THE WIPO TREATY ON GENETIC RESOURCES AND ASSOCIATED TRADITIONAL KNOWLEDGE: A NEGOTIATING, CONTEXTUAL AND CONCEPTUAL APPRAISAL

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ABSTRACT

The World Intellectual Property Organization (WIPO) Treaty on Intellectual Property, Genetic Resources, and Associated Traditional Knowledge marks a significant milestone in the several decades of efforts at multilateral levels to open the global intellectual property system to the needs of people on the margins in the global south and north. The negotiation trajectory of the treaty was fraught. Yet the elongated treaty-making process enabled the WIPO specialist committee that negotiated the treaty to promote global awareness of the dynamic of the interface of intellectual property with traditional knowledge in pragmatic ways. The treaty builds on earlier and contemporary initiatives across other regimes, notably the Convention on Biological Diversity. It is now an integral part of the broader ecosystem for the practical integration of traditional knowledge into the intellectual property system and global knowledge governance through transparency and accountability measures. The fractious negotiation history of the treaty along the dichotomous binary of demandeur and non-demandeur blocs remains troubling. For the treaty to advance a just and inclusive global intellectual property order, this dichotomy will need to be strategically mediated to ensure that non-demandeurs who hold the most genetic resources and associated traditional knowledge patents are not alienated from the treaty implementation process. Aside from that concern, a progressive aspect of the treaty that warrants deliberate effort at national and international uptake is the participation of Indigenous Peoples and Local Communities in the treaty governance and implementation. This pattern is worth consolidating in the continuing work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions and across other interrelated regimes.

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INTRODUCTION

May 24, 2024 is a significant date in the World Intellectual Property Organization's (WIPO) 56-year history. In the early hours of that day, the organization announced to the whole world that its member states had agreed to the much-anticipated treaty on Genetic Resources and Associated Traditional Knowledge (GR-ATK Treaty).[1] The GR-ATK Treaty is the 27th within the

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[1] *WIPO Member States Adopt Historic New Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge*, WIPO (May 24, 2024), https://www.wipo.int/pressroom/en/articles/2024/article_0007.html.

WIPO treaty canopy.[2] The historic treaty was negotiated under the mandate of WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions[3] (IGC or WIPO-IGC). The IGC was established in 2000.[4] Its overarching mandate, which remains in effect, is to develop international legal instrument(s) for the effective protection of genetic resources, traditional knowledge, and folklore (a.k.a. traditional cultural expressions) within the intellectual property system.[5]

Even though the IGC was established in 2000, it did not begin active textual negotiations until after the 2009 mandate.[6] Technically, the negotiations for the GR-ATK Treaty, as the first treaty of the WIPO-IGC, lasted for 15 years, even though the Committee has been in existence for about two and half decades.[7] The Committee's work continues, with negotiations now focusing on traditional knowledge (TK) and traditional cultural expressions (TCEs) later in the 2024-2025 biennium[8] and onwards.[9]

Over two decades of the IGC have resulted in massive academic and policy literature, including several commissioned studies that go beyond intellectual property.[10] Indeed, the IGC has become a prolific and authoritative source for

[2] *WIPO-Administered Treaties*, WIPO, https://www.wipo.int/treaties/en/index.html (last visited Apr. 4, 2025). The GRATK treaty is technically the 26th treaty and with the WIPO Convention, it brings the number of treaties under WIPO as of May 24, 2024 to 27th; *Id*.

[3] Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO Gen. Assembly, 26th Sess., WO/GA/26/6 (Aug. 25, 2000) [hereinafter WIPO 26th Gen. Assembly].

[4] WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Background Brief No. 2 (2024), https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2023-5-2-en-the-wipo-intergovernmental-committee-on-intellectual-property-and-genetic-resources-traditional-knowledge-and-folklore.pdf [hereinafter Background Brief].

[5] WIPO 26th Gen. Assembly, *supra* note 3.

[6] Background Brief, *supra* note 4; Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Agenda Item 28*, Decision,* WIPO Gen. Assembly, 38th Sess. (Oct. 1, 2009) ("The committee will, during the next budgetary biennium (2010/2011), and without prejudice to the work pursued in other fora, continue its work and undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of [genetic resources], [traditional knowledge] and [traditional cultural expressions].") [Hereinafter Agenda Item 28].

[7] Background Brief, *supra* note 4.

[8] Assemblies of the Member States of WIPO 64th Series of Meetings, *List of Decisions – 2023*, WIPO (2023), https://www.wipo.int/export/sites/www/about-wipo/en/assemblies/docs/a64-list-decisions.pdf.

[9] *Id.*

[10] *See, e.gs.*, Chidi Oguamanam, *Ramifications of the WIPO IGC for IP and Development*, *in* PROTECTING TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 339 (Daniel. F. Robinson, Ahmed Abdel-Latif & Pedro Roffe eds., 2017); Peter

legal and policy insights into intellectual property and subject matters of the Committee's mandate.[11] The Committee's work contributes to developments in related fora, not only within and outside the UN system but also at regional and national levels.[12] Fundamentally, IGC's work sheds light on the long and winding road of its subject matters into the WIPO and, consequently, the international intellectual property system.

This Article is premised on aspects of the negotiation history pursuant to the author's active involvement in the methodical documentation and reportage of the IGC process over a seven-year period. It is not a comprehensive history of the GR-ATK Treaty. Rather, using an abridged historical and critical narrative, it situates the dynamic contexts and underlying conceptual framework for the evolution of the final treaty text. This is to tease out the tensions that characterized the treaty negotiations with insights into competing interests and the circumstances of their resolutions. The objective is to situate the treaty in its historical context and to contribute to the early understanding of the significance and uniqueness of the treaty and its symbolic ramifications for the transformation of the global intellectual property system. The ensuing analysis elucidates the context of the emerging and increasingly complex, even if overlapping, regime ecosystem for the global governance of traditional knowledge and genetic resources.

The Article is divided into four major parts. The first part provides a contextual backdrop to the push toward the integration of traditional knowledge, with a special interest in traditional knowledge associated with genetic resources, into the global intellectual property system. In furtherance of that narrative, the second part tackles the evolutionary regime ecosystem and regime complex around traditional knowledge at the intersection of biodiversity courtesy of the Convention on Biological Diversity (CBD) and intellectual property pursuant to WIPO via the IGC. That analysis is deliberately foregrounded in the consciousness of miscellaneous stakeholders' roles in calling attention to the marginalization or exclusion of traditional knowledge in the intellectual property system. The third part explores the dramatic moments and highlights of the negotiation dynamics that climaxed in the GR-ATK Treaty. The fourth part highlights key textual provisions of substantive and procedural aspects of the treaty. The paper concludes with a synthesis of the significance of the treaty for a forward-looking and inclusive intellectual property system in relation to traditional knowledge.

K. Yu, *WIPO Negotiations on Intellectual Property, Genetic Resources and Associated Traditional Knowledge*, 57 AKRON L. REV. 101 (2024).

[11] Oguamanam, *supra* note 10, at 340.

[12] *Id.* at 45.

PART I: BRIEF CONTEXTUAL BACKDROP OF TK IN THE GLOBAL IP SYSTEM

1.1 From Europe to the World: Intellectual Property without TK

The 550-year foundation of the intellectual property system is moored in the municipal laws of Europe, dating back to the 1474 Patent Act enacted by the Senate of the Republic of Venice, which pioneered the formal patent system.[13] At its early stages of internationalization and subsequent globalization, intellectual property sustained its exclusive European imprint.[14] As an often mentioned and self-evident example, at the time of negotiations of the Paris and Berne Conventions,[15] most non-Western countries were Europe's colonial outposts.[16] To borrow the cliché, they had no representation at the table.[17] Their knowledge systems, conveniently and conceptually characterized as traditional knowledge – even the latter's relationship with genetic resources – were not within the purview of intellectual property.[18] The broader non-European epistemic traditions and worldviews of knowledge production and governance were also not deemed to fit within the intellectual property framework.[19] Subsequent attempts to open intellectual property to the needs of developing countries did not attract a sense of urgency. Entrenched resistance to the idea found refuge in intellectual property's putative, albeit dubious, orthodoxy.[20]

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[13] Ikechi Mgbeoji, *The Juridical Origins of the International Patent System: Towards a Historiography of the Role of Patents in Industrialization*, 5 J. HISTORY INT'L L. 403 (2003); Daren Tang, Opening Address of the 2024 WIPO Diplomatic Conference on Genetic Resources and Intellectual Property (May 13, 2024), https://www.wipo.int/export/sites/www/about-wipo/en/dg_tang/docs/dg-opening-speech-tk-dipcon-13052024.pdf; *see also* Agenda Item 28, *supra* note 6, at 28.

[14] *See generally* P. SEAN MORRIS, INTELLECTUAL PROPERTY AND THE LAW OF NATIONS 1860–1920 (2022); LIONEL BENTLY ET AL., PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT (1st ed. 2010); LIONEL BENTLY ET AL., INTELLECTUAL PROPERTY LAW (5th ed. 2014).

[15] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1161 U.N.T.S. 3 (revised at Paris July 24, 1971) [hereinafter Berne Convention]; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as revised July 14, 1967, 828 U.N.T.S. 305 [hereinafter Paris Convention].

[16] Jeremy de Beer, Jeremiah Baarbé & Caroline Ncube, *The Intellectual Property Treaty Landscape in Africa, 1885 to 2015*, 15 (OpenAIR, Working Paper No.4, 2017), https://open-air.africa/the-intellectual-property-treaty-landscape-in-africa-1885-to-2015/ (last visited Jun 25, 2020).

[17] SARA BANNERMAN, INTERNATIONAL COPYRIGHT AND ACCESS TO KNOWLEDGE 128 (2016).

[18] Chidi Oguamanam, *Local Knowledge as Trapped Knowledge: Intellectual Property, Culture, Power and Politics*, 11 J. WORLD INTELL. PROP. 29, 36 (2008).

[19] *Id.*

[20] Chidi Oguamanam, *Pressuring 'Suspect Orthodoxy': Traditional Knowledge and the Patent System*, *in* INDIGENOUS INTELLECTUAL PROPERTY 313, 322 (Mathew Rimmer ed.,

In the late 20th century, specifically in 1995, a milestone was achieved in the globalization of intellectual property through the World Trade Organization's (WTO) Trade-Related Aspects of Intellectual Property (TRIPS) agreement.[21] TRIPS was mainly championed by the USA,[22] a neo-European civilization,[23] but it was negotiated when virtually all developed countries had official seats at the table. However, in relation to earlier foundational treaties,[24] the TRIPS Agreement did not textually include traditional knowledge, nor did it factor the interests of Indigenous Peoples as well as local communities (IPLCs) of both the global north and south in its framework.

The apparent disdain for, and exclusion of, traditional knowledge from the early treaties as well as from the TRIPS agreement has unspoken nuances. European or Western conceptualization of intellectual property associates intellectual property as issuing from the creations of the mind.[25] This invokes a colonial innuendo, justifying intellectual property's failure to reckon with traditional knowledge.[26] At the heart of colonialism is a cultural and racial hierarchy[27] in which the humanity, even on essential terms, of non-western peoples and civilizations is questioned.[28] From colonial and Eurocentric premise, Indigenous Peoples and variegated local communities and colonized civilizations were incapable of genius or intellect required for innovation or, to borrow the patent term, inventive step.[29] That step typifies the investment of human genius to transform phenomena from their raw natural state to a state of added value.[30] The reward for that added value is expressed in exclusive proprietary and market terms, hence "intellectual *property*."[31]

2015). *But see* Tang, *supra* note 13 (where he argues that intellectual property rights evolve in synergy with the trajectories of innovations).

[21] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299 (adopted Jan. 1, 1995).

[22] SUSAN SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY 16 (2003). *See generally* DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS (5th ed. 2012).

[23] Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT. LAW 1113, 1114 (1995). Noting that United States' history is "a continuation of the Age of Europe"; Makau wa Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L. J. 201, 217 (2001).

[24] Paris Convention, *supra* note 15, at 306; Berne Convention, *supra* note 15, at 222.

[25] Berne Convention, *supra* note 15, at 222; Paris Convention, *supra* note 15, at 306.

[26] Oguamanam, *supra* note 18, at 36; OLUFUNMILAYO AREWA, PIRACY, BIOPIRACY AND BORROWING: CULTURE, CULTURAL HERITAGE AND THE GLOBALIZATION OF INTELLECTUAL PROPERTY 1 (2006).

[27] AREWA, *supra* note 26, at 1.

[28] Antony Anghie, *Francisco De Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321, 332 (1996).

[29] Oguamanam, *supra* note 18, at 36.

[30] *Id.* at 33.

[31] *Id.*

The exclusion of traditional knowledge from intellectual property, therefore, is not necessarily founded on the much-avowed conceptual irreconcilability of the two.[32] Before that was an issue, traditional knowledge and its purveyors never had a locus-standi for staking any claims based on the latter's genius or intellectual integrity. A people perceived as existing in a raw and savage state of nature[33] and lacking in intellectual ingenuity were, in consequence, logically part of the public domain.[34] As such, they were legitimate objects and targets of plunder. When a people were so treated, as colonialism did, their identity, self-determination, language, knowledge systems and everything else were not spared.[35]

As a symbolic signifier of the globalization of intellectual property, the TRIPS agreement's omission of traditional knowledge was indicative of the continuation of intellectual property's colonial legacy. TRIPS' failure to recognize traditional knowledge was a disastrous public relation both for the idea of intellectual property and for those who championed its inversion from an authorized monopoly for trade restriction[36] to an incentive for the promotion of free trade.[37] TRIPS prescribed a minimum standard (floor) of intellectual property protection for the adoption of all WTO member states.[38] Non-compliance with TRIPS is backed by elaborate sanctions, which were non-existent in the extant WIPO-driven intellectual property system.[39] TRIPS also created some exceptions or flexibilities, described by Jerome H. Reichman as wiggle rooms,[40] including segmented implementation and discriminatory compliance timelines to accommodate variations in the developmental and

[32] Naomi Roht-Arriaza, *Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities*, 17 MICH. J. INT'L L. 919, 929 (1995).

[33] Anghie, *supra* note 28, at 331.

[34] LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES 1 (3rd ed. 2021); s*ee also* ALBERT MEMMI, SUSAN GIBSON MILLER & JEAN-PAUL SARTRE, THE COLONIZER AND THE COLONIZED (Expanded ed. edition ed. 1991) Oguamanam, *supra* note 18, at 33.

[35] SMITH, *supra* note 34.

[36] Roger D. Blair & Wenche Wang, *Monopoly Power and Intellectual Property*, *in* THE CAMBRIDGE HANDBOOK OF ANTITRUST, INTELLECTUAL PROPERTY, AND HIGH TECH 204, 217 (D. Daniel Sokol & Roger D. Blair eds., 2017).

[37] SELL, *supra* note 22, at 6; *see also* Peter M. Gerhart, *The Tragedy of TRIPS*, 2007 MICH. ST. L. REV. 143, 154 (2007).

[38] Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 21, at part 2, sections 1–6.

[39] *Id.* art. 64.

[40] Jerome H. Reichman, *Securing Compliance with the TRIPS Agreement After US v. India Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, 1 J. INT'L ECON. L. 585, 587–88 (1998); *see also* Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, 46 HOUS. L. REV. 1115, 1182 (2009).

technological capacity of states.[41]

It is instructive that TRIPS only set a floor; it did not create a ceiling. Developed countries, led by the USA, were at liberty to ratchet up pressure on developing countries outside the TRIPS' multilateral framework. The USA, Europe, and their industrialized allies did this by concurrently pursuing bilateral options that imposed stronger IP standards than those prescribed under TRIPS.[42] This aggressive and forceful approach made intellectual property a touchstone for distrust in the developing world.[43]

The pressure on non-Western countries to implement TRIPS and TRIPS-plus intellectual property standards is linked directly to the USA's complaints and campaigns.[44] The grouse was that those countries had lax intellectual property laws.[45] Prodded by its industrial sectors, especially the so-called big pharmaceutical lobby,[46] the USA was determined to rein in developing countries and home states of most of the world IPLCs perceived as free riders on the intellectual property of American and western corporations.[47] The accommodations or wiggle rooms granted to developing countries under TRIPS over the years proved hollow.[48] Described as a product of bargain linkage diplomacy,[49] many developed countries felt hoodwinked by TRIPS.[50] Their export and access to western markets as the quid pro quo for strengthened domestic intellectual property laws remained weak.

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[41] Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 21, arts. 65, 66.

[42] Bryan Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 215 (Lorand Bartels & Federico Ortino eds., 2006); CAROLYN DEERE BIRKBECK, THE TRIPS IMPLEMENTATION GAME: A FIGHT FOR IDEAS 24 (2009); Juliet A. Ogbodo, TRIPS-PLUS *Provisions in the Economic Agreements with EU: The CARIFORUM's Experience and Lessons for West Africa*, 27:2 J. World Intell. Pty. 257 (2024).

[43] FREDERICK M. ABBOTT, WTO TRIPS AGREEMENT AND ITS IMPLICATION FOR ACCESS TO MEDICINES IN DEVELOPING COUNTRIES 54–55 (2002). *See generally* 25 YEARS OF THE TRIPS AGREEMENT: PRESENT, PAST AND FUTURE, (Christopher Heath & Anselm Kamperman Sanders eds., 2021).

[44] SELL, *supra* note 22, at 13.

[45] GERVAIS, *supra* note 22.

[46] SELL, *supra* note 22, at 118–19; GERVAIS, *supra* note 22.

[47] SELL, *supra* note 22, at 118-19; GERVAIS, *supra* note 22.

[48] Gerhart, *supra* note 37; Jens Hillebrand Pohl, *The End of History and Back Again: A Critical Look at the Political Promises of TRIPS*, *in* 25 YEARS OF THE TRIPS AGREEMENT: PRESENT, PAST AND FUTURE (Christopher Heath & Anselm Kamperman Sanders eds., 2021).

