

Ramifications of WIPO IGC for IP and Development*

Chidi Oguamanam**

Introduction

The year 2016 marks over a decade and a half of the existence for the World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The IGC is a child of circumstance and opportunity.¹ Detailed historical accounts of its evolution link it with earlier initiatives, including WIPO's Model Provisions on National Laws on Folklore and the Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions.² Also, the IGC was in part a response to the failure of World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to accommodate traditional knowledge (TK) and traditional cultural expressions (TCEs) as sources of intellectual property rights and knowledge production.

Since the Convention on Biological Diversity (CBD) came into effect in 1993, legal and policy actions for the protection of traditional knowledge across multiple and overlapping fora and regimes have intensified.³ Despite strides in those fora and regimes separate from the IGC, and weakened expectations in respect of the IGC's mandate to produce a text-based instrument(s) to ensure the effective protection of genetic resources (GR), TK and TCEs, there is still acknowledgement, however grudging, that intellectual property (as a concept, jurisprudence and policy instrument) is, in at-times-ironic fashion, at the very core of both the exploitation and the protection of traditional knowledge. And there is also an anchoring perception that WIPO is the most apposite forum for shaping international intellectual property policy.⁴

Over the years, the idea of traditional knowledge has progressively unraveled as a traction point for complex issue linkages between intellectual property and, for example, genetic resources, biodiversity conservation, the rights of Indigenous Peoples and Local Communities (ILCs), food, nutritional and environmental security. Because traditional knowledge cuts across regimes and is crucial to the lived realities of the world's impoverished regions and peoples, it has become a site for engaging, testing, and even challenging the development imperative in intellectual property. In this short chapter I reflect on the ramifications of the WIPO IGC process for intellectual property and development, and consider the implications of the wobbly nature of the seemingly interminable IGC process for developing countries.

Regime complexity

The IGC symbolizes an intensive policy space for continued exploration of the historical tension between conventional intellectual property and traditional knowledge systems. However, as indicated above, the IGC is but one of the variegated sites, established since the late 20th century, in which the issues relating to traditional knowledge and its multiple interfaces have been, and are continuing to be, explored. The WIPO General Assembly's understanding of the IGC mandate is clear: that deliberations are "without prejudice to the work pursued in other fora".⁵

But the litany of fora in which the issue of protection of TK writ large, and its associations with GR and the protection of various aspects of TCEs, is staggering (see Lawson, this volume). Discerning analysts have expressed concerns over how this regime complexity could potentially undermine efforts aimed at the protection of TK.⁶ These analysts point out that where multiple regimes engage a specific subject matter, the more powerful actors are in a position to leverage such regimes in a selective manner to advance their interests, e.g. through deliberate patronage of preferred regimes and fora, and neglect of less-favourable ones. One gets the impression that the 15 years without agreed treaty texts in terms of outcomes at the IGC reflects the dynamic of this "regime game" at its worst. A few powerful states and, to some extent, the global North as a geopolitical bloc, seem bent on ensuring that no outcome at the IGC will be a good outcome.

The development imperative

The IGC is a crucial aspect of sustained historic pressure on WIPO and, certainly, the international economic order, to embrace the development imperative. In the intellectual property or broader knowledge governance arena, Peter Yu describes the development agenda specifically as "an ongoing struggle by less developed countries to develop an innovation system that responds to their needs, concerns and local conditions".⁷ In 2007, WIPO formally outlined the current operative phase of the development agenda.⁸ Essentially, the agenda aims at mainstreaming, in practical ways, the development imperative in national and international intellectual property law and policy. Specifically, Development Agenda recommendation 8 paragraph urges "the IGC to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of international instrument or instruments".⁹

As a crucial aspect of the WIPO development agenda, the IGC's mandate makes a link across several practical-conceptual elements: intellectual property, genetic resources, traditional knowledge and traditional cultural expressions (folklore). The innovation landscape of the late 20th century¹⁰ demonstrates the concrete interactions of the above-enumerated elements. The shared perception among many in developing countries is that these interactions result in an outcome that consistently undermines the interests of developing countries and indigenous peoples and local communities across the world, especially through the phenomenon of biopiracy.¹¹ The IGC represents a crucial forum to negotiate how knowledge production at these complex intersections can advance the needs,

concerns and local conditions of stakeholders, especially developing countries, indigenous peoples and amorphous local communities.

