

TRIPS, DOHA AND TRADITIONAL KNOWLEDGE

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I. INTRODUCTION: THE IMPORTANCE OF TRADITIONAL KNOWLEDGE IN THE DOHA CONTEXT

The protection of traditional knowledge has progressively taken centre stage in global discussions concerning intellectual property and trade, especially since it is expressly mentioned in the Doha Ministerial Declaration.² There are several reasons for the issue's sudden move to the forefront. First, a large number of countries believe that up to now they have not derived great benefits from “traditional” forms of intellectual property, yet find themselves rich with traditional knowledge, especially genetic resources and folklore. They would like to exploit these resources, and several major companies share this interest. Another reason is the growing political importance of

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² Paragraph 19 reads in part as follows: “[Ministers] instruct the Council for TRIPS, in pursuing its work programme [...] to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1.”]. See also Chakravarthi Raghavan, “ASEAN For Protecting Indigenous/Traditional Knowledge”, *Third World Network* (May 5, 2000); John Mugabe, Intellectual Property Protection and Traditional Knowledge: An Exploration in International Policy Discourse, (Dec. 1998); Aaron Cosbey, “The Sustainable Development Effects of the WTO TRIPS Agreement: A Focus on Developing Countries” (March 1999).

aboriginal communities in several countries. The statement issued by the WIPO Inter-Regional Meeting on Intellectual Property and Traditional Knowledge organized in Chiangray, Thailand in November 2000, makes the point quite clearly:

“With the emergence of modern biotechnologies, genetic resources have assumed increasing economic, scientific and commercial value to a wide range of stakeholders; . . . traditional knowledge, whether or not associated with those resources, has also attracted widespread attention from an enlarged audience; . . . other tradition-based creations, such as expressions of folklore, have at the same time taken on new economic and cultural significance with a globalised information society.”³

While pharmaceutical and biotechnological companies are looking at ways to exploit indigenous medicinal knowledge, plants and other resources that are often found in developing countries, the Internet is progressively allowing creators of folklore or folklore-based copyrighted material to disseminate their material worldwide at very low cost.

II. DEFINING TRADITIONAL KNOWLEDGE

The expression “traditional knowledge” is used as a shorter form of “traditional knowledge, innovations and practices.”⁴ It includes a broad range of subject matters, for example traditional agricultural, biodiversity-related and medicinal knowledge and folklore. There have been a number of definitional efforts.

In the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, WIPO and UNESCO define folklore as "productions consisting of characteristic elements of the traditional

³ WIPO Inter-Regional Meeting on Intellectual Property and Traditional knowledge, Meeting Statement: A Policy and Action Agenda for the Future (Nov. 9-11, 2000).

⁴ See, e.g., the Convention on Biological Diversity, 5 June 1992, art. 8(j), 31 I.L.M. 818. The Draft U.N. Declaration, *supra* note 133, uses the expression “indigenous knowledge, cultures and traditional practices.” In its more recent documents, WIPO uses the expression “traditional knowledge, innovations and creativity.” See Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-finding Missions on Intellectual Property and Traditional knowledge 21-22 (1998-1999) [hereinafter “WIPO Report”] (April 2001).

artistic heritage developed and maintained by a community . . . or by individuals reflecting the traditional artistic expectations of such a community. . . ."

In a WIPO⁵ report,⁶ "traditional knowledge" is basically defined as a subset of the broader concept of "heritage." According to the Chairperson of the United Nations Working Group on Indigenous Populations, "heritage" itself may be defined as:

"[E]verything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all of those things which contemporary international law regards as the creative production of human thought and craftsmanship, such as songs, music, dances, literature, artworks, scientific research and knowledge. It also includes inheritance from the past and from nature, such as human remains, the natural features of the landscape, and naturally occurring species of plants and animals with which a people has long been connected."⁷

And according to WIPO, the subset of "heritage" referred to as traditional knowledge comprises:

"tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and, all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields."⁸

In the above definition, "tradition-based" "refers to knowledge systems, creations, innovations and cultural expressions that have generally been transmitted from generation to generation, are generally regarded as pertaining to a particular people or its territory have generally been developed in a non-systematic way, and are constantly evolving in response to a changing environment."

⁵ See World Intellectual Property Organization [Hereinafter WIPO] at www.wipo.int.

⁶ WIPO. INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS. REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE (1998-1999) (Geneva: WIPO, 2001), (need start pg), 25 [Hereinafter "WIPO Report"] available at <http://www.wipo.int/globalissues/tk/report/final/pdf/part1.pdf>.

⁷ See UNITED NATIONS, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, WORKING GROUP ON INDIGENOUS POPULATION, PROTECTION OF THE HERITAGE OF INDIGENOUS PEOPLE, UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (1997), (need start pg and rest of cite), iii.

⁸ WIPO Report, *supra* note 6, at 25.

Characteristically, traditional knowledge is thus knowledge that:

- is traditional only to the extent that its creation and use are part of the cultural traditions of a community--“traditional,” therefore, does not necessarily mean that the knowledge is ancient or static;
- is representative of the cultural values of a people and thus is generally held collectively;
- is not limited to any specific field of technology or the arts. .⁹

Because traditional knowledge encompasses several forms of cultural expressions, it also applies to religious and sacred arts, customs and other expressions of faith and ancient beliefs. To quote again from the WIPO report,

“Intertwined within practical solutions, traditional knowledge often transmits the history, beliefs, aesthetics, ethics, and traditions of a particular people. For example, plants used for medicinal purposes also often have symbolic value for the community. Many sculptures, paintings, and crafts

⁹ Some academics have proposed more complex definitions. Professor Graham Dutfield has suggested defining traditional knowledge by the way it is generated and held, and offers the following definitional characteristics of traditional knowledge:

It is recorded and transmitted through oral tradition; (the WIPO report uses the expression “originating, preserved and transmitted in a traditional context”. See WIPO document WIPO/GRTKF/3/9.)