[49] *See* J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. OF COMP. & INT'L L. 11, 61 (1998); *see also* Jerome Reichman & Keith Maskus, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT'L ECON. L. 279, 302 (2005).

[50] Reichman & Lange, *supra* note 49, at 61.

1.2 Access to Medicines Crises, Life Sciences R&D, Biopiracy

TRIPS' expansion of intellectual property regulations contributed to the global access to medicines crises.[51] For instance, India, which had a reputation as the third-world pharmacy because of its capacity for manufacturing generic drugs at affordable prices, was substantially constrained as a result of the new order.[52] Timing was everything. This medicines crisis was magnified during the AIDS pandemic in the 1990s-2000s.[53] Attempts at operationalizing TRIPS' wiggle room to ensure access to medicines for those in direst need did not shift the dial in any substantial or sustainable manner. A major tool in the wiggle room toolbox, compulsory licencing, proved to be more of a theory and a political palliative than it had any transformative and practical application.[54]

There was evident irony and hypocrisy, not to mention naked power imbalance in the globalization of the intellectual property system pursuant to TRIPS.[55] The USA and the rest of the Western world piled on the pressure, accusing the developing world of freeriding.[56] Their proffered solution was for the developing countries to upgrade their intellectual property laws to conform to those of the developed world.[57] This self-serving solution is premised on the fundamentally flawed logic that stronger domestic intellectual property was a pathway for the technological and economic advancement of these countries.[58] This logic flies on the face of the USA's pathway to being an industrial, technology and intellectual property exporting powerhouse.[59] There was no

[51] 25 YEARS OF THE TRIPS AGREEMENT: PRESENT, PAST AND FUTURE, *supra* note 43; ABBOTT, *supra* note 43, at i.

[52] *See* Mahdieh Fathi, Farzad Peiravian & Nazila Yousefi, *Impact of the Trade-Related Aspect of Intellectual Property Rights Agreement on Pharmaceutical Industry in Developing Countries: A Scoping Review*, 20 IRAN J. PHARMACEUTICAL RES. 339, 340–41 (2021).

[53] Jean-Frédéric Morin, *The Life-Cycle of Transnational Issues: Lessons from the Access to Medicines Controversy*, 25 GLOBAL SOC'Y 227, 245–46 (2011); Ellen 't Hoen et al., *Driving a Decade of Change: HIV/AIDS, Patents and Access to Medicines for All*, J. INT'L AIDS SOC'Y, at 3 (2011).

[54] Christina Cotter, *The Implications of Rwanda's Paragraph 6 Agreement with Canada for Other Developing Countries*, 5 LOY. U. CHI. INT'L L. REV. 177, 182–83 (2008); Beatrice Stirner & Harry Thangaraj, *Learning from Practice: Compulsory Licensing Cases and Access to Medicines*, 2 PHARM. PATENT ANALYST 195 (2013); Holger P. Hestermeyer, *Canadian-Made Drugs for Rwanda: The First Application of the WTO Waiver on Patents and Medicines*, 11 AM. SOC'Y INT'L L. (2007), https://www.asil.org/insights/volume/11/issue/28/canadian-made-drugs-rwanda-first-application-wto-waiver-patents-and (last visited Apr. 4, 2025).

[55] 25 YEARS OF THE TRIPS AGREEMENT: PRESENT, PAST AND FUTURE, *supra* note 43.

[56] Reichman & Lange, *supra* note 49, at 19–20.

[57] *Id.* at 15–16.

[58] GRAHAM DUTFIELD & UMA SUTHERSANEN, GLOBAL INTELLECTUAL PROPERTY LAW 7-9 (2008).

[59] B. Zorina Khan, *Copyright Piracy and Development: United States Evidence in the Nineteenth Century*, 10 REVISTA DE ECONOMÍA INSTITUCIONAL 21, 22 (2008); HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE

consideration given to protecting these countries' comparative advantage in the innovation ecosystem. Nor was there any intentionality on how their comparative advantage could be incorporated into the design of the intellectual property system to beneficial effect.

The branding of developing countries as intellectual property delinquents was inaccurate, if not misleading. As indicated, this label did not consider the contributions of these countries' peoples and, indeed, non-western civilizations of IPLCs all over the world to the global basket of knowledge.[60] The Western life sciences industrial complex, including the associated Research and Development (R&D) ecosystem, is no island onto itself. It does not operate in isolation from both traditional knowledge and insights of IPLCs.[61] Nor does it operate in sequestration from the vast genetic resources that are found, as a matter of profound disequilibrium, in the huge ecosystems as part of robust biological diversities of the ancestral homelands of the world's IPLCs in the global north and south.[62]

R&D, as well as innovations in life sciences, notably, in food, agriculture, horticulture, aquaculture, environment, medicine, therapeutics, and pharmaceuticals, to mention a few, are not solely dependent on one knowledge system.[63] This is so notwithstanding that the process of valorizing the output of such R&D through intellectual property, especially the patent system, projects only one side of the story. The patent system is designed to validate and reward innovations framed or specified after the Western science under strict statutory or legal formalities.[64] It is not fit-for-purpose in the context of innovation and knowledge production within the epistemic parameters of IPLCs as non-western civilizations.[65] Yet the dependency of Western life sciences on traditional knowledge and genetic resources found in IPLCs is incontrovertible,

24-34 (2002); *Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RSCH. LIBRS., https://www.arl.org/copyright-timeline/ (last visited Apr. 4, 2025); Susan Sell, *Intellectual Property and Public Policy in Historical Perspective*: *Contestation and Settlement*, 38 LOYOLA LOS ANGELES LAW REV. 267, 274, 282, 285, 287 (2004).

[60] Llewellyn Joseph Gibbons, *Do As I Say (Not As I Did): Putative Intellectual Property Lessons for Emerging Economies from the Not So Long Past of the Developed Nations*, 64 SMU L. REV. 923, 924 (2011).

[61] CHIDI OGUAMANAM, INTERNATIONAL LAW AND INDIGENOUS KNOWLEDGE: INTELLECTUAL PROPERTY, PLANT BIODIVERSITY, AND TRADITIONAL MEDICINE 1 (2010).

[62] *Id*.

[63] *Id*.

[64] *Id.*

[65] Oguamanam, *supra* note 18, at 29; TABREZ AHMAD & JAYA GODHWANI, TRADITIONAL KNOWLEDGE: A NEW CHALLENGE IN PATENTS 3 (2012); 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,* 9 IND. J. GLOBAL LEGAL STUD. 163, 163 (2001); GRAHAM DUTFIELD & UMA SUTHERSANEN, TRADITIONAL KNOWLEDGE AS INTELLECTUAL PROPERTY SUBJECT MATTER: PERSPECTIVES FROM HISTORY, ANTHROPOLOGY, AND DIVERSE ECONOMIES 2 (2023).

notwithstanding reservations about exaggerated claims and sustainability concerns.[66] For example, relying on IPLCs' use of medicinal plants, the prospects of developing a successful drug increase over seventy percent.[67] This is in juxtaposition with the intensive cost and unsure outcome of a scatter-gun approach into the forests in search of medicinal plants of pharmacological value.[68] An established trend like this begs a question regarding the veracity of the freeriding claims.

A critical appraisal of the modus operandi of the life sciences (symbolized in the vocal pharmaceutical industry) shows a strong link with traditional knowledge of IPLCs and their medicinal plants.[69] A significant percentage of the medicinal plants and their synthetic renditions are associated with ancient IPLCs civilizations.[70] Segments of activists and the critical public charge that the real free riders are not necessarily determined by those who have the accusatory megaphone.[71] No knowledge system exists in isolation[72]; hence, free riding remains a contextually contingent and contested proposition. This is the logical shorthand of how bio-piracy came into the discourse.[73] Bio-piracy symbolizes a counterpoise or pushback by IPLCs and their advocates to flip and shake off the narrative and toga of free riders as propagated by industrialized countries and holders of intellectual property.[74]

Within the 1990s-2000s period, notable NGOs and Indigenous advocacy groups, as well as some nation states, brought many flagship cases of biopiracy

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[66] DUTFIELD & SUTHERSANEN, *supra* note 65, at 337–38.

[67] OGUAMANAM, *supra* note 61, at 1; Yadav Uprety & Hari Datta Bhattarai, *From the Field into the Lab: Contribution of Traditional Knowledge to Modern Medicine*, 2 ANNAPURNA J. HEALTH SCI. 63, 65 (2022); Graham Dutfield, *in From Traditional Medicines to Modern Drugs*, GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE 93, 93 (Tania Bubela & E. Richard Gold eds., 2012).

[68] Graham Dutfield, *Opinion: Why Traditional Knowledge Is Important in Drug Discovery*, 2 FUTURE MED. CHEMISTRY 1405, 1405 (2010).

[69] *Id.* at 1405–06.

[70] DUTFIELD & SUTHERSANEN, *supra* note 65, at 330.

[71] VANDANA SHIVA, BIOPIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE (Reprint edition ed. 1997); Nick Meyen, *Recognizing Biopiracy*, ENV'T JUST. ORGS., LIABS., & TRADE (Aug. 20, 2012), http://www.ejolt.org/2012/08/recognizing-biopiracy/.

[72] DUTFIELD & SUTHERSANEN, *supra* note 65, at 18, 24–25, 27.

[73] Ikechi Mgbeoji, *Patents and Plant Resources-Related Knowledge: Towards a Regime of Communal Patents for Plant Resources-Related Knowledge*, *in* ENVIRONMENTAL LAW IN DEVELOPING COUNTRIES: SELECTED ISSUES 79, 82 (Nazrul Islam, Isabel Martinez & Wang Xi eds., 2001); DANIEL F. ROBINSON, CONFRONTING BIOPIRACY: CHALLENGES, CASES AND INTERNATIONAL DEBATES 1–3 (2010).

[74] IKECHI MGBEOJI, GLOBAL BIOPIRACY: PATENTS, PLANTS AND INDIGENOUS KNOWLEDGE 15–16 (2006); Patents & Biopiracy, ETC GRP, https://www.etcgroup.org/issues/patents-biopiracy (last visited June 26, 2024); ROBINSON, *supra* note 73; SHIVA, *supra* note 71; Meyen, *supra* note 71.

to focus.[75] The strategy included filing patent oppositions against biopiracy patents, as well as strategic awareness-raising and naming-and-shaming campaigns.[76] The biopiracy cases showcased how corporations obtained dubious patents on the basis of IPLCs' prior uses of genetic resources of various kinds.[77] The consequences of those patents include failure to recognize the immemorial knowledge of IPLCs (as a prior art) and conferring of exclusive privileges thereof to the patent holder.[78] These incessant and crude forms of appropriation exposed the injustice of a global intellectual property (notably the patent system) order. It portrayed the patent system as predatory on traditional knowledge and as a tool for perpetuating the disempowerment of the world's most vulnerable populations.[79]

Fixing the problematic nature of the intellectual property system in general and the patent system in particular is now a matter for reversal of pressure in a similar manner as bio-piracy. The demonstrated susceptibility of the patent system to the abuse of traditional knowledge and, consequently, the rights of IPLCs and developing countries was clearly not within the purview of the WTO. This is notwithstanding WTO-TRIPS' role in stoking discontent and exposing the lacuna about biopiracy.[80] This jurisdictional question mark over the WTO provided an opportunity for WIPO to naturally re-assume its residual, even if substantive, jurisdiction over intellectual property matters.[81] The WTO had usurped that jurisdiction via the TRIPS agreement, but even within WIPO, efforts by developing countries to redress the traditional knowledge question needed to first resolve the intra-forum question.[82]

PART 2: THE REGIME ECOSYSTEM OF THE TRADITIONAL KNOWLEDGE QUESTION

2.1 From Advocacy, Scholarship and Multiple Agencies

By the time the WIPO General Assembly established the IGC in 2000, there were widespread efforts across multiple regimes and fora to address the question

[75] DANIEL F. ROBINSON, BIODIVERSITY, ACCESS AND BENEFIT-SHARING: GLOBAL CASE STUDIES 89–90 (2015); Chidi Oguamanam, *Drawn Out Battle Over Genetic Resources Dampens Africa's Hopes*, THE CONVERSATION (Apr. 25, 2016), http://theconversation.com/drawn-out-battle-over-genetic-resources-dampens-africas-hopes-57289 (last visited June 26, 2024); ROBINSON, *supra* note 73 at 10, 14–17.

[76] For example, Captain Hook Awards for Biopiracy, ETC GRP, https://www.etcgroup.org/content/captain-hook-awards-biopiracy (last visited Apr. 4, 2025).

[77] ROBINSON, *supra* note 75, at 196; Oguamanam, *supra* note 75.

[78] ROBINSON, *supra* note 75, at 196; Oguamanam, *supra* note 75.

[79] Patents & Biopiracy, *supra* note 74.

[80] MGBEOJI, *supra* note 74, at 120; Oguamanam, *supra* note 75.

[81] Oguamanam, *supra* note 75.

[82] *Id.*

of TK both generally and in the context of genetic resources.[83] These developments involved motley initiatives by Indigenous movements, leading scholars and, of course, relevant UN organizations.[84] For example, the 1993 Bellagio Declaration[85] called for special protection regimes over folkloric and cultural heritage works as well as for "biological and ecological know-how of traditional peoples."[86] The Declaration was part of a monumental burst of influential advocacy work and research over two decades of negotiations and debates that culminated in the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[87] Even though it was concluded in 2007, the same year as the WIPO Development Agenda (seven years after the IGC), UNDRIP and the WIPO Development Agenda are strategic fillips on TK and intellectual property, which foregrounded the work of IGC, and eventually culminated in the new GR-ATK Treaty.[88]

A resourceful pack of pioneer elite scholars also contributed to the effort to address the issue of TK interface with the IP system while foreshadowing interest in genetic resources.[89] For example, the first major conference held in Nairobi in 1993, following the signing of the CBD a year earlier in Rio, resulted in an edited collection titled *Biodiplomacy: Genetic Resources and International*

[83] *See e.g.,* The Society for Critical Exchange, *The Bellagio Declaration*, https://case.edu/affil/sce/BellagioDec.html (last visited June 26, 2024); Commission on Human Rights, *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, E/CN.4/SUB.2/AC.4/1993/CRP.5 (1993); United Nations Environment Programme, *Convention on Biological Diversity*, 1760 U.N.T.S. 79, 31 I.L.M. 818 (1992).

[84] The Society for Critical Exchange, *supra* note 83; Commission on Human Rights, *supra* note 83; United Nations Environment Programme, *supra* note 83.

[85] The Society for Critical Exchange, *supra* note 83.

[86] *Id.*

[87] United Nations Declaration on the Rights of Indigenous Peoples, G.A. RES 61/295, U.N. Doc. A/RES/61/295 (2007) [hereinafter UNDRIP].

[88] *See id.* at arts. 11 and 31. Notably, the preamble to the GR-ATK treaty makes reference to UNDRIP. WIPO, *Geneva Report on the Protection of Traditional Knowledge* (2021), https://www.wipo.int/edocs/mdocs/tk/en/gratk_dc/gratk_dc_7.pdf. Similarly, the biennial renewal of mandates of the IGC from 2007 makes reference to "Bearing in mind the Development Agenda recommendations." *See* e.g., 64th Session of Assemblies of Member States of WIPO Agenda Item 15(v), July 6-14, 2023, *Report on Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)*, https://www.wipo.int/documents/d/igc/docs-en-igc-mandate-2024-2025.pdf. The Development Agenda recommended sets of priority targets for mainstreaming development considerations into WIPO's work and programming. They include tech assistance, capacity building, tech transfer, ICT, access to knowledge, impact studies, norm-setting etc. Conceivably, IGC's work straddles most of these, but it is more engaged with norm-setting. World Intellectual Property Organization, Recommendations on the Protection of Traditional Knowledge (2021), https://www.wipo.int/export/sites/www/ip-development/en/agenda/docs/recommendations.pdf.

[89] *See infra* notes 90–94.

Relation, edited by Vincente Sanchez and Calestous Juma. [90] Part II of this collection focused on the theme of "access to genetic resources and indigenous knowledge."[91] Vandana Shiva,[92] Darrell Posey, Frédéric Hendrickx, Veit Koester and Christian Prip contributed to the theme.[93] These contributions mapped, in a self-fulfilling degree, the conceptual frameworks, policy ramifications and pragmatic challenges at the intersection of traditional knowledge and aspects of intellectual property with a focus on patents and genetic resources within the design of the CBD.[94]

Aside from these scholars, leading American IP scholar, Peter K. Yu[95] identifies additional experts who led the "early discussions of the interplay between intellectual property and traditional knowledge."[96] They include Dutfield & Posey;[97] Coombe;[98] Farley;[99] Kuruk;[100] Ragavan;[101] Roht-Arriaza,[102] Yu,[103] etc. This non-exhaustive but sampling list must include Okediji;[104]

[90] VINCENTE SÁNCHEZ & CALESTOUS JUMA, EDS., BIODIPLOMACY: GENETIC RESOURCES AND INTERNATIONAL RELATIONS (1994).

[91] Vandana Shiva, *The Convention on Biological Diversity: Negotiation and Contents*, *in* BIODIPLOMACY: GENETIC RESOURCES AND INTERNATIONAL RELATIONS 107, 107 (Vincente Sánchez & Calestous Juma eds., 1994).

[92] *Id.*

[93] Frédéric Hendrickx, Veit Koester & Christian Prip, *Access to Genetic Resources: A Legal Analysis, in* BIODIPLOMACY: GENETIC RESOURCES AND INTERNATIONAL RELATIONS 139, 139 (Vincente Sánchez & Calestous Juma eds., 1994).

[94] SÁNCHEZ & JUMA, *supra* note 90, at 105–54.

[95] Yu, *supra* note 10, at 104–05.

[96] *Id.*

[97] DARRELL A. POSEY & GRAHAM DUTFIELD, BEYOND INTELLECTUAL PROPERTY: TOWARD TRADITIONAL RESOURCE RIGHTS FOR INDIGENOUS PEOPLES & LOCAL COMMUNITIES (1996).

