private sector areas that provide the committee with technical expertise in intellectual property.⁴⁵ This technical expertise is vital to the committee's work and complements the strategic work of ACTPN. Under its charter IFAC is to provide detailed technical advice on trade agreements negotiated by the USTR.⁴⁶ In the case of the US-Singapore FTA, IFAC, in the words of its report, "advised U.S. negotiators on, and reviewed draft texts, of the U.S.-Singapore FTA intellectual property chapter".⁴⁷ Importantly, IFAC reviewed the US-Singapore FTA in the context of other multilateral and bilateral agreements and initiatives that the US had achieved. In other words, IFAC is a committee that gets its hands dirty by reviewing and drafting specific agreements. It does this technical work across all US trade initiatives in intellectual property, whether bilateral, regional and multilateral. It is thus able to coordinate at a technical level the work it does across these different fora, thereby ensuring that US trade negotiating initiatives push intellectual property standards in the direction that US industry would like. The technical expertise on IFAC, as well as the expertise available to it from the corporate legal divisions of its members means that, for example, it can evaluate a country's intellectual property standards in detail when that country seeks WTO accession and it can provide detailed assessments of the standards that USTR negotiators must bring home in a negotiation.

Formally, IFAC must report to the President, the USTR and Congress when the President notifies Congress of an intention to enter into a trade agreement. This formal role,

⁴⁴ A description is to be found in The President's 2002 Annual Report on the Trade Agreement Program, <http://www.ustr.gov/reports/2003.html>.

⁴⁵ The members are, International Intellectual Property Alliance, The Gorlin Group, Law Offices of Hope H. Camp, representing Eli Lilly and Company, Cowan, Leibowitz & Latman, P.C., Anheuser-Busch Companies, Sidley, Austin, Brown & Wood, LLP, representing Biotechnology Industry Organization, Covington and Burling representing Microsoft Corporation, Merck & Company, International Anticounterfeiting Coalition, Intellectual Property Owners Association, Pfizer, Pharmaceutical Research and Manufacturers of America, The Engineered Wood Association, Georgia-Pacific Corporation, Business Software Alliance, Lark-Holton Global Consulting, Levi Strauss & Company, Tuttle International Group, Procter & Gamble, Distilled Spirits Council of the United States, Rubber and Plastics Manufacturers Association.

⁴⁶ The Charter is available at <http://www.ita.doc.gov/td/icp/Charter-23.html>.

⁴⁷ See The U.S. Singapore Free Trade Agreement (FTA) The Intellectual Property Provisions: Report of the Industrial Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3), February 28, 2003, 3.

however, represents only a small part of a more complex system of private sector nodal governance. Members of IFAC work outside of the committee to ensure that the US remains committed to an agenda of globalizing US standards of intellectual property. So, for example, the Biotechnology Industry Organization (BIO), which represents more than 1,100 organizations and is a member of IFAC has over the years independently lobbied the USTR on the question of intellectual property rights. Its agenda is a matter of public record and is neatly summarized in a letter of January 29, 2003 to the USTR, Robert Zoellick: “[t]he United States’ intellectual property system is the best in the world, and BIO advocates the establishment of global standards protecting intellectual property comparable to those in the United States.”⁴⁸

Naturally when BIO sits on IFAC it brings its advocacy position with it. A seat on IFAC means that BIO is able, in co-operation with the other members, to provide technical and drafting advice to the USTR as to the kind of standards that meet the desires of the organizations that BIO represents. There are a number of incentives for the USTR to be attentive to the suggestions of IFAC, including the superior technical expertise of the committee, the fact that the negotiating mandate in the Trade Act of 2002 requires the USTR to seek standards of protection comparable to US domestic law and that IFAC must ultimately write a report, as it did in the case of US-Singapore FTA, that endorses the agreement as being in the economic interests of the US. The upshot is that the standards that members of IFAC seek are very often the ones they achieve, especially in bilateral negotiations where the US almost always has superior bargaining power. So, for example, BIO has urged that where there are delays by trading partners in the granting of patents there be compensatory extensions of the patent term and it has also advocated that trading partners adopt US standards of data protection for pharmaceutical products. Articles 16.7 and 16.8 of the US-Singapore FTA implement these US domestic standards in Singapore. BIO also works in other ways outside of IFAC. It, for example, responds to the USTR’s request for public comment on which countries should be the subject of ‘Special 301’ listing and as a recognized international NGO in WIPO it can be active in pushing its position on patents in the WIPO Patent Agenda process.

To sum up: the members of IFAC become intimately involved in trade negotiations on intellectual property, not just advising but reviewing drafts and helping to decide objectives. Most importantly, they track US negotiating objectives across negotiations in different fora, thereby ensuring that these objectives are consistently pursued and pursued in a way that is most likely to bring long term success. Shifting from bilaterals to multilaterals has been at the centerpiece of US strategy for the last 20 years and has proven to be highly effective.

US Industry Objectives

⁴⁸ The letter is available on BIO’s website <http://www.bio.org>

In a letter that responded to a request from the United States Patent and Trademark Office in 1991 for public comments on global patent harmonization BIO outlined a number of key objectives including:

- The desirability of a treaty that imposes identical standards of substantive patentability rather than a treaty that accommodates a range of options;
- The desirability of a treaty that delivers a single examination model with examination being carried out by a major patent office; and
- The desirability of a treaty that would have the widest range of patentable subject matter and that would remove the exclusions currently contained in Article 27.3 of TRIPS.

In a letter of 2003 BIO reiterated the importance of eliminating the exclusions in Article 27(3)(b) and also added that any new trade agreements the US negotiates must prohibit any special requirements on patent applications such as those relating to the origin of living materials.

IFAC, which as explained above, has a key role in US trade negotiations concerning intellectual property has steadily been working towards these industry objectives.

On the issue of patent-defeating disclosures, which relates directly to the drive to document traditional knowledge, BIO has indicated broad support for the position that the definition of prior art includes information made available to the public anywhere in the world. In fora such as the TRIPS Council, the US has expressed support for the idea of documenting traditional knowledge. It would appear therefore that industry can live with the drive to document TK and indeed may even see advantages in it. One reason for this may be that it will not often be the case, especially in the context of modern biotechnology, that TK (whether documented or not) will disclose to the public an invention in the form that it is eventually claimed by a company. Documentary TK may give companies leads to inventions, but that is not the same as making knowledge of the invention public. A related but little discussed point is the capacity of indigenous groups to make use of defensive publication strategies. As a WIPO study has pointed out such strategies are routinely used by large corporations.⁴⁹ Specialist journals such as the Xerox Disclosure Journal and The IBM Technical Disclosure Bulletin form part of this strategy, but even a moments perusal of these journals shows that high levels of scientific expertise are required to make inventions part of the prior art. This is especially true in the biotechnology area.

Finally, it is worth noting that to date US membership of treaties has closely tracked the goals that have been sought by its industry (see the table below). The US has not ratified treaties that have been seen as problematic in some way by its industries. It is a safe bet that it will only join these treaties when US industries calculate that the costs of staying

⁴⁹ See Practical Mechanisms for the Defensive Protection of Traditional Knowledge and Genetic Resources within the Patent System, WIPO/GRTKF/IC/5/6, May 14, 2003.

out outweigh the costs of joining. This is precisely the calculation that was made when the US joined the Berne Convention in 1989.