It is based on diachronic data, whereas western science is largely based on synchronic data;

It is rooted in a social context that sees the world in terms of social and spiritual relations between all life-forms. In contrast, western science is hierarchically organized and vertically compartmentalized--The WIPO report uses the expression “relationship between the knowledge and a traditional or Indigenous community or other group of persons identifying with a traditional culture, such a sense to preserve the knowledge or a sense that misappropriation or demeaning usage would be harmful or offensive; and It derives its explanations of environmental phenomena from cumulative, collective and often spiritual experiences.

It is learned through observation and hands-on experience;

It is based on the understanding that the elements of matter have a life force. (All parts of the natural world are therefore infused with spirit);

It does not view human life as superior to other animate and inanimate elements: all life-forms have kinship and are interdependent;

It is holistic (whereas western science is “reductionist”);

It is intuitive in its mode of thinking (whereas western science is analytical);

It is mainly qualitative (whereas western science is mainly quantitative);

It is based on data generated by resource users. (As such it is more inclusive than western science, which is collected by a specialized group of researchers who tend to be more selective and deliberate in the accumulation of facts);

See G. Dutfield, “TRIPS-Related Aspects Of Traditional Knowledge”, *supra* note 20, at 241. Prof. Dutfield admits that even with all of the above characteristics, the definition is far from being watertight:” A great deal of hybridisation and cross-fertilisation takes place to the extent that it would be incorrect to define TK as an entirely discrete category of knowledge.”

are created according to strict rituals and traditions because of their profound symbolic and/or religious meaning.”¹⁰

While the components of traditional knowledge, clearly it can take many different forms and is not easy to define traditional knowledge in precise legal terms, especially when it comes to drawing a line to separate this traditional knowledge from knowledge and information the protection of which is not sought as party of the Doha Round. Clearly, ancientness is not the dominant criteria. Knowledge held by the ancient Egyptians, Greeks and Romans permeates Western culture and no one is suggesting that it be protected a new. One way to define traditional knowledge might be by defining who the holders are. But even agreeing that it is knowledge held by aboriginal peoples is insufficient, because (a) then a definition of aboriginal is required; and (b) it is fair to assume that at least some knowledge held by aboriginal peoples could be considered as “non-traditional”.

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Another level of distinction that may be relevant is that some forms of traditional knowledge are considered “sacred” by their holders or keepers, while others (e.g., certain forms of folklore) are routinely exploited commercially. In the case of sacred knowledge, some commentators observed that commodification may diminish the

¹⁰ *Id.* at 212.

¹¹ WIPO Report, at p. 212.

cultural and spiritual value of the knowledge, and the “right” that certain groups of traditional knowledge holders (and the countries that will defend their interests in the Doha negotiations) may thus not be a right in respect of the exploitation of the knowledge, but a right to *exclude* all others.¹² This means that any form of a right to remuneration including compulsory licensing is unlikely to meet their stated needs. But intellectual property, and especially copyright protection, which is often seen, especially on common law jurisdictions as an incentive or reward for bringing new creations to society does not require exploitation and may be used to prevent any exploitation (*e.g.*, unpublished manuscripts).

In light of the above, it may not be possible to agree on a legal definition that would be sufficiently tight to become part of world trade rules, or even on the exact needs of traditional knowledge holders. But it may not be necessary to do so, based on emerging ideas on how to tackle the issue in the Doha context.

III. THE CHALLENGES POSED BY TRADITIONAL KNOWLEDGE

Traditional knowledge is an enormous challenge for TRIPS. Many expressions of folklore and several other forms of traditional knowledge do not qualify for protection because they are too old and are, therefore, in the public domain.¹³ Providing exclusive rights of any kind for an unlimited period of time would seem to go against the principle that intellectual property can be awarded only for a limited period of time, thus ensuring the return of intellectual property to the public domain for others to use.¹⁴ In other cases, the author or inventor of the material is not identifiable and there is thus no “rightsholder” in the usual sense of the term. In fact, the author or inventor is often a large and diffuse group of people and the same creation or invention may have several versions and incarnations. Textile patterns, musical rhythms and dances are good

¹² See “Elements of a *Sui Generis* System for the Protection of Traditional Knowledge”, WIPO Document WIPO/GRTKF/IC/4/8, of September 30, 2002, at p. 6.

¹³ See Michael F. Brown, “Can Culture Be Copyrighted?”, 39 *Current Anthropology* 193 (1998).

¹⁴ See WIPO Report, *supra* note 134, 148 & 216; Bogumil Jewsiewicki & Madeleine Pastinelli, “The Ethnography of the Digital World, or How to Do Fieldwork in a ‘Brave New World’,” 22 *Ethnologies* (2000).

examples of this kind of material. Additionally, expressions of folklore are refined and evolve over time.