[98] Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275 (2001).

[99] Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?* 30 CONN. L. REV. 1 (1997).

[100] Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tension Between Individual and Communal Rights in Africa and the United States*, 48 AM. U.L. REV. 769 (1999).

[101] Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. J.L. SCI. & TECH. 1 (2001).

[102] Roht-Arriaza, *supra* note 32.

[103] Peter Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 TEMP. L. REV. 433 (2008).

[104] Ruth Gana, *Has Creativity Died in the Third World - Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. INT'L L. & POL'Y 109 (1995).

Drahos;[105] Mgbeoji;[106] Oguamanam;[107] and Gervais,[108] among many others.[109]

In the UN organizations, the issue of traditional knowledge resonates in various nuances across multiple foundational instruments and mandates of specialist agencies and their programs of work.[110] They include civil and political rights jurisprudence pursuant to the UN human rights system.[111] Also, traditional knowledge is part of the thematic works of several economic, social and cultural right bodies, notably propelled by the work of the ECOSOC. They include those relating to health (WHO);[112] food and agriculture (FAO);[113] the environment (UNEP/CBD);[114] culture and science (UNESCO);[115] and within the ubiquitous nexus to the UN's elaborate and dynamic development agenda.[116] Added to these are the work of the United Nation's Permanent Forum on Indigenous Issues (UNFII),[117] the activities of the Expert Mechanism on the

[105] Peter Drahos, *Indigenous Knowledge, Intellectual Property and Biopiracy: Is a Global Biocollecting Society the Answer*, 22 EUR. INTELL. PROP. REV. 245 (2000).

[106] Mgbeoji, *supra* note 73.

[107] Chidi Oguamanam, *Protecting Indigenous Knowledge in International Law: Solidarity beyond the Nation-State*, 8 L. TEXT CULTURE 191 (2004).

[108] Daniel Gervais, *Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach*, 2005 MICH. STATE L. REV. 137 (2005).

[109] A caveat is due here. This list does not include leading indigenous scholars in Australia, New Zealand, Canada and the United States who have charted the path around indigenous knowledge and its intersection with intellectual property at those national levels and at an international level. These scholars' contributions deserved more dedicated attention.

[110] See, e.g., United Nations Environment Programme, *supra* note 83; BEGOÑA VENERO AGUIRRE ET AL. & WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), DOCUMENTING TRADITIONAL KNOWLEDGE – A TOOLKIT, (2017).

[111] LAURENCE HELFER & GRAEME AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE (2011).

[112] *Traditional, Complementary and Integrative Medicine*, WORLD HEALTH ORG., https://www.who.int/health-topics/traditional-complementary-and-integrative-medicine#tab=tab_1 (last visited Feb 5, 2025).

[113] *International Treaty on Plant Genetic Resources for Food and Agriculture*, FOOD AND AGRIC. ORG. UNITED NATIONS, https://www.fao.org/plant-treaty/en/ (last visited Feb 5, 2025).

[114] *UNEP and Biodiversity*, UNITED NATIONS ENV'T PPROGRAMME, https://www.unep.org/unep-and-biodiversity, (last visited Feb 5, 2025).

[115] For example, UNESCO's work relating to traditional knowledge involves several conventions and instruments, most notably the 2003 Convention for the Safeguarding of Intangible Culture Heritage. *See* Convention for the Safeguarding of the Intangible Cultural Heritage pmbl., Oct. 17, 2003, 2368 U.N.T.S. 3.

[116] *WIPO Development Agenda*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (2007), https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2021-22-en-wipo-development-agenda.pdf.

[117] Established in 2000, UNPFII is "a high-level advisory body to the [UN] Economic and Social Council … with the mandate to deal with indigenous issues related to economic and social development, culture, education, health and human rights." *United Nations Permanent*

Rights of Indigenous Peoples (EMRIP), and the works of special rapporteurs.[118] However, our focus remains on the direct intersection of traditional knowledge and intellectual property.

2.2 Setting the Stage: From the CBD to the Patent Law Treaty

As evident already, even though not an intellectual property regime, the CBD was catalytic to rendering urgent the traditional knowledge question in the intellectual property space. This happened in several respects. First, the empowerment of IPLCs is central to the realization of the three objectives of the CBD: conservation of biological diversity; sustainable use of its components; fair, equitable access; and sharing of benefits from the use of genetic resources, through various measures, including technology transfer.[119]

Second, the CBD recognizes the pivotal role of the knowledge, innovations, and practices of IPLCs in biodiversity conservation.[120] Third, the Convention affirms the crucial role of patents and other *intellectual property rights* in achieving its objectives.[121] Fourth, it provides that intellectual property rights (at national and international levels) shall be applied in ways that are "supportive of and do not run counter to its [the Convention's] objectives."[122] In sum, it recognizes the mutually-reinforcing links between traditional knowledge with genetic resources and life sciences innovations as instrumental, albeit on an aspirational basis, to the conservation of biological diversity and sustainability.[123]

The TRIPS agreement and the CBD are two major international regimes with interlocking subject matters. They came into force within 12 months of each other.[124] The constructive ambiguity that was evident in CBD's approach to intellectual property meant that it also needed to be reconciled with the constructive ambiguity of the TRIPS agreement in relation to traditional

Forum on Indigenous Issues (UNPFII), UNITED NATIONS DEP'T OF ECON. AND SOC. AFFS, https://social.desa.un.org/issues/indigenous-peoples/unpfii (last visited Mar. 31, 2025).

[118] In 2001 the UN Commission on Human Rights appointed the first Special Rapporteur (SP) on the Rights of Indigenous Peoples. The work of the SP has since become an insightful resource for promotion of the rights of Indigenous Peoples. *See Special Rapporteur on the Rights of Indigenous Peoples*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/special-procedures/sr-indigenous-peoples (last visited June 26, 2024).

[119] Convention on Biological Diversity art. 1, June 5, 1992, 1760 U.N.T.S. 79 [hereinafter Convention on Biological Diversity].

[120] *Id.* art. 8(j).

[121] *Id.* art. 16(5) (emphasis added).

[122] *Id.*

[123] *See generally* OGUAMANAM, CHIDI, THE WIPO TREATY ON GENETIC RESOURCES AND ASSOCIATED TRADITIONAL KNOWLEDGE: A NEGOTIATING, CONTEXTUAL AND CONCEPTUAL APPRAISAL (July 15, 2024), https://ssrn.com/abstract=5021377.

[124] The CBD entered into force December 29, 1993, whereas the TRIPS came into force on January 1, 1995. Convention on Biological Diversity *supra* note 119, at 1.

knowledge. On this point, it is instructive that despite its silence on traditional knowledge, the TRIPS agreement did not entirely keep the subject outside its radar.[125] The long-drawn negotiation of the CBD, which largely happened contemporaneously with the Uruguay Rounds negotiations of the WTO (for TRIPS), ensured that both bodies sustained a mutual awareness of developments in each other regarding the overlap over their interests in TK and genetic resources.[126]

For example, the TRIPS Council entertained discussions on TK in the context of the implementation review of the TRIPS Article 27.3(b) and within the frame of the 2001 Doha Development Agenda.[127] Doha incorporated traditional knowledge and folklore and the streamlining of the relationship between the TRIPS agreement and the CBD into the agenda of the TRIPS Council.[128] The repeatedly stalled revision of Article 27 of TRIPS is indicative, in part, of the inherently conflicted orientation of the two instruments.[129] It also reflects the elusive capacity for rapprochement among vested interests along the simplistic binary of industrialized and developing countries.[130] In its constructive ambiguity, especially under Article 27, TRIPS retains the capacity to facilitate the continuing appropriation of TK through 'biopiracy' – a term treated with cynicism mainly by developed countries no less for its emotive tenor than for its legal uncertainty.[131] Stronger IP protection and expanded patentable subject matters under Article 27 of TRIPS that now included life forms were considered objectionable among IPLCs on many grounds.[132] Thus, TRIPS stood in sharp

[125] DUTFIELD & SUTHERSANEN, *supra* note 58, at 334.

[126] *Understanding the WTO – The Uruguay Round*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5e.htm (last visited Mar. 31, 2025); *History of the Convention*, CONVENTION ON BIOLOGICAL DIVERSITY, https://www.cbd.int/history (last updated Mar. 28, 2025).

[127] DUTFIELD & SUTHERSANEN, *supra* note 58, at 344; Frederick M. Abbott, *Compulsory Licensing for Public Health Needs: The TRIPS Agenda at the WTO After the Doha Declaration on Public Health*, 17 QUAKER UNITED NATIONS OFF. 1, 4 (2002), https://ssrn.com/abstract=1977304; *see generally* Jerome Reichman & Frederick Abbott, *The Doha Round's Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines Under the Amended TRIPS Provisions*, 10 J. INT'L ECON. L. 921 (2007).

[128] *See Article 27.3b, Traditional Knowledge, Biodiversity*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/art27_3b_e.htm (last visited April 1, 2025).

[129] Carlos M. Correa, *Traditional Knowledge and Intellectual Property: Issues and Options Surrounding the Protection of Traditional Knowledge*, 11 QUAKER UNITED NATIONS OFF. 1, 23 (2001), https://quno.org/resource/2001/11/traditional-knowledge-and-intellectual-property.

[130] *Id.*

[131] DUTFIELD & SUTHERSANEN, *supra* note 58, at 337.

[132] Dennis S. Karjala, *Biotech Patents and Indigenous Peoples*, 7 Minn. J.L. Sci. & Tech. 483, 514 (2006); Debra Harry, *Patenting Of Life and Its Implications For Indigenous Peoples*, INDIGENOUS PEOPLES COUNC. ON BIOCOLONIALISM (1995), http://www.ipcb.org/publications/briefing_papers/files/patents.html.

contrast to more accountable and equitable access and benefit sharing through the involvement of IPLCs and the sustainable and development objectives of the CBD.[133]

Efforts by developing countries to seize the review provisions under Article 27 of the TRIPS to advance TK within the IP system remained largely unsuccessful.[134] Indeed, the case for a more transparent and accountable patent system through disclosure of the origin of genetic resources and associated traditional knowledge in patent application, which is the heart of the GR-ATK Treaty, was proactively canvassed in the TRIPS Council,[135] but eventually deflated to WIPO, as explained below. According to Dutfield and Suthersanen, ["t]he WTO may not be the most appropriate venue for establishing new norms for positive traditional knowledge protection that would require the insertion of additional text to the TRIPS agreement or possible deletion of existing text."[136] This important point is indicative of the sustainability deficit of the WTO power-grab which the TRIPS agreement represented. In that regard, Nobel Laureate Stiglitz was less sparing when he noted that "intellectual property could not have been included in a trade agreement in the first place, at least partly because its regulation is demonstrably beyond the competence of trade negotiators."[137]

Meanwhile, the CBD was intentional that its linkage of genetic resources with intellectual property and Indigenous knowledge must be implemented not in isolation but in collaboration with relevant international organizations, especially WIPO.[138] Various decisions of the Conference of Parties (COP) of the CBD and the latter's programs relevant to intellectual property, genetic resources and traditional knowledge referred to collaboration with WIPO and other organizations in a mutually supportive manner.[139]

Notably, the implementation mandate of Article 8(j) of the CBD, earlier mentioned, was clear that it must be done "in collaboration with other relevant

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[133] Chidi Oguamanam, *The Convention on Biological Diversity and Intellectual Property Rights: The Challenge of Indigenous Knowledge*, 7 S. CROSS UNIV. L. REV. 89, 93 (2003).

[134] *See generally* BIRKBECK, supra note 42.

[135] *TRIPS Council Still Divided on Genetic Resources and Traditional Knowledge*, IISD (Nov. 9, 2006), https://sdg.iisd.org/news/trips-council-still-divided-on-genetic-resources-and-traditional-knowledge/.

[136] DUTFIELD & SUTHERSANEN, *supra* note 58, at 345.

[137] Joseph E. Stiglitz, *Intellectual-Property Rights and Wrongs*, PROJECT SYNDICATE (Aug. 5, 2005), https://www.project-syndicate.org/commentary/intellectual-property-rights-and-wrongs, *cited in* DUTFIELD & SUTHERSANEN, *supra* note 58, at 12.

[138] Ahmed Abdel-Latif, *Revisiting the Creation of the IGC: The Limits of Constructive Ambiguity? in* PROTECTING TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 14, 15 (Daniel F. Robinson et al. eds., 2017).

[139] *Access to Genetic Resources*, Conference of the Parties to the Convention on Biological Diversity, Fifth Ordinary Meeting, Decision COP V/26 (May 14-25, 2000), https://www.cbd.int/decisions/cop/5/26 UNEP/CBD/COP/DEC/V/26.

organizations, including the World Intellectual Property Organization (WIPO)."[140] Further, in section, A para 15(d) of Decision V/26, the COP of the CBD in 2000 invited:

> relevant international organizations, including the World Intellectual Property Organization, to analyse issues of intellectual property rights as they relate to access to genetic resources and benefit-sharing, including the provision of information on the origin of genetic resources, if known, when submitting applications for intellectual property rights, including patents.[141]

Similarly, in section B para 2 of the same decision, the CBD invited: "the World Trade Organization to acknowledge relevant provisions of the Convention and to take into account the fact that the provisions of the Agreement on Trade-related Aspects of Intellectual Property Rights and the Convention on Biological Diversity are interrelated and to further explore this interrelationship."[142]

On its own, WIPO was receptive to being involved in the traditional knowledge project. It commissioned two-year (1998, 1999) fact-finding missions (FFMs) to explore, on a cross-regional basis globally, the intellectual property needs and expectations of the holders of traditional knowledge.[143] The result of the study, which was released in 2001, identified traditional knowledge as one of the global intellectual property issues of the 20th century, and it was later integrated into WIPO programing.[144] Clearly, WIPO was positioned to seize the initiative on traditional knowledge as a matter of its jurisdictional and norm-setting competence. It needs to be noted that regarding folklore or traditional cultural expressions, there have been much earlier attempts within WIPO (in reference to copyright) and UNESCO to broach the subject matter.[145] But, the intersection of intellectual property, traditional knowledge, and genetic resources constituted a relatively novel subject matter for WIPO. That is the

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[140] Abdel-Latif, *supra* note 138.

[141] *Access to Genetic Resources*, *supra* note 139.

[142] *Id.*

[143] WIPO, INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS (2001), https://www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf.

[144] *Id.* at 5.

[145] According to Abdel-Latif, efforts in this regard started in the 1960s but were not able to result in an amendment of the Berne Convention on Literary and Artistic Works. However, such pressure resulted in the joint initiatives by WIPO and UNESCO that resulted in WIPO's *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*. Abdel-Latif, *supra* note 138, at 11; *See* Margo A. Bagley and Justin Hughes, *Secret Traditions as Trade Secrets* (forthcoming in 66 HARV. INT'L L.J. 101, 110 n. 45 (2025)); Emory Public Law Research Paper No. 25-4, Loyola Law School, Los Angeles Legal Studies Research Paper No. 2025-11, available at SSRN: https://ssrn.com/abstract=5205070 or http://dx.doi.org/10.2139/ssrn.5205070.

main reason the new GR-ATK Treaty, as the first agreement pursuant to the IGC, is unique on its own merit, among other considerations.

2.3 The Colombian Connection and Patent Law Treaty

The attempt to step down traditional knowledge in WIPO through the IGC received a major boost through a fortuitous and dramatic circumstance. This was by virtue of a quick-fix effort to treat the issue in bite-size pieces, for example, by sticking aspects of it into a formal administrative procedure for filing patents.[146] In the fall of 1999, Colombia tabled a proposal to the Standing Committee on the Law of Patents (SCP) for incorporation in the proposed Patent Law Treaty.[147] According to the proposal, industrial property law must provide protection for only the legally acquired biological and genetic heritage of countries.[148] Eligibility for such protection must be premised on documentation and contracts evincing access to genetic resources, including where the associated products and services are developed and the country of origin of such genetic resources.[149]

The Colombian proposal did not mention traditional knowledge. However, by 1999, when Colombia tabled that proposal, the CBD had been in operation for over six years, raising global awareness about Indigenous knowledge and biopiracy.[150] The WIPO FFMs were concluded after boosting global and regional awakening over the marginalization of traditional knowledge.[151] In addition, major cases of biopiracy stoked attention and interest in biopiracy.[152] These developments happened in the background of the evident lopsided and highhanded nature of the TRIPS agreement and its association with access to medicines crises of the 1990s-2000s,[153] as already mentioned.

Therefore, it was hardly surprising that the Colombian initiative attracted strong support from developing country blocs, notably the Group of Latin American Countries and the Caribbean (GRULAC),[154] the African Group, even the European Community and the group of Central European and Baltic States (CEBS).[155] Pushback from Germany, the US and, Japan, etc. was anchored on

[146] Paul Claus, *Patent Law Treaty: Simplified Procedures for National and Regional Patent Formalities*, 22 WORLD PAT. INFO. 287, 287 (2000). This was the approach discerning from the negotiations of the Patent Law Treaty as indicative of Colombia's intervention.

[147] U.N. WIPO, Standing Committee on the Law of Patents, Protection of Biological and Genetic Resources*, Proposal by the Delegation of Colombia*, 3rd Sess., U.N. Doc. SCP/3/10 (Sept. 8, 1999).

[148] *Id.*

[149] *Id.*

[150] Convention on Biological Diversity, *supra* note 119.

[151] WIPO, *supra* note 143, at 233.

[152] ROBINSON, *supra* note 73; ROBINSON, *supra* note 75, at 3; Oguamanam, *supra* note 75.

[153] OGUAMANAM, *supra* note 61, at 168.

[154] Abdel-Latif, *supra* note 138, at 16.

