

# **Appropriation Without Representation? The Limited Role of Indigenous Groups in WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore**

## **ABSTRACT**

*The World Intellectual Property Organization's (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC) is currently engaged in text-based negotiations to develop an international legal instrument, or set of instruments, that will effectively protect traditional knowledge, traditional cultural expressions, and genetic resources. Yet, the people who will arguably be most affected by the ultimate instrument(s)—indigenous peoples and local communities—are not able to fully participate in these negotiations. Instead, WIPO deems them “observers.” They cannot formally present proposals, amendments, or motions, and cannot vote at IGC sessions. Thus, their limited influence implicates questions of equity, sovereignty, and global justice. Claiming to recognize this dilemma, WIPO has created mechanisms to increase these groups' attendance and participation. However, many argue that these mechanisms are insufficient and that WIPO's final product will lack legitimacy if indigenous peoples and local communities do not play a genuine role in the process. This Note explores how the IGC's current organizational structure limits indigenous peoples' and local communities' influence and presents ways for the IGC to more fully incorporate these groups and their ideas while maintaining a member-based organizational structure.*

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The legal issues surrounding traditional knowledge are unlike any in intellectual property law.<sup>1</sup> This is because they span copyright, trademark, trade secret, and patent law, and involve questions about sovereignty, self-determination, and human rights.<sup>2</sup> Conventional intellectual property regimes do not currently protect traditional knowledge, which has ancient roots and is often informally and orally

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1. See JANE ANDERSON, DUKE UNIV. SCHOOL OF LAW CTR. FOR THE STUDY OF THE PUBLIC DOMAIN, INDIGENOUS/TRADITIONAL KNOWLEDGE & INTELLECTUAL PROPERTY 2 (2010), available at [http://web.law.duke.edu/cspd/pdf/ip\\_indigenous-traditionalknowledge.pdf](http://web.law.duke.edu/cspd/pdf/ip_indigenous-traditionalknowledge.pdf).

2. See *id.* at 2-3.

transmitted.<sup>3</sup> Instead, indigenous peoples' and local communities' norms are often the only standards protecting traditional knowledge, leaving it vulnerable to misappropriation.<sup>4</sup>

Nevertheless, protecting traditional knowledge internationally is a relatively recent concern.<sup>5</sup> In 2000, the World Intellectual Property Organization (WIPO), a United Nations (UN) body, established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC) to study the issues surrounding this knowledge and to present recommendations to WIPO's General Assembly.<sup>6</sup> Almost fifteen years later, the IGC still struggles to define terms, build consensus, and create an instrument or set of instruments to effectively protect traditional knowledge.<sup>7</sup>

Looming over these criticisms is the greatest criticism of all: indigenous peoples and local communities—the individuals with the greatest stake in the IGC's undertaking—are not able to adequately participate in the negotiations that will define their international intellectual property rights.<sup>8</sup> Although WIPO's charter permits

3. See WORLD INTELLECTUAL PROP. ORG. [WIPO], THE WORLD INTELLECTUAL PROPERTY ORGANIZATION TRADITIONAL KNOWLEDGE DOCUMENTATION TOOLKIT 16 (Nov. 1, 2012) [hereinafter DOCUMENTATION TOOLKIT], available at [http://www.wipo.int/export/sites/www/tk/en/documents/pdf/tk\\_toolkit.pdf](http://www.wipo.int/export/sites/www/tk/en/documents/pdf/tk_toolkit.pdf).

4. See Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L.J. 37, 39 (2009). Misappropriation is defined in Article 1 of the revised Objectives and Principles of the IGC. See WIPO Secretariat, Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge & Folklore, *The Protection of Traditional Knowledge: Revised Objectives and Principles*, WIPO/GRTKF/IC/8/5 (Apr. 8, 2005), available at [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_8/wipo\\_grtkf\\_ic\\_8\\_5.doc](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_5.doc). An illustrative example of misappropriation: In the 1990s, when two researchers attempted to patent the use of turmeric to heal wounds, the Council of Scientific & Industrial Research (CSIR) from New Delhi, India, successfully challenged the patent by demonstrating that turmeric had been used for healing wounds for thousands of years. See *Traditional Knowledge and Intellectual Property: The Case of Turmeric*, THE LIFEINTELECT BLOG (Oct. 24, 2013), <http://lifeintellect.com/blog/2013/10/24/traditional-knowledge-and-intellectual-property-case-of-turmeric>; cf. Sumathi Subbiah, Note, *Reaping What They Sow: The Basmati Rice Controversy and Strategies for Protecting Traditional Knowledge*, 27 B.C. INT'L & COMP. L. REV. 529 (2004).

