Indigenous Peoples at WIPO:
Intellectual Property, The Politics of Recognition, and Identity-based Claims-making

Paper prepared for presentation at the Annual Meeting of the American Political Science Association, September 3, 2009 – Toronto, Canada

Patricia M. Goff, PhD
pgoff@wlu.ca

Intellectual property makes for contentious global politics. Once the legalistic and technical preserve of patent regulators and copyright lawyers, it is now in the crosshairs of highly contested moral, ethical, economic, and political issues. From the desirability of patenting genetic material to the responsibility for making expensive proprietary drugs available to a wider public, debates about intellectual property complicate efforts to govern the globalized, knowledge economy.

This paper examines one dimension of contemporary contestations around intellectual property – indigenous peoples' efforts to gain recognition from the World Intellectual Property Organization (WIPO) for their unique perspective concerning traditional knowledge and traditional cultural expression. This domain merits attention because it is characterized by a unique type of claims-making on the part of indigenous civil society actors – identity-based claims-making. The claims of indigenous civil society groups are not divorced from their economic well-being or their commercial capacity. Nonetheless, they incorporate elements grounded in indigenous groups' desire to be able to express their identities through every day practices, practices that can be threatened by the prevailing global intellectual property regulatory framework. Identity-based claims are difficult for WIPO to accommodate since they spring from an alternative understanding of the very concepts that define intellectual property in its current guise. I argue that insights from legal pluralism may provide an entry point into thinking creatively about how to accommodate indigenous concerns at WIPO. More broadly, this analysis highlights aspects of global governance that deserve greater attention in a world where trans-border movement and cultural cross-fertilization are the norm, namely demands for international organizations to accommodate diverse practices within universalizing global frameworks.

Prevailing Debates about Difference in International Organizations

The effort by indigenous peoples to gain respect as IP rights-holders at WIPO is not the first time that international organizations have found themselves confronted with the question of

diversity and difference. At least two other examples exist, each informative in its own way as we consider indigenous claims.

First, one can point to ongoing efforts by international organizations to address cultural diversity. Numerous agencies and instruments exist to protect cultural rights. The UN Educational, Scientific and Cultural Organization (UNESCO) takes as one of its main mandates the protection of cultural heritage and the promotion of cultural diversity and it has sponsored the creation of conventions designed to secure these outcomes. Related to this, Will Kymlicka has recently argued that that, "we are witnessing the increasing 'internationalization' of state-minority relations, and the global diffusion of multiculturalism as a new framework for reforming those relations" (Kymlicka, 2007: 3). He goes onto specify how this is happening. "We can distinguish two levels at which multiculturalism is being globalized. First, there is the global diffusion of the *political discourse* of multiculturalism... Second, there is the codification of multiculturalism in certain international *legal (or quasi-legal) norms*, embodied in declarations of minority rights" (Kymlicka, 2007: 3-4 emphasis in original). In Kymlicka's formulation, international organizations are implicated in the internationalization of multiculturalism as catalysts for change within domestic environments. IOs cajole and pressure states to adopt policies and to establish standards that reflect a commitment to multiculturalism. It is in this way that "ideas of multiculturalism and minority rights, which one might have expected to be relegated to the peripheral institutions of the international community dealing with 'culture' and 'heritage', have permeated the core institutions relating to security, development, and human rights" (Kymlicka, 2007: 39).

These examples show that culture and identity issues have not been absent from the concerns of international organizations. However, they also suggest that international organizations have been most preoccupied with issues of diversity insomuch as they can promote such ideas among states members. IOs have not held themselves to standards of cultural inclusion, nor have they generally been asked to do so, until now.

The second way that international organizations have been asked to accommodate diversity and difference relates to developing countries. The Bretton Woods institutions provide useful examples. The International Monetary Fund (IMF), the World Bank and the World Trade Organization (WTO) have all come under fire at different moments for promoting one-size-fits-all policies. The IMF and the World Bank have favoured a neoliberal approach to economic governance, advancing privatization, deregulation, and free trade across the variety of contexts where they work. Similarly, the WTO's single undertaking has required all member states, regardless of differences, to commit to the principles underpinning the trade regime. Yet member governments and non-governmental groups have contested this universalism, arguing that developing countries may be harmed by such policies. The result has been a greater move toward local input and "ownership" in World Bank policies, as well as an array of "special and differential treatment" policies at the WTO that relax the demands on developing states.

Noteworthy here is the fact that, to the degree that these international organizations recognize diversity and difference, it is grounded in level of development. What differentiates

Bretton Woods institution member states, thus warranting some retreat from universal, one-size-fits-all policies, is progress on the road to development as defined according to a series of socioeconomic indicators. Cultural difference is not part of the equation.