[155] *Id.*

the perception that the issue was one of substantive law and out of sync with the formal and administrative nature of the Patent Law Treaty.[156] Without letting up, Colombia re-tabled that proposal, this time at the 2000 Diplomatic Conference for the adoption of the Patent Law Treaty.[157] Given the strong support for the proposal and equally strong opposition to it, the issue threatened to derail the Patent Law Treaty.[158]

To resolve the stalemate, the WIPO Secretariat was tasked to take up the matter of intellectual property and genetic resources as one to be continued at WIPO.[159] The WIPO Director General, Kamil Idris, was charged with the responsibility of facilitating the conversation.[160] After extensive consultations, and in addition to submission by GRULAC, the DG proposed the setting up of a special body in WIPO to tackle the question of genetic resources while incorporating existing WIPO interests in traditional knowledge and folklore.[161] The DG's initiative was framed formally into the agenda of the 2000 General Assembly *as matters concerning intellectual property and genetic resources, traditional knowledge, and folklore*.[162] Aside from WIPO's jurisdictional competence in normative and substantive matters relating to intellectual property, the justification for creating such a body is that the themes cut across all categories of intellectual property and beyond.[163] As such, they do not fit into existing WIPO bodies, organograms, programs and treaty architecture.

Regarding this subject matter, here is how the GA decision was captured in a WIPO press release under the title of "Global Issues":

> *The Assembly created a special body to probe the link between intellectual property and genetic resources, traditional knowledge and folklore … The work of the intergovernmental committee will focus on three primary themes: intellectual property issues that arise in the context of (i) access to genetic resources and benefit sharing; (ii) protecting of traditional knowledge, whether or not associated with genetic resources; and (iii) the protection of expressions of folklore*.[164]

A few albeit unofficial guardrails were evident in the process that led to setting up the IGC, some of which were formally reflected in the language of subsequent renewals of the IGC mandate. First, the work of the Committee was

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[156] *Id.* at 14.

[157] WIPO, Diplomatic Conference for the Adoption of the Patent Law Treaty Article 5(5), PT/DC/26 (May 18, 2000), https://www.wipo.int/edocs/mdocs/diplconf/en/pt_dc/pt_dc_26.pdf.

[158] Abdel-Latif, *supra* note 138 at 11.

[159] *Id.* at 19.

[160] *Id.*

[161] *Id.*

[162] *Id.* at 15.

[163] *Id.* at 17.

[164] Press Release, WIPO, WIPO General Assemblies Wrap Up (Oct. 3, 2000), https://www.wipo.int/pressroom/en/prdocs/2000/wipo_pr_2000_243.html.

to be conducted in collaboration with the work of other WIPO bodies and programs.[165] Second, the Committee's work was to take into consideration development in relevant organizations.[166] Third, the committee was not expected to prejudge its own outcome.[167] Much later, the committee was required to take cognizance of the Development Agenda recommendations.[168]

From the above outline, clearly, the IGC mandate was essentially exploratory. Its first meeting was held in the spring of 2001.[169] The mandate has since remained renewable biennially, based on the Committee's progress report and its recommendations or requests to the WIPO General Assemblies for mandate renewals.[170] Consequently, for the first nine years, the IGC had no mandate to undertake text-based negotiations. Over that period, it essentially existed as "a forum for discussion."[171] IGC's foundation was laid by building a massive resource through commissioned studies, reports, and other variegated resources that contributed to the conceptual, philosophical and pragmatic understanding of the subject matter(s).[172] Conceivably, the Committee invested nearly a decade of its work on foundation-laying. The next definitive level in the evolution of IGC was in 2009. That year, the IGC mandate was more clearly defined and transitioned beyond open-ended discussions to textual negotiations in the following years.

Under agenda item 28 (IGC) of the WIPO 2009 General Assembly decision, member states agreed that the IGC mandate be renewed for the body to "continue its work and undertake text-based negotiations with the objective of reaching agreement on a text of international legal instrument (or instruments) that would ensure effective protection of GRs, TKEs."[173] Even though an agreement was reached 15 years later on the first instrument pursuant to IGC, it is instructive that in the 2009 General Assembly Decision, there was a reference

[165] U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore, *supra* note 4, at 4.

[166] *Id.* at 3.

[167] U.N. WIPO Comm. on The Relationship Between Intell. Prop., Genetic Res. and Traditional Knowledge, 26th Sess., annex II, at 1, U.N. Doc. WO/GA/26/9 (Sept. 14, 2000).

[168] Wend Wendland, *The Evolution of the IGC from 2001 to 2016: An Insider's Perspective*, *in* PROTECTING TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 31, 35 (Daniel F. Robinson et al. eds., 2017).

[169] U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, 1st Sess., U.N. Doc. WIPO/GRTFK/IC/1 (May 23, 2001).

[170] *See*, *e.g.*, *id.*; U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore, 40th Sess., U.N. Doc. WIPO/GRTKF/IC/40/20 (June 6, 2019); U.N. WIPO, Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore, 41st Sess., U.N. Doc. WIPO/GRTKF/IC/41/4 (Feb.18, 2022); U.N. WIPO, 1st Sess., U.N. Doc. WIPO/GRTFK/IC/1 (May 23, 2001*)*.

[171] Background Brief, *supra* note 4; Yu, *supra* note 10, at 130; Wendland, *supra* note 168.

[172] Oguamanam, *supra* note 10, at 339.

[173] Agenda Item 28, *supra* note 6.

to convening a Diplomatic Conference out of the IGC mandate in 2011.[174] With the benefit of hindsight, this was certainly a naively optimist and flawed sense of how issues evolved at the IGC. Certainly, the road to the GR-ATK Treaty was long and winding. The chronicles, dramas, the-lows-and-the-highs of the following 15 years of severally renewed text-based negotiation mandates are well documented in the WIPO's IGC-dedicated website.[175] However, those are outside the scope of this paper.

The next section of this paper explores the underlying conceptual framework for the resulting treaty. As a major highpoint, the 36th session of the IGC (2018) took a dramatic and consequential turn in the IGC negotiation experience. The circumstances of that meeting were such that it could have abruptly ended the IGC. But a combination of events flipped and quickened the journey to the GR-ATK Treaty against precedent and even against the analysis of most informed pundits within and outside WIPO.[176]

PART 3: GR-ATK TREATY FRAMEWORK AND NEGOTIATION DYNAMIC

3.1 Text-Based Negotiation Mandate

Even though the WIPO General Assembly (GA) of 2009 had referenced the possibility of a Diplomatic Conference in 2011, that was not to be until 15 years later.[177] By the 2018-2019 biennial mandate of the IGC, textual negotiations had been going on for about 10 years. The character of IGC's two yearly renewable mandate has noticeably shifted to reflect that reality. For example, a few features of the mandates, as evident in the 57th WIPO GA decision that renewed the Committee's mandate for the 2018-2019 biennium, are reflective of this pattern. It refers to "Development Agenda recommendations," "acknowledging the progress made" [in textual negotiations], and "agrees that the mandate of the Committee be renewed, without prejudice to the work pursued in other fora."[178] The language enjoins the committee to "continue to expedite its work, close gaps, with the objective of reaching an agreement on an international legal instrument(s), without prejudging the nature of the outcome(s) relating to

[174] *Id.*

[175] Intergovernmental Committee (IGC), WIPO, https://www.wipo.int/tk/en/igc/index.html (last visited June 27, 2024).

[176] The frustrating outcome of IGC 36 thanks to the decision of the United States Delegation to opt out of a Rev 2 Document at the very last stage of negotiations resulted in the Chair's (Ian Goss – Australia) resolve to raise the famous Chair's Text. The latter was eventually sanctioned by the 2022 WIPO General Assembly as the basic negotiating instrument for the Diplomatic Conference that resulted in the GR-ATK treaty. Yu, *supra* note 10, at 284.

[177] U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore, Rep. 14th Sess., U.N. Doc. WIPO/GRTFK/IC/14/12 (Oct. 1, 2009).

[178] U.N. WIPO, Assemblies of the Member States of WIPO: List of Decisions, 57th Session of Meetings (2017), at 11–12 (agenda item 18(a)-(e)).

intellectual property which will ensure the balanced and effective protection"[179] of the three subject matters. The mandate even goes in further detail exhorting on "evidence-based"; "open and inclusive" methodology.[180] It sets out a work program and timetable for the Committee, often as proposed to the GA by the IGC itself.[181]

3.2 The 36th (2018) WIPO IGC: Dramatic Game Changer

As of 2018, the structure of the GRs text had crystallized with key features, even if it was subject to continuing negotiations and evolution. The features of the document included a preamble, objectives, definition/list of terms, disclosure requirements, exceptions and limitations, sanctions and remedies, and relationship with other international instruments.[182] The WIPO-IGC 36, which was held between June 25 - 29, 2018, was the last meeting of the Committee for the 2018-2019 biennium dedicated to closing the gaps on the draft instrument on genetic resources.[183] Before the meeting, the working document on GRs out of the IGC 35 – *The Consolidated Document Relating to Intellectual Property and Genetic Resources* ("the Consolidated Document") was utterly convoluted.[184] The document was afforested with square brackets,[185] with practically every word and phrase contested. All the draft articles of the document had several competing alternatives, sometimes up to four.[186] For demandeurs, morale was low; lethargy had set in; negotiations had turned toxic with pervasive suspicion.[187] Delegates had created a non-navigable forest of stalemate, with no feasible way out unless a new strategy was adopted.

Up to this stage, clear tendencies had emerged. Through their regional blocs, delegates consistently sustained well-known and predictable positions on each draft textual provision under consideration.[188] Even if not completely accurate, there was a clear split across categories of demandeur and non-demandeur

[179] *Id.* at 11.

[180] *Id.*

[181] *Id.*

[182] *See* WIPO SECRETARIAT, *Consolidated Document Relating to Intellectual Property and Genetic Resources*, U.N. Doc. WIPO/GRTKF/IC/34/4 (2017); WIPO SECRETARIAT, *Consolidated Document Relating to Intellectual Property and Genetic Resources*, U.N. Doc. WIPO /GRTKF/IC/40/6 (2019).

[183] U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore, 36th Sess., U.N. Doc. WIPO/GRTKF/IC/36/11 (Dec. 10, 2018).

[184] WIPO SECRETARIAT, *Consolidated Document Relating to Intellectual Property and Genetic Resources*, U.N. Doc. WIPO/GRTKF/IC/35/4 (2017).

[185] Texts or words put in square bracket indicate that parties have no agreement regarding them.

[186] WIPO SECRETARIAT, *supra* note 184.

[187] *Id.*

[188] Chidi Oguamanam, *Understanding African and Like-Minded Countries' Positions at WIPO-IGC*, 60 IDEA 386, 386–87 (2020).

interests and bloc of countries, each with its own like-minded allies ranging from Indigenous caucus, participating NGOs, and professional interest lobbies to a coterie of other partisan actors in the room.[189] Perhaps more worrisome was the tendencies of some group of powerful non-demandeur countries whose negotiating tactics were to keep the forum within its foundational status as a discussion forum.[190] For these countries, it was discernible that no outcome was the best outcome.[191] Those countries, mainly identified as Group B,[192] led by the United States, Japan, the Republic of Korea, Canada and a few countries of the European Union, latched on to the "evidence-based" mantra of the mandate language.[193] They did this by strategically introducing and literarily dumping an interminable deluge of partisan reports and commissioned studies – all pointing to how harmful, onerous, and deleterious a treaty with mandatory disclosure of the origin of genetic resources and associated traditional knowledge would be to patent holders, industries, and research.[194] They also harped on the paucity of positive evidence of results from countries that have introduced mandatory disclosure requirements.[195] This practice stoked resentment among demandeur blocs.[196] For the latter, the approach was indicative of a lack of good faith.[197]
Methodology was another feature of the IGC and a source of significant disaffection. The mandate refers to "open and inclusive working methods,"[198] which is not defined. The mandate left discretion for the Committee Chairs to

[189] *Id.* at 440–41.

[190] *Id.* at 432–34.

[191] *Id.* at 459.

[192] *Id.* at 413 (noting Group B is a group of industrialized countries).

[193] *Id.* at 458–59.

[194] *See*, *e.g.,* U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore, 36th Sess., U.N. Doc. WIPO/GRTKF/IC/36/5 (Apr. 10, 2018); U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore, 36th Sess., U.N. Doc. WIPO/GRTKF/IC/36/6 (Apr. 10, 2018); U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore, 36th Sess., U.N. Doc. WIPO/GRTKF/IC/36/7 (May 28, 2018); U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore, 36th Sess., U.N. Doc. WIPO/GRTKF/IC/36/8 (May 28, 2018); U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore, 36th Sess., U.N. Doc. WIPO/GRTKF/IC/36/9 (May 28, 2018); U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore 36th Sess., U.N. Doc. WIPO/GRTKF/36/10 (June 26, 2018).

[195] *See* WIPO/GRTKF/IC/36/5, *supra* note 194; WIPO/GRTKF/IC/36/7, *supra* note 194; WIPO/GRTKF/IC/36/8, *supra* note 193; WIPO/GRTKF/IC/36/10, *supra* note 194.

[196] U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *supra* note 183, para. 234.

[197] U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *supra* note 183, para. 234.

[198] U.N. WIPO Gen. Assembly, 51st Sess., para. 215, U.N. Doc. WO/GA/51/18 (Dec. 13, 2019).

design such a work method. Historically, Chairs have been pragmatic in the design of such working methods; they developed the practice of tendering the working methods for members' approval prior to implementation.[199] At the IGC 36, which was the last dedicated to genetic resources pursuant to the 2018-2019 biennium, the IGC Chair, Australia's Ian Goss, employed virtually all tools in the methodology toolbox in an attempt to expedite work and close gaps regarding the Consolidated Document on Genetic Resources referenced above.[200] He was determined to break the logjam. The tools included a mix of Ad-Hoc Technical Expert Groups, three contact groups, informal sessions and, of course, the plenary as the decision-making body.[201] The Chair made an effort to ensure geographically balanced representation when constituting these groups.[202] The Committee, through the Facilitators and Friends of the Chair, produced the Rev 1[203] document out of this session based on the work and reports of these multiple bodies. Delegates elaborately debated Rev 1, the outcome of which resulted in Rev 2.[204]

3.3 A United States Bushwhack That Backfired

Delegates received Rev 2 of the 36th IGC session positively, as the final report comprehensively documents.[205] Rev 2 reflected the most realistic and pragmatic attempt to close gaps in the stalemated Consolidated Document on GRs. As in such high-stakes negotiations, no bloc or interest group got all it wanted. Yet an overwhelming majority indicated their intention to work with Rev 2 and supported transmitting it to IGC 40 as the working document.[206] It became a new lifeline for the genetic resources text and, by extension, the IGC. Unfortunately, in a dramatic twist, on Friday, June 29, 2018, at the closing plenary session of the IGC, with high hopes for progress made, the delegation

[199] The idea of Chairs proposing a working methodology for approval is a convention of IGC. *See, e.g.*, U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, 37th Sess., paras. 15–16, 20–21, 27, U.N. Doc. WIPO/GRTKF/IC/37/17 (Dec. 10, 2018) (discussing deliberations over the Chair's (Ian Goss) proposed working methodology).

[200] *See* U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *supra* note **Error! Bookmark not defined.**, paras. 41-42.

[201] Chidi Oguamanam, *Crunch Time at WIPO-IGC: A Last Attempt to Draft a New Genetic Resources Text?*, ABS CANADA (June 19, 2018), https://abs-canada.org/wipo-igc-genetic-resources/.

[202] *See id*.; Chidi Oguamanam, *US Fails to Block Progress Over Genetic Resources Text at WIPO-IGC 36*, OPENAIR (July 11, 2018), https://openair.africa/us-fails-to-block-progress-over-genetic-resources-text-at-wipo-igc-36/ [hereinafter Oguamanam OPENAIR].

[203] This document officially had no status. *See* U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *supra* note 183, para. 46.

[204] *Id*. at paras. 22, 203-205, 208.

[205] *Id*. at paras. 201-214, 217-218, 222, 226.

[206] *Id*. at paras. 201-214, 217-218, 222, 226.

of the United States bushwhacked the 36th IGC with a litany of complaints.[207] The USA submitted an elaborate accusatory statement.[208] The USA delegation expressed disappointment that "many of the textual contributions that it had made over the course of the week [were not] reflected in the document … despite its efforts to provide comments and proposals."[209] Despite endorsing the Chair's methodology and acknowledging the delegation's effective participation,[210] the USA attacked that methodology, arguing specifically that the contact group process was non-inclusive.[211] The delegation further charged that the "IGC had strayed from the customary WIPO working methods where all Member States' views and contributions were taken into account in a negotiation process."[212] It argued unequivocally that "Rev. 2 was not an acceptable basis for future work" and that "[i]t did not support the transmission of either Rev. 1 or Rev. 2 to IGC 40."[213]

The USA's submission nearly nullified a week of the 36th IGC, prompting the Chair to adjourn proceedings for troubleshooting consultations.[214] At the resumed plenary, the majority's closing submission made it clear that the USA position drew the ire of the rest of the delegations from both demandeur and non-demandeur blocs.[215]

Speaking on behalf of the Group of Like-minded Countries ("LMCs"), Indonesia captured the sombre but defiant mood in the room. In a lengthy submission, it argued that progress had been made for over a decade and half, but unfortunately, some delegations engaged "with the intention to delay or to widen gaps or even to block progress," which was regrettable.[216] Indonesia noted that the methodology and ensuing decisions were created through a transparent and open process. The LMCs observed that:

> [i]t had heard no objection to the way the Chair had proposed to guide the meeting until then, when the result and outcome of the IGC's work in the last six days had come to fruition. That methodology was being cited as one of the reasons why one Member State could not approve Rev. 2 and would not move forward to make any progress. It was only one Member State that had tried to stop the process by not supporting transmitting the text for further work of the IGC. Should there be any other Member States similarly inclined that the IGC could not in any way transmit Rev. 2 as a

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[207] Oguamanam OPENAIR, *supra* note 202.