5. See WIPO, BACKGROUND BRIEF NO. 2: THE INTERGOVERNMENTAL COMMISSION ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE & FOLKLORE 1 [hereinafter BACKGROUND BRIEF NO. 2], available at [http://www.wipo.int/export/sites/www/tk/en/documents/pdf/background\\_briefs-e-nx2-print.pdf](http://www.wipo.int/export/sites/www/tk/en/documents/pdf/background_briefs-e-nx2-print.pdf).

6. See *id.*

7. See Catherine Saez, *Frustrations Show at Slow Progress on Protection of Traditional Knowledge at WIPO*, INTELLECTUAL PROPERTY WATCH (Apr. 21, 2012, 5:53 PM), <http://www.ip-watch.org/2012/04/21/frustrations-show-at-slow-progress-on-protection-of-traditional-knowledge-at-wipo>.

8. See Gale Courey Toensing, *World Intellectual Property Organization Blasted for 'Misappropriation' of Indigenous Knowledge, Resources*, INDIAN COUNTRY TODAY MEDIA

indigenous groups<sup>9</sup> and the nongovernmental organizations (NGOs) that claim to represent them to attend the IGC sessions as “observers,”<sup>10</sup> they cannot vote, nor can they formally present proposals, amendments, or motions.<sup>11</sup> Apart from these institutional barriers, these groups also confront challenges that stem from limited resources and political marginalization.<sup>12</sup> As a result, their limited influence implicates questions of fairness, equity, and global justice.<sup>13</sup>

WIPO uses various strategies, such as sponsoring indigenous groups to attend IGC sessions and pre-session panel presentations, to include indigenous groups in the IGC process to some degree.<sup>14</sup> Also, WIPO member states arguably represent the interests of the indigenous groups within their borders.<sup>15</sup> Yet, these groups and advocates criticize WIPO for not considering their perspectives or ignoring their limited input.<sup>16</sup>

This Note examines the IGC’s current structure to determine what role indigenous groups and the organizations and states that

NETWORK.COM (May 16, 2012), <http://indiancountrytodaymedianetwork.com/2012/05/16/world-intellectual-property-organization-blasted-misappropriation-indigenous-knowledge>.

9. The IGC’s efforts cover traditional knowledge belonging to both “indigenous peoples” and “local communities.” *Practical Guide for Observers*, [http://www.wipo.int/export/sites/www/tk/en/igc/pdf/observers\\_practical\\_guide.pdf](http://www.wipo.int/export/sites/www/tk/en/igc/pdf/observers_practical_guide.pdf) (last visited February 17, 2014). Their definitions can be found in Part I.A.2 of this Note. *See infra* Part I.A.2. For simplicity and brevity, this Note uses the term “indigenous groups” to refer to both “indigenous peoples” and “local communities.”

10. *See* Convention Establishing the World Intellectual Property Organization, signed July 14, 1967 (as amended Sept. 28, 1979), 828 U.N.T.S. 3, available at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283854](http://www.wipo.int/treaties/en/text.jsp?file_id=283854); *Observers*, WIPO, <http://www.wipo.int/members/en/admission/observers.html> (last visited Jan. 15, 2014) [hereinafter *Observers*].

11. *Practical Guide for Observers*, *supra* note 9; *cf.* WIPO Secretariat, *Note on Existing Mechanisms for Participation of Observers in the Work of the WIPO Intergovernmental Commission on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* 1 (Oct. 10, 2011) [hereinafter *Note on Existing Mechanisms*], available at [http://www.wipo.int/export/sites/www/tk/en/igc/pdf/note\\_igc\\_participation.pdf](http://www.wipo.int/export/sites/www/tk/en/igc/pdf/note_igc_participation.pdf). (identifying then-existing practices for enhancing observer participation).