The WIPO IGC Process

Ideas and knowledge are at the heart of the information economy, making WIPO a central institution of global economic governance. Established in 1970, WIPO replaced the United International Bureaus for the Protection of Intellectual Property, which oversaw the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works. WIPO now administers over twenty treaties on behalf of its 184 (?) member states. Its core tasks include "assisting governments and organizations to develop the policies, structures and skills needed to harness the potential of IP for economic development; working with Member States to develop international IP law; administering treaties; running global registration systems for trademarks, industrial designs and appellations of origin and a filing system for patents; delivering dispute resolution services; and providing a forum for informed debate and for the exchange of expertise" (WIPO: An Overview).

In 2000, WIPO turned its attention to the protection of traditional knowledge (TK) and traditional cultural expression (TCE), and to benefit sharing for genetic resources. It became apparent during the final days of negotiations of the WIPO Patent Law Treaty that these issues would not be included in that process, despite member state calls for their inclusion. As a compromise solution, an ad hoc committee was struck to study how the IP system might accommodate TK, TCE, and genetic resources and the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was born.

The IGC was convened in 2001 for the first time and it has met twice yearly since then. Its activities have been accompanied by much data-gathering and analysis on the part of the WIPO Secretariat, including scores of fact-finding missions to indigenous and traditional communities around the world. The most recent meeting occurred in Geneva in ...

The work of the IGC would not yet count as a negotiating process per se, but rather as an effort to share experiences and to map the issues and the preferences of stakeholders, including local, traditional and indigenous communities, and industry, who are accredited to the IGC meetings. The Committee has produced a number of formal working documents, including sets of separate Draft Provisions for the protection of Traditional Knowledge (TK) and Traditional Cultural Expression (TCE). In the February 2008 session, member states asked the Secretariat to prepare a gap analysis of existing national and international laws for the protection of TK and TCE in an effort to ascertain where new protections might be required. The work of the IGC is important and progress has been made, however it is striking to note that at February 2008

session, fully seven years after the start of the IGC process, member states and accredited groups claimed that they still could not agree on the definition of TK or of TCE.

While parties to the IGC have yet to agree on definitions of TK and TCE, there seem to be some acknowledged features that characterize these. TK and TCE are often unrecorded or unwritten. It may be inappropriate to use them for commercial purposes. Stewards of TK and TCE may be communities, clans or other collectives, as opposed to individuals. "For laws regarding the ownership of knowledge to make sense, social ideas about the possibility of knowledge or information being attached to particular individuals (through ownership) needed to be developed" (Sell and May, 2006: 11), yet many traditional communities find this unpalatable, even impossible. There may be sacred elements to the TK and TCE, such that their communication beyond the community to which it belongs may be unacceptable. TK and TCE may be embedded in spiritual and/or cultural values and practices.

A Digression on Indigenous Civil Society Actors

It is worth noting that indigenous peoples do not always fit comfortably into categories that scholars of global governance rely on to capture civil society actors. At the WIPO IGC meetings, indigenous groups are listed as non-governmental organizations. The Saami Council, the Tulalip Tribes of Washington State, the Assembly of First Nations, and The Indian Movement "Tupaj Amaru" are seated alongside the International Association for the Protection of Industrial Property, the International Association of Plant Breeders, the International Chamber of Commerce, and the International Federation of Pharmaceutical Manufacturers Association.

It is significant that WIPO has made it possible for indigenous groups to participate in the process in this way – by having the ability to intervene in the proceedings of the IGC. Indeed, in recent years, WIPO has established a special fund to defray costs for indigenous peoples who wish to have representation at the IGC, but cannot afford passage to Geneva. Nonetheless, the category of non-governmental organization seems an uneasy fit and it limits the ways in which indigenous peoples can participate. In many places, indigenous peoples have been accorded self-determination rights. The Tulalip Tribes of Washington State, for example, have a government-to-government relationship with American federal agencies. In other cases, member states have themselves taken action to underline the special status that indigenous peoples have in domestic environments. The Canadian government has paid for Assembly of First Nations representatives to attend the IGC meetings and the government of New Zealand has seated Maori representatives with the national delegation to the IGC, rather than having them appear with other NGOs. These actions seem to acknowledge that indigenous peoples merit a more substantial role in these international processes. As Koivurova and Hein¨am¨aki (2006, 102) put it,

> "It would seem fair to distinguish between indigenous peoples and other groups when it comes to representation in international law: if nothing else, indigenous peoples'

> organisations represent peoples, not interest-based constituencies such as the members of environmental organisations. On the other hand, indigenous peoples are not as yet perceived as being equal in status to peoples of recognised states but, rather, as possessing a measure of self-government within existing states. This intermediate position representing peoples, but within existing states, should be reflected in indigenous peoples' status in international treaty-making. One might well enquire concerning the kind of self-determination rights the present system of international law accords to indigenous peoples. It seems self evident that the more rights of self governance indigenous peoples possess, the more influence they should have in international treaty making."