[208] *See* U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *supra* note 183, para. 224.

[209] *Id*. at para. 224.

[210] *Id*. at para. 119.

[211] *Id*. at para. 224.

[212] *Id*.

[213] *Id*.

[214] *Id*. at para. 225.

[215] *Id*. at para. 226.

[216] *Id*.

> basis for further work, it would appreciate it if they could come forward and put it on the record as well.[217]

Indonesia hinted that "[n]othing stopped members of the LMCs to build their own national and regional systems to protect GRs and TK associated with GRs."[218] It lamented that:

> [t]he LMCs had been engaging with good faith and with the trust and belief that every WIPO Member State would be coming to IGC meetings in full respect of the IGC process to achieve the same objective as stated in the agreed mandate. However, it had been proven otherwise. It had thought the process would not be held hostage by one Member State …. It was disappointed and its confidence in the IGC was shaken.[219]

Predictably, one country took the bait thrown by Indonesia on behalf of LMCs. The delegation of Japan came forward to place it on record that it "fully supported the intervention made by the Delegation of the USA" regarding Rev. 2.[220] This turn of events prompted some delegates to question whether WIPO's consensus decision-making process was the same thing as unanimity.[221] At the end of the day, "[t]here was no consensus for transmitting Rev. 2 to IGC 40. The decision would be to forward the Consolidated Document from IGC 35 to IGC 40. However, Rev. 2 would be in the report of IGC 36, available as a resource for Member States to consider in future discussions."[222] The official proposal read in part:

> The Committee developed, on the basis of document WIPO/GRTKF/IC/36 /4, a further text, 'Consolidated Document on Intellectual Property and Genetic Resources Rev. 2' ("Rev. 2"). However, the Member States were unable to reach consensus on Rev. 2. The Committee decided to transmit the text in the annex to document WIPO/GRTKF/IC/36/4 to the Fortieth Session of the Committee, in accordance with the Committee's mandate for 2018-2019 and the work program for 2018, as contained in document WO/GA/49/21. Rev. 2 as prepared by the Facilitators and the Friend of the Chair will be reflected in the report of the session.[223]

3.4 The Resolve for the Chair's Text

The Chair took responsibility for IGC 36's failure to deliver an outcome and

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[217] *Id*.

[218] *Id*.

[219] *Id*.

[220] *Id*. at para. 230; *see also* Oguamanam OPENAIR, *supra* note 202.

[221] Oguamanam OPENAIR, *supra* note 202.

[222] U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *supra* note 183, para. 225.

[223] *Id*. at para. 243.

he promised to develop a Chair's Text.[224] He invited Member States to make recommendations, including joint recommendations, for his consideration as he prepared the text.[225] The Chair's Text was to be a work-in-progress and would be accompanied by explanatory notes.[226] At the 40th session of the IGC, the Chair transmitted the Chair's Text, dated April 30, 2019, as a non-paper, titled, *Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources*.[227] The SARS-CoV-19 pandemic in 2020 forced the IGC into hiatus.[228] During that period, member states sustained the Committee's work through virtual meetings and activities, including opportunities to comment on the Chair's Text.[229] At the 41st IGC session (August 30 - September 3, 2021), held in hybrid format, the Committee recommended that the General Assembly renew its mandate allowing it to "use all WIPO working documents including […] the Chair's Text […] as well as any other contributions of Member States, such as conducting /updating studies covering, inter alia, examples of national experiences, including domestic legislation, impact assessments, databases[…] " in the continuation of its work.[230]

On resumption of IGC negotiations pursuant to the 42nd session, the Consolidated Document remained the operative negotiating text, while the Chair's Text had the status of a working document like many others.[231] After Ian Goss left office under pressure, the Committee elected Lilyclaire Bellamy (Jamaica) as the new Chair to oversee the IGC.[232] At the 43rd session of the IGC (May 30 - June 3, 2023), demandeurs were unequivocal about their determination to preserve the sanctity of the Chair's Text.[233] In response, the new Chair pledged that only she held the exclusive authority to edit the text — now officially documented as WIPO/GRTKF/IC/43/5—based on received

[224] Chidi Oguamanam, *TK and TCEs Again Under Focus at 37th WIPO IGC*, ABS CANADA (Sept. 3, 2018), https://www.oguamanam.com/publications/2018-9-3/tk-and-tces-again-under-focus-at-37th-wipo-igc.

[225] *Id.*

[226] *Id.*

[227] Ian Goss (Chair, WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore), *Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources* (Apr. 30, 2019).

[228] Chidi Oguamanam, *At Resumed 'Post-Pandemic' IGC Negotiations, Change in Committee Leadership Leaves Delegates Between Two Genetic Resources Texts*, ABS CANADA (Mar. 14, 2022), https://www.oguamanam.com/publications/2022-3-14/at-resumed-post-pandemic-igc-negotiations-change-in-committee-leadership-leaves-delegates-between-two-genetic-resources-texts.

[229] *Id.*

[230] U.N. Doc. WIPO/GRTKF/IC/41/4, *supra* note 170, para. 52(d).

[231] Oguamanam, *supra* note 228.

[232] *Id*.

[233] *Id*.

comments, to avoid dilution.[234] That pledge helped buy her the confidence of demandeurs, especially the Africa Group and LMCs, amidst existing suspicion.[235]

Notwithstanding the truce on the Chair's Text, the new Chair insisted on using the Consolidated Text as the negotiating document.[236] This was a pragmatic approach. Refusing to do so would have infuriated the United Sates and triggered another stalemate.[237] As part of their negotiating strategy, the demandeurs mostly maintained a low-key approach as a nuanced protest and unofficial rejection of the Consolidated Text throughout the 43rd session.[238] During that session, the United States and its allies engaged hyperactively, continuing their familiar pattern of binge drafting and dumping of partisan studies and updates—ostensibly in keeping with the so-called evidence-based methodology.[239] Demandeurs perceived strategy as a subtext for delaying progress and turning the IGC into an interminable talk shop.[240] For demandeurs, the tactics deployed by non-demanduers amounted to a palpable lack of good faith and evidence of a determination not to move the negotiations forward to a Diplomatic Conference.[241]

After one week of negotiations, the Consolidated Text (now Rev 2 of IGC 43)[242] had grown even more unwieldy, making the Chair's Text the most viable path forward. The Committee was effectively stalled by two competing genetic resources texts.[243] Because of the Chair's Text low-profile status, non-demandeurs underestimated its significance in the ensuing negotiations.[244] The 43rd IGC decision, or more accurately indecision, on agenda item 6 on genetic resources speaks for itself:

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[234] U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, 43rd Sess., paras. 2-3, U.N. Doc. WIPO/GRTKF/IC/43/5 (May 3, 2022). As the formal transmission of the Chair's Text, this was accompanied with a notation that the document "was initially prepared by Mr. Ian Goss when he was the Chair of IGC. As the new Chair, Ms. Lilyclaire Bellamy will take note of any comments made on the text and consider next steps in relation to it." *Id*. at 1.

[235] U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, 49th Sess., Statement by the African Group, U.N. Doc. WIPO /GRTKF/IC/49/ (Dec. 2, 2024).

[236] Oguamanam, *supra* note 228.

[237] *Id*.

[238] *Id*.

[239] *Id*.

[240] Oguamanam OPENAIR, *supra* note 202.

[241] *Id*.

[242] U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, 43rd Sess., U.N. Doc. WIPO/GRTKF/IC/43/4 (Mar. 31, 2022). According to the adopted report of 43rd Session of IGC dated June 3, 2022, there was no consensus on transmitting Rev 2 to the 47th session of the Committee.

[243] Oguamanam, *supra* note 228.

[244] *Id*.

> The Committee noted divergent views on the way forward, including on whether the Consolidated Document (WIPO/GRTKF/IC/43/4, as amended over time) and/or the Chair's Text (WIPO/GRTKF/IC/43/5, as amended over time), should be the basis for negotiations on genetic resources. The Committee took note that some members consider that the Chair's Text (WIPO/GRTKF/IC/43/5) should be the basis for the Committee's negotiations on genetic resources and the basis upon which a Diplomatic Conference should be convened, while others disagree.[245]

In July 2022, at the 63rd WIPO General Assembly, Member States set a precedent against odds, defying pundits, when they decided: "[T]o convene a Diplomatic Conference to conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources, based on document WIPO/GRTKF/IC/43/5 [i.e. the Chair's Text] and any other contributions by Member States […]" and[246] "[A]greed that document WIPO/GRTKF/IC/43/5, the Chair's text of a Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources *will constitute the substantive articles of the Basic Proposal for the Diplomatic Conference* […]"[247]

3.5 Chair's Text as Basic Proposal

As the above narrative shows, the transformation of the Chair's Text into a basic negotiating instrument for the Diplomatic Conference was unexpected. The Chair's Text was a courageous and symbolic lifeline for the GR-ATK Treaty. Given the lethargic atmosphere leading up to the point of the Chair's Text, it was clear that if the GR negotiations had stalled, they could have potentially marked the end of the IGC process, as Indonesia had warned on behalf of the LMCs.[248] The Chair's Text addressed the contentious issues earlier identified pursuant to the assigned tasks of the three contact groups out of IGC 36 and sought compromises around them.[249]

The foundation for the text resulted from the 36th IGC session's robust

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[245] U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore, 43rd Sess., *Decisions of the Forty-Third Session of the Committee*, U.N. Doc. WIPO/GRTKF/IC/43/DECISIONS, at 3 (June 3, 2022).

[246] U.N. WIPO, Special Session of the Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore, para. 1, U.N. Doc. WIPO/GRTKF/IC/SS/GE /23/2 (June 23, 2023).

[247] Viviana Muñoz Tellez, *A Breakthrough in Negotiations on Intellectual Property, Protection of Genetic Resources and Traditional Knowledge in WIPO?,* 113 S. CTR. POL'Y BRIEF 1, 2 (2022).

[248] *See* Oguamanam OPENAIR, *supra* note 202.

[249] *See* U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *supra* note 234.

methodology.[250] Building on that, the Chair personally undertook extensive consultations across negotiating blocs, stakeholders and strategic actors.[251] Fundamentally, the text drew influence from the report of the Ad Hoc Expert Group on Genetic Resources, co-chaired by Pedro Roffe and Krisztina Kovacs, as well as from the reports of the three contact groups on: (a) the subject matter of the treaty; (b) disclosure requirement; and (c) databases (later renamed 'information systems').[252] Those contact groups were themed around the most contentious aspects of the negotiations.[253]

The IGC subjected the Chair's Text to further negotiations in the Special Session of September 2023 to "further close any existing gaps to sufficient level."[254] The same month, the resulting instrument from the Special Session was transmitted for the approval of the IGC Preparatory Committee as part of the basic proposal for the final provisions of the treaty for the Diplomatic Conference.[255] Among other responsibilities, the Preparatory Committee, working closely with WIPO Legal Counsel, approved the proposal for the administrative Articles of the treaty.[256] The two components of the treaty, Articles 1-10 (main text that evolved out of the Chair's text) and Articles 11-23 (administrative text), were negotiated respectively by Main Committees One and Two of the 2024 Diplomatic Conference.[257] The Diplomatic Conference adopted the consolidated final version—which reduced the total articles of the treaty to 22 and opened it for signature on May 24, 2024.[258]

Comparing Rev 2 of IGC 36 with the 2018 Consolidated Genetic Resources Document from IGC 35 and the first official version of the Chair's Text (released in 2019) offers the clearest picture of the heavy lifting by the Chair and

[250] *Id*. at para. 225.

[251] *See* Oguamanam, *supra* note 201.

[252] U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *supra* note 183, para. 42.

[253] Wend Wendland, *International Negotiations on Indigenous Knowledge to Resume at WIPO: A View of the Journey So Far and the Way Ahead*, WIPO MAGAZINE (Feb. 14, 2022), https://www.wipo.int/web/wipo-magazine/articles/international-negotiations-on-indigenous-knowledge-to-resume-at-wipo-a-view-of-the-journey-so-far-and-the-way-ahead-55953.

[254] U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *supra* note 246, para. 1.

[255] *Id*. at para. 2.

[256] *Id.* at para. 3.

[257] Chidi Oguamanam, *WIPO ICC 47: Resettling IGC After 2024 Diplomatic Conference on Genetic Resources*, CHIDI OGUAMANAM (June 4, 2023), https://www.oguamanam.com/publications/2023-3-31/a-critical-examination-of-the-african-legal-framework-for-indigenous-knowledge-e79rs-y2fyb.

[258] In the adopted instrument, the substantive provisions are reduced to 9 Articles (1-9) with the deletion of Draft Article 4 on exemption and limitations. Consequently, the administrative Articles start from 10-22. *See* WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge arts. 1-22, May 24, 2024, U.N. Doc. TRT/GRATK/001 [hereinafter WIPO GRATK Treaty].

delegates to produce the pathbreaking treaty. Notably, the Chair's Text is accompanied by elaborate explanatory notes that provide insightful background information and justification for virtually all provisions in the text.[259] At the Special Session, the demandeur bloc of countries favoured de-personalizing and retaining the explanatory notes to the Chair's Text as it was further fine-tuned into the final treaty provisions.[260] However, their non-demandeur counterparts were conversely inclined.[261] As a result, delegates ultimately removed the explanatory note.[262] The next section provides an outline of the treaty provisions, highlighting the issues that shaped the treaty outcome.

PART 4: GR-ATK TREATY: ISSUES THAT SHAPED TEXTUAL OUTCOME

4.1 Main Text

(a) Preamble and Objective

The eight-paragraph preamble previews the intense debate over the treaty's objective and its subject matter. Delegates split along the demandeur and non-demandeur binary over the treaty's subject matter.[263] Most demandeur countries supported the application of the treaty to the entire gamut of the intellectual property system as opposed to non-demandeurs' insistence that the treaty be benchmarked to the patent system.[264] Their case is that patents are most directly implicated at the intersection of traditional knowledge and genetic resources.[265] On the contrary, demandeurs, including the Indigenous Caucus, considered the approach to be too simplistic as it leaves out tacit aspects and breadth of TK that encompasses other intellectual property regimes such as plant breeders' rights, trademarks, trade secrets, geographical indications, etc., despite their constraining formalities and technicalities.[266]

Non-demandeurs also resisted demandeurs' efforts to link the treaty directly to biopiracy and "misappropriation" of GRs and ATK.[267] They challenged direct reference in the preamble to specific relevant international instruments such as

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[259] K.M. Gopakumar, *WIPO: Widespread Discontent on Revised Draft Text on Genetic Resources and Associated Traditional Knowledge*, THIRD WORLD NETWORK (Sept. 7, 2023), https://www.twn.my/title2/intellectual_property/info.service/2023/ip230903.htm (noting "a few editorial changes in the [Chair's] explanatory note. Most of these changes are to remove the first-person references made by then Chair").

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] Oguamanam, *supra* note 188, at 409.

[264] *Id*. at 450.

[265] *Id.* at 391-93.

[266] DUTFIELD & SUTHERSANEN, *supra* note 58, at 343.

[267] Oguamanam, *supra* note 188, at 422-24.

the Convention on Biological Diversity.[268] On the other hand, expectedly, there was little resistance to referring to UNDRIP in the preamble.[269] However, recognizing that UNDRIP applies only to "Indigenous Peoples," delegates agreed to affirm "Local Communities" in the preamble.[270] A joint reading of the preamble and Article 1 on objectives situates the treaty as essentially a transparency and, to some extent, an accountability instrument[271] to "prevent patents from being granted erroneously."[272] Both the preamble and Article 1 deliberately avoided linking the treaty to the CBD and instead narrowed its scope to the patent system.[273]

(b) Disclosure Requirement

The disclosure requirement is the heart of the treaty and certainly the most contested part of the negotiations. The treaty mandates the disclosure of the origin or source of GRs and ATK underlying the invention subject of a patent application.[274] Making the disclosure requirement mandatory is the most revolutionary contribution of the treaty as an international legal instrument. The mandatory disclosure largely accounts for the concession by demandeurs to limit the scope of the treaty to the patent system in the preamble and objective clauses.[275]

Even though many countries have domestic laws on mandatory disclosure of genetic resources and traditional knowledge,[276] there is no uniformity regarding the details thereof.[277] Those details include the scope of the disclosure in relation to genetic resources and associated traditional knowledge.[278] This is referred to as the content of disclosure – what specifically should be disclosed in the patent

[268] *Id*. at 399, 414.

[269] *Id.* at 414.

[270] WIPO GRATK Treaty, *supra* note 258, pmbl.

[271] *See* Chidi Oguamanam, *The New WIPO Genetic Resources and Associated Traditional Knowledge Treaty: A Symbolic and Modest Step toward an Inclusive and Just IP System*, CHIDI OGUAMANAM (May 24, 2024), https://www.oguamanam.com/publications/new-wipo-treaty.

[272] WIPO GRATK Treaty, *supra* note 258, art. 1(b).

[273] *Id*. at, pmbl., art. 1.

[274] *Id.* at arts. 3.1.

[275] *Id*. at pmbl., arts. 1, 3.1.

[276] *See* U.N. WIPO*, Technical Study on Disclosure Requirements in Patent Systems Related to Genetic Resources and Traditional Knowledge* (2004) https://www.wipo.int/edocs/pubdocs/en/tk/786/wipo_pub_786.pdf [hereinafter WIPO Technical Study]; U.N. WIPO, *Disclosure Requirements Table Relating to Genetic Resources and/or Traditional Knowledge,* https://www.wipo.int/export/sites/www/tk/en/docs/genetic_resources_disclosure.pdf [hereinafter WIPO Disclosure Table].

[277] WIPO GRATK Treaty, *supra* note 258, pmbl.