Hardening of positions

The 15 years of IGC negotiations have reinforced and hardened positions among proponents and opponents of TK, along opportunistic, ideological and political lines all of them bearing the hallmarks of North-South geopolitical power relations as an obvious and enduring undercurrent. As an outcome, these trends impugn expectations and chill hope by developing countries over the sincerity of their developed-world counterparts in nurturing the development agenda within and outside the WIPO committee processes.

A selective sample of lingering issues that have held up negotiations for too long reflects a mixed bag of the finicky, the semantic, and the substantive. The policy objectives to be served by the anticipated IGC instrument or instruments, for example, range between, on the one hand, preventing “misappropriation” of genetic resources and associated traditional knowledge, or misappropriation of traditional knowledge and associated genetic resources, and, on the other, preventing “erroneous grant of patents”, “invalid patents” or “biopiracy”. Delegates still bicker over what constitutes misappropriation and how it is to be defined. In addition, there is palpable reluctance to legitimize the concept of “biopiracy” (perceived as a too-politically-loaded term) into legal text and jurisprudence. Consensus also remains elusive on whether the IGC text(s) should focus on patent qua patents as opposed to intellectual property in general.¹² And debate continues on whether the text would specifically provide for the protection of derivatives of TK and of GR, derivatives of TK associated with GR, or derivatives of GR associated with TK. In addition, experts have yet to agree on what constitutes the trigger (i.e. what form/quantity/quality of uses or association of GR, and/or TK, in an invention) for an obligation to arise under the proposed instrument(s). While some stakeholders insist that invention must be “directly derived” from GR and associated TK, others insist that in the era of biotechnology, bioinformatics and synthetic biology, the use and appropriation of knowledge related to genetic information can happen without physical association with a specific genetic resource, rendering moot the concept of direct contact or derivation.

Among the more substantive sources of disquiet is the matter of whether there has to be disclosure (see Bagley chapter, this volume), or notification of information on, GRs or TK utilized for intellectual-property-protected innovation (i.e. in a patent application), and if so, what the scope of the disclosure should be (i.e. should it be of the source, or the origin). Likewise, the nature of sanctions that would result from failure to disclose remains a matter of testy debate. With the disclosure debate, the element focused on source and origin, which is particularly complicated, with “non-demandeurs” (who do not favour disclosure of source/origin)¹³ generating political capital from their resistance. The complex, natural and anthropomorphically-driven migrations of GRs, and the equally complex and varied cultural trajectories of their applications and appropriations across ecological and jurisdictional lines – not to

mention their applications across fluid epistemic contours – show that there can be no simplistic demarcation between source and origin. Also contentious is the role of national patent or intellectual property offices in any potential bureaucracy that would be responsible for implementation of treaty text(s) emanating from the IGC negotiations. Perhaps the most significant logjam is the lack of consensus on the nature or uses of genetic resources that should be eligible for exceptions and limitations, or waiver from a disclosure requirement.

Lastly, there is no consensus on the role or modality for creating databases of TK (see Robinson and Chiarolla chapter, this volume). Would such databases be complementary, defensive measures against the abuse of TK through the patent system (i.e. against biopiracy), or, rather, part of a stand-alone alternative scheme to the instrument(s) expected from the IGC?¹⁴

The TK construct

As in similar fora where traditional knowledge comes under critical scrutiny, there is ample resistance, ranging from the conceptual, and the definitional to the philosophical, against TK as a construct. Definitions of what constitutes TK tend to be open-ended, defying legal certainty (see Ruiz chapter, this volume). The very idea of demarcation of knowledge systems across traditional and other juxtaposing models tends to re-open the old debate – in sociology-of-science or sociology-of-knowledge circles, where the ideas of knowledge hybridization, knowledge fluidity and knowledge creolization are resurgent – around the suspect relationship between modernism and tradition.¹⁵ Yet few antagonists of TK would deny that some associated uses and practices, in their interface with genetic resources, have deeper or earlier historical roots than others in a cultural, ecological region, or in a local community, and that such an acknowledgement can be made without prejudice to the migratory and co-dependent nature of knowledge evolution.