12. *See* United Nations Office of the High Commissioner for Human Rights, Submission from the OHCHR to the World Intellectual Property Office Secretariat to the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Nov. 30, 2011) [hereinafter Submission from the OHCHR], available at [http://www.wipo.int/export/sites/www/tk/en/documents/pdf/ochr\\_comments\\_on\\_observer\\_participation.pdf](http://www.wipo.int/export/sites/www/tk/en/documents/pdf/ochr_comments_on_observer_participation.pdf); Nancy Kremers, *Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Are U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?*, 15 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1, 71 (2004).

13. *See* DUNCAN MATTHEWS, *INTELLECTUAL PROPERTY, HUMAN RIGHTS AND DEVELOPMENT: THE ROLE OF NGOS AND SOCIAL MOVEMENTS* 2–3 (2011).

14. *See* CHRISTOPH B. GRABER ET AL., *INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES* 192 (2012).

15. *See infra* Part II.

16. *See* Saez, *supra* note 7; Toensing, *supra* note 8.

purport to represent them play in creating the legal instruments that will affect their claims to their traditional knowledge.<sup>17</sup> Part I explains the debate surrounding how to define the relevant terms, the structure of WIPO and the IGC, and reasons why the participation of indigenous groups matters.<sup>18</sup> Part II explores indigenous groups' current representation in the IGC, evaluates how these groups contribute to the negotiations, poses questions about their varying incentives, and surveys proposed solutions to better incorporate indigenous groups' perspectives.<sup>19</sup> Part III presents solutions to strike a balance between the desire to include indigenous groups in the IGC process and the reality of likely needing to maintain WIPO's structure as a member state-based organization.<sup>20</sup> Solutions are not lacking; action is.<sup>21</sup>

### I. DEFINING TERMS AND THE EVOLUTION OF WIPO'S IGC

Despite WIPO's efforts to provide meaningful intellectual property protections through the creation of the IGC and its work, the IGC's structure remains a barrier to indigenous groups' influence on the final instrument(s).<sup>22</sup> The lack of a common vocabulary regarding who will be affected by the IGC's work and the kind of knowledge to be protected further complicates discussions.<sup>23</sup>

#### A. *Defining Terms*

One of the primary obstacles facing WIPO is how to define important terms like "indigenous," "knowledge," and "traditional," among others.<sup>24</sup> The terms in this field defy simple definition.<sup>25</sup> Tensions exist because these terms implicate the historical, political, and cultural differences that persist between and within indigenous groups and the international community.<sup>26</sup> They therefore serve as a locus of fervent debate.<sup>27</sup>

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17. See *infra* Parts I–III.
  18. See *infra* Part I.
  19. See *infra* Part II.
  20. See *infra* Part III.
  21. See *infra* Part II.E.
  22. See *infra* Part I.D.
  23. See *infra* Part I.A.
  24. See ANDERSON, *supra* note 1, at 3–4.
  25. See *id.* at 3.
  26. See *id.* at 4.
  27. See *id.* at 3–4.

## 1. Areas of Interest: TK, TCE, and GR

The IGC developed three distinct categories to help manage its domain since each area of interest presents its own set of challenges.<sup>28</sup> The three categories are: (1) traditional knowledge (TK),<sup>29</sup> (2) traditional cultural expressions and folklore (TCE), and (3) genetic resources (GR).<sup>30</sup> Nevertheless, Justin Hughes argues “all three involve rights, remuneration, and respect for inputs to innovation that are typically taken for granted.”<sup>31</sup>

As an initial matter, “traditional knowledge,” as a catchall phrase, describes all knowledge that prior generations of indigenous groups and local communities have passed down through traditional means.<sup>32</sup> It forms part of the traditional lifestyle of the communities that act as its custodian.<sup>33</sup> In this sense, traditional knowledge often forms part of the community’s cultural or spiritual identity, which makes it difficult to protect under current intellectual property systems.<sup>34</sup> When used in this way, traditional knowledge’s definition is elastic and can have varied meanings.<sup>35</sup>

28. See *id.* at 4–5.

29. In this Note, “TK” refers to traditional knowledge in its more technical, narrow sense, whereas “traditional knowledge” refers to broader use of the term.

30. See ANDERSON, *supra* note 1, at 4–5.

31. Justin Hughes, *Traditional Knowledge, Cultural Expression, and the Siren’s Call of Property*, 49 SAN DIEGO L. REV. 1215, 1218 (2012).