[278] WIPO Technical Study, *supra* note 276, at 2.

application.[279] Others are the trigger language, which refers to the nexus between the invention underlying a patent application and the GRs and/or ATK.[280] The final major issue under disclosure is the consequence of non-disclosure, addressed under the treaty's sanctions and remedies.[281]

Scope: Delegates settled on two prongs of disclosure: the *origin* and the *source* as they apply to GRs and ATK. Specifically, pursuant to Article 3, patent applicants should disclose "the country of origin of the genetic resources"[282] or "source of the genetic resources"[283] where the country of origin is unknown. Regarding ATK, a patent applicant is required to disclose the "Indigenous Peoples or local community"[284] who provided it, or, where the Indigenous Peoples or local community is unknown, "the source of the traditional knowledge associated with genetic resources."[285]

The Article envisions that if an applicant does not know the country of origin or the source of the GRs and ATK, they must "make a declaration to that effect."[286] This is an attempt to create a responsibility for due diligence as opposed to merely checking boxes.[287] In most jurisdictions, false and negligent declarations have legal consequences.[288]

On a practical level, contracting parties are responsible for providing administrative guidance on how applicants can achieve compliance with disclosure as well as the opportunity to rectify erroneous and incorrect disclosures.[289] Relevant offices, including patent offices, are not responsible for verifying "the authenticity of disclosure."[290] As a pragmatic matter, patent offices or patent examiners are not equipped to deal with the veracity of the provenance of GRs or ATK.[291] Their competence is in relation to prior art.[292]

Article 3 reflects delicate balancing across the exigencies of transparency, accountability and pragmatism within the framework and practice of the patent pre-grant process. Non-demandeurs repeatedly argued that the treaty should not burden the patent system.[293] In the non-demandeur's inclination, rightly or

[279] *Id*.

[280] *Id*. at 4.

[281] *Id*. at 5.

[282] *Id*. at art. 3.1(a).

[283] *Id*. at art. 3.1(b).

[284] *Id*. at art. 3.2(a).

[285] *Id*. at art. 3.2(b).

[286] *Id*. at art. 3.3.

[287] *Id*. at art. 3.3.

[288] *See e.g*., Patent Act, 1977 (U.K.), *reprinted in* R.S.C. 1985, para. 76, c P-4 (Can.).

[289] Oguamanam, *supra* note 188, at 391-93.

[290] WIPO GRATK Treaty, *supra* note 258, art. 3.5.

[291] *See* THOMAS N. DUENING ET AL., TECHNOLOGY ENTREPRENEURSHIP 103 (Thomas N. Duening et al., eds., 3d ed. 2021).

[292] *Id.* at 102.

[293] Oguamanam, *supra* note 188, at 203.

wrongly, focusing the treaty on patents meant that it should not deal with issues of compliance with ABS protocols for sourcing GRs and ATK,[294] which fall within the CBD's purview.[295] This approach is consistent with non-demandeurs' determination to eschew overtly linking the treaty to the CBD.[296] Ironically, earlier drafts of the treaty had robustly linked it to the CBD and ABS.[297]

(i) Trigger for Disclosure

One of the most contentious issues in the treaty negotiations was the "trigger language," which arguably evolved most during the process. "Trigger" deals with the nature of the nexus between the invention in the patent application and the GRs or ATK.[298] Drafters must craft the trigger language with as much certainty as possible because it animates the substance of the treaty and its operationalization. If ambiguously crafted, the trigger can render the entire treaty inconsequential.[299] To trigger disclosure of the origin of GRs or ATK, not every link between the GRs or ATK and the invention in issue is relevant.[300] For example, if an invention is based on a unique trait of a genetic resource endemic in a particular ecological area, disclosure shall relate to that trait or specific property.[301] It should not apply to the same genetic resource conceivably existing in trans-boundary contexts, but which may not be endowed with the target property. Similarly, in lay terms, if the nexus that GRs and/or ATK have with the invention is peripheral or expendable, it does not trigger disclosure.[302] Delegates invested significant negotiating ingenuity and thoughtful effort into crafting a pragmatic trigger language.[303] After all the haggling, two trigger words "[materially/directly] based on" out of several survived up to the Chair's

[294] This position is logically associated with the influence of the United States which is not a party to the CBD and many Group B countries such as Canada who have yet to ratify the Nagoya Protocol. Parties to the Nagoya Protocol, CONV. ON BIOLOGICAL DIVERSITY, https://www.cbd.int/abs/nagoya-protocol/signatories (last visited Jan. 30, 2025).

[295] Convention on Biological Diversity, *supra* note 119, art. 1.

[296] Margo A. Bagley, *Digital DNA: The Nagoya Protocol, Intellectual Property Treaties, and Synthetic Biology*, WOODROW WILSON INT'L CTR. FOR SCHOLARS, Dec. 2015, at 17.

[297] U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge & Folklore, 29th Sess., U.N. Doc. WIPO/GRTKF/IC/29/4 (Nov. 30, 2015).

[298] *See* Goss, *supra* note 227, at 7.

[299] *Id*.

[300] *Id.* at 9.

[301] *Id*.

[302] Here is an excerpt from Chair's explanatory note 4 on Trigger – "Those GRs, which may be involved in the development of the invention, but which are not material to the claimed invention, shall not trigger the disclosure requirement. This includes in particular research tools such as experimental animals and plants, yeasts, bacteria, plasmids, and viral vectors, which, while technically GRs, are often standard consumables that may be acquired from commercial suppliers and that do not form part of the claimed invention, and thus need not be disclosed." Goss, *supra* note 227, at 9.

[303] *Id*.

Text.[304] Even then, they were the only words that remained in square brackets in the Chair's Text through the Special Session and up to the Diplomatic Conference.[305] Here is how the Chair's Text captured the issue of the trigger:

> In the context of GRs, the term '*materially/directly based on*' clarifies that the subject matter triggering a disclosure are GRs necessary or material to the development of the claimed invention. 'Based on' includes any GRs involved in the development of the invention. The term '*materially/directly*' indicates that a causal link must exist – materially/directly – between the invention and the GRs. In practical terms, this means that only those GRs without which the invention could not be made should be disclosed.[306]

The final text of the treaty dispenses with the two competing trigger words and settles on "where the claimed invention in a patent application is *based on*" GRs or ATK;[307] in such cases, disclosure of origin or source is mandatory. Article 2 provides a modified definition[308] of "based on" from the Chair's Text to mean "the genetic resources and/or traditional knowledge associated with genetic resources must have been necessary for the claimed invention, and that the claimed invention must depend on the specific properties of the genetic resources and/or traditional knowledge associated with genetic resources."[309]

Two additional imports of the trigger language are worth highlighting. First, non-demandeurs supported narrowing the trigger.[310] They argued that the invention must be *directly* based on GR or ATK.[311] This means that the trigger would have to be premised on a physical causal nexus with the GRs or ATK. Such an approach would have excluded both derivates and the tacit nature of ATK. Demandeurs perceived it as too narrow.[312] For them, a direct causal and physical nexus was out of fashion with contemporary technology trends.[313] Demandeurs

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[304] *Id*.

[305] *Id*.

[306] *Id*.

[307] WIPO GRATK Treaty, *supra* note 258, art. 3.1-3.2.

[308] The word "development" in the initial definition was dropped because it was thought that it included the entire ecosystem of production or manufacture including research and development which will make disclosure onerous and beyond an identifiable patent applicant. *Compare* WIPO GRATK Treaty, *supra* note 258, art. 2, *with* Goss, *supra* note 227, at 8.

[309] WIPO GRATK Treaty, *supra* note 258, art. 2.

[310] Oguamanam, *supra* note 188, at 207.

[311] *Id*.

[312] *Id*. at 443 ("The African Group and its [Demandeur] allies are extremely reluctant about the language of the directly-based on trigger. . .They argue that the language is biased in favor of physical access or connection between users and GRs.").

[313] The Swedish, Brazilian, and Ecuadorian delegations all protested the inclusion of what they viewed as overly constrictive language in the treaty's operative provisions. *See* U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *supra* note 183, para. 55 (noting "a lot of heated discussion" had occurred over "

promoted trigger words such as material, necessary, utilization, etc., or even simply *based on* without further qualifiers.[314] Such an approach left enough interpretational room to include digital sequence information ("DSI").[315] Non-demandeurs were unequivocal and insisted that the treaty does not cover DSI – a subject that became a lightning rod in the negotiations.[316] Parties appear to have found a compromise in Article 8. That Article provides for a review of the treaty after four years of entry into force to deal with issues including derivatives, new and emerging technologies, and possible extension of the disclosure requirement.[317]

The second, albeit unspoken, significance of the trigger language is that it reflects a conceptual and ideological translation of the interface between traditional knowledge systems and Western science.[318] That convergence happens in the application of GRs and ATK within the patent space, which is expressed as a scientific and technical narrative via patent specification.[319] The additional leg of the trigger definition is that the "claimed invention must depend on the *specific properties* of the genetic resources and/or traditional knowledge associated with genetic resources."[320] The treaty does not define "specific properties of genetic resources."[321] Focusing on the biomolecular level, the reference to specific properties is typical of the life sciences, but how can one conceptualize the idea of specific properties of ATK as a nuanced and tacit knowledge system? While the reduction of biological materials to their molecular level is the language and approach of Western science, it is alien regarding the production of TK. The drafters missed an opportunity to use the trigger language to mediate the

whether [Article 4.1] provided sufficient clarity and included digital sequence information"); *see also id.* at para. 161 (noting the concern of "Brazil and many other countries" that exclusion of "[d]erivatives . . . and . . . digital sequence information on GRs" would render the treaty "toothless"); *see also id*. at para. 212 ("There were a number of concerns . . . [over the] exclusion of issues relating to derivatives and digital sequence information.").

[314] Oguamanam, *supra* note 188, at 444.

[315] *Id*.

[316] This dynamic was evident in the deliberation of the 36th IGC Contact Group on triggering disclosure requirements. *See* U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *supra* note 183, at 14-15 (surveying the "variety of views" of what language to use when describing the trigger requirement). Several non-demandeur countries expressed concern that capacious language describing the trigger would inadvertently lead to coverage of DSI. *See id.* at para. 47 (describing controversy over trigger language).

[317] WIPO GRATK Treaty, *supra* note 258, art. 8.

[318] Chidi Oguamanam, *Documentation and Digitization of Traditional Knowledge and Intangible Cultural Knowledge: Challenges and Prospects*, *in* INTANGIBLE CULTURAL HERITAGE AND INTELLECTUAL PROPERTY: CULTURAL DIVERSITY AND SUSTAINABLE DEVELOPMENT 358, 358-59 (2009).

[319] *Id.* at 359.

[320] WIPO GRATK Treaty, *supra* note 258, art. 2 (emphasis added).

[321] *Id*. (defining terms).

epistemic tension between TK systems and formal life sciences in which GRs and ATK can be meaningfully rendered in the patent language, if that was ever possible. The implications of this lacuna in the trigger language would become clear during the treaty's implementation.[322]

Awkwardly, the insertion of Article 4—on the treaty's non-retroactivity to patents filed before its entry into force and its deference to existing national disclosure laws—truncates the flow of the disclosure requirement.[323] Article 4 appears before Article 5 on "sanctions and remedies."[324] Article 5 essentially builds upon and applies to Article 3. Its focus is on non-disclosure, mainly within the patent post-grant framework.[325]

(c) Sanctions and Remedies

Article 5 deals with the consequences of failure to comply with the substantive provisions of Article 3.[326] It requires Contracting Parties to implement administrative measures to address such failure.[327] In its detail, Article 5 reflects the high-stakes exchange between demandeurs' inclination for stronger consequences, notably revocation of patent as a post-grant sanction for non-disclosure.[328] This contrasts with the non-demandeurs' slap-on-the-wrist or persuasive approach that offers an opportunity for rectifying the failure to disclose information required under Article 3.[329] Parties haggled over this conflict and ultimately agreed on Article 5.3. That Article states that Contracting Parties cannot "revoke, invalidate or render unenforceable the conferred patent rights solely on the basis of applicant's failure to disclose the information specified in Article 3."[330] A compromise provision is found between two extremes in Article 5.4, which gives Contracting Parties wide discretion to impose post-grant sanctions (conceivably including revocation) "where there has been fraudulent intent in regard to the disclosure requirement. . . ."[331]

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[322] *Cf.* CHIDI OGUAMANAM, INTERNATIONAL LAW & INDIGENOUS KNOWLEDGE 192 (2006) ("[I]ntellectual property rights can facilitate cultural erosion and epistemological assimilation of less empowered peoples and custodians of informal knowledge.").

[323] WIPO GRATK Treaty, *supra* note 258, art. 4.

[324] *Id.* at art. 5.

[325] *Id.*

[326] *Id.*

[327] *Id.* at art. 5.1 ("Each Contracting Party shall put in place appropriate, effective and proportionate legal, administrative, and/or policy measures to address a failure to provide the information required in Article 3 of this Treaty.").

[328] Oguamanam, *supra* note 188, at 440-41 ("[T]he African Group and its demandeur allies back a stronger sanction for non-disclosure while non-demandeurs favor a slap on the wrist if not outright opposition.").

[329] *Id*. at 441.

[330] WIPO GRATK Treaty, *supra* note 258, art. 5.3.

[331] *Id.* at art. 5.4.

On a pragmatic level, there is no uniformity across jurisdictions and regions with mandatory disclosure requirements over the issue of patent revocation.[332] For example, while the EU, Switzerland and the Andean regions do not provide revocation as a sanction for breach of the disclosure requirement, Brazil, India, and South Africa provide for revocation in their national laws.[333] Counterintuitively, patent revocation may be ineffective in this context. When a patent is revoked, critical pieces of information are left open for plunder in ways that can undermine IPLCs, who are the most vulnerable stakeholders.[334] However, that should not be an incentive for non-disclosure, as the law is averse to rewarding wrongs. Other pragmatic measures for managing failure to disclose such as expropriation could be essential. For example, in recognition of this concern, the Rev 2 Document of the 36th IGC included a provision for dispute settlement.[335] For no justifiable reason, that idea was dropped in the Chair's Text and consequently in the final treaty.[336]

Parties appeared to agree that revocation is an extreme sanction applicable as a measure of last resort.[337] Nonetheless, a critical reading of Article 5 on sanctions and remedies reveals that a party's discretion to impose any sanction is severely limited by the high threshold of fraudulent intent.[338] Another view is that the section saved all other sanctions for abuse of patents relating to GRs and ATK where disclosure is not in issue.[339] The treaty's convoluted provision on sanctions and remedies is likely to become a source of interpretative conundrum going forward.

(d) Databases/Information Systems

The next most contentious issue is the case of GRs and ATK databases. Non-demandeurs favoured an elaborate provision for databases that patent examiners could ostensibly use to exercise due diligence[340] in checking for prior art and inventive step. This is consistent with their preference for focusing the

[332] WIPO Technical Study *supra* note 276; WIPO Disclosure Table, *supra* note 276.

[333] WIPO Disclosure Table, *supra* note 276.

[334] Oguamanam, *supra* note 188, at 442.

[335] In Draft Article 6.4: "[Member States]/ [Parties] [shall]/[should] put in place adequate dispute resolution mechanisms." WIPO SECRETARIAT, *Consolidated Document Relating to Intellectual Property and Genetic Resources*, U.N. Doc. WIPO/GRTKF/IC/35/REF /FACILITATORS TEXT REV. 2 (2018).

[336] U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *supra* note 183.

[337] *Id*. at 16.

[338] WIPO GRATK Treaty, *supra* note 258, art 5.4.

[339] *Id*.

[340] In Rev. 2 Document of the IGC 36th Session (2018), Draft Article 7 deals with databases under the title of "due diligence." WIPO SECRETARIAT, *Consolidated Document Relating to Intellectual Property and Genetic Resources*, U.N. Doc. WIPO/GRTKF/IC/35/REF /FACILITATORS TEXT REV. 2 (2018).

instrument on patents. Databases also serve the objective of making the instrument essentially a patent transparency document.[341] However, the significance and contentious nature of the database debate, which later morphed into "information systems" in the Chair's Text and ultimately in the treaty, arise from several considerations.

First, "information systems" is at the intersection of the tension between two often competing visions of the instrument. The first views the instrument as advancing the positive protection of GRs and ATK.[342] The second prioritizes the instruments' essence as offering defensive or preventative protection of GRs and ATK from misappropriation.[343] For hardliner non-demandeur countries, notably the United States, Japan, the Republic of Korea, and Canada, databases are the preferred alternative to mandatory disclosure requirements.[344] As an illustration, in 2018, the USA introduced document: *WIPO/GRTKF/IC/36/10 - The Economic Impacts of Patent Delays and Uncertainty - US Concerns About Proposal for New Patent Disclosure Requirement* at the IGC.[345] In response to that document, the delegations of Japan submitted: "…it would be more appropriate to establish databases on GRs that would provide information that examiners needed to determine novelty and inventive steps of inventions claimed in patent applications. That should be done instead of introducing a mandatory disclosure requirement."[346]

Second, if databases are framed as an alternative to mandatory disclosure, then their creation should be mandatory and central, not ancillary, to the treaty. For demandeurs, databases are essentially defensive or peremptory tools to be used to avoid erroneous grant of patents based on existing knowledge of uses of GRs and ATK.[347] Consequently, it is a secondary and complementary resource in relation to mandatory disclosure requirements.[348] While mandatory disclosure

[341] WIPO Technical Study *supra* note 276, at 6.

[342] WIPO/GRTKF/IC/36/8, *supra* note 194.

[343] The word 'misappropriation' was contested. Non-demandeurs found it objectionable for the reason that it affirms 'biopiracy,' a word that became a lightning rod. Both words, 'misappropriation' and 'biopiracy' did not eventually appear in the final treaty. This contrasts with the earlier versions of the treaty. *See, e.g.*, U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge & Folklore, 29th Sess., U.N. Doc. WIPO/GRTKF/IC/29/8 (May 30, 2016).

[344] WIPO/GRTKF/IC/36/5, *supra* note 194.

[345] WIPO/GRTKF/IC/36/10 *supra* note 194.

[346] U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *supra* note 183, para. 80.