Koivurova and Hein¨am¨aki (2006) go onto explain that the Arctic Council is an important exception in global governance institutions because the Inuit Circumpolar Conference, the Saami and others participate as "permanent participants" with a special status as partners who can table proposals and must be fully consulted before the eight states members make their decisions.

The unique status of indigenous peoples seems to render even the broader concept of "civil society" problematic. Lipschutz (1999, 260) offers the following definition: "*Civil society* includes those political, cultural, and social organizations of modern societies that are autonomous of the state but part of the mutually constitutive relationship between state and society." It, too, presumes a relationship to the state that only partially captures the status of many indigenous peoples who have gained rights to self-determination.

In recent IGC sessions, indigenous peoples' groups have also called into question the notion that they are *stakeholders* in the process, preferring to remind participants that they are *rights-holders*. They are not groups sitting on the margins of the intellectual property framework, experiencing its indirect or residual effects. They are themselves holders of valuable knowledge.

Indigenous Peoples' Demands

In this section, I argue that the vast majority of the claims that indigenous peoples make at WIPO spring from concerns about identity. That is not to say that they reveal no concerns about commercial capacity or material well-being. Some claims seem to deal exclusively with these latter sorts of concerns, as international relations theory might predict. Most others, however, either fuse material concerns to identity issues or spring purely from concerns about identity as it is expressed through every day practices. The goal is, in the words of one indigenous advocacy group, to create "culturally appropriate community economic development" (WIPO/GRTKF/IC/2/16 – 152).

Every session of the IGC since its inception has culminated in a report of proceedings, chronicling the interventions by governmental, intergovernmental, and non-governmental actors. My analysis is based on the claims articulated in these documents. Not all indigenous peoples are present at the IGC meetings. Some attend on certain occasions; others, like the Saami Council,

have been present since the beginning. Therefore, representatives speak on behalf of individual indigenous groups; however they often suggest that their concerns are not idiosyncratic. That said, one cannot identify a single, cohesive view that accurately captures the concerns of all indigenous groups. One further complicating factor here is that some holders of traditional knowledge are not indigenous groups. The notion of indigeneity as it is used at WIPO seems better suited to North and South American Aboriginal peoples than to African tribal peoples, though the latter also seek protection for traditional knowledge and traditional cultural expression and participate in the WIPO IGC.

At least two indigenous peoples' demands represent a desire for inclusion in the current intellectual property framework. First, where traditional knowledge or traditional cultural expression is being patented by people from outside indigenous communities, there must be prior and informed consent. Second, where the sale or use of TK and TCE generates commercial gain, indigenous groups ask for a system of fair and equitable benefit sharing. These demands might be conceptualized as conventional claims that any stakeholder in WIPO might make.

In the early days of the IGC, indigenous groups asked for greater participation in the development of IP rules. They also articulated a need for resources to help them participate, which was met with some success n 2005 when WIPO set up the Voluntary Fund for accredited observers to the IGC who are members of local or indigenous communities. Indigenous groups also routinely remind IGC participants that the WIPO process is only one where indigenous rights and obligations are being explored. The UN Permanent Forum on Indigenous Issues and ongoing negotiations surrounding the Convention on Biological Diversity are two other venues where indigenous issues figure prominently and indigenous groups play a central role.

While these claims are significant, they do not comprise the bulk of the statements in the IGC proceedings. The main statements by indigenous groups spring from concerns about their very identities and how they can preserve their practices in the face of IP regulations. One basic claim points to the difference between intellectual property on the one hand and traditional knowledge and traditional cultural expression or folklore on the other. By extension, this difference renders the current IP system insufficient for protecting TK and TCE.

For example, the representative of the Saami Council, Mattias Ahren, (WIPO/GRTKF/IC/2/16 – 48) argues that,

> The indigenous peoples generally regarded their knowledge and natural resources not as a commodity, but as a common good that vested in the people collectively. In contrast, intellectual property rights were private rights intended to be sold on the market. For that reason among others, intellectual property rights would not be appropriate for protecting indigenous knowledge and resources." He goes onto explain that, "indigenous peoples regarded their knowledge and natural resources as springing out from a spiritual, cultural and sometimes religious connection between the people and its land..."