On a political even if opportunistic level, critics of the use of TK to amplify the development imperative (under the auspices of IGC and other fora) question the legitimacy of state actors as champions of TK in relation to indigenous peoples and local communities, given the historic absence of unity of purpose between the latter and states. However, at the same time that there are concerns about so-called “state biopiracy” (see Dutfield, this volume), there is perhaps no indigenous or local community constituency where legitimacy of representation is not at issue. In most indigenous and local communities, the question of representative legitimacy assumes greater complication than in the state context. Some of the objections to state role, albeit well-founded, tend to ignore the fact that the capacity of states, especially postcolonial states, to champion the protection of traditional knowledge is a factor of their constitutive ethnicity and politico-historical antecedents and factors. For example, comparing the legitimacy of the government of India as a state sponsor or champion of the traditional knowledge claims of indigenous and local communities to the legitimacy of the governments of Canada may be inappropriate.

In addition, critics of state roles seem oblivious to the reality that international processes have historically been suspicious of indigenous peoples' rights and have regularly constrained indigenous peoples' participation in those processes vis-à-vis sovereign states (see Solomon, this volume). For example, indigenous peoples' attendance at, and their contributions to, the IGC process is constrained both by funding and rules of procedure that place them at the mercy of sovereign states. As a caucus, their attendance has progressively declined in the course of the long, drawn-out IGC process.¹⁶ Nevertheless, there is already a good, albeit not robust, emergent international regime on indigenous peoples' rights. In specific regard to genetic resources, for example, the Nagoya Protocol has further strengthened indigenous and local communities as legitimate beneficiaries of TK-related innovations in a manner that constrains the proclivity of states to exclude the interests of indigenous peoples and local communities. In essence, depending on context, it does not follow that state championship of rights over traditional knowledge amounts to state biopiracy in a manner akin to corporate biopiracy.

In developing countries, both the state and its constitutive indigenous and local communities may be the direct or indirect beneficiaries of TK. Either way, such an outcome is more likely to yield grassroots transformation through direct or indirect impacts on individuals, peoples and communities in contra distinction to the phenomenon of corporate biopiracy, which, for the most part, is externally-driven corporate exploitation and exclusion of indigenous and local community rights. When developing countries and indigenous and local communities are empowered as stakeholders in TK through intellectual property or *sui generis* formulations, contracts, and other responsive models of knowledge governance, then the development imperative is practically translated. The IGC is a strategic platform for advancing this objective.

In knowledge governance frameworks, development as freedom and capacitation¹⁷ entail inclusive accommodation of all contributors to the process of knowledge production and its transformation. In, for example, pharmaceuticals, biotechnology, medicines, agriculture, chemicals, cosmetology, and the life sciences, knowledge production and transformation reinforce the fluidity (or futility) of boundary-marking across knowledge systems. They also demonstrate that TK is an extremely valuable source of innovation and insight as is evident in the patterns of biopiracy globally. As such, the legitimate desire of TK's perennially marginalized curators, the world's indigenous and local communities, for the innovation system to recognize their contributions, and address their needs, contexts and concerns, is critical to the interrelated concepts of capacitation, freedom, development and self-determination – in contrast to the prevailing system that fuels misappropriation of TK through its de-legitimization.

Slow progress at the IGC

Deliberations at the IGC do not seem to be fully attuned to the nexus between the committee's work and the development imperative. Developed-world opposition to the push by developing countries and indigenous and local communities for a

pragmatic recalibration of the patent system (to tackle prevalent misappropriation of TK and the glaring abuses of the patent system) only inflame existing mistrust by developing countries over the commitment of their Northern counterparts to the development agenda.