Apart from the above-mentioned reasons for excluding some forms of traditional knowledge from existing forms of intellectual property protection, there is clearly a lot of tradition material that is unfit by its very nature for protection by extant intellectual property norms. Examples include spiritual beliefs, methods of governance, languages, human remains and biological and genetic resources in their natural state, *i.e.*, without any knowledge concerning their medicinal use. With the exception of these types of material not proper subject matter for protection *per se*, however, most other forms of traditional knowledge could qualify for copyright or patent protection if they had been created or invented in the usual sense. In response, holders of traditional knowledge argue that the current intellectual property regime was designed by Western countries for Western countries.¹⁵

Often, an author outside of the group that created the folklore will create a derivative work using folklore as a basis but with enough derivative originality to benefit from copyright protection. For example, sound recordings using traditional music are common. Many creators of folklore find this situation doubly unacceptable: while they are unable to benefit financially and otherwise from their creative efforts, others are "using" the intellectual property system not only gainfully, but in fact, against the original folklore creators who may be prevented from using their own material if, as it evolves, it comes to resemble the derivative work. To traditional knowledge holders, this is a perverse, if an unintended, result.

The same set of problems occurs with patents. While discoveries and other forms of traditional medicinal knowledge based on plants or animal parts or fluids generally cannot be patented either because they are obvious or because they are in the public domain, drugs derived from such plants and animals are generally patentable. The

¹⁵ See Michelle McGrath, "The Patent Provisions in TRIPS: Protecting Reasonable Remuneration for Services Rendered--or the Latest Development in Western Colonialism?", (1996) 18 *EIPR* 398.

companies that developed and refined the molecule will own the patents. However, the research and development efforts concerning traditional medicinal knowledge and products is often inspired by holders of traditional knowledge, who may directly instruct Western scientists or teach them by letting them observe their traditional practices.¹⁶ There have been allegations that using this knowledge, and then obtaining a patent, which will be the exclusive property of the company that conducted the additional research and expended efforts to refine the molecule, is unfair to the holders of traditional knowledge¹⁷. In sum, the negative exclusionary effect of the current intellectual property system (which generally does not protect traditional knowledge as such for the reasons mentioned above) is compounded by a positive exclusionary effect because intellectual property rights are acquired by non-traditional knowledge holders to exclude their pre-existing rights.¹⁸

Making the matter even more complex is the fact that property rights, as they are understood in Western legal systems¹⁹ often do not exist in indigenous and local communities that hold traditional knowledge. In fact, many if not most forms of traditional knowledge is held collectively (or “communally”).

Some of the criticism leveled at the current intellectual property system concerning its exclusionary effect is fair, but may be dealt with by relatively minor changes to current practices. Other aspects may require more far-reaching choices.

IV. PROTECTION OF TRADITIONAL KNOWLEDGE IN INTERNATIONAL INSTRUMENTS

¹⁶ Sometimes referred to as “bioprospection”. See Someshwar Singh, Rampant “Biopiracy of South's Biodiversity”, *Third World Network* (July 20, 2000).

¹⁷ See Ikechi Mgbeoji, “Patents And Traditional Knowledge Of The Uses Of Plants: Is A Communal Patent Regime Part Of The Solution To The Scourge Of Bio Piracy?”, (2001) 9 *Indiana J. of Global Legal Studies* 163.

¹⁸ See See James Tunney, “E. U., I. P., Indigenous People and the Digital Age: Intersecting Circles?”, (1998) 20 *EIPR* 336.

¹⁹ See Kamal Puri, “Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action”, (1995) 9 *Intell. Prop. J.*, 293, at p. 310.

There are several relevant international instruments tending to confirm the view that indigenous peoples should have some legal control over the exploitation of their traditional knowledge when such knowledge has special cultural significance.²⁰ Article 7(1) of the International Labor Organization's Revised Convention of 1989²¹ recognizes the right of indigenous peoples to "decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development."

The United Nations *Draft Declaration on the Rights of Indigenous Peoples*²² is perhaps the most relevant international document in this area. Still in draft form, its Article 29 currently reads as follows:

"Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts."²³

One could also mention here the *United Nations Declaration of Human Rights*, which provides that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the

²⁰ See Stephenson Jr, "The Nexus Between Intellectual Property Piracy, International Law, The Internet, and Cultural Values", (2001) 14 St. Thomas L. Rev. 315, at 324-8. This paper focuses on instruments most directly relevant for sacred traditional knowledge holders. A more complete inventory of international instruments, especially with respect to patent and patent-like protection, is contained in Michael Halewood, "Indigenous and Local Knowledge in International law: A Preface to Sui Generis Intellectual Property Protection", (1999) 44 *McGill L.J.* 953. The impact of current WTO negotiations is also analyzed in Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 *Case Western Reserve J. Envtl. L.* 233, 250 (2001).

²¹ C169 Indigenous and Tribal Peoples Convention, 1989. It came into force on Sept. 5, 1991. See <http://ilolex.ilo.ch:1567/scripts/convde.pl?C169> (last visited April 3, 2002). This Convention revised Convention 107 of 1957 and was ratified by Convention No. 169, which revised Convention No. 107, has been ratified by 13 countries: Bolivia, Colombia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, Mexico, Norway, Netherlands, Paraguay and Peru.

²² E/CN.4/Sub.2/1993/29/Annex I of Aug. 23, 1993 available at <http://www.cwis.org/fwdp/draft9329.html>.

²³ *Id.* See Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U.J. INT'L L. & POL. 291, 305-6 (2000).

author”²⁴.

V. POSSIBLE WAYS FORWARD

A. POLITICAL POSITIONS

As a preliminary matter, as to the scope of the Doha negotiations, certain countries likely will argue that some aspects of traditional knowledge should not be considered trade-related, and thus try to keep the focus on ongoing work in other fora (CBD, WIPO). This would avoid bringing any new rules under the WTO dispute-settlement mechanism. The Uruguay Round example of moral rights (in the copyright area—see Article 9.1 of TRIPS) comes to mind in that connexion. Alternatively, measures could be agreed upon but not be made subject to dispute-settlement, as was done in respect of parallel imports/exhaustion.²⁵ These arguments may hold sway, for example, in respect of certain forms of undocumented sacred traditional knowledge.