32. See *id.* at 1217; see also *Frequently Asked Questions*, WIPO, <http://www.wipo.int/tk/en/resources/faqs.html#a2> (last visited Jan. 25, 2014) [hereinafter *Frequently Asked Questions*] (emphasis added) (defining traditional knowledge). Traditional knowledge is often used interchangeably with the term “indigenous knowledge” when conceived as a broad category, but traditional knowledge is preferred because it does not limit who can benefit from a developed property system. See CHIDI OGUAMANAM, *INTERNATIONAL LAW AND INDIGENOUS KNOWLEDGE: INTELLECTUAL PROPERTY, PLANT BIODIVERSITY, AND TRADITIONAL MEDICINE* 20–26 (2006). When considered a general category encompassing all other types of knowledge, traditional knowledge is sometimes deployed as a foil to “Western science.” See Peter Drahos & Susy Frankel, *Indigenous Peoples’ Innovation and Intellectual Property: The Issues* 1, 11 (Victoria Univ. of Wellington Legal Research Papers, Paper No. 36/2012, 2012). Scholars like Chidi Oguamanam argue that scholars who exaggerate differences between traditional knowledge and Western science tend to fail to take into account the constantly changing nature of knowledge and the frequent hybridization of existing knowledge. See OGUAMANAM, *supra*, at 15–18.

33. See ANDERSON, *supra* note 1, at 4; Hughes, *supra* note 31, at 1217–18; *Frequently Asked Questions*, *supra* note 32.

34. WIPO, *BACKGROUND BRIEF NO. 1: TRADITIONAL KNOWLEDGE & INTELLECTUAL PROPERTY* 1 [hereinafter *BACKGROUND BRIEF NO. 1*], available at [http://www.wipo.int/export/sites/www/tk/en/resources/pdf/tk\\_brief1.pdf](http://www.wipo.int/export/sites/www/tk/en/resources/pdf/tk_brief1.pdf). “[I]t is not easily protected by the current intellectual property system, which typically grants protection for a limited period to inventions and original works by named individuals or companies.” *Id.*

35. See OGUAMANAM, *supra* note 32, at 16–17, 26; Drahos & Frankel, *supra* note 32, at 11.

In recent IGC debates, WIPO members use TK more narrowly to describe a smaller subset of technologies—typically diagnostic, therapeutic, horticultural, predictive, or technologies related to engineering with natural materials.<sup>36</sup> Examples include: “[a)] knowledge about traditional medicines; [(b)] traditional hunting or fishing techniques; [(c)] knowledge about animal migration patterns; [and (d)] knowledge about water management.”<sup>37</sup> WIPO classifies TK as a type of knowledge that might otherwise be protected under patent, trademark, or trade secret law.<sup>38</sup>

TCE, in contrast to TK, includes intellectual property such as traditional music, dances, stories, rituals, insignia, arts and crafts, sculptural forms, and architectural forms.<sup>39</sup> Viewed through a Western lens, these expressions prompt copyright and trademark questions.<sup>40</sup> In practice, conventional intellectual property systems sometimes protect TCE.<sup>41</sup>

The third area of interest is GR, which WIPO defines as “genetic material of actual or potential value.”<sup>42</sup> Although intellectual property law generally would not protect naturally occurring genetic resources, inventions and plant varieties based on or developed using genetic resources with traditional knowledge may be patentable.<sup>43</sup>

While these categories make discussions more manageable, they do not necessarily coincide with the way indigenous groups understand and discuss their knowledge systems within their communities.<sup>44</sup> Indigenous peoples “tend to employ the political discourse of human rights: rights to land, territory, and resources; rights to full disclosure and prior informed consent; rights to cultural integrity and customary practices; and rights to equitable benefit-sharing and control over access to traditional resources.”<sup>45</sup>

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36. See Hughes, *supra* note 31, at 1217.

37. *Frequently Asked Questions*, *supra* note 32.

38. *Traditional Knowledge*, WIPO, <http://www.wipo.int/tk/en/tk> (last visited Jan. 17, 2014). *But see* TSHIMANGA KONGOLO, UNSETTLED INTERNATIONAL INTELLECTUAL PROPERTY ISSUES 42–44 (2008) (explaining why TK would be prevented from being included in the conventional IP system).