TREATY	US STATUS
WTO TRIPS	Member
Patent Cooperation Treaty	Member
UPOV (1991)	Member
Convention on Biological Diversity	Signed but not ratified
Biosafety Protocol	
International Treaty on Plant Genetic Resources for Food and Agriculture	Signed but not ratified

DESIRABILITY OF A TREATY

The issue of the desirability of a treaty on TGKP has subjective and objective dimensions. Obviously, as the declarations by those countries that are members of the MDG make clear, an international regime of some kind is desired by a number of developing countries. The last meeting of WIPO's IG ended with a call from some African countries for work to commence on a binding treaty. Other countries are adopting more of a wait and see approach.⁵⁰ Views about the desirability of a treaty amongst indigenous groups vary. What is clear from some fora such as the Permanent Forum is that indigenous groups would like some practices relating to the propertization of genetic resources by means of the patent system stopped, but whether this means that all indigenous groups support a treaty is another matter. This is an empirical question beyond the scope of this paper to answer. WIPO's extensive fact-finding missions did not really suggest an answer to this question since those missions were more concerned with the issues raised by traditional knowledge and existing intellectual property systems.⁵¹

As with any public policy proposal the desirability of a treaty on TGKP can be evaluated using tools of analysis to be found in disciplines such as economics. It is worth noting here that the institutions of intellectual property have received comparatively little attention from mainstream economics and that those economists who have looked at the operation of the patent system in particular have expressed reservations about its efficiency.⁵² From an economic perspective it is not clear that a treaty that propagates a new kind of monopoly in knowledge is desirable from an efficiency point of view. This

⁵⁰ See the submission by the EC in the context of the review of Article 27.3(b) of TRIPS – IP/C/W/254.

⁵¹ Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO, Geneva, 2001.

⁵² For an excellent analysis of the literature see O. Granstrand, *The Economics and Management of Intellectual Property*, Edward Elgar, Cheltenham, UK and Northampton, MA, USA, 1999, chaps. 2 and 3.

is especially true where the effect of a treaty would be to protect knowledge assets that had already been created in the absence of property rights protection. Moreover, as Paul Heald has recently observed, there is an emerging consensus amongst scholars around the world that there is too much intellectual property protection.⁵³ There is not a particularly strong analytical or empirical base from which to argue the case for yet more intellectual property rights in traditional knowledge or any other area for that matter. The explosion in intellectual property standard-setting that has occurred can be best explained in terms of rent-seeking behaviour.

There is also potentially a much deeper problem with a treaty on TGKP, one that cuts across the desire of developing countries to capture economic benefits from the use of genetic resources and TK. One of the important observations that came out of WIPO's fact finding missions was that there was a great deal of uncertainty about how to value TK.⁵⁴ This uncertainty is especially salient in the case of TK, because TK, if it is used by a company, will most likely be used as a further input into research by that company. At the time the knowledge is disclosed or the genetic resource handed over the value of that information cannot be fully known by either party. As Kenneth Arrow in his seminal discussion of market failure in innovation markets noted "the value of information for use in developing further information is *much more conjectural* than the value of its use in production and therefore *much more likely to be underestimated*" (emphasis added).⁵⁵ Arrow went on to observe that charging a price for that information was likely to result in suboptimal demand.

The possible implications of uncertainty over the economic value of TGKP are considerable. If developing countries commit themselves to a treaty that significantly raises the costs of TGKP to companies, the value of which is already uncertain, then the effect will most likely be to dampen demand.⁵⁶ This is particularly so if there are less costly substitutes available (for example combinatorial chemistry, searching in non-member countries, exploring microbiological diversity in unregulated areas etc).⁵⁷ The effect of treaty, therefore, might be to discourage the commercialization of TGKP. WIPO's fact-finding mission suggests that at least some indigenous groups would be happy with this outcome, but clearly this would not meet the desires of the countries that

⁵³ Paul Heald, 'The Rhetoric of Biopiracy' 11 (2003) *Cardozo J. Int'l & Comp. L.* 519.

⁵⁴ *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*, WIPO, Geneva, 2001, 230.

⁵⁵ K. Arrow, 'Economic Welfare and the Allocation of Resources for Invention' reprinted in P. Drahos (ed.), *Intellectual Property*, Ashgate, Dartmouth, Aldershot, 1999, 14.

⁵⁶ In this context it is worth noting that the effect of the CBD may be to have dampened demand for access to genetic materials. Kerry ten Kate & Sarah Laird report that one change in business practice as a result of the CBD is "a decrease in corporate collecting". See Kerry ten Kate and Sarah Laird, *The Commercial Use of Biodiversity*, Earthscan, London, 1999, 323. Brazilian scientists have also called upon the Brazilian government to loosen its laws to make it easier for scientists to collect genetic materials. Brazil has recently reformed its laws to make it easier for scientists to collect for non-commercial purposes. See 'Brazil's biopiracy laws are stifling research' and 'Brazil eases restrictions on biodiversity researchers' available at <http://www.scidev.net>.

⁵⁷ On this point see J. Watal, *Intellectual Property Rights in the WTO and Developing Countries*, OUP, New Delhi, 2001, 171.

are members of the Megadiverse Group. These countries see important commercialization possibilities in the field of TGKP.⁵⁸

FEASIBILITY OF A TREATY

The issue of feasibility is bound up with the question of what kind of treaty should one aim for. Many treaties that have been signed over the decades end up being a dead letter. The issue of indigenous group knowledge is of enormous symbolic importance to some developing countries and indigenous groups and so a treaty in this field that suffered this fate would be a setback at many different levels. Given that there is a diversity of views over the details of what should and should not be protected, how it should be done and by whom, the prospects of successfully negotiating a detailed rule-intensive treaty with a raft of enforceable obligations appear slim. From the point of view of feasibility, the most obvious option is to consider a framework treaty that contains some general principles and which can evolve over time into something more concrete.

There are many examples of treaties that begin as ‘vague and platitudinous’ and end up as highly specific and with an enforcement regime.⁵⁹ The Paris and Berne conventions each represent a 100 or so years of intensive state negotiations and in essence started life as little more than framework agreements. Many treaties in fact disappoint the aspirations of their original architects, but then over time as opportunities and state groupings change such treaties may evolve into something of genuine significance.⁶⁰ Obviously, a framework treaty is the first critical step in this process because it creates the “contracting space” for the evolution of more specific and enforceable obligations.

Even a framework treaty, however, faces feasibility constraints. Whether or not a treaty in this field can deliver practicable results will profoundly depend on nature of the relationship between the states involved in its negotiation and the many indigenous people that could be potentially affected by the treaty.⁶¹ The foundation to any successful negotiation on a treaty lies in harmonious and cooperative relationships between indigenous groups and national governments. Yet as a recent Composite Report in the CBD points out in very many areas of the world indigenous groups are the victims of national governments rather than their partners:

⁵⁸ See para 1 of the Cancun Declaration of Like-Minded Megadiverse Countries.

⁵⁹ J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge University Press, Cambridge, 2000, 620.

⁶⁰ J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge University Press, Cambridge, 2000, 619-20.

⁶¹ The Crucible Group, noting the complexities of relations between indigenous groups and governments, recommended that governments adopt Article 29 of the Draft Declaration on the Rights of Indigenous Peoples. See The Crucible II Group, *Seeding Solutions*, Vol. 1, IPGRI, DHF, IDRC, Canada, 2000, 78.

The report on Australia, Asia and the Middle East draws attention to the problem of persecution and lack of recognition of indigenous peoples, and other traditional knowledge holders, as one of the main causes of traditional knowledge loss.

There are similar kinds of observations about other regions of the world. The composite report then goes on to make a fundamental observation about traditional knowledge:

[A]ccess to the land upon which traditional knowledge is based, together with the opportunity to practice it, is paramount for retention of traditional biodiversity-related knowledge.⁶²

The composite report points out that despite the land claims that have been pressed by indigenous activists around the world many governments have made inadequate progress.⁶³ This does set a real problem for any proposed treaty on TGKP. The claim that this kind of knowledge is holistic has many dimensions, but one dimension is that such knowledge is territorial. It is knowledge that people have of a place or that relates to a place. The elements of place and knowledge become intertwined with the life of a people to a degree of intimacy such that the loss of place or knowledge becomes experienced as a tangible harm.

