TRADITIONAL KNOWLEDGE, INTELLECTUAL PROPERTY, AND INDIGENOUS CULTURE: AN INTRODUCTION

Peter K. Yu[*]

> *Human communities have always generated, refined and passed on knowledge from generation to generation. Such "traditional" knowledge" [sic] is often an important part of their cultural identities. Traditional knowledge has played, and still plays, a vital role in the daily lives of the vast majority of people. Traditional knowledge is essential to the food security and health of millions of people in the developing world. In many countries, traditional medicines provide the only affordable treatment available to poor people. In developing countries, up to 80% of the population depend on traditional medicines to help meet their healthcare needs. In addition, knowledge of the healing properties of plants has been the source of many modern medicines.*[1]

In recent years, the misappropriation of folklore, traditional knowledge, and indigenous practices has become an increasingly important issue in global politics.[2] In September 2000, the World Intellectual Property Organization (WIPO) established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, which provides a forum for governments to discuss intellectual property matters concerning the access to genetic resources and benefit-sharing and the protection of traditional knowledge, innovations

[*] Acting Assistant Professor of Law, Executive Director, Intellectual Property Law Program, and Deputy Director, Howard M. Squadron Program in Law, Media & Society, Benjamin N. Cardozo School of Law, Yeshiva University; Research Associate, Programme in Comparative Media Law and Policy, Centre for Socio-Legal Studies, University of Oxford. The Author would like to thank past and present members of the *Cardozo Journal of International & Comparative Law*, in particular Elizabeth Bullard and Peter Wilner, for assistance in making this symposium possible.

[1] COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 73 (2002) (footnotes omitted).

[2] For discussions of the interplay of intellectual property and traditional knowledge, see generally Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275 (2001); David R. Downes, *How Intellectual Property Could Be a Tool to Protect Traditional Knowledge*, 25 COLUM. J. ENVTL. L. 253 (2000); Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997); Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769 (1999); Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT'L L. & COM. REG. 229 (1998); Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1 (2001); 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 (1996). *See also* Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793 (2001) (discussing the tension between group authorship and the current intellectual property system).

and creativity, and expressions of folklore.[3] Similar issues have been raised and discussed within the framework of the Convention on Biological Diversity[4] and by such international intergovernmental organizations as the Food and Agriculture Organization (FAO), the United Nations Conference on Trade and Development (UNCTAD), the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the World Health Organization (WHO). Most recently, in the Doha Ministerial Declaration, members of the World Trade Organization (WTO) called for the Council for TRIPS "to examine . . . the relationship between the TRIPS Agreement and the Convention on Biological Diversity [and] the protection of traditional knowledge and folklore."[5]

Despite the limited attention it has received (until lately), the debate over the protection of folklore, traditional knowledge, and indigenous practices impacts on a wide variety of policy areas, including agricultural productivity, biological diversity, cultural patrimony, food security, environmental sustainability, business ethics, global competition, human rights, international trade, public health, scientific research, sustainable development, and wealth distribution. This debate becomes even more important in light of growing dissatisfaction with the international trading system among less developed countries and of the recent anti-globalization protests in Seattle, Washington, Prague, Quebec, and Genoa.[6]

On February 21-22, 2002, the Cardozo Intellectual Property Law Program brought together leading academics, economists, intellectual property lawyers, government officials, and representatives of intergovernmental and nongovernmental organizations to explore the role of intellectual property in protecting folklore, traditional knowledge, genetic resources, and indigenous practices. Among the issues addressed include: How to define folklore and traditional knowledge? Should traditional knowledge and indigenous creations be protected under the existing intellectual property and cultural property regimes? What are the implications of protecting folklore for art and museums? How can policymakers balance the protection of traditional innovations and genetic resources of indigenous peoples against the need for those materials in genomic research and in the development of pharmaceuticals, nutriceuticals, and bio-engineered products? Should the international community develop a global regulatory regime or should it strive for diverse protection that is consistent with the local conditions of each individual country? How can governments effectively negotiate traditional knowledge in the domestic and international fora?

---

[3] The website of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is available at http://www.wipo.int/globalissues/igc/index.html.

[4] Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992).

[5] Ministerial Declaration ¶ 19, WTO Document No. WT/MIN(01)/DEC/1 (Nov. 14, 2001), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.doc.