39. See Hughes, *supra* note 31, at 1216–17.

40. See *id.* at 1218.

41. See BACKGROUND BRIEF NO. 1, *supra* note 34, at 3.

42. *Genetic Resources*, WIPO, <http://www.wipo.int/tk/en/genetic> (last visited Jan. 17, 2014).

43. See *id.* The IGC’s work is said to complement the Convention on Biological Diversity (CBD) and its Nagoya Protocol, and the United Nation’s Food and Agricultural Organization’s (FAO) International Treaty on Genetic Resources for Food and Agriculture. See BACKGROUND BRIEF No. 1, *supra* note 34, at 3.

44. See ANDERSON, *supra* note 1, at 4; Drahos & Frankel, *supra* note 32, at 8.

45. Miriam Latorre Quinn, Note, *Protection for Indigenous Knowledge: An International Law Analysis*, 14 ST. THOMAS L. REV. 287, 293 (2001) (quoting Rosemary J. Coombe, *Intellectual*

Many indigenous peoples do not attach importance to definitions; instead, they understand their knowledge through the relationships created by the possession of that knowledge, rather than the features of that knowledge.<sup>46</sup> “Accordingly, [they] may view intellectual property rights as an obstacle rather than an aid to maintaining their knowledge.”<sup>47</sup> To add to the confusion, traditional-knowledge holders are not necessarily indigenous peoples.<sup>48</sup>

## 2. “Indigenous Peoples”

According to the United Nations Permanent Forum on Indigenous Issues (UNPFII), there are more than 370 million indigenous people in approximately ninety countries worldwide.<sup>49</sup> Nevertheless, the UN has decided not to adopt a specific definition for “indigenous peoples.”<sup>50</sup> Governments agree it is neither desirable nor necessary to establish a universal definition.<sup>51</sup>

*Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 IND. J. GLOBAL LEGAL STUD. 59, 79 (1998)); see also MATTHEWS, *supra* note 13, at 71 (“For indigenous peoples and local communities, traditional knowledge constitutes the very foundation of cultural heritage, cultural identity, and social integrity . . . and should not be viewed primarily from a commercial perspective.”).

46. See Drahos & Frankel, *supra* note 32, at 9–10.

47. Quinn, *supra* note 45, at 293 (quoting Rosemary J. Coombe, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 IND. J. GLOBAL LEGAL STUD. 59, 79 (1998)). Some scholars discourage defining what “traditional knowledge” means. See OGUAMANAM, *supra* note 32, at 15.

48. See Drahos & Frankel, *supra* note 32, at 11; *supra* Part I.A.3.

49. See *History of Indigenous Peoples and the International System*, UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, <http://social.un.org/index/IndigenousPeoples/AboutUsMembers/History.aspx> (last visited Jan. 25, 2014).

50. See *Indigenous Peoples, Indigenous Voices*, UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, available at [http://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf) (last visited on Jan. 25, 2014); Secretariat of the Permanent Forum on Indigenous Issues, United Nations Dept. of Econ. & Social Affairs, Div. for Social Pol’y & Dev., *The Concept of Indigenous Peoples*, U.N. Doc. PFII/2004/WS.1/3 (Jan. 19–21, 2004) [hereinafter *The Concept of Indigenous Peoples*], available at [http://www.google.com/url?sa=t&ret=j&q=u.n.%20doc.%20pfi%2F2004%2Fws.1%2F3&source=web&cd=2&ved=0CDYQFjAB&url=http%3A%2F%2Fwww.un.org%2Fesa%2Fsocdev%2Funpfi%2Fdocuments%2Fworksh op\\_data\\_background.doc&ei=40ZKUvj-IIGS9gTEuoDwAw&usg=AFQjCNFMb2Ln4AqUEFKk\\_8o zGuEM8LvcYw&sig2=hvKulZ8rBo04PBcL5GPhiQ&bvm=bv.53371865,d.eWU](http://www.google.com/url?sa=t&ret=j&q=u.n.%20doc.%20pfi%2F2004%2Fws.1%2F3&source=web&cd=2&ved=0CDYQFjAB&url=http%3A%2F%2Fwww.un.org%2Fesa%2Fsocdev%2Funpfi%2Fdocuments%2Fworksh op_data_background.doc&ei=40ZKUvj-IIGS9gTEuoDwAw&usg=AFQjCNFMb2Ln4AqUEFKk_8o zGuEM8LvcYw&sig2=hvKulZ8rBo04PBcL5GPhiQ&bvm=bv.53371865,d.eWU) (explaining that no definition of indigenous peoples has been defined). The United Nations emphasizes that the lack of formal definitions has not been crucial to the United Nation’s successes or failures, referring to other groups who have been left undefined, such as “minorities” and “peoples.” See *id.* at 3–4. In the United Nations Declaration of Indigenous Rights, there is no clear indication of who is protected under the Declaration; however, Article 33 states in part, “[i]ndigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.” See United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 (Sept. 13, 2007) [hereinafter United Nations Declaration on the Rights of Indigenous