TREATY' S OPERATING PRINCIPLES

National Treatment, MFN and Mutual Recognition

One important issue that parties to a treaty in this field will have to decide is how the treaty will regulate the relationship between a given party's domestic standards and that of another's standards. In particular, the parties will have to decide to what extent they will want to use the treaty as a means to converge on a given set of standards. Related to this is the question of whether the treaty will itself set positive minimum standards that each party must have or for that matter maximum standards beyond which the parties cannot go. The issue of the convergence effects of a treaty on TGKP is a very sensitive one. States such as Peru and the Philippines, which have invested time and resources into developing national models and protection for traditional knowledge, may take the view that they have little incentive to participate in a treaty that could undermine national models that have been costly to obtain.

The core principles that regulate the interaction of national standards amongst members of a treaty are the principles of reciprocity, national treatment, most-favoured-nation

⁶² See Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biodiversity, UNEP/CBD/WG8J/3/4, p.6.

⁶³ See Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biodiversity, UNEP/CBD/WG8J/3/4, 7.

(MFN) and mutual recognition. These principles can operate together in various ways in a treaty and they can be the subject of qualifications, exceptions and conditions. States may start with a robust statement of MFN or national treatment, for example, but then allow for certain exceptions based on subject matter or membership.⁶⁴ National treatment may be the subject of a ‘list’ approach in which certain matters are listed for national treatment or certain matters are excluded from national treatment. Reciprocity can be thought of as a foundational principle. States agree to be bound by principles such as MFN and national treatment because other states do.

Clearly states can use these principles to shape their rights and liabilities on any given subject matter in a wide variety of ways, including in the field of TGKP. The national treatment and MFN principle are essentially principles that commit states to an equality of treatment. National treatment whether it is applied to goods or individuals, aims to place those goods or individuals in the same position. In investment treaties, for example, a host state under national treatment is required to treat foreign investors in the same way as it treats its nationals. In intellectual property treaties national treatment requires a state to grant the same rights to foreign intellectual property holders that it grants to national intellectual property holders. The equalizing effect of MFN and national treatment does not necessarily produce a harmonizing effect. MFN and national treatment only require a state to extend its standards to goods or citizens from another state, but not to match the standards of that other state. Within intellectual property the principle of national treatment has been linked to the principle of common minimum standards. As the scope of those minimum standards has increased, the principle of national treatment acts, in effect, as a harmonizing device ie it spreads the same standards.

National Treatment

National treatment would appear to have less weight in the field of TGKP because ultimately the purpose of enacting standards in this field is to recognize a vast array of different customs and practices that exist amongst the indigenous peoples of the world. The value of respect for difference, which is central to this whole area, is not strongly served by a principle that would require a state to treat an outside indigenous group or the use of indigenous knowledge in the same way that it treated its own indigenous groups. National treatment of itself does not oblige a state to recognize another state’s standards. It follows that national treatment is not an especially suitable principle where states wish their own domestic standards to be recognized in a foreign state. Strong states such as the US have been able to take advantage of the principle of national treatment, but this is principally because the US has been able in bilateral and regional treaty negotiations to secure standards that match its domestic standards. Once states such as Jordan, Chile and Singapore agree to enact domestic intellectual property standards that are, in effect, US

⁶⁴ For example both the national treatment obligation and MFN obligation in TRIPS preserve or create new exceptions. For a discussion of the various ways in which these basic principles can be qualified see Most-Favoured-Nation Treatment, UNCTAD Series on issues in international investment agreements, United Nations, New York and Geneva, 1999; National Treatment, UNCTAD Series on issues in international investment agreements, United Nations, New York and Geneva, 1999.

domestic standards, the principle of national treatment operates to give US intellectual property holders or goods of US origin the benefits of those standards. If the purpose of states in the field of TGKP is to allow for the recognition of diversity then national treatment may not be the right choice of principle.

National treatment could be used to ground a minimalist approach to the protection of TGKP. Such an approach would be based on states simply agreeing to provide adequate and effective protection for TGKP.⁶⁵ The treaty could remain vague about what constituted adequate and effective protection. A far more radical approach would be to combine the principle of national treatment with a general norm on the prohibition of use of TGKP without permission. Such a norm could be derived from doctrines of misappropriation and unfair competition to be found in various jurisdictions. Sam Ricketson, a leading intellectual property scholar, has pointed out that such a general norm could, as a logical possibility, replace all existing categories of intellectual property.⁶⁶ But as Ricketson himself notes there are many practical difficulties with such an approach at the national level. A small group of developing countries, which were prepared to experiment with such an approach, could attempt to entrench in a treaty a general norm of misappropriation.⁶⁷ Once such a norm was in place, the critical issue would be the manner of its reception and interpretation in the domestic commercial law of member states of the treaty. Courts would become the primary architects of the law on TGKP. Such an international norm of misappropriation would be likely to produce a variety of results in similar situations at the domestic level because, amongst other things, it would be shaped by very different traditions of civil and common law.

Mutual Recognition

On the face of it the principle of mutual recognition would appear to have the greatest relevance, because it allows for the recognition of another party's standards. Mutual recognition is a principle that is important in cross-border provision of services such as banking and insurance. It can also be applied to the sale of goods that come from one jurisdiction to another (as it is for example under the Mutual Recognition Agreement and the Trans-Tasman Mutual Recognition Arrangement between Australia and New Zealand). Typically, the parties to a mutual recognition agreement will have agreed to at least some common standards that applicants for a licence to operate will have to have met.⁶⁸ It is also important to note that in this kind of situation the principle of mutual recognition will not have conferred extra rights on a commercial actor. The foreign beneficiary gains the benefit of entry, but not extra rights.

⁶⁵ Article 1 of the Universal Copyright Convention provides an example of this kind of approach.

⁶⁶ See Sam Ricketson, 'New Wine into Old Bottles: Technological Change and Intellectual Property Rights' 10 (1992), *Prometheus*, 53, 75.

⁶⁷ The idea of a general international norm prohibiting the unfair exploitation of TK has been advanced within the context of the work of Intergovernmental Committee at WIPO. See Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, WIPO/GRTKF/IC/5/3, 2003, 58.

⁶⁸ See Most-Favoured-Nation Treatment, UNCTAD Series on issues in international investment agreements, United Nations, New York and Geneva, 1999, 23.

The effect of mutual recognition is different, however, if the principle is applied to the holders of rights. In its simplest form, the principle would require a state to recognize the standards of rights protection of other states. However, states may be reluctant to commit themselves to such a principle because of potentially non-reciprocal effects. For example, State A may declare some aspects of folklore to be in the public domain while State B may subject all elements of folklore to property rights protection. An agreement between them based on mutual recognition would mean that the citizens of State B could draw on those elements of State A's folklore that were in the public domain while the citizens of State A would have to respect the property rights protection that State B had granted its citizens.⁶⁹ Mutual recognition essentially presupposes some mutually held standards. Yet in a survey carried out by WIPO in 2002, 9 out of 21 states reported that their current standards of intellectual property did not afford protection for TK.⁷⁰ It would be surprising if states were prepared to recognize property rights for foreigners that they did not recognize for nationals. Generally, the basic norm of reciprocity is never too far way in any international agreement or process. States that enacted weaker property rights regimes for TGKP might take the view that they were disadvantaged by mutual recognition because it required them to recognize the strong domestic standards of foreign states. Generally speaking, mutual recognition works well where trade in goods or services is already occurring and there is already some degree of convergence between the standards that are to be the subject of mutual recognition. The mutual recognition between Australia and New Zealand, for example, seems to have been successful in part because the "close commonality of history, culture and objectives across Australia and New Zealand reduces significantly the risk that mutual recognition would compromise any jurisdiction's basic interests".⁷¹

The principle of reciprocity

The principle of reciprocity is a fundamental norm of international relations. In the case of intellectual property most copyright treaties in the 19th century between European states operated on the basis of reciprocity ie State A would agree to protect the works of authors of State B, if State B agreed to protect the works of authors of State A.⁷² The Paris and Berne conventions made the principle of national treatment a key principle in international intellectual property protection. The principle of reciprocity has, however, continued to remain important. The US, for example, used the principle in its Semiconductor Chip Protection Act of 1984. Essentially, it offered protection to chip manufacturers from other countries only if they offered protection to US manufacturers

⁶⁹ A real historical example is reported in 'Introductory Observations' in the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions', UNESCO/WIPO 1985, para. 7. The Law of Morocco restricted folklore to unpublished works, while the Laws of Algeria and Tunisia did not.