Elsewhere, the Saami representative (WIPO/GRTKF/IC/3/17 – 245) "reiterated that legal systems designed to protect indigenous genetic resources, TK and folklore, should they be adequate, cannot be elaborated solely from an IP perspective." He noted "a fundamental difference between IPRs and TK; namely the intrinsic connection between TK and the culture and environment in which it was developed, in turn per definition implying that TK vest foremost in the people or community collectively, and not in any individual creator."

Later, Ahren,

> agreed that there were examples where existing IPR mechanism (sic) protected traditional cultural expressions, but added that there were also examples where traditional IP mechanisms fell short of providing protection… The representative stressed that the reason for traditional IP rights not adequately protecting traditional cultural expressions was the intrinsic connection between such cultural expressions and the culture and the environment from which they originated. It added further that it was often impossible to identify the individual creators of traditional cultural expressions and that indigenous peoples regarded that a substantial part of their traditional cultural expressions vested in people collectively and often looked upon themselves as custodians thereof. It added that cultural heritage of indigenous peoples were both a collective and individual right, therefore the responsibility for its use and management were borne by the people as a whole in accordance with their customary laws and traditions (WIPO/GRTKF/IC/4/15 – 87).

The representative of the Indigenous Peoples' Biodiversity Network echoed this view (WIPO/GRTKF/IC/4/15 – 18) in noting that,

> cultural knowledge was not so much valued for its intrinsic worth, but for its instrumental value, i.e. the commercial gains that may arise from its use, which had led to a "gold rush" mentality *inter alia* in claiming IP rights over TK. The representative maintained that IP policies and practices had profound implications for indigenous and traditional communities, as exemplified by instances where the IP system had sanctioned IP claims over materials associated with indigenous knowledge and innovation systems. The representative pointed out that therefore most indigenous peoples considered the IP system to be highly predatory and to exacerbate the trend of exploitation, poverty and cultural erosion with which indigenous peoples lived. The representative explained that indigenous peoples saw IP claims as technically, spiritually and morally wrong, based on three views among others. First, the nature of the Western IP system was inadequate to protect their innovations because indigenous peoples had a different world view from the dominant Western culture with its primary emphasis on individualism and materialism. Second, indigenous knowledge and innovations should be managed by indigenous

concepts of authorship and of IP, which can be found in local customary laws. Third, it was an ethical principle of their system that anyone wanting to make use of indigenous peoples' innovations or to reproduce their creations must fully respect their cultural or spiritual context.

The representative of the Indian Movement "Tupaj Amaru" (WIPO/GRTKF/IC/2/16 – 90) criticized WIPO working documents on IP and GR, TK and F for emphasizing "the commercial application of genetic resources, without taking into account their spiritual dimension and cultural traditions, based upon customary law."

Indigenous peoples do not reject the IP system completely. Rather, they note that it is only partially useful or applicable to TK and TCE. For example, the Assembly of First Nations representative recommended that,

> WIPO recognize that present IP regimes served primarily to protect commercial interests and that current legal regimes were not designed to address cultural interests or integrity therefore not necessarily sensitive to the content, processes and holders of TK and folklore, and that WIPO should formulate protection systems that address such issues as cultural integrity, rights of attribution, communal ownership and re-creation, and perpetual protection;
>
> (ii) that WIPO recognize the existence of multiple systems of law and customs in human societies as current IP regimes constituted one system for protection of rights and that customary and traditional systems also existed to protect cultural rights and serve core cultural goals...;
>
> (iv) that WIPO be cognizant of the potential negative consequences of global or international regulatory mechanisms such as the development of a world patent system on a local system... (WIPO/GRTKF/IC/4/15 – 88)

Similarly, the Andean Community,

> acknowledged that recourse to trade secrets, collective trademarks, geographical indications, and copyright and related rights... were interesting measures for the protection of TK and as elements to be considered when constructing a *sui generis* system. However, such measures provided segmented protection for certain elements and did not protect TK as a whole. With regard to folklore, the representative said that it must be kept in mind that the UNESCO-WIPO Model Provisions proposed a regime that related to expressions mainly of an artistic nature and these were only a type of TK. Such protection granted was only of a defensive nature against abusive or unfair use (WIPO/GRTKF/IC/3/17 – 240).

Yet another indigenous group highlighted the limited usefulness of the IP system for the protection of TK and TCE. Pauktuutit Inuit Women's Association (WIPO/GRTKF/IC/5/15 – 172) argued that, "the nature of TK is that it is held by communities and is a culmination of generations of knowledge. It is a timeless knowledge. As such the time limited protections currently provided within many existing IP regimes do not meet the needs of TK holders."