[347] Oguamanam, *supra* note 188, at 422.

[348] *Id*. at 447.

is a rights-based approach, databases are measures-based. The two approaches are not mutually exclusive,[349] contrary to suggestions by Japan and its allies.[350]

Third, as complementary resources, databases should be optional for many reasons. They are expensive to design, operationalize, and maintain, requiring extensive expertise and infrastructure that is hard for many demandeurs to afford.[351] Demandeurs and IPLCs perceive databases and their discourses with suspicion and trepidation. Among other things, digital renditions of these databases make them vulnerable to distortion and other forms of compromise, including hacking.[352] With pros and cons, databases are a metaphoric double-edged sword. They are capable of both enhancing the exploitation of GRs and ATK and strengthening their protection within the intellectual property system.[353]

The intensity of interest of non-demandeurs in promoting databases stoked suspicion among Indigenous Caucus and demandeur blocs.[354] The latter preferred a simplified provision on databases or information systems affirming them as optional, complementary, and defensive tools.[355] These tools should be moderated by appropriate safeguards, the details of which ought to be governed by national laws and developed with the involvement of IPLCs.[356]

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[349] U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *supra* note 183, paras. 46, 47, 203.

[350] U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge & Folklore, 47th Sess., U.N. Doc. WIPO/GRTKF/IC/47/10 (Mar. 21, 2023).

[351] Jane Hunter, *The Role of Information Technologies in Indigenous Knowledge Management*, 36 AUSTL. ACAD. & RSCH. LIBRS. 109, 115 (2005).

[352] Tolulope Balogun, *Data Management of Digitized Indigenous Knowledge System in Repositories*, 39 INFO. DEV. 425, 434 (2023).

[353] See Reto M. Hilty et al., *Traditional Knowledge, Databases and Prior Art: Options for an Effective Defensive Use of TK Against Undue Patent Granting*, *in* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND CULTURAL HERITAGE 132, 132 (Irini Stamatoudi ed., 2022), for debates surrounding the use of technology, databases and other documentation format for the protection of traditional knowledge and traditional cultural expressions; Mira Burri Nenova, *New Technologies and the Protection and Promotion of Traditional Cultural Expressions*, *in* TRADITIONAL KNOWLEDGE: IMPEDIMENTS TO IPR PROTECTION 131, 131 (V Madhuri ed., 2008); Seemantani Sharma, *Traditional Knowledge Digital Library: "A Silver Bullet" in the War against Biopiracy?*, 17 J. MARSHALL REV. INTELL. PROP. L. 214, 215-16 (2017); Chidi Oguamanam, *Documentation and Digitization of Traditional Knowledge and Intangible Cultural Knowledge: Challenges and Prospects*, *in* INTANGIBLE CULTURAL HERITAGE AND INTELLECTUAL PROPERTY: COMMUNITIES, CULTURAL DIVERSITY AND SUSTAINABLE DEVELOPMENT 357, 358 (Toshiyuki Kono ed., 2009).

[354] Yu, *supra* note 10, at 143.

[355] WIPO/GRTKF/IC/36/8, *supra* note 194.

[356] The dichotomous approach between non-demandeurs and demandeurs is evident in the transition on the subject in the texts of Rev. 2, IGC 36 (Due Diligence Draft 7(a)(b)), the Chair's Text (Information Systems Draft Article 7.1, 7.2, 7.3(a)-(e)), the 2023 Special Session Text (Article 7 unchanged) and the adopted Text of the Diplomatic conference under Article 6 (Article 7.1. 7.2. 7.3 moderated) which was the final compromise. *See generally* WIPO

The *chapeau* to Article 7 of the Chair's Text made information systems optional.[357] However, the text's detailed approach to the subject reflected non-demandeurs' preferences. Even the idea of settling on the title of "information systems" is telling as it throws open a vast range of technologically backed options, of which databases are just one.[358] Article 7, including Sub Article 7.3 (paragraphs (a) through (e)), begin by emphasizing the need for information to be accessible for search and examination.[359] Curiously, the Article directly exhorts the Assembly of Contacting Parties to establish technical committee(s) on information systems to, among other things, tackle the details of the design of the system, ensure interoperability, develop safeguarding guidelines, and use miscellaneous resources for sharing of information.[360] It also provides for the "possible establishment of an online portal to be hosted by the International Bureau of WIPO through which [relevant] Offices would be able to directly access and retrieve data"[361] from established national and regional information systems. These detailed provisions conflict with the supposedly optional nature of the information systems as a defensive tool. It is rarely fashionable for a treaty to delve into such a level of detail over a matter that squarely falls within the power of the treaty governing body. While non-demandeurs appeared to endorse the information system as complementary, their expectation is that the system could be a preferred substitute to mandatory disclosure, as the delegation of Japan hinted.[362]

/GRTKF/IC/35/REF/FACILITATORS TEXT REV. 2, *supra* note 340, at 15; Goss, *supra* note 227, at 16; U.N. WIPO, Special Session of the Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore, at annex 4, U.N. Doc. WIPO/GRTKF /IC/SS/GE/23/INF/2 (June 23, 2023); U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge & Folklore, at annex 15, 42nd Sess., U.N. Doc. WIPO/GRTKF/IC/42/4 (May 30, 2016).

[357] Goss, *supra* note 227, at 16.

[358] *See* U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge & Folklore, 47th Sess., U.N. Doc. WIPO/GRTKF/IC/47/13 (May 22, 2023). (The Committee invested much attention and expertise on exploring the issue of databases and their transition to information systems. For example, the 43rd session of IGC (June 5-9, 2023) tasked the WIPO Secretariat to "organize further ad hoc virtual meetings of experts on possible disclosure requirements, and a virtual seminar and/or other virtual technical meetings on information systems, registers and databases of genetic resources and associated traditional knowledge before the forty-seventh session of the Committee. Ad Hoc Technical Expert Committee on Information System was established. In addition to the survey on information system conducted by the Secretariat the work of technical committee was instrumental to further and more elaborate negotiations and outcome on information's systems.)

[359] Goss, *supra* note 227, at 16.

[360] *Id*.

[361] *Id*.

[362] U.N. WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *supra* note 183, para. 80.

In the final stages of treaty negotiations at the Diplomatic Conference, delegates had the opportunity to revisit the provisions on information systems. This resulted in a smarter and neater Article 6 of the treaty on information systems as a compromise text on the subject.[363] That Article reflects the nature of information systems as a defensive, measures-based approach to complement mandatory disclosure.[364] It retains the option for the Assembly of the Contracting Parties to establish technical working groups on information systems without listing the group's tasks as in the previous version.[365]

The final text on information systems seeks to assuage the suspicion and trepidation the notion of information systems evokes among demandeurs and IPLCs.[366] It provides for such systems to be established with safeguards developed "in consultation, where applicable, with Indigenous Peoples and local communities, and other stakeholders …."[367] Thus, the provision on information systems embeds one of the major highlights of the treaty, namely its proactive empowering and mainstreaming IPLCs in treaty implementation and, by extension, in the intellectual property system.[368] That point is buttressed further in the next section. There, the paper cursorily highlights a few pertinent features of the treaty, focusing on its administrative provisions.

4.2 Administrative Provisions

As indicated earlier, the administrative provisions of the treaty are contained in Articles 9-22.[369] They were prepared by the WIPO Legal Counsel's Office and negotiated first by the Preparatory Committee and finally by the Diplomatic Conference, where it was firmed out to Main Committee Two[370] and finalized in the plenary. There are two major but interrelated issues that characterize the administrative provisions of the treaty; the rest could be described as miscellaneous and do not warrant detailed attention in the remainder of this paper.

(a) Mainstreaming IPLCs in the Treaty

The first issue concerns the inclusion of IPLCs in the implementation of the treaty through the work of its governing bodies, specifically the Treaty

363 WIPO GRATK Treaty, *supra* note 258, art 6.

364 See U.N. WIPO *Ad Hoc* Group on Genetic Resources, at 4, U.N. Doc. WIPO/EXP/GR /GE/18/2 (June 14, 2018).

365 WIPO GRATK Treaty, *supra* note 258, art. 6.3.

366 *Id*. at art. 6.

367 *Id*. at arts. 6.1-6.2.

368 *Id.* at Pmbl.

369 *Id*. at arts. 9-22.

370 Namibia's Ms. Vivienne Katjiuongua chaired Main Committee Two. WIPO, *supra* note 1.

Assembly and Diplomatic Conference.[371] The treaty took a revolutionary approach by providing for the "effective participation of representatives from Indigenous Peoples and local communities" in the Assembly.[372] The Article further invites "Contracting Parties to consider financial arrangements for the participation of Indigenous Peoples and local communities."[373]

Member states of WIPO negotiated the treaty *de jure* in their sovereign capacity.[374] Aside from their statutory jurisdiction over patents, it is instructive that many of those states have dubious authority over the main subject matters of the treaty, namely GRs (most of which are found in the ancestral lands of IPLCs) and ATK (which is outside the purview of any member state).[375] *De facto*, IPLCs participated for over two decades and will continue to participate in the IGC, including in the continuing negotiations pursuant to TK and TCEs stream of the IGC mandate, albeit as a unique kind of observers.[376] Throughout the process, member state contributions funded IPLC participation through a dedicated and replenishable Voluntary Fund.[377] In exceptional cases, like in the Diplomatic Conference, WIPO tapped into its budget to augment the Voluntary Fund to enhance IPLCs' attendance and participation.[378]

Even though IPLCs have no vote in the IGC process,[379] member states recognize that the legitimacy of both the IGC and the new treaty derives from IPLCs' participation. It is logical that IPLCs participate in the treaty assembly not only to sustain the treaty's legitimacy but also to provide much-needed expertise and insight over far-reaching issues associated with treaty governance and implementation. The treaty provision in Article 10(1)(c) is pathbreaking, given its significance in securing the effective participation of IPLCs within a treaty text.

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[371] WIPO GRATK Treaty, *supra* note 258, art. 10.2(d) ("[T]he convocation of a Diplomatic Conference for the revision of this Treaty as referred to in Article 14, including as a result of the review referred to in Article 8 …").

[372] *Id*. at art. 10.1(c).

[373] *Id*.

[374] WIPO, GENERAL RULES OF PROCEDURE OF WIPO, (as amended July 15, 2023), https://www.wipo.int/policy/en/rules_of_procedure.html [hereinafter GENERAL RULES OF PROCEDURE].

[375] Maui Solomon, *An Indigenous Perspective on the WIPO IGC*, *in* 1 PROTECTING TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMM. ON INTELL. PROP. AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 219, 221 (Daniel F. Robinson et al. eds., 2017).

[376] Oguamanam, *supra* note 271.

[377] U.N. WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge & Folklore, 41st Sess., para. 10, U.N. Doc. WIPO/GRTKF/IC/41/3 (July 13, 2021).

[378] U.N. WIPO Gen. Assembly, 56th Sess., para. 9(b), U.N. Doc. WO/GA/56/10 (June 19, 2023).

[379] WIPO/GRTKF/IC/37/17, *supra* note 199, para. 27.

Despite the ambiguity surrounding "effective participation," including it in the treaty text marks a significant and progressive step beyond the status quo.[380]

The foot-in-the-door offered to IPLCs pursuant to Article 10(1)(c) is best appreciated by highlighting the scope of the mandate of the Assembly. The Assembly's mandate includes maintenance, development, and review of the treaty; convocation of a Diplomatic Conference for treaty revision and review; establishment of technical working groups; adoption of amendments to certain articles of the treaty; establishment of procedural rules (e.g., quorum, voting, etc.) and the admission of certain intergovernmental entities as treaty parties.[381] The presence of IPLCs in the Assembly charged with this gamut of agenda items ensures that their voices, advice, concerns, insights, and objections will not be lacking in the development and shaping of the treaty.

(b) Participation of Non-Demandeurs in Treaty Governing Bodies

The second major administrative issues concern the undisguised interest of non-demandeurs states in participating in the treaty's governing organs.[382] This became a matter of constructive ambiguity from the Preparatory Meetings up to the Diplomatic Conference.[383] The interest is best understood on the following background.

As already shown, a nuanced dynamic in the treaty negotiation is the dichotomization of stakeholders along the binary of demandeurs and non-demandeurs.[384] Conceptually, the latter are skeptical over the *raison d'être* of the treaty. They are perceived as reluctant participants in the negotiation, preferring, as indicated earlier, to keep the IGC as essentially a discussion forum[385] with no prejudged outcome. For the non-demandeurs, the best outcome from the IGC is no outcome.[386] Their participation in the process has been essential to protect the interest of life sciences and the patent industrial complex, which they believe could be threatened by the treaty.[387] It is an unofficial secret that, led by the

[380] *See* Oguamanam, *supra* note 271.

[381] WIPO GRATK Treaty, *supra* note 258, art. 10.2.

[382] U.N. WIPO Preparatory Comm. of the Diplomatic Conf. to Conclude an Int'l Legal Instrument Relating to Intell. Prop., Gen Res. and Traditional Knowledge Associated with Genetic Res., art. 13.2, U.N. Doc. GRATK/PM/2 (July 10, 2023).

[383] *Id.* para. 1.

[384] *See* Oguamanam, *supra* note 188, at 457; Wendland, *supra* note 168, at 31.

[385] *See* WIPO Background Brief, *supra* note 4, at 5.

[386] *See* Oguamanam, *supra* note 10, at 340.

[387] See WIPO/GRTKF/IC/36/10, supra note 194, at 5, as a symbol of this sentiment. The Economic Impacts of Patent Delays and Uncertainty -US Concerns About Proposal for New Patent Disclosure Requirement. The partisan study was supported by Japan, Republic of Korea, Canada and Group B (Group of Developed and Industrialized countries).

USA, such hardline non-demandeur states are less likely to ratify or accede to the treaty.[388]

Recognizing that the GRs-ATK treaty was inevitable, despite the effort to derail the Committee's work at the 36th IGC in 2018, a section of non-demandeur states remained determined to stay active in the treaty's potential governing bodies (Assembly and Diplomatic Conference) of the new treaty.[389] This is conceivably to protect their perceived interests. Expectedly, this received strong pushback from demandeurs.[390] Only parties that accede to or ratify a treaty are entitled to the full rights, privileges, and benefits of the treaty.[391] Curiously, the WIPO Secretariat, through the Office of the Legal Counsel, chose the path of constructive ambiguity, as evident in Article 15 of *Draft Administrative Principles and Final Clauses for the Instrument to be Considered by the Diplomatic Conference*.[392] The Article provides, "This instrument may only be reviewed by a Diplomatic Conference. The Convocation of the Diplomatic Conference shall be decided by the Assembly."[393] The ambiguity here is that the draft fails to specify the "Diplomatic Conference of Contracting Parties" to the treaty as the unequivocal body to review the treaty.[394]

Given the pervasive suspicion between non-demandeurs and demandeurs, there was much fuss over this ambiguity. Demandeurs sensed that this lacuna potentially provides a backdoor for non-contracting Parties to participate in the review of the treaty and, in so doing, influence issues relating to a treaty they do not believe in.[395] Non-demandeurs turned this totally avoidable matter into a

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[388] The first indication of this self-fulfilling prophesy of sorts was the United States' visible absence in the signing of the Final Act and the Treaty at an elaborate historic ceremony on May 24, 2024, after an agreement was reached on the treaty text. The USA shunned signing any document even though signing a treaty is a symbolic expression albeit non-binding of a state's intention to comply with the treaty before ratification or accession. However, even though Japan, the Republic of Korea, the EU and Canada signed the Final Act, they skipped signing the treaty. There are 31 signatures of the WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge (with Peru signing on June 14, 2024, the number is 32 at the time of this paper). WIPO SECRETARIAT, *Signatures of the WIPO Treaty on Intellectual Property, Genetic Resources, and Associated Traditional Knowledge*, GRATK/DC/10 (May 28, 2024); *see also* U.N. WIPO Final Act, GRATK/DC/9 (May 27, 2024) (being the list of Signatories to the Final Act which stood at 141 as at May 24, 2024).

[389] *See* WIPO GRATK Treaty, *supra* note 258, art. 10.1.

[390] *See* WIPO Background Brief, *supra* note 4, at. 3.

[391] *See id*.

[392] *See* U.N. Doc. GRATK/PM/2, *supra* note 382, art. 15.

[393] *Id*.

[394] *Id*.

[395] *See* Chidi Oguamanam, *WIPO Diplomatic Conference on Genetic Resources and Associated Traditional Knowledge: Slow Progress, Hopeful Outlook,* CHIDI OGUAMANAM (May 20, 2024), https://www.oguamanam.com/publications/wipo-diplomatic-conference-slow-progress-hopeful-outlook.

bargaining issue by linking it to Article 17 on entry into force of the treaty.[396] That Article provides that the treaty enters into force after 15 eligible parties deposit their instruments of ratification or accession.[397] Non-demandeurs supported 30 as acceptable ratification and accession for the treaty coming into force.[398] They insisted that if Article 15 of the *Draft Administrative Principles* brings clarity to the constructive ambiguity by referencing the Diplomatic Conference of Contracting Parties, they will not support 15 as the number of ratifications and accessions for entry into force of the treaty.[399]

The treaty adopts a compromise on this constructive ambiguity in Article 14 of the treaty, which provides: "This Treaty may only be revised by a Diplomatic Conference, in accordance with the Vienna Conference on the Law of Treaties.[400] The Convocation of the Diplomatic Conference shall be decided by the Assembly."[401] Rather than resolve the deliberately orchestrated constructive ambiguity, this circular reference to the text and, by extension, the jurisprudence of the Vienna Convention fueled more suspicion.[402] It left a core aspect of the treaty, i.e., the extent to which non-parties can contribute to such an overarching issue as the review and revision of the treaty, to the interpretive rabbit hole and jurisprudence of the Vienna Convention on the Law of Treaties.[403]

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[396] In his consensus-building consultations with the Africa Group, the Mexican President of the Diplomatic Conference, H.E. Guilherme DE Aguiar Patrioka was clear that Group B States were invested in retaining the constructive ambiguity of Article 15. He conveyed Group B's position that if demandeurs insisted on clarifying that ambiguity, non-demandeurs will insist on higher threshold of 30 ratifications/accessions for treaty entry into forces as opposed to the 15 pursuant to Article 17 of the final negotiation text. *See id.*

[397] *Id.*; U.N. Doc GRATK/PM/2, *supra* note 382, art. 18.