⁷⁰ See Report on the Review of Existing Intellectual Property Protection of Traditional Knowledge, WIPO/GRTKF/IC/4/7, November 5, 2002.

⁷¹ Productivity Commission, Evaluation of the Mutual Recognition Schemes, Commonwealth of Australia, Canberra, 2003, 2.

⁷² J. Braithwaite and P. Drahos, Global Business Regulation, Cambridge University Press, Cambridge, 2000, 58-59.

based on US standards.⁷³ Under the US law, foreign states could petition for protection and that protection would be granted by the US if the relevant state had satisfactory law itself or was progressing towards it. Japan and Europe moved quickly down the path of providing sui generis protection.

The case of semiconductor chip protection is instructive in thinking about a treaty on TGKP. Once semiconductor chip technology became established it began to prove difficult for manufacturers to gain patent protection because of problems related to obviousness (the new year's lay-out design was much the same as the one in the previous year). Semiconductor chip technology was depicted as being in a special category and therefore said to need a sui generis approach. This sui generis protection was proposed as an additional form of protection, not as a replacement for existing forms.

The US was successful with its strategy of globalizing semiconductor chip protection using the principle of reciprocity because foreign manufacturers in Japan and Europe wanted access to the lucrative US market, industry interests were concentrated and there were only a small number of countries with which it was important for the US to come to a reciprocal arrangement (Japan was the other main producer in the 1980s). In the case of a treaty on TGKP there are a large range of state and non-state actors that have interests. These interests are a complex mix of economic and non-economic and the perception of these interests is in many cases affected by the nature of the domestic relationship between individual governments and indigenous groups. This complex mix of actors and interests means that the principle of reciprocity is unlikely to work in the same way that it did in the context of semiconductor chip protection. Finally, there is no hegemonic actor in favour of globalizing standards of protection for TGKP in the way that there was in case of semiconductor chips.

WHICH OPERATING PRINCIPLE?

National treatment and mutual recognition will become more relevant to a treaty on TGKP as states are able to agree on a set of core common standards for TGKP. The diversity of approaches that has been documented by WIPO suggests that perhaps it is premature to apply these principles in a treaty at this time. Another possibility is to concentrate on the use of memoranda of understanding amongst states (MOU). MOU are in widespread use in many areas of international regulation such as drugs, food and competition law.⁷⁴ There may also be scope for their application in the field of TGKP. For example, states could agree to facilitate the recognition and enforcement of customary use protocols (discussed in the next section) in their respective jurisdictions.

⁷³ J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge University Press, Cambridge, 2000, 76.

⁷⁴ See J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge University Press, Cambridge, 2000, chaps. 10, 15 and 16. Drake points out that MOU occupy something of a "middle ground" in terms of their bindingness. He places them between legal agreements and declarations. See William J Drake, *Communications in P.J. Simmons and Chantal de Jonge Oudraat (eds.) Managing Global Issues: Lessons Learned*, Carnegie Endowment for International Peace, Washington DC, 2001, 25, 61.

A treaty could commit states to facilitating the protection of TGKP through the use of MOU. The treaty would, in effect, declare TGKP to be a matter of positive comity amongst its members. States would be obliged to explore what they could do to assist other states in the enforcement of TGKP using a specific and well-understood form of instrument. The flexibilities of MOU would be an advantage in an area where states would have to find ways of agreeing to the enforcement of different standards of protection. Another important advantage of this kind of incremental approach is that it would help to build normative consensus amongst states. Just as importantly, it would also help to foster a community of officials concerned with the development and enforcement of TGKP. In the long run the effective international regulation of TGKP depends on the creation of just such a technical community.⁷⁵

ELEMENTS OF A TREATY

Lessons from TRIPS

One of the reasons that an ambitious agreement such as TRIPS succeeded is that the corporate beneficiaries of that agreement were able to agree on a basic framework for a treaty. The level of agreement was such that they were able to suggest draft provisions in the form of fundamental principles and present them to GATT members in the name of the 'international business community'.⁷⁶

It is difficult to judge what the actual level of agreement is in the field of TGKP. The lack of agreement on basic definitions referred to at the beginning of this paper is one indicator that there is some way to go before one can speak of strong consensus. An agreement on TGKP that has the kind of comprehensiveness to be found in TRIPS is probably not a realistic option. Instead, states should perhaps be aiming at a treaty that guides their national standard-setting process and that lays the foundation for subsequent revision conferences and protocols. The fact that the treaty served this function of guidance would not preclude it from being detailed. It would be important for the treaty to specify detail on key elements rather than offering yet more framework principles. Arguably, both the CBD and the ITPGRFA have provided states with enough framework principles in this area.

TRIPS contains another lesson for the design of a treaty on TGKP. TRIPS was a radical innovation in that it linked intellectual property to the trade regime, but conservative in that the standards contained in TRIPS were ones that were already established in existing intellectual property conventions. To a large extent TRIPS was an updating exercise.

⁷⁵ On the critical role of epistemic communities in international regulation see J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge University Press, Cambridge, 2000, 501-504.

⁷⁶ The framework is contained in *Basic Framework Of GATT Provisions On Intellectual Property: Statement of Views of the European, Japanese and United States Business Communities*, The Intellectual Property Committee (USA), Keidanren (Japan), UNICE (Europe), 1988. For a discussion of how key corporate players came to such an agreement see P. Drahos with J. Braithwaite, *Information Feudalism*, Earthscan, London, 2002, ch. 8.

The advantage of this design philosophy, as Gervais points out, was that the costs of confusion and uncertainty amongst the users of national intellectual property systems (industries, courts, administrators) were kept lower than if a philosophy of radical redesign had been adopted.⁷⁷ One advantage of adopting a conservative design philosophy for a treaty on TGKP is that it would have fewer destabilizing effects on existing intellectual property rules and arrangements. From the point of view of facilitating the commercialization of TGKP, this would be an advantage.

Definitional issues

A lot has been written about the appropriate terms that should be used legally to capture the knowledge assets of indigenous groups, local people or traditional groups.⁷⁸ It is fairly clear that no one definition commands universal support. The best that can be hoped for is some sort of inclusive cluster approach comprised of a general phrase like ‘traditional and group knowledge and practice’ that is then followed by a list of examples or sub-classes. The list would be a non-exclusive list and would, where possible, draw on definitions that had gained wide international acceptance. Much energy and literature has been devoted to discussing definitional issues. The time is probably right for a simple, open-ended and pragmatic approach to be taken.

The Land Issue – A Treaty Review Mechanism

A treaty that did not in some way recognize the territorial issues that are bound up in TGKP would ultimately undermine its credibility and effectiveness. Yet at the same time a treaty on TGKP could not deal with issues of indigenous land claims because they are matters for national governments and indigenous groups to resolve. One way forward here might be to ask how a treaty, which in its preamble recognized that TGKP was inseparable from its territorial context, might assist indigenous groups at the national level. One modest aspiration might be to use such a treaty to create a further window of transparency on the progress on land issues as they relate to TGKP. It is of crucial importance that the treaty contains a robust mechanism for tracking the link between TGKP and territory. The Composite Report pointed out that there were few initiatives in the world that were directed towards both the protection of TK and the conservation and sustainable use of biodiversity.⁷⁹ Currently the reporting mechanism in the CBD, where states submit national reports, is not working well on the issue of indigenous knowledge. The Composite Report itself recommends that thematic reports on Article 8(j) should be compiled.⁸⁰

⁷⁷ Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (2nd edn.) Sweet and Maxwell, London, 2003, 68.