The Saami Council representative noted, too,

> that TK holders should not be forced to adopt to IP regimes that are not designed to protect TK. He stated that most existing IP mechanisms were limited in time, which meant that even if protected for a limited time cultural expressions would eventually end up in the public domain and that this was inadequate as protection for culture cannot be limited in time and should exist indefinitely. The representative reiterated that indigenous knowledge holders had not developed their knowledge for commercial use.... He added that a *sui generis* system should include all knowledge that formed part of the relevant people or communities culture, since the system should be designed to protect the culture and not the knowledge as such (WIPO/GRTKF/IC/3/17 – 245).

Many of the indigenous groups noted a discomfort with categorizing TK and TCE as strictly intellectual property issues. For example, the Indigenous Peoples' Biodiversity Network (WIPO/GRTKF/IC/2/16 – 153) remarked that the discussions "were focused only on the economic aspects of a small part of traditional knowledge. The Representative stated that this knowledge was valuable to them because of its holistic function with other elements of the world... the question of intellectual property was also a question of human rights." The Saami Council (WIPO/GRTKF/IC/3/17 – 78) "stressed the need for the Committee to consider aspects other than IP if its work were to be relevant to indigenous peoples. This entailed sustainable development and other environmental issues..." In noting that, "...IP mechanisms could never completely provide adequate protection for indigenous TCEs [traditional cultural expressions]", the Saami Council argued not only that discussions at WIPO should go beyond the IP aspects of TK and TCE, but also that discussions on indigenous concerns in other fora should address TCE and not assume that it is strictly the preserve of WIPO (WIPO/GRTKF/IC/5/15 – 53).

Many indigenous statements focus on specific aspects of TK and TCE protection. For example, the Indian Movement "Tupaj Amaru" (WIPO/GRTKF/IC/5/15 – 80) expressed concerns about public domain provisions in the prevailing IP framework as they relate to indigenous identity.

> To document and place TK in the public domain would signify violating the confidential character of many of the intangible, sacred and secret elements which belong to the living patrimony which was transmitted from generation to generation, and which constituted the memory of their ancestors. Placing indigenous knowledge in the public domain would

> accentuate the deterioration of the cultural values and elicit appropriation of their cultural values by trans-national corporations and consequently the destruction of the indigenous identity."

The statement by the representative of the Tulalip Tribes of Washington State is particularly instructive in capturing the uniqueness of the indigenous worldview. I quote it at length here,

> The concept of the public domain was not accepted by many indigenous peoples... Indigenous peoples had their own sources of natural law, and the values of the secularized, individual property-based model was (sic) not that values that commonly moved indigenous peoples. The representative explained that in indigenous cosmology, knowledge was a gift from the Creator. There was no clear distinction between sacred and other kinds of knowledge... Indigenous peoples had collective systems for using the Creator's gifts, and these generally had complex systems of regulating the use of knowledge, in which some knowledge was held by individuals, clans, or other groups. Although individuals might hold knowledge, their right was collectively determined, and it was rare that individuals had the right to use knowledge in a free and unconstrained manner; they were bound by the laws of their tribe and of the Creator.... The representative noted that even if knowledge was shared and used widely, it did not fall into the public domain: it was shared among those who were trusted to know their roles and responsibilities in using the knowledge. The representative noted that misuse of this knowledge was not only 'derogatory, libellous, defamatory, offensive and fallacious,' as described in the secular language of document WIPO/GRTKF/IC/5/3, but that it could cause severe physical or spiritual harm to the individual caretakers of the knowledge or their entire tribe from their failure to ensure that the Creator's gifts were properly used, even if misuse was used by others outside of the tribe, or by tribal members who were outside of the control of customary authority. For this reason, the representative concluded, misappropriation and misuse was not simply a violation of 'moral rights' leading to a collective offense, but a matter of cultural survival for many indigenous peoples.... Indigenous innovation, while sometimes associated with a profit motive, more commonly came as an expression of a deep interrelationship between tribal members, their Creator and their homelands (WIPO/GRTKF/IC/5/15 – 56).

The Inuit Circumpolar Conference has also expressed its identity-based concerns. Their representative "commented on recent cases of violations of indigenous peoples' rights in their intangible assets, which constituted not only misappropriation but also misrepresentation as to the nature and identity of the Inuit" (WIPO/GRTKF/IC/4/15 – 159). Elsewhere, the ICC notes that,

> The Inookshook rock formations that mark places on Inuit land have been used by large pharmaceutical companies as a symbol to sell their products. Such use interfered with who the Inuit were and what they stood for. There may come a time when the general public would relate the Inookshook to the company behind it, and not to the Inuit culture. The representative said that current IP systems were inadequate to protect TK and TCEs, yet that customary laws were not applied. The representative said ownership was a distinct concept under Inuit culture and IP and explained that, in relation to Inuit songs, there was a sense of sacredness and that the lyrics or tune of the song would be shared according to the originator's role in the family or community structure. This was respected by the Inuit community. These types of customary practices and laws must be acknowledged in some type of appropriate mechanism (WIPO/GRTKF/IC/5/15 – 173).