[398] *See* Oguamanam, *supra* note 395.

[399] *See id*.

[400] U.N. WIPO Diplomatic Conf. to Conclude an Int'l Legal Instrument Relating to Intell. Prop., Gen Res. and Traditional Knowledge Associated with Genetic Res., art. 14, U.N. Doc. GRATK/DC/7 (May 24, 2024); Vienna Convention on the Law of Treaties art. 40, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[401] Article 14 of the final treaty was the same as Article 15 of Preparatory Committee Meeting, as proposed by the Office of the WIPO Legal Counsel. GRATK/PM/2, *supra* note 382, art. 15.

[402] *See* Oguamanam, *supra* note 395.

[403] *See* Nirmalya Syam & Carlos M. Correa, *Understanding the New WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge*, 131 SOUTH CENTRE 1, 5 (July 3, 2024) https://www.southcentre.int/wp-content/uploads/2024/07/PB131_Understanding-the-New-WIPO-Treaty-on-Intellectual-Property-Genetic-Resources-and-Associated-Traditional-Knowledge_EN.pdf. Part IV of the Vienna Convention is titled "Amendment and Modification of Treaties." It has 3 elaborate articles 39-41 with complex and cross-linked provisions to other parts of the treaty in ways that do not provide easy and direct interpretative resolution to the consequence of the link to the Vienna Convention in Article 14. For example, Article 39 provides: "A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement in so far as such treaty may otherwise provide." This issue of linking Article 14 to Vienna Convention is

The interest of non-parties in the future development of a treaty instrument is legitimate and well-founded. First, when treaty parties are open to accommodating non-parties, the latter are in a better position to make informed decisions regarding their potential membership.[404] That is not feasible when they are shut out entirely. Second, the more parties that ratify or accede to a treaty, the greater the treaty's effect and influence in achieving its objectives. This is pertinent for a treaty such as the GR-ATK, where most patent-holding countries are also non-demandeurs whose buy-in is crucial for the success of the treaty.[405]

The WIPO process and, indeed, international treaty law have sufficient frameworks for allowing non-parties to instruments to participate often as observers, without voting rights.[406] In the case of WIPO, the Assemblies of WIPO treaties are constituted at the same period and venue as part of the consolidated agenda of the WIPO General Assembly, which doubles as the Assemblies of the Member States of WIPO. Also, in other ways, non-treaty parties have opportunities to leverage some influence regarding such treaties. This is possible through, for example, the WIPO Program and Budget Committee ("PBC"), the Committee on Development and Intellectual Property ("CDIP"), and such committees whose mandates are cross-cutting.[407] Finally, there is ample flexibility through rules of procedure of specific treaties to solicit or request the participation of non-parties in any capacity at the discretion of the treaty assembly.[408]

However, none of these options is equivalent to granting non-parties the right to participate in treaty review. Were this to be allowed, there would be no incentive for non-parties to join a treaty. In sum, despite the self-evident futility of the constructive ambiguity in Articles 10 (2)(d) and 14 of the GR-ATK treaty, the fact that non-demandeurs leveraged it as a bargain linkage strategy, over the accession and ratification threshold for treaty entry into force, indicates that the issue of their participation in whatever capacity in the treaty organs is most likely to rear its head at the treaty implementation stage.[409] Deferring the issue of

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further complicated by the fact that issues relating to WIPO treaties must be linked as a matter of interpretational nexus to 1979 Convention Establishing WIPO (as amended) (entry into force July 1, 1984, WIPO Lex No. TRT (CONVENTION/001). *See* Vienna Convention, *supra* note 400, arts. 39-41.

[404] For example, the Council of Europe makes elaborate accommodation for participation of non-members to the Council of Europe treaties generally and in specific matters (by invitation) as a deliberate effort to not shut out countries that may have stakes in relevant Council treaties and towards the promotion of the overarching objectives of the Council or specific treaty. *See* COUNCIL OF EUR., *Participation of Non-Member States*, https://www.coe.int/en/web/conventions/participation-of-non-member-states (last visited Feb. 6, 2025).

[405] As evident in GRATK/DC/10, so far, the 31 (+ Peru) signatories to the treaty are mainly developing countries. Even key actors, such as India and Indonesia are missing from that list as at the time of this study. *See* GRATK/DC/10, *supra* note 388.

[406] GENERAL RULES OF PROCEDURE, *supra* note 374.

[407] *Id.* at Part III.

[408] *Id.* at Rule 48; *see also* WIPO Background Brief, *supra* note 4 and accompanying text.

[409] *See* Oguamanam, *supra* note 271.

constructive ambiguity to the Vienna Convention's interpretive framework was perfectly avoidable. Realistically, there is ample room for the United States and its hardliner allies and skeptics of the treaty to genuinely influence treaty policies and implementation through WIPO's extant processes, organs, and decision-making bodies, but such possibilities do not avail treaty skeptics of the status, rights, and privileges of *de jure* parties to the treaty.

CONCLUSION

The road to the GR-ATK Treaty was long and arduous. Skeptics of the treaty and the entire IGC preferred an interminable discussion forum with no commitment to an outcome. However, the tenacity of the IGC optimists triumphed. More than two decades of IGC work have yielded significant and invaluable resources and jurisprudence for navigating the interface of intellectual property and traditional knowledge. The IGC process, in general, and the GR-ATK Treaty, in particular, demonstrate that it is possible to approach the issue of intellectual property and traditional knowledge outside the conceptual and theoretical morass that has dogged the interface. Most scholarly energy in the debate has focused on the perceived irreconcilability of the two, while seeking a *sui generis* form of intellectual property for traditional knowledge[410]—a goal that remains elusive for the most part. Much apprehension also centres on the underlying ideological gulf and conflicting worldviews between traditional knowledge and its IPLCs custodians, on one hand, and Western intellectual property, on the other.[411] Those are credible and legitimate concerns worthy of continuing interrogation.

However, the new treaty takes an essentially pragmatic tenor. It is a transparency and, to a large degree, an accountability instrument that contributes to an intellectual property system that is at least modestly inclusive of the interests and concerns of IPLCs and the developing world.[412] As indicated by the WIPO Director General, Daren Tang, the treaty reflects an intentional orientation of WIPO toward a more inclusive and forward-looking intellectual property system that works for all, not just a few, through addressing perennial concerns of IPLCs

[410] Roht-Arriaza, *supra* note 32; Farley, *supra* note 99; Ragavan, *supra* note 101; Mgbeoji, *supra* note 65; J. Janewa OseiTutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147 (2011).

[411] *See e.g.*, Chidi Oguamanam, *Wandering Footloose: Traditional Knowledge and the "Public Domain" Revisited*, 21 J. WORLD INTELL. PROP. 306 (2018); Ruth L. Okediji, *Traditional Knowledge and the Public Domain*, CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION [CIGI], Paper no. 176 (June 2018); Karjala, *supra* note 132; Harry, *supra* note 132.

[412] *See* WIPO, *supra* note 1 (noting that "[t]his is the first WIPO Treaty to address the interface between intellectual property, genetic resources and traditional knowledge and the first WIPO Treaty to include provisions specifically for Indigenous Peoples as well as local communities"); Oguamanam, *supra* note 188, at 426-31.

and the global south.[413] The treaty is a significant step that emboldens the progressive evolution of the 2007 WIPO Development Agenda.

The narrow focus of the treaty on the patent system turned out to be a core compromise required for non-demandeurs to commit to a global mandatory disclosure regime. Such a concession is reminiscent of high-stakes negotiations. For many, that trade-off will remain and, indeed justly so, an enduring part of their criticism of the treaty. There is, however, a merit to the argument that the patent system is pragmatically the most engaged at the interface of genetic resources and traditional knowledge. Yet, neither the WIPO nor the treaty has the capacity to restrict IPLCs' relationships and dealings with genetic resources to patents only. Ultimately, an objective way to appraise the treaty is to recognize that it contributes to and forms part of a complex regime framework that pressures the intellectual property system toward a meaningful consideration for traditional knowledge in response to increasing interest in genetic resources.

In this regard, Tang observes that genetic resources are "becoming deeper and more consequential, driven by bold advances in digital technologies and the life sciences."[414] He makes a case for the need to integrate "many others whose great contributions never see the light of the day, or who remain underserved by IP."[415] This is in reference to "all countries and their communities everywhere, including Indigenous Peoples and Local Communities,"[416] whose traditional knowledge associated with genetic resources remains an enduring bedrock for innovations in the life sciences.

This article has explored how the Convention on Biological Diversity (CBD) was pivotal in the evolution of the emergent regime complex at the interface of traditional knowledge and intellectual property. This holds true even though the CBD is not an intellectual property instrument. Clearly, the CBD foreshadowed that concerns about traditional knowledge now transcend intellectual property. They are best understood as part of global knowledge governance and a pluralistic, cross-cutting epistemic order, including new questions and concerns relating to digital sequencing, data governance, and even artificial intelligence as matters of equity, access, and distributive justice around innovation in the life sciences. Furthermore, consideration of Indigenous Peoples and their knowledge systems is increasingly part of the accepted framework of international free trade and environmental agreements as well as broader development considerations.[417] Through the GR-ATK Treaty, WIPO has exercised its normative

[413] Tang, *supra* note 13, at 3.

[414] *Id*. at 2.

[415] *Id*. at 3.

[416] *Id*.

[417] *See e.g.,* preamble to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (referencing indigenous rights, sustainable development and traditional knowledge). Article 18.16 CPTPP provides: "Parties recognize the relevance of intellectual property systems and traditional knowledge associated with genetic resources to each other, when that traditional knowledge is related to those intellectual property systems."

imprimatur on traditional knowledge as part of an emergent regime complex and development ecosystem.

Ironically, non-demandeurs and segments of treaty skeptics were united in not overtly linking the treaty to other regimes, especially the CBD and associated issues.[418] However, directly or indirectly, such linkage remains inevitable for many intuitive and evident reasons, four of which will suffice. First, there is a recognition of the imperative for mutual supportiveness of the treaty with "other international instruments related to genetic resources and traditional knowledge associated with genetic resources."[419] Second, Article 8 provides a buffer for progressive and periodic review of the treaty to address, among others, "issues arising from new and emerging technologies that are relevant to the application of this Treaty."[420] Third, in Article 2, the definition of the trigger phrase, "Based on," refers in part to the claimed invention depending "on the specific properties of the genetic resources…,"[421] which is best translated through the application of digital technologies, including digital sequencing. Fourth, the refrain in the IGC's renewed mandates across biennia calls for synergy with "work pursued in other fora" and acknowledgement of the Development Agenda.[422] A combination of the foregoing factors, including Articles 7, 8, and 2 as referenced, logically ties the treaty implementation to the ecosystem of new and emergent technologies and their developmental ramifications. Those include digital sequence information as part of a CBD-inspired regime complex at the intersections of

Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 18.16, Mar. 8, 2018, NZTS. Article 11.53 of Regional Comprehensive Economic Partnership Agreement provides: "Subject to its international obligations, a party may establish appropriate measures to protect traditional knowledge, genetic resources, and folklore." Regional Comprehensive Economic Partnership Agreement, art. 11.53, Nov. 15, 2020, ASEAN. Chapter 32 of the United-States-Mexico-Canada Agreement (USMCA), titled "Exceptions and General Provisions", in 32.5 specifically focuses on Indigenous Peoples. It provides in part: "[T]his Agreement does not preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to Indigenous Peoples." United States-Mexico-Canda Agreement (USMCA), art. 32.5, Nov. 30, 2018. The footnote to this provision is even more specific: "For greater certainty, for Canada the legal obligations include those recognized and affirmed by section 35 of the Constitution Act 1982 or those set out in self-government agreements between a central or regional level of government and Indigenous Peoples." United States-Mexico-Canda Agreement (USCMA), art. 32.5, n7, Nov. 30, 2018. Canada and indeed parties to major regional trade agreements have leveraged these and similar provisions to protect Indigenous Peoples' interests, including their knowledge systems, where applicable, and other development issues.

[418] Goss, *supra* note 227, notes on art. 1.

[419] U.N. Doc. GRATK/DC/7, *supra* note 400, pmbl.

[420] *Id*. at art. 8.

[421] *Id*. at art. 2.

[422] *See, e.g.*, U.N. WIPO, *List of Decisions - 2023*, at 13(v)(ii), (2023), ("Bearing in mind the Development Agenda recommendations … the WIPO General Assembly agrees that the Mandate of the Committee be renewed, without prejudice to the work pursued in other fora as follows: ….").

traditional knowledge, intellectual property, and innovation for distributive justice. This is epitomized in the CBD Kunming-Montreal Global Biodiversity Framework ("KMGBF") and its program of work.[423]

While the IGC negotiations dragged on, several countries and regions—such as South Africa, India, China, Switzerland, Indonesia, the Andean Community, and the European Union—enacted instruments on mandatory disclosure of origin or sources of genetic resources and/or associated traditional knowledge.[424] As against the desires of the non-demandeur hardliners, the genie, as the cliché goes, was already out of the bottle. In a way, the treaty was an effort at catching up with developments at national and regional levels. It provides a global and harmonized framework for the entrenchment of mandatory disclosure in patent law and practice. In addition, the treaty's ground-breaking accommodation of IPLCs would also need to be domesticated in each national jurisdiction, taking into consideration existing contexts and contingencies for effective and positive translation of the treaty to empower IPLCs. Additionally, the treaty's requirement for consultation with IPLCs in the establishment and design of information systems is another significant contribution that will positively impact domestication.

Overall, the treaty has raised high hopes—from the highest levels to the grassroots —among the world's IPLCs and the global south. This is evident in the following random sample of notes of optimism by a cross-section of delegates captured in real time at the Diplomatic Conference, variously characterizing the treaty as: a "threshold of a new era in intellectual property rights" (Indonesia), "transformative development and once-in-a-generation in intellectual property" policy-making (South Africa); "historic opportunity to transform the intellectual property system" (India); "product of a long and winding road whose time for conclusion is now" (Guatemala); "unprecedented opportunity to redress the imbalance in the global IP system" (Pakistan); "critical moment and opportunity" (Botswana); and "modest but significant step" (Native American Rights Fund).[425] Further, the treaty is portrayed as: "one of the greatest achievements for multilateral collaboration in 2024 that would send strong signals to other ongoing negotiations in other fora" (Brazil) and as an instrument that "sends clear message to the international community on the seriousness attached to traditional knowledge and genetic resources" (Jamaica).[426] And Nigeria celebrated

[423] Adopted at the 15th Meeting of the Conference of Parties of the CBD, the KMGBF is the basis for ongoing program of work on governance of digital sequence information over genetic resources. *See* U.N. Convention on Biological Diversity, Kunming-Montreal Global Biodiversity Framework, U.N. Doc. CBD/COP/DEC/15/4 (Dec. 19, 2022).

[424] WIPO Disclosure Table, *supra* note 276.

[425] Chidi Oguamanam, *WIPO Diplomatic Conference on Genetic Resources and Associated Traditional Knowledge: Delegates Set a Positive Tone in the Early Days*, CHIDI OGUAMANAM (May 15, 2024), https://www.oguamanam.com/publications/wipo-diplomatic-conference-positive-tone-in-the-early-days.

[426] *Id.*

the making of the treaty thus: "… this is a new day; rarely has it been heard that a multilateral organization will produce a new treaty, in difficult terrain, on a new subject matter at the intersection of human rights, innovation and trade".[427]

No one should be under any illusion. While the 15 ratification and accession threshold in Article 17 does not look insurmountable, there is heavy lifting to be done. These efforts involve domesticating the treaty, reconciling it with existing regional and national laws and regulations both in their text, and adjusting patent office practices institutionally. At the time of writing, only 44 countries, primarily in the global south, have signed the treaty with one ratification. Notably absent are non-demandeur countries except two – Switzerland and Australia.[428] While the treaty marks the triumph and resilience of multilateralism, there is a need for vigilance and constructive engagement with and not alienation of industrialized countries that hold most genetic resources and associated traditional knowledge patents.

History shows that when powerful players are disgruntled with any regime—old, new or emergent—they resort to bilateralism and seek to reshape the regime according to their preferences.[429] While the GR-ATK Treaty is hailed or even hyped as a milestone, stakeholders must be intentional in not allowing a counterproductive backlash. The attitude of non-demandeurs as key actors in the global intellectual property system begs the question of whether they are genuinely open to making intellectual property inclusive to those on the margins. The GR-AKT Treaty merits celebration as a milestone. Perhaps more deserving of celebration is the WIPO ICG's work spanning over two decades. That work has proven highly impactful and has influenced multiple regimes, including environment, trade, and broader development considerations on the importance of traditional knowledge, well before the birth of the first IGC treaty. One hopes the new treaty will serve as an impetus and not a hindrance to expedite continuing IGC negotiations on traditional knowledge and traditional cultural expressions sans additional decade(s) for an outcome.

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[427] Prof. Ruth Okediji, excerpt from Nigeria's Closing Statement at conclusion of the Treaty, delivered May 24, 2024, WIPO Headquarters, Geneva (video record with the Author).

[428] This is differentiated from about 141 countries that signed the Final Act of the Treaty on the same day. *See WIPO GRATK Treaty, supra note 258. For update on signatories (44) and ratification/s (only one country, Malawi) as at May 8, 2025, see WIPO, WIPO-Administered Treaties,* https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=19830.

[429] *See* Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004); Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia The International Intellectual Property Regime Complex*, 2007 MICH. ST. L. REV. 1 (2007); Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277 (2004).