⁷⁸ For a survey see *Traditional Knowledge – Operational Terms and Definitions*, WIPO/GRTKF/IC/3/9.

⁷⁹ See *Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biodiversity*, UNEP/CBD/WG8J/3/4, p.4.

⁸⁰ See *Recommendation 1 in Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biodiversity*, UNEP/CBD/WG8J/3/4, p.10.

One of the problems with any reporting mechanism in the context of the CBD is that its efficacy might be diluted by the volume and complexity of the COP agenda under the CBD. A treaty on TGKP offers the opportunity to construct a specialist reporting mechanism that could raise the profile of indigenous land claims. In fact, it might be possible to go even further and construct some sort of review mechanism in which selected states would be annually reviewed on their progress in preserving TGKP, a review that would include some sort of assessment of the progress that the relevant state had made in addressing the land claims of indigenous groups. The exact model for a reporting and/or review mechanism is a matter for negotiation, but international organizations offer many examples of such a mechanism, including the WTO's Trade Policy Review Mechanism and the International Labour Organization's sophisticated dialogic machinery for securing compliance with its standards.⁸¹

It might be said that such a review mechanism might act as a deterrent to states participating in a treaty on TGKP. The reply to this line of argument is to say that the inclusion of such a review mechanism in a treaty would, in the light of the observations of the COP's composite report on the foundational nature of the land issues, form an excellent test of the sincerity of states that are pushing for a treaty on TGKP.

Labelling

One of the significant contributions that a treaty might make is to help develop an approach to a system of certification that could be used by indigenous groups around the world for the marketing of their products. One of the recommendations of the Second Session of the Permanent Forum was that states should promote "the knowledge, application and dissemination of appropriate technologies and indigenous peoples' local products with certificates of origin to activate product activities, as well as the use, management and conservation of natural resources".⁸²

WIPO, in its report of its fact finding missions, made reference to the Indigenous Label of Authenticity that was developed by the National Indigenous Arts Advocacy Association in Australia in 1999.⁸³ It was thought that the mark would help to ensure a fair and equitable return to Aboriginal and Torres Strait Islander communities and that it would maximize consumer's certainty that they were getting the genuine product.

The results of the authentication mark have, however, been disappointing and the mark has been abandoned. The reasons have to do with debates about what constituted authenticity, the fact that one mark was not seen as being able to accommodate the needs of all indigenous groups and the lack of proper funding for the administration of the mark.⁸⁴ This failure can be compared to a success story, namely the fairtrade label. The

⁸¹ For a discussion of the ILO's work see J. Braithwaite and P. Drahos, *Global Business Regulation*, Cambridge University Press, Cambridge, 2000, 238-239.

⁸² See Report of the Second Session (12-23 May 2003, E/c.19/2003/22, p.9.

⁸³ Two labels were developed and registered – the Label of Authenticity and the Collaboration Mark.

⁸⁴ See Jane Anderson, *The Production of Indigenous Knowledge in Intellectual Property Law*, unpublished PhD thesis, University of New South Wales, September 2003, 240-241. See also L. Wiseman, 'The

contrast between this and the authenticity label could not be greater. Products selling under the fairtrade label can be found in European, US, Canadian and Japanese markets. The Fairtrade Labelling Organizations International (FLO) represents some 352 certified producers and 449 licensees that are authorized to use the label in 17 consumer countries. Some 800,000 farmer and workers benefit as producers from the FLO systems of certification. Significantly, according to its website, FLO is moving down the path of a single International Fairtrade Certification Mark because it helps consumer recognition and aids producers in international trade.

It would be wise to study in detail the reasons for the failure of the authenticity label in Australia and compare this with the success of the fair-trade label. One preliminary conclusion that could be drawn is that it pays to think big. In a world of increasing trade, trademarks can work large-scale effects in wealthy consumer markets. In the case of FLO, these large-scale effects have been won through an extended period of co-ordination amongst the National Initiatives, the individual country organizations that make up FLO. Labelling initiatives that are poorly financed, that do not look to global markets and are isolated are likely, as in the case of the authenticity mark in Australia, to fail. Crucial also is the idea that producers should unite around a few or, as FLO plans, one highly visible certification mark.

There is little doubt that in the self-indulgent and narcissistic consumer markets of developed countries the demand for TK products is likely to be great. Labelling will be fundamental to the success of any such products. The potential members of a treaty on TGKP should, drawing on the experience of the fairtrade label, use the treaty as a means of developing a co-ordinated approach amongst themselves to labelling and certification. WIPO's fact-finding missions revealed a clear demand by indigenous groups for the improved use of certification systems.⁸⁵ Indigenous groups need more than just assistance with matters relating to the registration of marks. The fairtrade label example shows that labels linked to trade and development issues can become global brands if they are part of an overall commercial strategy in international markets. Simply offering indigenous groups some assistance with registration and the payment of trade mark fees is more likely to produce failures along the lines of the Australian authenticity label than success stories like the fairtrade label. Governments should explore the role that they can play in creating an infrastructure that allows for the creation of some small group of highly visible certification marks for the benefit of indigenous groups.⁸⁶

Protection of Indigenous Art and Culture in Australia: The Labels of Authenticity' 23 (2001), European Intellectual Property Review, 14.

⁸⁵ Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO, Geneva, 2001, 123. See also Consolidated analysis of the legal protection of traditional cultural expressions, WIPO/GRTKF/IC/5/3, May 2, 2003, p.51.

⁸⁶ An example of the way in which the certification movement might be used to assist indigenous groups is to be found in the forest certification scheme of the Forest Stewardship Council. This certification scheme recognizes the right of indigenous peoples to be compensated for the use of their traditional knowledge. See UNCTAD, Background note by the UNCTAD Secretariat, TD/B/COM.1/EM.13/2, 22 August 2000, 23, fn.10.

States should, however, ensure that the labelling issue is not confused with the issue of geographical indications. Geographical indications are one highly specialized form of intellectual property that can potentially divide developing countries in terms of trade gains and losses. Protection for geographical indications has advanced slowly and the economic case for developing countries embracing this kind of protection is far from clear.⁸⁷ The connections between TGKP and labelling should be looked at in the context of certification more broadly rather than in the context of this narrow and potentially highly divisive form of intellectual property.

Customary Law versus Protocols on Customary Use

One conclusion of the WIPO fact-finding mission was that “traditional societies often have highly-developed, complex and effective customary systems for TK protection”.⁸⁸ The extent to which such customary systems are recognized within any given state is a matter of legal analysis. States have generally proceeded carefully in such matters. There are only a few international agreements that call for the recognition of customary law systems. The WIPO fact-finding mission also reported a view that customary law and practice “should be explored as a possible basis for the international protection of TK”.⁸⁹ It is probably safe to say that exploring the possibility of customary laws operating as laws across states would take a long time. This is not to say that it should not be done, but rather that the results will be some time in coming.

Another approach that might produce some practical results in the medium term is one that utilizes protocols setting out the uses to which third parties, wherever located, may put the relevant materials, knowledge, artifacts or symbols.⁹⁰ The usual objection to the use of protocols is based on enforceability. Protocols are not laws and therefore adherence to them is a voluntary matter.⁹¹ There are a number of replies that one can make to this objection. For much the same reason that it is a mistake to assume that all actors are virtuous, it is a mistake to assume that none are so. There are at least some actors who would welcome the guidance that a protocol can provide since they wish to do the right thing. This is especially true of reputation-sensitive actors such as large museums, scientific organizations and large corporations that do not want damaging publicity. More importantly, compliance with protocols can be enhanced if the protocols are themselves part of a regulatory enforcement pyramid. A considerable body of scholarship has shown both theoretically and empirically how enforcement pyramids can

⁸⁷ On this point see the Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy, London, 2002, 90.