[6] *See generally* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002) (discussing the increasing dissatisfaction over such international bodies as the International Monetary Fund, the World Bank, and the World Trade Organization). *See also* Frederick M. Abbott, *TRIPS in Seattle: The Not-So-Surprising Failure and the Future of the TRIPS Agenda*, 18 BERKELEY J. INT'L LAW 165 (2000) (discussing the implications of the failed Seattle Ministerial Conference for the future of the TRIPs Agreement); David A. Gantz, *Failed Efforts to Initiate the "Millennium Round" in Seattle: Lessons for Future Global Trade Negotiations*, 17 ARIZ. J. INT'L & COMP. L. 349 (2000) (discussing the implications of the failed Seattle Ministerial Conference for future global trade negotiations); Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61 (2001) (arguing that the failed Seattle Ministerial Conference was the eruption of long suppressed issues); Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. L. 257 (2000) (offering a proposal for reconciling the concerns of the protestors in Seattle with the purposes and procedures of the WTO).

So far, governments and intergovernmental organizations have been focusing their energies, resources, and attention on understanding the issue. However, once they have acquired a deeper understanding of, and greater practical experience on, this issue, they might begin to develop international norms that seek to promote, protect, and preserve folklore, traditional knowledge, genetic resources, and indigenous practices. In light of such development, this introduction focuses on four issues that are seldom addressed by commentators.

First, the outcome of the negotiation process often depends on the forum in which the parties conduct their negotiation.[7] Indeed, the international intergovernmental body that is responsible for organizing the treaty conference—be it FAO, UNCTAD, UNESCO, WHO, WIPO, or WTO—has a strong ability to shape the terms of the treaty, including its definitions, the scope of protection, the remedies, and the enforcement mechanism.[8] Even if we assumed all the parties and issues involved were to be identical, a treaty negotiated under the WTO regime would be very different from one sponsored by WIPO.

Thus, if governments want to extend the protection of traditional knowledge beyond the intellectual property field—and perhaps into the international trade arena—a WIPO-sponsored treaty will be highly unsatisfactory. Likewise, if governments want to create protection gradually and to limit initial protection to specific intellectual property items, negotiating the treaty in the WTO might invite further complication of this already very difficult issue by allowing governments to link intellectual property rights to other trade-related items (or even to reopen discussions concerning other aspects of the WTO Agreements, including the TRIPs Agreement[9]).

As a result, policymakers have to be very careful in selecting the forum in which they conduct their negotiation. Given the wide array of issues involved in the protection of folklore, traditional knowledge, and indigenous practices, it would be very unlikely that a single international intergovernmental body can shape the discussions. As the U.K.-based Commission on Intellectual Property Rights noted in its recent report:

> It is essential that all of the agencies considering the issue work together to avoid unnecessary duplication and to ensure that the debate includes as many different views as possible. . . . We believe . . . that no single body is likely to have the capacity, expertise or resources to handle all aspects of traditional knowledge. Indeed it is our view that a multiplicity of measures, only some of them IP-related, will be necessary to protect, preserve and promote traditional knowledge.[10]

Second, the success of the negotiation process often depends on the mindsets of the negotiators. In particular, it depends on whether the negotiators believe they are playing a zero-sum game or a nonzero-sum game. In game theory terms, a zero-sum game is a game in which a

---

[7] *See generally* Symposium, *World Trade, Intellectual Property, and the Global Elites: Intellectual Property Lawmaking in the New Millennium*, 10 CARDOZO J. INT'L & COMP. L. 1 (2002).

[8] *See* INTERNATIONAL INTELLECTUAL PROPERTY LAW 189 (Anthony D'Amato & Doris Estelle Long eds., 1996) (stating that "[o]ften the treaty that emerges from a multilateral treaty conference is noticeably shaped by the organization that provided the forum for the conference"); *see also* INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY 57-60 (Graeme B. Dinwoodie et al. eds., 2001) (discussing the negotiation of intellectual property treaties).

[9] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1197 (1994)

[10] COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, *supra* note 1, at 78.

player's gain must result in another player's loss. By contrast, in a nonzero-sum game, a player's gain will not necessarily result in another player's loss. Thus, negotiators having a zero-sum mindset will be more likely to split the difference through accommodation and compromises, whereas those having a nonzero-sum mindset will be more likely to create forward-looking solutions that provide mutual benefits to all the parties involved while at the same time preserving the hard-earned relationships among all the negotiating parties.[11]

Third, as conflict resolution scholars and cognitive psychologists have discussed in depth, policymakers face various psychological barriers during the negotiation process, and these barriers can undermine their ability in making rational decisions.[12] For example, loss aversion is the tendency for decisionmakers to attach more weight to prospective losses than to prospective gains of an equal value.[13] Policymakers who succumb to loss aversion might be more receptive to proposals that protect traditional knowledge if they focus on the potential benefits, rather than the potential costs, of those proposals.