First, there should be an acknowledgement that certain intellectual property rules can and do apply without any modification to certain forms of traditional knowledge, especially knowledge (*e.g.*, arts & crafts) that is exploited commercially, and that existing civil law may also be used to prevent certain uses of traditional knowledge. On the former point, collective/certification marks as well as geographical indications may be used to certify the origin of “genuine” articles. Article 22.2 provides that WTO members must make protection of geographical indications available to “interested parties”, a term broad enough to apply to aboriginal communities that hold traditional knowledge. Outstanding issues with respect to the scope of WTO members’ obligations in the area of geographical indications²⁶ may then be of particular interest to holders of certain forms of traditional knowledge. As to the application of civil law rules, both trade secret protection (which is partly recognised in Article 39 of TRIPS) and various torts and delicts and

²⁴ Adopted Dec. 10, 1948. G.A. Res. 217A(III), U.N. Doc. No. A810, at 27.

²⁵ TRIPS Article 6.

²⁶ TRIPS Articles 22-24.

related doctrines, including misappropriation and unjust enrichment may be applicable.²⁷ It may not be possible to codify them in TRIPS due to, first, the disparities among legal systems and (b) the fact the extent to which such rules may apply is still unclear.

The interaction between existing rights and any new right relating to traditional knowledge should also be specified. To take copyright as an example, authors (of the type of works currently protected under most copyright laws) generally believe that the Uruguay Round was both good and bad for their interests. Good because it enshrined the Berne Convention norms into TRIPS and thus made them subject to the WTO dispute-settlement procedures. Bad because by excluding moral rights, it eviscerated authors' rights. On the patent side, companies that rely on the patent system will undoubtedly demand that their level of protection not be affected negatively by any new rights in respect of traditional knowledge. The same could be said of companies whose trade or service marks have acquired significant value. Even if WTO Members were to agree on a Declaration on Traditional Knowledge (instead of a legal agreement or TRIPS amendment), those that favour an intellectual property-like form of protection for traditional knowledge would thus be well-advised to acknowledge the role of existing intellectual property rules in order to avoid a stiff opposition from current intellectual property holders.

Then, negotiators are likely to tackle folklore-related and medicine-related problems differently.

In the area of folklore, long-standing efforts in WIPO and UNESCO to agree a *sui generis* right have not succeeded, although model provisions²⁸ were made available to member States. A number of WTO members see a *sui generis* system as a solution of last resort, because it usually indicates that instead of finding out why the system does not work, a "tailored" system is legislatively put in place without necessarily thinking about

²⁷ See Daniel Gervais, "The Internationalization Of Intellectual Property: New Challenges From The Very Old And The Very New", (2002) 12 *Fordham Intell. Prop. Media & Ent. L.J.* 929.

²⁸ WIPO/UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions of 1982.

its impact on the existing system. It is thus quite unlikely that the Doha negotiators will agree that the current TRIPS framework is discriminatory, and as a result adopt a sweeping *sui generis* right to protect all forms of traditional knowledge.

B. POSSIBLE ELEMENTS OF THIS *SUI GENERIS* PROTECTION

Would a new *sui generis* right be “intellectual property”? First, it could be argued that a *sui generis* system can be viewed as intellectual property if (a) it applies to the protection of intangible assets and (b) provides a certain right to exclude others. Indeed, intellectual property is not limited to existing rights but should apply to all forms of creativity and inventiveness²⁹. In the case of artistic and literary creations such as textile patterns, music, choreographic productions and the like, it may make sense to establish a system similar either to the collective and authentication marks, or to the moral right aspect of copyright.

Another view of intellectual property is that it must also apply to specific, identifiable works, objects or inventions, created or invented by identifiable rightsholders. From this perspective, rightsholders are necessarily those who created or invented the intellectual property, or have acquired it by transfer--contractual or *de jure*, as in the case of employee-made works or inventions. This debate may seem theoretical, but if the new right is considered a form of intellectual property, it may be subject to a number of existing treaties (e.g., re national treatment), though Article 1.2 of TRIPS defines intellectual property only as rights protected under “Sections 1 to 7 of Part II”.³⁰ It can also be said that intellectual property even as it exists today is not property proper, but that debate is quite a separate matter. The question in this context is whether a new *sui generis* right would in fact form part of what we refer to as “intellectual property” and what legal effect this may have under existing international instruments.

²⁹ See Article 2 *in fine* of the *Convention Establishing the World Intellectual Property Organization*.

³⁰ Which includes rights protected under the provisions of the Berne and Paris Conventions that were incorporated by reference into TRIPS (Articles 2.1 and 9.1), but not specifically mentioned in TRIPS (e.g., trade names). See paragraphs 333-338 of the Appellate Body Report in *United States – Section 211 Omnibus Appropriation Act of 1998*, doc. WT/DS176/AB/R.

Independently of whether it *sui generis* protection is in fact “intellectual property”, a 1981 report³¹ on this point prepared by the Australian Department of Home Affairs and Environment mentioned the following:

- A prohibition on non-traditional uses of sacred/secret materials;
- Prohibitions on debasing, mutilating and destructive use of folklore;
- Payments to traditional owners of folklore on items used for commercial purposes;
- Development of a system of clearances for prospective users of folklore;
- Establishment of an Aboriginal Folklore Board to advise the Minister on policy issues; and
- Establishment of a Commissioner for Aboriginal Folklore to issue clearances and negotiate payments.