By definition, the sorts of claims that indigenous groups are making at the WIPO IGC require a novel response. Capacity-building and technical assistance would be of only limited usefulness. Instead, as the First Nations Development Institute explain, "Any work undertaken in this regard must also ensure that it is in compliance with the customary laws that govern the knowledge. As was mentioned by many of the delegates already, this was not simply about fitting traditional knowledge into the formal patent system, but rather gaining an understanding and respect for other systems already governing this knowledge, working toward a complementarity that could meet the needs of both knowledge holders and users." (WIPO/GRTKF/IC/2/16 – 152) Because the indigenous claims speak to the ways in which intellectual property regulation can influence the very essence of indigenous peoples' experience of community and culture, they cannot be simply incorporated into the existing system. Rather, the existing system likely needs to evolve to include indigenous peoples.

Approaches to Accommodating Identity-based Claims-making at WIPO

Rosemary Coombe has suggested that, "recognition of the ways in which culture is reified, asserted, claimed, defended, managed or preserved in and through legal institutions is both relatively novel and rather overdue..." (Coombe, 2005: 37). Her own work goes some distance in helping us to understand the intersection of culture and intellectual property. Coombe seems to attribute the uneasy fit between these two to the predominance of neoliberalism. She notes, for example, that with regard to "the relationship between neoliberalism and the legalization of cultural claims.... It appears that neoliberalism is capable of accommodating those forms of cultural difference that can be formulated in commodity terms but that it is challenged by those who assert rights based upon cultural difference that are difficult to encompass within the conceptual frameworks of modernity" (Coombe, 2005: 37). In Coombe's formulation, international organizations themselves seem to drop out of the equation. Instead, "*capital* encounters and must accommodate or negotiate with the societies and worldviews of others and

... these dialectic transformations constitute alternative and multiple modernities" (emphasis mine, Coombe, 2005: 39). There is a similar thrust to the work of Gramscian scholars like Robert Cox and Stephen Gill, as well as critical scholars of the intellectual property regime like Chris May or Kurt Burch. According to Burch, TRIPS is 'a remarkable symbolic document' promoting a specific view of property and market relations as part of a (neo) liberal agenda of global governance (Burch 1995, 216).

While there is likely great truth in these claims, they tend to overlook the ways in which international organizations themselves are constituted in such a way as to make the accommodation of identity-based or cultural claims intrinsically difficult. In some ways, my argument starts where Chris May leaves off. May argues that WIPO is not strictly a technical entity charged with overseeing intellectual property regulation. Rather, he suggests that WIPO is norm-generating, socializing those who participate in it into a distinct worldview. The difficulty of accommodating indigenous concerns seems to bear this out.

This difficulty does not arise from a lack of will on the part of WIPO staff. The WIPO Secretariat cannot be characterized as unreceptive to indigenous claims. As a specialized agency of the UN, they could claim that cultural issues are not their concern. WIPO is concerned with IP, while UNESCO or the Permanent Forum is concerned with indigenous rights. However, they have not taken this route. Though the Secretariat cannot initiate policy without a mandate from member governments, the staff in the Global Issues section, where these issues reside, have worked tirelessly to understand indigenous concerns and to facilitate their participation in the IGC process. They have mounted capacity-building events for indigenous groups unfamiliar with the IP system. They have established a fund to defray the costs of indigenous representatives that would like to be present at IGC meetings. Therefore, it is clear that WIPO staff are receptive to solutions that would integrate TK and TCE into the IP framework.

The same cannot be said of member governments. The International Relations literature argues persuasively that international organizations are often nothing more than the instruments of strong states. In this formulation, strong state interests may constrain weaker state members' or international organization Secretariat efforts to bring about change. This argument is not irrelevant in the WIPO case. Member states have lined up in groups on the issues of traditional knowledge and traditional cultural expression. The developed countries are organized into Group B, including the United States, Canada, Australia, New Zealand, the European Union, and Japan. Some people read Group B participation in the IGC process as obstructive. In recent IGC meetings, these countries have certainly not put forth a proposal for a way forward. Rather, they have repeatedly asked for more research into the types of laws and regulations that might be suitable.