However, despite initial skepticism, some developing countries managed to develop a measure of (gradually eroding) faith in the process. The Africa Group, the representatives of ILCs (indigenous caucus) and other negotiating blocs in the IGC, have invested tremendous energy and tenacity in the process. According to the Iranian delegation to the IGC's 28th session, the IGC process is symbolic of "development-oriented IP norm-setting in WIPO".¹⁸ Whereas its success (through substantive developed-oriented treaty text(s)) would reassure developing countries of WIPO's commitment to taking development concerns in intellectual property rights seriously, its failure (by way of potential stalemate) would spread a sense of disillusionment and exclusion, among developing countries and ILCs, in respect of the international intellectual property system. Accordingly, failure at the IGC could yield instances of unpredictable backlash in the WIPO committee process and in relation to other international TK-oriented regimes. Failure could, further, fuel geopolitical tension, widen inequity and escalate the trust deficit in the international intellectual property regime complex.

Conclusion: IGC Glass half full?

Notwithstanding the concerns raised above, the IGC's metaphorical glass can arguably still be seen as half full. For developing countries, the benefits of the decade and half of exchanges at the IGC can still be redeemed and leveraged. With the exception of the US, Japan, Canada, South Korea,¹⁹ and to a lesser extent the EU, most negotiating blocs in the IGC have achieved or are close to achieving concrete consensus on core issues regarding international instruments for effective protection of GR, TK and TCEs. This consensus could constitute the basis for national regimes in willing states. The majority of these willing countries and regions constitute the world's mega-genetically-diverse sites and are home to many of the world's indigenous peoples and local communities (ILC) custodians of traditional knowledge. All they require is the political will to push forward on their shared consensus via an international instrument, even if that happens on a new multilateral level and development forum outside WIPO.

In addition to the possibility of adapting their shared consensus within the IGC negotiations into a multilateral instrument, many "demandeur" countries, regions and global South negotiating blocs (e.g. the Africa Group, Like Minded Countries, Latin American and Caribbean Group of Countries, the Asia-Pacific Group, etc.) also have the option of engaging in the aforementioned regime game, through deliberate and collaborative patronage of friendlier regimes – such as the Food and Agriculture Organisation (FAO) Plant Treaty, the CBD Nagoya Protocol, and the broader CBD framework including cognate frameworks such as the United Nations Declaration on the Rights of Indigenous Peoples – in order to foster a development-oriented

intellectual property system at the intersection of traditional knowledge and genetic resources.

Finally, at national levels, many countries are seizing the initiative of ensuring effective protection of traditional knowledge by fine-tuning domestic patent laws and related statutes to accommodate some of the contentious issues at the IGC, including, for example, disclosure, in patent applications, of source and origin of GR and associated TK. As well, initially inspired by India, these countries are embracing documentation schemes for traditional knowledge, as both a complementary and defensive strategy against biopiracy.

Thus, the IGC's potential for shaping policy, and for advancing the development imperative, may not necessarily be a function of the ultimate outcome of its overly-prolonged deliberations. So far, IGC's impact is being felt in the progressive attempts in various fora and regimes, national and international, to pressure global knowledge governance to tackle head-on the injustice of global biopiracy and the abuse of the intellectual property system at the expense of the world's impoverished peoples and marginalized regions.

*©2017: Final version published as "Ramifications of the WIPO IGC for Intellectual Property and Development" in Daniel F. Robinson, Ahmed Abdel-Latif and Pedro Roffe, eds., *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (London: Routledge, 2017) 339-346.

**Full Professor, University of Ottawa at the Centre for Law, Technology and Society at the University of Ottawa Faculty of Law (Common Law) @chidi_oguamanam

¹ This takes into account the 2015 hiatus from the IGC negotiations.

² See Paul Kuruk, "Regulating Access to Traditional Knowledge and Genetic Resources: The Disclosure Requirement as a Strategy to Combat Biopiracy" (2015) 17:1 Sandiego Int'l Law Journal 1-74 [Kuruk].

³ This is evident through various work programs of the CBD, the Bonn Guidelines, the Nagoya Protocol on ABS and developments in cognate regimes such as the FAO Plant treaty, some of which partially integrate or are inspired by the elements and principles of the United Nations Declaration on the Rights of Indigenous Peoples.