These proposals include a mixture of “intellectual property-like” rights, referred to in the report as “indigenous intellectual property”.. The first prohibition above would recognize a right similar in certain respects to the moral right to oppose use that prejudices the author's reputation, but somehow combined with a limitation on expressions that offend, *e.g.*, a particular religious group. In countries where freedom of speech/expression is protected, this may pose a significant problem. The second prohibition recognizes a right close to the moral right allowing an author to oppose any “mutilation” of his or her work. The third proposal would require direct governmental intervention to impose a collective remuneration system.

Other proposals illustrate the intricacies of the traditional knowledge/intellectual property interface. For example, authors Terri Janke and Michael Frankel³² suggested *inter alia* a provision recognizing the perpetual duration of indigenous folklore and knowledge, and

³¹ Department of Home Affairs and Environment, Report of the Working Party on the Protection of Aboriginal Folklore 73-75 (1981). The recommendations were not implemented.

³² See Terri Janke, “Our Culture, Our Future: Proposals For The Recognitions And Protection Of Indigenous Cultural And Intellectual Property” (1997).

exemptions of folklore from the requirements of originality and material form. The earlier mentioned perpetual duration proposal seems to clash head-on with the public domain component of certain forms intellectual property. Indefinite protection (*e.g.* trademarks and trade secrets) is not new.³³ The second item (exemptions with respect to the originality criterion) would denature the very core of copyright: copyright is granted precisely because a work is original. What Janke and Frankel intended is probably more in the nature of a *sui generis* right that, like the EU protection of databases, does not protect works or inventions, but a specific subject- matter (certain compilation) against specific acts.

In a recent report³⁴, the International Bureau of WIPO proposed a *sui generis* right that is both systematic and “comprehensive”, in that it does not separate the components of the knowledge and thus reserves its “holistic” nature). The *sui generis* right(s) would include:

- A right to prevent unauthorised use (making, using, offering for sale, selling or importing) of traditional knowledge;
- A right to prevent any reproduction of a fixation of traditional knowledge that is unauthorized or distorting;
- A strong moral right;
- A right in respect of databases similar to the right (of preventing unfair commercial use and preventing disclosure) contained in Article 39.3 of TRIPS;
- A right to assign or transfer, notably in respect of benefit-sharing under the Convention on Biological Diversity.³⁵

One significant issue is the documentation and inventory of traditional knowledge, which some see as a double-edged sword. It is difficult to enforce a right in respect of an object (or element of knowledge) that has not been identified prior to an alleged

³³ See Preliminary Analysis of National Experiences with the Legal Protection of Expressions of Folklore, WIPO Document WIPO/GRTKF/IC/4/3 of 20 October 2002, at pp.24-25

³⁴ Elements of a Sui Generis System for the Protection of Traditional Knowledge. WIPO Document WIPO/GRTKF/IC/4/8 of 30 September 2002.

³⁵ *Id.*, at pp. 27-28.

appropriation. This, in fact, is what led many countries to require fixation in the area of copyright³⁶. It was recently considered a fundamental element of copyright law by the Canadian Supreme Court: “ ‘Fixation’ has a relatively well settled but rather different connotation in copyright law. It distinguishes works capable of being copyrighted from general ideas that are the common intellectual “property” of everyone.”³⁷ But fixation is not required in every country. Nor is it required in international copyright and neighbouring rights treaties, where it is in fact generally seen as an exception to the rule of automatic protection. Conceptually at least, it is thus not a bar to protection at the international level³⁸, even though countries that do have the requirement in their national law are likely to want to maintain it.

Indeed, granting a new right in respect of undocumented knowledge may lead to legal uncertainty. Yet, documenting traditional knowledge is perceived by some as increasing the risk of unauthorized takings³⁹. Any database or inventory of traditional knowledge should thus be done with great care, notably so as not to facilitate misappropriation⁴⁰. One solution mentioned in this context is tagging⁴¹.

³⁶ For example, in Australia, see *John Fairfax & Sons Pty. Ltd. v. Australian Consolidated Press Ltd.*, [1960] S.R. (N.S.W.) 413. In Canada, see *Canadian Admiral Corp. v. Rediffusion Inc.*, [1954] Ex. C.R. 382. In the United States, see 17 U.S.C. § 102(a) (1994); and Robert A. Gorman & Jane C. Ginsburg, *Copyright for the Nineties* 360-63 (4th ed. 1993). See also H. Laddie et al., *The Modern Law of Copyright and Designs* (3rd ed. 2000), vol. 1, at para. 1.2.

³⁷ *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] SCC 34, at para 25.

³⁸ See Articles 2(2) and 5(2) of the Berne Convention. See also G. Dutfield, “TRIPS-Related Aspects of Traditional Knowledge”, (2001) 33 *Case Western Reserve J. of Int'l L.* 233, 252.

³⁹ See “Panel: The Law And Policy Of Protecting Folklore, Traditional Knowledge, And Genetic Resources”, (2002) *Fordham Intellectual Property, Media and Entertainment L. J.* 753, 768-9.

⁴⁰ *WIPO Report (2002)*, at pp. 19-20. See also Frank J. Penna & Coenraad J. Visser, “Cultural Industries and Intellectual Property Rights”, chapter in the *Trade Handbook* (Washington: World Bank, 2001), at 11; and <www.worldbank.org/afr/ik/index.htm>.