⁸⁸ Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO, Geneva, 2001, 221.

⁸⁹ Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO, Geneva, 2001, 155.

⁹⁰ For an example of this approach in Australia see D. Mellor with T. Janke, Valuing Art, Respecting Culture: Protocols for Working with Australian Indigenous Visual Arts and Crafts Sector, National Association for the Visual Arts, Sydney, 2001.

⁹¹ But as has been pointed out protocols do establish industry standards that may eventually chart the way for legal rights. See Consolidated analysis of the legal protection of traditional cultural expressions, WIPO/GRTKF/IC/5/3, May 2, 2003, 75.

increase compliance.⁹² At the base of the pyramid are the ‘soft’ tools of regulation such as guidelines, protocols and educational strategies. These soft tools assume that actors are disposed to do the “right thing” and are willing to co-operate. As one moves up the pyramid, the tools of regulation begin to assume a more coercive character until, at the top of the pyramid, there is some form of incapacitation (this depends on the area of regulation but may involve imprisonment, suspension of trade, loss of licence and so on). Where the regulator is unsuccessful at the bottom of the pyramid he or she can move up the pyramid to deploy the more coercive tools of regulation. An enforcement pyramid gives a regulator a unified set of regulatory strategies that can be deployed against all types of actors (virtuous, rationally calculating, resistant, incompetent). As one type of strategy fails because of the type of actor involved, another is wheeled into place. Advocates of the enforcement pyramid argue that there should be a presumption in favour of starting at the base of the pyramid with dialogic and information-based strategies.⁹³ This is less costly, more respectful and ultimately makes the use of coercion more legitimate, because non-coercive strategies have been given a chance to work. Regulating the use of TGKP by means of an enforcement pyramid is especially appropriate because, for indigenous groups, respectful engagement with others over the use of their knowledge and resources is the fundamental starting point of any process of regulation.

The basic challenge for a treaty on TGKP is how to coordinate the creation of an international enforcement pyramid. The details of this pyramid are discussed in the next section, but it is worth observing that the numerous technical studies undertaken by WIPO show that many of the regulatory elements of this pyramid are already in place. Protocols are one important tool that have a place at the base of the pyramid. Importantly the regulatory efficacy of guidelines, codes of conduct and protocols depends on them being integrated into an enforcement pyramid. One of the problems in the fields of TK and access and benefit sharing has been that there has been a proliferation of such guidelines and codes of conduct and a failure to integrate these into an overall enforcement strategy. The calls for yet more guidelines and codes continue.⁹⁴ This overproduction problem softens even further the value of guidelines and codes of conduct. It also creates uncertainty for potential users.

Capacity issues

The need for capacity building is routinely stated in this field. What is not stated is just how massive are the capacity problems in all the fields that a treaty on TGKP will touch. Consider just the following examples drawn from the field of patents:

⁹² I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, OUP, New York, 1992; J. Braithwaite, *Restorative Justice and Responsive Regulation*, OUP, NY, 2002.

⁹³ See J. Braithwaite, *Restorative Justice and Responsive Regulation*, OUP, NY, 2002, 30.

⁹⁴ For example, the Permanent Forum on Indigenous Issues recommended the establishment of an international ethical code on bio-prospecting in order to avoid bio-piracy. See Recommendation 9, Report of the Second Session of the Permanent Forum on Indigenous Issues, E/2003/43-E/C.19/2003/22.

In 1999 the Swedish Patent and Registration Office in commenting on the reform of the International Patent Classification observed that “[i]t is too complicated and detailed for the general public or for small offices that only need to search small bodies of patent literature (or do not search at all)” and that the problems with the IPC had grown to a point “where even experts have trouble making accurate searches”.⁹⁵ Even allowing for progress made since 1999, these remarks have some salience for those who would have indigenous groups tracking the use of TK through the patent system using the IPC.⁹⁶

The medical humanitarian organization Médecins Sans Frontières (MSF) in a report on pharmaceutical patents observed that patent searches “on medicines ... require technical skills in chemistry to ensure you find out exactly which patents protect which medicines”.⁹⁷ The same report went on to note that information from various patent offices was sometimes not consistent.

Aside from technical capacity problems there are problems at the level of awareness. Ekepere, for example, in commenting on the success of the OAU Model Law, observes that it is an “understatement that most Africans are not aware” of the model law or the reasons for its development.⁹⁸ What appears to be true of a regional model law may also turn out to be true of an international treaty.

Indigenous groups will be in a much worse position than national patent offices or a well-resourced NGO like MSF to use the patent system. Unless some way is found to allow indigenous groups to track and monitor the status of patent applications and patents a treaty standard that encouraged the release of more information about a patent application will be of little practical value to indigenous people or for that matter the understaffed and under-resourced patent offices of many developing countries.⁹⁹

Rather than individual countries trying to solve this problem at a national level there is a strong case for a treaty in this field to address this problem through the creation of a transparent, high profile, multilateral agency that could take on the numerous technical tasks that arise out of the exploitation of genetic resources and TGKP that belong to

⁹⁵ See IPC/R 1/99 Rev. 1 Annex 10, 1-2.

⁹⁶ A proposal to revise the IPC to accommodate the classification of TK is being worked on by a WIPO Taskforce on Classification of Traditional Knowledge. The Taskforce has prepared a revision proposal in the field of medicinal preparations containing plants. The next edition of the IPC will enter into force on January 1 2005. See Practical Mechanisms for the Defensive Protection of Traditional Knowledge and Genetic Resources within the Patent System, WIPO/GRTKF/IC/5/6, 19.

⁹⁷ Pascale Boulet, Christopher Garrison, Ellen ‘t Hoen, *Drug Patents Under the Spotlight*, Médecins Sans Frontières, Geneva, 2003, 22.

⁹⁸ See Johnson A Ekepere, ‘The African Union Model Law for the Protection of the Rights of Local Communities Farmers and Breeders and the Regulation of Access to Biological Resources’ in C Bellman, G. Dufield and Ricardo Meléndez-Ortiz (eds.) *Trading in Knowledge*, Earthscan, UK and USA, 2003, 232, 237.

⁹⁹ On the problem of under-resourced patent offices in developing countries see M. Leesti and T. Pengelly (2002), ‘Institutional Issues for Developing Countries in Intellectual Property Policymaking, Administration & Enforcement’, Commission on Intellectual Property Rights, Study Paper 9, available at <http://www.iprcommission.org>.

indigenous groups. The treaty could, for example, commit states to establishing an organization along the lines of a Global Bio-Collecting Society (GBS) model that has been proposed elsewhere and recommended for further exploration.¹⁰⁰

Declaration of origin issue

The CBD imposes a variety of obligations on the use of genetic resources, including the fundamental ones of benefit-sharing and prior informed consent. A key question that has arisen is how these obligations can be met when genetic resources and TK are utilized in the development of an invention and/or claimed in an invention. One solution suggested has been that the patent applicant bear an obligation of disclosure relating to the use of such resources and knowledge. But, as a recent 75 page WIPO study has shown, this seemingly simple requirement raises a considerable number of technical issues that relate to what must be disclosed in order for the patent applicant to meet his obligation, what triggers the obligation to disclose and what are the consequences of non-disclosure.¹⁰¹

Somewhat neglected in the discussions of the declaration issue is the capacity question. The patent system already, in one way or another, results in a considerable amount of information being generated about the origins of genetic resources. There may also be an emerging practice relating to disclosure of origin. The WIPO study, for instance, refers to a study of 500 patent applications related to biological materials in which the applications relating to plants almost always mentioned the country of origin.¹⁰² Given that in at least some patent applications there is already some information that is relevant to the issue of origin, a key question becomes who is to process and act upon such information?