⁴ Kuruk, *supra* note 2 at 15 nn. 22, 347-355.

⁵ See http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_1617.pdf.

⁶ For example, see Meunier, Sophie, and Karen Alter, "The Politics of International Regime Complex" (2009) 7:1 Perspectives on Politics 13-24; Laurence R. Helfer, "Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking" (2004) 29 Yale Journal of International Law 1-83; "Regime Shifting in the International Intellectual Property System" (2009) 7:1 Perspectives on Politics 39-44.

⁷ See Pater K. Yu, "A Tale of Two Development Agendas" (2009) 35 Ohio Northern University Law Review 465-573 at 467.

⁸ In 2007, the WIPO General Assembly adopted 45 recommendations under the Development Agenda. For text of the recommendations, see <http://www.wipo.int/ip-development/en/agenda/recommendations.html>.

⁹ Ibid. TRIPS mandate on discussions on TK/GR from 2001 Doha Declaration urges stakeholders to take 'into account the development dimension', this element which is often omitted when mandate quoted.

¹⁰ Specific reference here is to biotechnology and applications of recombinant DNA insights across different industrial sectors: pharmaceutical, chemical, agriculture, etc. In addition, the use of digital and information communication technologies to mine, fixate, adapt, and transform mainly oral forms of traditional cultural expressions is also part of the new innovation landscape often captured as 'bio' and digital revolutions.

¹¹ It is important to indicate that biopiracy is not necessarily limited to the exploitation of TK associated with biological resources or broader biocultural knowledge forms. In some adaptations, it serves as a metaphor for the exploitation of the actual and potential creativity of indigenous peoples and local communities including in the realm of music, chorography, and various forms of traditional oral or non-oral cultural expressions especially as facilitated by the use of information and communication technologies. See Olufunmilayo B. Arewa, "Piracy, Biopiracy and Borrowing: Culture, Cultural Heritage and the Globalization of Intellectual Property", (March 2006), Case Legal Studies Research Paper No. 04-19. Available at SSRN: <http://ssrn.com/abstract=596921> or <http://dx.doi.org/10.2139/ssrn.596921>.

¹² In the context of biopiracy and the intersection of traditional knowledge and genetic resources, the assumption is that patent is the regime of intellectual property most engaged. However, that assumption is not quite accurate. Other regimes of intellectual property such as trade secrets may also be involved in the biopiracy dynamic.

¹³ The terms "demandeurs" and "non-demandeurs" are used in negotiating circles to designate countries that favour disclosure of source and/or origin of genetic resources in patent application and those that are opposed to it, corresponding loosely to developing and developed country blocs.

¹⁴ Majority of non-demandeurs favour the establishment of traditional knowledge databases at national levels to serve as reservoirs of prior knowledge that can be leveraged as a defensive measure to avoid questionable claims for novelty required to grant patents. However, while not opposed, in principle, to traditional knowledge databases, many developing countries do not consider it as an alternative to expected treaty text(s) to the IGC. Moreover, while such databases account for traditional knowledge in the public domain, it is yet not clear how to account for those that are in the public domain.

¹⁵ See, generally, Chidi Oguamanam, "Pressuring 'Suspect Orthodoxy': Traditional Knowledge and the Patent System, in Matthew Rimmer, ed, *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Cheltenham: Edward Elgar, 2015) 313.

¹⁶ See Chris Koziol, "Indigenous voices being marginalized at WIPO?" (3 June 2016) *ABS Canada* (blog), online at: <http://www.abs-canada.org/news/indigenous-voices-being-marginalized-at-wipo/>.

¹⁷ See generally Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press 1999)

¹⁸ See WIPO/GRTKF/IGC/28/11 (Feb 15, 2016) Report of 28th Session of IGC Jul 7-9, 2014, para. 114

¹⁹ They are referred as the 'Group B' negotiating bloc. But it is not clear if South Korea is formally part of this group even though it often aligns with the position of Group B.