Observers point out that the largest patent holders in the world belong to Group B, giving them an incentive to resist change to an existing international IP regulatory framework that serves their commercial interests. Also noteworthy in Group B is the presence of the four countries with the most vocal, active, and powerful indigenous communities: Canada, the United States, Australia, and New Zealand. In different ways, each country has developed relations at

the national level that have, at times, been antagonistic. At other times, they have led to gains for indigenous communities in terms of land claims and rights, among other things. It may be the case that these governments prefer not to introduce global level processes that can influence the direction of domestic debates about aboriginal rights.

While there appears to be some evidence that powerful member states may not see change to be in their interest, it is also true that the nature of such change is poorly specified. In other words, it seems ill-advised to assume that Group B countries are working to avoid damage to their interests when it is not yet clear that the outcome of the IGC process would cause such damage. It is difficult to predict damage to Group B interests in the absence of a clear sense of what the outcome of the IGC process will be. Many indigenous groups are calling for a *sui generis* system. If this process is followed to its natural outcome, a whole new series of IP rights holders would be created. This is uncharted territory. Others are calling for local customary law to be recognized beyond domestic environments. Both of these options would be extremely difficult to produce. Realistically, WIPO Secretariat staff suggest that the outcome would more likely be a framework document, encouraging states to respect the interest of indigenous groups.

We should certainly take seriously these conflicting interests and the distribution of power in this debate. Nonetheless, the situation at WIPO is different from, say, the negotiations over agriculture at the WTO, where strong states need to respect the rules as written so as to accommodate developing country demands or where clear differences in terms of economic capacity and potential gain from the process are apparent. At WIPO, the camps and their respective interests are much more complex. Accommodating those interests might well require rewriting international IP rules or, at a minimum, an evolution in the intersubjective understandings that underpin the rules. But it is not apparent that a zero sum outcome, wherein current power holders find themselves weakened by efforts to accommodate indigenous and traditional communities, is inevitable. As Frank Dobbin (1994) notes, groups may well act according to their interests, but an interest-based analysis does not go very far in explaining why different groups pursue their interests in different ways in different places. This is especially true if we assume that change at WIPO might take the form not of an indigenous-friendly framework *replacing* the current one, but rather an indigenous-friendly framework *alongside* the current one.

For all intents and purposes, then, WIPO is being asked to accommodate a range of practices or to "manage hybridity" (Schiff Berman, 2007: 1159). This is arguably the terrain of legal pluralism. "Legal pluralists have sought to document hybrid legal spaces, where more than one legal, or quasi-legal, regime occupies the same social field" (Schiff Berman, 2007: 1158). As Schiff Berman (2007: 1169) explains, "theorists of pluralism start from the premise that people belong to (or feel affiliated with) multiple groups and understand themselves to be bound by the norms of these multiple groups." Increasingly, in the international arena, we are finding "situations in which two or more state and non-state normative systems occupy the same social field" (Schiff Berman, 2007: 1170) and WIPO appears to be one of the most egregious examples in the face of indigenous demands. Legal pluralists suggest that, "instead of assuming that states

provide the only possible relevant normative systems and instead of thinking only about "solving" legal disputes by identifying a single relevant legal authority, we need a framework for conceptualizing normative conflict that is more pluralist" (Schiff Berman, 2007, 1179). The inquiry becomes less a question of which normative framework will prevail and more a question of mapping "which social norms tend to be treated as authoritative and by whom." From the standpoint of legal pluralists, universalizing frameworks are at odds with diversity, yet the identity-based claims-making in the WIPO IGC process represent an effort to promote diversity. "Successful mechanisms, institutions, or practices will be those that simultaneously celebrate both local variation *and* international order, and recognize the importance of preserving both multiple sites for contestation *and* an interlocking system of reciprocity and exchange" (Schiff Berman, 2007: 1195).

Legal pluralism has rarely been applied to questions of global governance. To the degree that we have witnessed a similar debate, it has been through the lens of "policy space," which has been most comprehensively applied to the trading regime. Gallagher (2008: 37) defines policy space as "the extent to which trade rules provide nation-states with an optimal degree of openness that allows them to be integrated with the world economy as well as pursue domestic development policy." According to Hoekman (2004, 8), policy space implies "flexibility for all developing countries as currently (self-) defined in the WTO whether to implement a specific set of (new) rules, as long as this does not impose significant negative (pecuniary) spillovers." The concept of policy space has arisen from what Rodrik (2007, 8) has called "the central dilemma of the world economy…the tension between the *global* nature of many of today's markets in goods, capital and services, and the *national* nature of almost all of the institutions that underpin and support them." Stiglitz (in Gallagher, 2005: 32) echoes this. "The rules of the game have been designed for the most part by the advanced industrial countries, or, more accurately, by special interests in those countries, for their own interests, and often do not serve well the interests of the developing world, and especially the poor."