It also has to be asked whether the real costs of pursuing a treaty-based declaration option have been properly considered. A declaration requirement that proved difficult to comply with and at the same time carried with it the penalty of invalidity for non-compliance could potentially create a lot of uncertainty in the biotech patenting field. This might lead to benefit-loss rather than benefit-sharing.

If a declaration requirement is to have a practical effect it must be matched by a capacity initiative along the lines of the GBS model. On the capacity front it is unlikely that much can be expected from patent offices. Examiners in the major patent offices are facing huge backlogs of patent applications. The USPTO's 21st Century Strategic Plan

¹⁰⁰ See P. Drahos, "Indigenous Knowledge, Intellectual Property and Biopiracy: Is a Global Bio-Collecting Society the Answer?", [2000] (22) European Intellectual Property Review, 245-250. The Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices observed that a "possible role for the Global Bio-Collecting Society in monitoring access to TK could be explored". See UNCTAD, 'Outcome of the Expert Meeting' TD/B/COM.1/EM.13/L.1, 9 November 2000, 5. Support for considering the idea was also expressed in Report of the International Seminar on Systems for the Protection and Commercialization of Traditional Knowledge, New Delhi, 3-5 April 2002, 13.

¹⁰¹ See Draft Technical Study on Disclosure Requirements Related to Genetic Resources and Traditional Knowledge, WIPO/GRTKF/IC/10.

¹⁰² Draft Technical Study on Disclosure Requirements Related to Genetic Resources and Traditional Knowledge, WIPO/GRTKF/IC/10, 42-43.

estimates that there are 7 million patent applications waiting to be examined.¹⁰³ Expecting examiners to investigate the information to be found in declarations of origin is probably unrealistic.

One strategy worth considering here is to try and spread a declaration requirement by means of best administrative patent practice. The basic idea would be that patent offices would, as a matter of practice, require patent applicants to disclose in writing the circumstances of acquisition of their genetic resources and the role, if any, that traditional knowledge played in their application. Guidelines on the extent of disclosure could be developed as part of a cooperative exercise initiated by the major patent offices of developed and developing countries (the Trilateral Offices along with say China, India and Brazil). The Trilateral Offices have a long record of cooperation and recently they have been furthering this cooperation in the biotech field.¹⁰⁴ Importantly, the consequences of a false, incomplete or misleading disclosure would be determined by national patent law. Each of the major patent jurisdictions have over the decades developed a refined body of law relating to who is an inventor, co-inventorship, fraud upon the patent office and so on. A declaration requirement should aim to harness this law rather than disturb it.

One important advantage of proceeding down this administrative route is its comparative ease of implementation. Even if the Trilateral Offices refused to participate in a process of developing best practice guidelines for a disclosure of origin, the major patent offices of developing countries (China, Brazil and India) could begin the process. These developing countries are important emerging markets and so will continue to attract a significant and growing number of biotechnology applications, especially through the PCT filing route. These offices could also request the patent applicant to provide information about related foreign applications (allowable under Article 29(2) of TRIPS). This would provide an entity like the Global Bio-Collecting Society with information about a group of patents that it should be tracking. Further, once information relating to origin and use of any genetic material and/or TGKP was available and published in some patent applications the information would be available for use in other jurisdictions. There are also reasons to believe that the Trilateral Offices would decide to participate in the process of globalizing best practice on this matter. These offices do not especially want to be involved in embarrassing bio-piracy episodes. Implementing an administrative practice would be easier than attempting to fit a declaration requirement into existing patent treaty law, especially if its purpose was to enable the existing web of controls in patent law to work more efficiently.

Although the process of developing best practice guidelines for use by patent offices could begin in the absence of a treaty, it might be useful to have a provision in the treaty that committed states to the process of developing such guidelines.

¹⁰³ USPTO (2003) 'The 21st Century Strategic Plan' available at <http://www.uspto.gov>.

¹⁰⁴ Examples of cooperation are to be found on Trilateral website.

AN INTERNATIONAL ENFORCEMENT PYRAMID ON TGKP

As was suggested earlier, the fundamental role of a treaty on TGKP should be to coordinate the creation of an international enforcement pyramid. The various technical discussion papers produced by WIPO suggest that many of the elements of this pyramid are already in place at the national level. The treaty could set out to achieve three broad goals with respect to the creation of the pyramid. The first would be to coordinate norm building at different levels of the pyramid. So, for example, this paper has suggested that protocols of customary use are important at the base of the pyramid as they create the opportunity for a process of respectful engagement between indigenous groups and those who would like to use TGKP. Helping indigenous groups to develop protocols that will carry information about their customary laws and practices across borders is one example of something that the treaty could prioritize. Similarly, states could commit themselves to the development of a best practice administrative procedure that required patent applicants to disclose the circumstances of acquisition of genetic materials or TGKP.

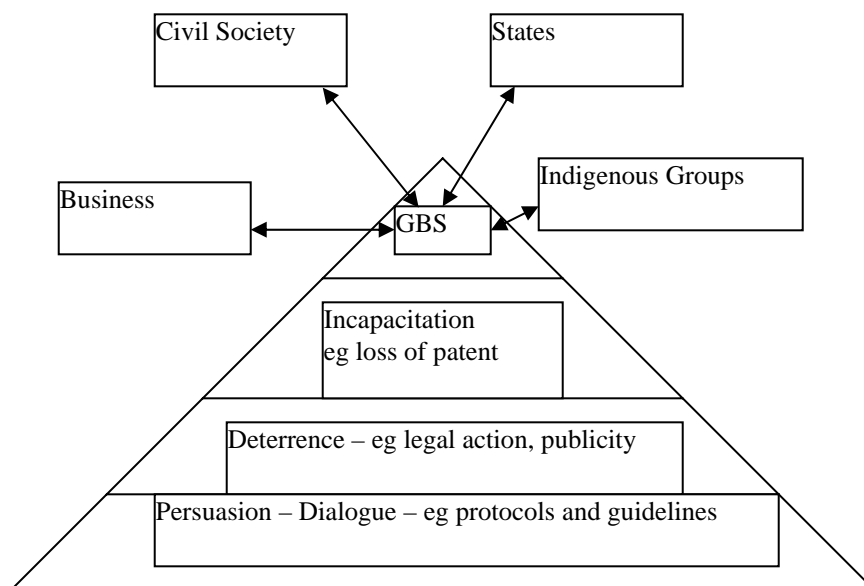
A second and vital goal of a treaty would be the creation of a single multilateral entity such the Global Bio-Collecting Society that could provide indigenous groups and states with the capacity to use the international enforcement pyramid. Without an entity that is capable of monitoring and assisting in the coordination of an enforcement action, which utilized the available national levers within a jurisdiction, a treaty on TGKP is likely to be a paper tiger.

A third fundamental goal of a treaty on TGKP would be the creation of a treaty review mechanism. The purpose of such a mechanism would be to commit states to a process of continuous improvement on the protection of TGKP. There are different approaches one might take to a treaty review mechanism, but one possibility is that states could agree on a set of performance indicators in this field. These could include reporting on the following:

- Progress on land rights issues related to TGKP;
- The implementation of a best practice declaration requirement for patents dealing with TGKP;
- Assistance rendered to other states on enforcement, including the number of MOU signed with other states;
- Assistance given to indigenous groups to develop representative commercial structures.

States could then agree, as is done in the WTO's Trade Policy Review Mechanism, that all Members would be subject to regular review. A review mechanism would magnify the transparency of domestic decision-making by states on TGKP. The performance indicators would help to evaluate progress and might also provide a way of coordinating technical assistance to states that reported difficulties in making progress.