Another example is reactive devaluation—the tendency for parties to devalue proposals offered by their adversaries even though they will accept identical proposals put forward by their allies or by neutral parties.[14] Thus, if less developed countries perceive developed countries as their adversaries, they will tend to undervalue whatever proposals developed countries offer. By the same token, if developed countries perceive less developed countries as their adversaries, and consider the traditional knowledge debate an unjustified enlargement of the development agenda, they also will undervalue whatever proposals less developed countries offer.

Finally, as many scholars and indigenous rights activists have pointed out, the negotiation concerning the protection of traditional knowledge was significantly hampered by the lack of participation by the indigenous community. As Professor Rosemary Coombe reminded us:

> Although indigenous peoples are now recognized as key actors in this global dialogue, it will need to be expanded to encompass a wider range of principles and priorities, which will eventually encompass political commitments to indigenous peoples' rights of self-determination. Only when indigenous peoples are full partners in this dialogue, with full juridical standing and only when the their cultural world views, customary laws, and ecological practices are recognized as fundamental contributions to resolving local social justice concerns will we be engaged in anything we can genuinely call a dialogue.[15]

There is no doubt that policymakers should involve indigenous peoples in the global dialogue. However, they should not ignore the fact that many members of the traditional community remain reluctant to participate in the negotiation process, partly due to their concern about further abuse, misappropriation, and exploitation of their arts and crafts and partly due to

---

[11] *See generally* Peter K. Yu, *Toward a Nonzero-sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. 569 (2002).

[12] *See, e.g.*, ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 156-72 (2000) (discussing psychological and cultural barriers); Robert A. Baruch Bush, *"What Do We Need a Mediator for?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 9-12 (1996) (discussing cognitive barriers).

[13] *See* MNOOKIN ET AL., *supra* note 12, at 161-64 (discussing loss aversion).

[14] *See id*. at 165-66 (discussing reactive devaluation).

[15] Coombe, *supra* note 2, at 284-85.

the secretive nature of some of the indigenous creations and practices, such as sacred symbols and religious rituals.[16]

In fact, policymakers have to be vigilant and constantly evaluate whether the negotiation process contains any systematic barriers that make participation difficult. After all, folklore, traditional knowledge, and indigenous practices were developed and passed on from generations to generations through an oral tradition or by imitation. These materials therefore might not fit well into the Western worldview, the capitalist philosophy, and the prevailing concept of individual authorship (or inventorship), all of which underlie the development of the current international intellectual property regime.[17]

In sum, the choice of forum, the mindsets of the negotiators, the extent and impact of cognitive barriers on the policymakers, and the participation of the indigenous community in the negotiation process will play major roles in determining whether governments can create a mutually beneficial solution, whether they can promote biological and cultural diversity, and whether they can establish a harmonized regime that effectively protects folklore, traditional knowledge, and indigenous practices.

[16] *See, e.g.*, Farley, *supra* note 2, at 5 (discussing how some aboriginal designs are so sacred that "they are viewed only during certain ceremonies, and only by those who have attained the requisite level of initiation"); John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 356 (1989) (noting that some cultural objects "are secret in nature, intended to be seen only by a restricted group of people at particular times or exposed only in a specific place"); Scafidi, *supra* note 2, at 829-30 (discussing how a newspaper photographer "violated and upset the Pueblo's balance of life" by taking photographs of a ceremonial dance while flying at low altitude over the Pueblo of Santo Domingo).

[17] As the Bellagio Declaration stated:

> Contemporary intellectual property law is constructed around the notion of the author, the individual, solitary and original creator, and it is for this figure that its protections are reserved. Those who do not fit this model—custodians of tribal culture and medical knowledge, collectives practicing traditional artistic and music forms, or peasant cultivators of valuable seed varieties, for example—are denied intellectual property protection.

Bellagio Declaration, *reprinted in* JAMES BOYLE, SHAMANS, SOFTWARE & SPLEENS: LAW AND THE CONSTRUCTION OF INFORMATION SOCIETY 192, 193 (1996):