The policy space debate is not only about trade. As Haslam (2007, 1169) puts it with regard to bilateral investment treaties, "concerns persist in the contemporary literature that such agreements seriously reduce the policy space and flexibility required by developing countries." Haslam (2007, 1180) notes, "that the state, especially in the developing world, has lost policy autonomy in the face of globalization and its agents, particularly multinational corporations, has become an article of faith in international political economy." Generally, developed country governments are making rules that constrain developing country government domestic development policy choices (Wade in Gallagher, 2005: 80; Hoekman, 2004: 1).

Why not simply apply the policy space notion to WIPO rather than adding legal pluralism to the mix? Certainly it would not be difficult to move the policy space concept out of the trade environment and into the intellectual property context. Similarly, it would not be too much of a stretch to envision indigenous peoples' demands as similar to those of developing countries at the WTO. However, where policy space limits us in the WIPO debates – and where the lens of legal pluralism may be more fruitful – lies in the fact that the policy space debate largely springs

from the assumption that the rules of trade are conceptually acceptable, though for developing countries they may be too onerous. They need not be changed; they should be relaxed. In asking what can be done about the situation facing developing countries in the trade regime, Wade (2005, 96) argues that "a more development-friendly environment requires changes in the mandate and procedures of the multilateral economic organizations. The question is how to reconceptualize and legitimize expanded "special and differential treatment" for developing countries and dilute requirements for "reciprocity," "national treatment," and "international best practice." In other words, the changes need to happen within the WTO framework. The policy space debate presumes that any accommodations for developing countries can be made *within* the international regulatory regime as it currently exists.

Indigenous peoples, on the other hand, are calling into question the very nature of the rules that animate the global intellectual property framework. They see the limited usefulness of the WIPO framework, however they simultaneously insist that their customary law and their unique worldview be respected. These demands seem to take us out of the policy space debate and into the realm of legal pluralism.

Bibliography

Fraser, Nancy, "Rethinking Recognition," New Left Review 3 (May-June 2000): 107-120.

Gallagher, Kevin P., "Trading Away the Ladder? Trade Politics and Economic Development in the Americas," New Political Economy (2008) 13:1, 37-59.

Gallagher, Kevin P. (ed.), Putting Development First: The Importance of Policy Space in the WTO and International Financial Institutions (New York: Zed Books, 2005)

Haslam, Paul Alexander, "The Firm Rules: multinational corporations, policy space and neoliberalism," Third World Quarterly (2007) 28:6, 1167-1183.

Hoekman, Bernard, "Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment," Paper presented at the Third Annual Conference on Preparing the Doha Development Round, EUI July 2-3 2004. Available at http://

Koivurova, Timo and Leena Hein¨am¨aki, "The participation of indigenous peoples in international norm-making in the Arctic," Polar Record 42 (221): 101–109 (2006).

Kymlicka, Will, Multicultural Odysseys: Navigating the New International Politics of Diversity (New York: Oxford University Press, 2007)

Lipschutz, Ronnie D., "From Local Knowledge and Practice to Global Environmental Governance," in Approaches to Global Governance Theory, edited by Martin Hewson and Timothy J. Sinclair (Albany, NY: SUNY Press, 1999): 259-283.

May, Christopher, The World Intellectual Property Organization (Routledge, 2006).

Schiff Berman, Paul, "Global Legal Pluralism," Southern California Law Review 80 (2007): 1155-1237.

Sell, Susan and Aseem Prakash, "Using Ideas Strategically: The Contest between Business and NGO Networks in Intellectual Property Rights." International Studies Quarterly (2004): 48, 143-175.

Stiglitz, Joseph E., "Development Policies in a World of Globalization," In Gallagher, 15-32.

Wade, Robert Hunter, "What Strategies are Viable for Developing Countries Today?" In Gallagher, 80-101.

Wilmer, Franke, The Indigenous Voice in World Politics (Newbury Park, CA: Sage Publications, 1993).

WIPO/GRTKF/IC/2/16 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Second Session, Dec. 1-14, 2001.

WIPO/GRTKF/IC/3/17 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Third Session, June 13-21, 2002.

WIPO/GRTKF/IC/4/15 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fourth Session, Dec. 9-17, 2002.

WIPO/GRTKF/IC/5/15 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fifth Session, July 7-15, 2003.

WIPO/GRTKF/IC/2/16 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Second Session, Dec. 1-14, 2001.