⁴¹ Prof. C. Visser explains it as follows: “The problem, of course, with the transfer of the technology approach is that you have to have an organized body of knowledge, so you need some sort of database or the like, and also an identifiable entity, like this organization in Costa Rica, to administer the transfer of the technology, to receive the royalties, and to distribute them to the appropriate beneficiaries. This also raises, of course, related issues of protection of trade secret. For example, what should be the contents of a database compiled by countries to document traditional knowledge or botanical knowledge in this way? A tension between the protection against IP and protection for IP exists here. In order to protect against IP, if you want to make something part of the searchable prior art, you have to disclose as much as possible. If you want to exploit the traditional knowledge by means of a compilation or a transfer technology agreement, then it is in your interest to disclose as little as possible in the agreement. I am working on a project in Venezuela. The solution there seems to be to tag only. So you would list in the database only the items that are available for the transfer of technology.” (in “Panel: The Law And Policy Of Protecting Folklore, Traditional Knowledge, And Genetic Resources”, *loc. cit.*, at 768.)

The interface between any protection mechanism for folklore and copyright needs to be carefully studied. As a matter of public policy, should an author of traditional literary or artistic material (in a copyright sense) that is exploited commercially benefit for longer (or even perpetual) protection while non-aboriginal (or traditional knowledge-holding) authors “only” benefit from a 50 (or 70 in a number of countries) *post mortem auctoris* term of protection? It seems that solutions in this area could encompass a combination of moral rights⁴², collective marks and geographical indication protection, and perhaps an agreement to allow the obstacle of individuality to be overcome. As a matter of principle, collective or communal ownership of copyright should not be hugely problematic. Many countries already have collective works in their national law and what is being considered here is an extension of such a concept, in which the rightsholder is the community concerned, or perhaps the State in appropriate cases.⁴³ WTO rules, or individual members, could mandate the formation of a proper body corporate to facilitate the recognition of ownership and the validity of consent given to use protected traditional knowledge.⁴⁴ Other options include a modified concept of *droit de suite* to implement benefit-sharing obligations on the resale of artistic works that contain traditional knowledge material; and allowing WTO members who so wish to establish the equivalent of a *domaine public payant* to collect funds to compensate holders of traditional knowledge. The latter proposal may entail tailoring national treatment and MFN obligations.

With respect to medicinal knowledge, some Members are seeking the adoption of a declaration on the patentability of genetic and traditional resources that would provide that :

⁴² See David R. Downes, “How Intellectual Property Could be A Tool To Protect Traditional Knowledge”, (2000) 25 *Colum. J. Envtl. L.* 253, 257-262.

⁴³ See Paul Kuruk, “Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal Of The Tensions Between Individual And Communal Rights In Africa And The United States”, (1999) 48 *Am. Univ. L. Rev.* 769, 778.

⁴⁴ There are precedents in the area of land rights. See *Martu People v. State of Western Australia et al*, [2002] FCA 1208 (Aust.).

- Patent (in relevant classes) and plant variety protection applicants⁴⁵ would have to declare any genetic or traditional material used to develop and incorporated in the claimed invention; this type of declaration is compatible with patent rules that promote full disclosure of the invention (in exchange for the monopoly). This obligation would have to be properly circumscribed so to as to avoid unnecessarily burdensome administrative or other requirements on patent applicants⁴⁶. As of December 2002, several key WTO Members opposed such an obligation;
- With respect to applications for patents concerning drugs or other products that may be derived from traditional knowledge or genetic sources, prior art searches would include traditional knowledge sources to ensure that the invention is indeed novel and non-obvious as required by patent laws worldwide. This may be less problematic, but building traditional knowledge is opposed by a number of developing countries that believe it may actually lead to an increase of what they have referred to as “bio-piracy” (see below);
- Members would agree to consult on appropriate benefit-sharing obligations, notably in light of the Convention on Biological Diversity. Appropriate language could be drawn from Article 62.3 on the principle of benefit-sharing (with some improvements) and/or Article 40.3 if a TRIPS-related mechanism is envisaged for case-by-case disagreements between private parties (including traditional knowledge holders). As of December 2002, there was no agreement on the scope

⁴⁵ The UPOV Secretariat made the following statement in a document submitted to the WTO: “The requirement for ‘distinctness’ in the UPOV Convention means that protection shall only be granted after an examination to determine if the variety is clearly distinguishable from all other varieties whose existence is a matter of common knowledge at the date of filing of the application. The breeder is usually required, in a technical questionnaire that accompanies his application for protection, to provide information concerning the breeding history and genetic origin of the variety. Therefore, UPOV is not opposed to the disclosure, per se, of countries of origin or geographical origin of genetic resources in any way that will facilitate the examination mentioned above, but could not accept this as an additional condition of protection.” “Review of the Provisions of Article 27.3(B), Relationship Between the TRIPS Agreement and The Convention On Biological Diversity and Protection of Traditional Knowledge and Folklore: Information from Intergovernmental Organizations: Addendum” WTO Document IP/C/W/347/Add.3 of 11 June 2002, at paragraphs 19-20.

⁴⁶ See “The Relationship Between The Trips Agreement and the Convention on Biological Diversity: Summary of Issues Raised and Points Made: Note by the Secretariat,” WTO Document IP/C/W/368 of 8 August 2002, esp. paragraphs 22-26.

or legal form of any such undertaking;

- Members would, through the appropriate structure (which could be WIPO and/or national patent offices), contribute to the establishment of traditional and genetic resources databases for prior art searches. This of course is an imperfect solution. Holders of certain forms of (especially sacred) traditional knowledge may not want to reveal it; or may fear that by putting it in a database it becomes easier to misappropriate. Countries and communities that do not wish to contribute their knowledge to the database would not have to do so, but then it may be more difficult to argue that a patent granted with respect to any such knowledge is not novel. A possible solution would be that such databases be kept secret or protected under a regime similar to Article 39.3, but if a patent application was denied because of knowledge held in such a database, it seems that at least that element of the database would have to be made known (to the applicant).