International Enforcement Pyramid for TGKP¹⁰⁵



This international enforcement pyramid is different from the usual responsive regulatory pyramid in that such pyramids typically assume a single regulator. In this case, however, the Global Bio-Collecting Society is not a regulator in the classical sense, but rather a nodal co-ordinator of other actors. The GBS may undertake enforcement action itself in certain cases such as opposing a patent where an indigenous group is unable to do so and there is evidence of inappropriate conduct by the patent applicant. But on other occasions it may provide information to patent offices, indigenous groups or civil society actors that may then in turn take appropriate action. This pyramid, in keeping with the philosophy of responsive regulation, begins with the presumption that it is best to start at the base of the pyramid with dialogue and persuasion. Other actors will often be in a better position to begin that process of engagement than the GBS. If, for example, a museum breaches a protocol of customary use it may change its behaviour once the breach is pointed out to it. In some cases the GBS may cast its shadow over the process thereby alerting a potential offender to the possibility of an escalation up the pyramid if persuasion and dialogue do not work. The point is that, in a case where enforcement has to work across borders and accommodate a diversity of standards and values, there is no one actor that can manage all the tools of enforcement. But there does have to be an actor that can manage the many information problems that occur in this type of enforcement environment and that can co-ordinate a response amongst the actors best

¹⁰⁵ This pyramid draws upon John Braithwaite's pyramid for an integration of restorative, deterrent and incapacitative justice. see J. Braithwaite, *Restorative Justice and Responsive Regulation*, OUP, 2002, 32.

placed to utilize the next stage of the escalation in the enforcement response. In the international context in which TGKP is to be the subject of regulatory protection it will be this co-ordination that constitutes the enforcement pyramid and therefore its responsive effects. Without this kind of co-ordination, enforcement responses will fall to the ad hoc initiatives of different actors. The result will be that sometimes the punishment will be unnecessarily severe because an excessive level of response was the first response or there is a failure of punishment because the co-operation of those actors capable of implementing a response at the top of pyramid (for example, patent offices) has not been obtained. The effect will be to create uncertainty and resentment amongst some actors who believe that they have been unfairly targeted. In such a world trust decreases and defiance may well increase.¹⁰⁶

THE GBS AND EXISTING INTERNATIONAL EFFORTS

TGKP is an issue that cuts across work programmes within fora as well as the work programmes of different fora. A treaty on TGKP would also have to take account of the primacy of existing treaties on aspects of TGKP. As the COP pointed out in COP VI (Decision VI/10),

the Convention on Biological Diversity is the primary international instrument with the mandate to address issues regarding the respect, preservation and maintenance of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity.

Similarly the ITPGRFA can be said to be the primary international instrument for plant genetic resources in the context of agricultural biodiversity.

A treaty would also have to be careful not to undermine the work that indigenous groups and international organizations have done on broader indigenous issues. Within the UN system a 1982 decision of the United Nations Economic and Social Council led to the creation of the Working Group on Indigenous Populations (WGIP) of the Sub-Commission on the Promotion and Protection of Human Rights. In 1985 the WGIP began work on a declaration on the rights of indigenous peoples. The draft Declaration, which was completed in 1993, is currently the subject of discussion by a working group in the Commission on Human Rights, a working group in which many indigenous organizations participate. The draft *United Nations Declaration on the Rights of Indigenous Peoples* is to date the best draft declaration that exists on the rights of indigenous peoples. The Crucible Group reported that many viewed the adoption of the Declaration as a more important priority than increasing the participation of the indigenous groups in the CBD.¹⁰⁷

¹⁰⁶ For the reasons as to why defiance may increase see J. Braithwaite, *Restorative Justice and Responsive Regulation*, OUP, 2002, ch.4.

¹⁰⁷ The Crucible II Group, *Seeding Solutions*, Vol. 1, IPGRI, DHF, IDRC, Canada, 2000, 79.

The Commission on Intellectual Property Rights after noting the large number of international bodies that were working on aspects of TK observed that “[t]here is much to gain at this early stage by considering the issue in a number of fora”.¹⁰⁸ At some point, however, the question of which forum is appropriate for a treaty will have to be considered. A summary by the WTO Secretariat noted that there are essentially two views on the issue of the forum.¹⁰⁹ Some states (for example, the EC and US) take the view that WIPO’s work programme on the issue should be given priority. Other states (for example, Brazil and India) want an approach that is integrated across the relevant fora.

One possibility that should be explored is whether key organizations such as the WIPO, the FAO and the CBD might be able to establish a Global Bio-Collecting Society as a joint initiative. Each of these organizations has important specialist skills and knowledge that the GBS would need to draw on (WIPO, for instance, has matchless expertise in running registration systems). It would be worthwhile, therefore, to explore the role that these international organizations could play in the establishment and governance of the GBS. Involving these organizations in the GBS would also be a practical means of achieving greater coherence and coordination on the issue of TGKP more generally. A GBS could, for example, pull together the work of different international organizations on the development of protocols, guidelines and codes of conduct and issue them as an integrated set. Such a set would be likely to gain a greater de facto authority and following because they would be linked to an agent capable of carrying out or co-ordinating an enforcement response.

The areas of TGKP and biodiversity are rife with freerider and collective action problems. International co-ordination is, on any realistic assessment, going to be painfully slow. One advantage of basing an approach on the creation of a GBS is that it would give priority to the enforcement issue and it would encourage states to make more efficient use of existing norms rather than devoting resources to the creation of new norms that in any case would still have to be enforced.

FUNDING THE GBS

A question that follows on from an agreement to establish a Global Bio-Collecting Society is how such an organization might be funded. This is a question outside the scope of this paper to answer. However, it is worth noting that patent offices, copyright collecting societies and WIPO are able to earn incomes from the services that they provide to the private sector. Similarly, a GBS might fund the cost of its operation from some of the services that it would provide to the private sector or other organizations

¹⁰⁸ Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*, London, 2002, 79.

¹⁰⁹ *The Protection of Traditional Knowledge and Folklore: Summary of Issues Raised and Points Made IP/C/W/370*, 8 August 2002.

such as patent offices. Another approach, at least in the beginning, would be to examine the role that WIPO and the lead patent offices such as the European Patent Office, the Japanese Patent Office and the US Patent and Trademark Office could play as donor agencies in the establishment of a GBS. In a wide-ranging study of institutional issues related to intellectual property in developing countries, Mart Leesti and Tom Pengelly showed that organizations like WIPO, the EPO and the World Bank were providing some significant development assistance, but much could be done to improve donor co-ordination.¹¹⁰ Their specific recommendations on what could be done to improve donor co-ordination in intellectual property-related programmes could be used as springboard to target the creation of a GBS.

CONCLUSION

The central conclusion of this paper is that a treaty on TGKP should focus on the enforcement dimension of TGKP. Specifically this would involve members in the establishment of a Global Bio-Collecting Society that would coordinate enforcement work so as to constitute an international enforcement pyramid. The treaty should also establish a review mechanism and a set of indicators that could be used to evaluate the progress of states on the regulation of TGKP. At this stage of the evolution of protection for TGKP, a treaty should not attempt to set substantive international norms of protection (for example, by creating an international norm of misappropriation of TK). Instead, states should focus on creating a treaty that does not discourage the development of national approaches and norm-creation on TGKP, but does offer the members of such a treaty a means of cooperating and coordinating on the enforcement of TGKP. A treaty that is modest in setting substantive standards, but strong on coordinating national enforcement activities will be far more likely to avoid the fate, which befalls many treaties, of becoming a dead letter.

¹¹⁰ M. Leesti and T. Pengelly, *Institutional Issues for Developing Countries in Intellectual Property Policymaking, Administration & Enforcement*, Study Paper 9, Commission on Intellectual Property Rights, 49.