C. THE ROLE OF DISPUTE-RESOLUTION

Dispute-resolution mechanisms may play a significant role in any solution “package” in this area. It is predictable that various groups or countries may claim rights in the same traditional knowledge (*e.g.*, where an ethnic group is present in more than one country). There may also be conflicts between ownership under different laws (and/or customs⁴⁷). This may require two-levels of dispute-resolution: first, between States (and the current DSU or a modified version thereof including expert assessors would probably work); and second, for disagreements between private parties, including aboriginal communities. Here, a system similar to the one put in place by WIPO for intellectual property disputes might serve as a possible model.

Another aspect, which is related to the above but may be considered separate for the purposes of the negotiations, would be to determine whether members are free to reject a

⁴⁷ See “Panel II: The Law And Policy Of Protecting Folklore, Traditional Knowledge, And Genetic Resources”, *supra* note 39.

patent application based on the basis of Article 27.2 in light of other (e.g., the CBD) international obligations that are not part of the WTO framework⁴⁸.

D. PROPOSED SOLUTIONS

As to form, there is a fundamental decision to be made. Either TRIPS is fully reopened and a *sui generis* right is “worked in”, together with a revision of Article 27.3(b)⁴⁹, various WIPO Treaties and geographical indications (the “maximalist approach”), or Members choose a softer approach. In light of the Ministers’ words at Doha⁵⁰ One cannot easily envisage that there would be a major reworking of TRIPS that would not take account of traditional knowledge and biodiversity issues. At the same, time, the fact that the interface between intellectual property (as defined in the current TRIPS Agreement) and traditional knowledge, including fundamental issues such as collective/communal ownership, mandatory benefit-sharing (and what happens if not agreement is found), term of protection/public domain concerns⁵¹, possible acquired rights, etc.⁵², makes it hard to imagine that a legal text could be agreed upon anytime soon. Experiences at the national level are mostly inconclusive. Legal solutions do not seem entirely ripe, even though work on a possible *sui generis* right is progressing⁵³. We suggest that work should continue in the WIPO and only when solutions have emerged there should their inclusion in the TRIPS/WTO framework be envisaged. This may or may not happen before the end of the “Doha Round”.

Reopening the TRIPS Agreement is unlikely to be successful given that TRIPS is a compromise, a package deal that, once reopened, will prompt demands for lower or

⁴⁸ See Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries*, Oxford U.P. 2001, at pp. 319-323.

⁴⁹ Including a decision on the UPOV issue. See below.

⁵⁰ “We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration, to examine, inter alia, the relationship between the TRIPS Agreement and the *Convention on Biological Diversity, the protection of traditional knowledge and folklore,...*”. Paragraph 19 of the main Doha Ministerial Declaration of November 2001. WTO Document WT/MIN(01)/DEC/1 (emphasis added).

⁵¹ In this connexion, see the recent US case of *Eldred v. Ashcroft*, 2003 WL 118221 (Jan. 15, 2003).

⁵² See Daniel Gervais, *supra* note 27, at 955-966.

⁵³ See *supra* note 12 and accompanying text, and section V.B.

higher levels of protection in almost all areas of intellectual property. In addition, several WTO Members do not yet have to comply with the 1994 version of TRIPS (least-developed members have until 2005 for most of the Agreement and until 2016 for pharmaceutical patents⁵⁴). If intellectual property rules are to be modified, it may thus be more appropriate to add rules in a separate document, which could include, *e.g.*, an undertaking to comply with the substantive provisions of the 196 WIPO Treaties⁵⁵, or other post-TRIPS WIPO initiatives in the field of trademarks and patents⁵⁶.

Against this backdrop it seems that at least at this juncture the best solution would be to adopt a Declaration or Understanding on Traditional Knowledge (and Trade). It should begin with a preamble which would reflect the need felt by several WTO Members to protect traditional knowledge; the importance of such knowledge and perhaps even address some of the inadequacies of the current intellectual property regime, in which case it should also include a statement to the effect that the protection of traditional knowledge should not, as a matter of principle, prejudice the protection of intellectual property⁵⁷. In fact, in order to secure the support of current groups of rightsholders, the importance of authors and inventors of subject matter protected as works or inventions under copyright and patent laws and treaties, and of the role played by such authors⁵⁸ and

⁵⁴ See Article 66 of TRIPS and para. 7 of the *Declaration on the TRIPS Agreement and Public Health*, of 14 November 2001. WTO Document WT/MIN(01)/DEC/2.

⁵⁵ *WIPO Copyright Treaty* and *WIPO Performances and Phonograms Treaty*, both adopted on 20 December 1996, and both of which also entered into force in 2002.

⁵⁶ For example, the *Trademark Law Treaty* of October 27, 1994, and the *Patent Law Treaty* on June 1, 2000. Some Members have indicated a willingness to incorporate substantive obligations of the *International Convention For The Protection Of New Varieties Of Plants* (UPOV) of December 2, 1961 as the appropriate way of implementing TRIPS Article 27.3(b) in respect of plants. A subsidiary question is whether this would be along the lines of the October 23, 1978 or March 19, 1991 version. As at December 5, 2002, x countries were party to 27 the 1978 Act, 23 to the 1991 Act and two to previous Acts. Given that there is a relationship between UPOV, biodiversity and traditional knowledge, either the issue of plant variety protection will be negotiated in a broader context, or the results of the negotiation will (in the eyes of at least some participants) be part of a broader package.

⁵⁷ Perhaps along the lines of Article 1 of the 1961 Rome Convention (*International Convention For The Protection Of Performers, Producers Of Phonograms And Broadcasting Organisations*) in the area of rights neighbouring on copyright, which reads: "Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection."

⁵⁸ There would seem to be a strong incentive for traditional knowledge advocates to secure the support of author (in a traditional copyright sense) groups in country with a strong moral rights tradition because it constitutes the ultimate example of a non-market based intellectual property right (loosely) based on the dignity of the person. See D.R. Downes, *supra* note 42, at 259-262. This of course may lead to a

inventors, should be reaffirmed.

On substance, the Understanding/Declaration could then contain a number of specific undertakings, including some or all of the following:

- The recognition that WTO Members are, subject to the above considerations about existing rights and rightsholders, free to protect traditional knowledge above and beyond any existing protection for objects of intellectual property or other subject matter. This seems fully compatible with, *inter alia*, Article 1.1 of TRIPS;⁵⁹
- Supporting technical cooperation efforts, as well as further research and development into the application of current intellectual property rights to traditional knowledge;
- Supporting the need to respect traditional knowledge holders in the exploitation of traditional and genetic resources⁶⁰ and encouraging the transfer of technologies developed on that basis;
- Subject to the protection of existing intellectual property and to legitimate interests of intellectual property users, agreeing to explore ways of protecting (or negotiating mechanisms of the protection of) forms of traditional knowledge that seem to fit the definition contained in Article 2 of the Convention Establishing WIPO; namely “rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.” Special attention

reexamination of the exclusion of Article 6**bis** of the Berne Convention from TRIPS obligations (Article 9.1) and begs the question whether non-market (and thus, trade) based issues are properly dealt with within the WTO framework.

⁵⁹ Although the question of national treatment (vs. reciprocity) is likely to come up. Members that are not keen to protect traditional knowledge and thus not ready to make some concessions in this area, may find it politically more difficult to insist on national treatment.

⁶⁰ Some Members are likely to seek a specific undertaking on benefit-sharing.

could be paid to traditional knowledge the commercial exploitation of which is particularly inappropriate⁶¹;

- Supporting the development in the appropriate forum of databases of traditional knowledge and standards for the development of such databases to ensure that interconnectivity (operability) is possible where appropriate. Members could consider specific technical cooperation funding in this area;
- Using available databases to search relevant prior art⁶² in examining patent applications. On this point, it is likely that further undertakings may be sought in terms of mandatory declarations of genetic (and traditional) resources used by a patent applicant. This may not be necessary, as some of it may already be covered by invention disclosure obligations that form part of the industrial applicability/utility requirement.

The proposal outlined above would not impose traditional knowledge obligations (including a *sui generis* right) on all WTO Members, and advocates of traditional knowledge may thus not find it acceptable. But imposing a broad *sui generis* right does not, at least at this point in time, seem realistic. The purpose of the proposal is to find an acceptable middle-ground, which we suggest is to both give legitimacy and recognition to the concerns of traditional knowledge holders, and address in as much detail as may be possible in the current environment those aspects on which it may be possible to move forward.

⁶¹ See Daniel Gervais, "Spiritual But Not Intellectual: The Protection of Sacred Traditional Knowledge", (2003) 20 *Cardozo Arts & Entertainment Law Journal*.

⁶² More ambitious proposals include a "more favourable" treatment (or broader) search for applications concerning substances (possibly) originating in countries rich in traditional or genetic resources. See Srividhya Ragavan, "Protection Of Traditional Knowledge", (2001) 2 *Minnesota Intellectual Property Review* 1, 14-15.

Some other issue relating to geographical indications and UPOV⁶³ would most likely be discussed part of ongoing negotiations in this area. The latter is part of the Article 27.3(b) review⁶⁴, while geographical indications are part of the built-in TRIPS agenda⁶⁵. One of the main issues to be addressed in that last respect is the degree of flexibility that Members have in implementing their TRIPS obligations⁶⁶.

VI. CONCLUSION

There is significant pressure to integrate traditional knowledge and the related issue of biodiversity protection⁶⁷ in the WTO set of rules. Though we examined the possible contexts of such a right, we do not believe that integrating a full *sui generis* right (in TRIPS or otherwise) is possible in the current context. Rather, the best option for advocates of traditional knowledge protection in the Doha negotiations may be to seek to legitimize their concerns in the form of a Declaration which may have the effect of making official certain interpretations of the TRIPS Agreement (*e.g.*, in respect of certain exceptions) and pave the way for a second stage of negotiations, during which positive obligations could be discussed in the form of a legal text. In the meantime, work will no doubt continue at the WIPO and more countries will experiment possible legal mechanisms⁶⁸.

⁶³ See *supra* note 56 and accompanying text.

⁶⁴ See also paragraph 19 of the main Doha Ministerial Declaration, *supra* note 50.

⁶⁵ TRIPS Article 24. There is of course also the issue of whether the scope of these negotiations will go beyond wines & spirits. See paragraphs 12 and 18 of the Doha Ministerial Declaration, *loc. cit.* See also Srividhya Ragavan, *loc. cit.*, at 19-20 for a different analysis and other proposals.

⁶⁶ See Meetali Jain, "Global Trade And The New Millennium: Defining The Scope Of Intellectual Property Protection Of Plant Genetic Resources And Traditional Knowledge In India", (1999) 22 *Hastings International and Comparative L. Rev.* 777, 779-80; and generally G. Dutfield, "TRIPS-Related Aspects of Traditional Knowledge", *supra* note 20.

⁶⁷ See David R. Downes, *supra* note 42, at 265; and Ikechi Mgbeoji, *supra* note 17, at 167-170.

⁶⁸ See the comments by Linda S. Lourie in "Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources", *supra* note 39, at 788-790.