For practical purposes, however, the UN and many indigenous peoples endorse the Martinez Cobo Report, which provides an expansive definition of the term “indigenous communities, peoples and nations”:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.<sup>52</sup>

The report presents factors such as ancestral land occupation, common ancestry, culture, and language to define the term “historical continuity.”<sup>53</sup> It also identifies indigenous individuals as those who self-identify as indigenous and indigenous populations recognize and accept.<sup>54</sup>

### 3. “Local Communities”

The IGC’s work also covers knowledge belonging to “local communities,” as WIPO designates the bearers of traditional knowledge as “indigenous peoples and *local communities*.”<sup>55</sup> WIPO defines local communities as “the human population in a distinct ecological area who depend directly on its biodiversity and ecosystem goods and services for all or part of their livelihood and who have developed or acquired traditional knowledge as a result of this dependence, including farmers, fisherfolk, pastoralists, forest dwellers

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Peoples], available at [http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf). The United Nations also recognizes that the terms “indigenous” and “tribal” are used as synonyms when the peoples concerned identify themselves under the indigenous agenda, even though there are tribal peoples who are not “indigenous” in the literal sense but are nevertheless living in the same situation. See *The Concept of Indigenous Peoples*, *supra*, at 3.

51. See *The Concept of Indigenous Peoples*, *supra* note 50, at 3. But see *Social and Human Sciences: Nation-State*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION [UNESCO], <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/nation-state> (defining “nation-state”).

52. *The Concept of Indigenous Peoples*, *supra* note 50, at 2 & n.4. Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, provided this definition in his well-known Study on the Problem of Discrimination against Indigenous Populations. See *id.* at 1.

53. *Id.* at 2.

54. *Id.*

55. See generally WIPO, INDIGENOUS PEOPLES AND LOCAL COMMUNITIES PORTAL, <http://www.wipo.int/tk/en/indigenous> (last visited Jan. 17, 2014). This phrase is borrowed from the CBD and the Permanent Forum on Indigenous Issues. *Glossary*, WIPO, <http://www.wipo.int/tk/en/resources/glossary.html#26> [hereinafter *Glossary*] (emphasis added) (last visited Jan. 17, 2014) (defining indigenous and local communities).

and others.”<sup>56</sup> Local communities can be of indigenous descent but are not necessarily descendants of indigenous populations.<sup>57</sup> As with “traditional knowledge” and “indigenous peoples,” the term “local communities” is riddled with vagueness, further complicating the IGC’s efforts to define critical terms.<sup>58</sup>

### B. WIPO to Develop Legal Instrument(s)

Historically, the international community’s political focus did not prioritize traditional knowledge; rather, it encouraged indigenous self-government and incidental political rights.<sup>59</sup> Not until the 1980s did the international community begin to emphasize indigenous worldviews regarding information systems.<sup>60</sup> Traditional knowledge and intellectual property law intersected when (1) the international community recognized the economic value of traditional knowledge; (2) developing countries increased their focus on international intellectual property rights; and (3) indigenous groups created global political networks.<sup>61</sup>

Prior to WIPO, two international legal instruments, the Convention on Biological Diversity (CBD) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), sought to protect traditional knowledge to some extent.<sup>62</sup> Although the CBD recognized the importance of traditional knowledge and was a binding instrument focused on conservation and sustainability, it failed to cover traditional knowledge as its own category of intellectual property, and it arguably facilitated the exploitation and commercialization of traditional knowledge.<sup>63</sup> Similarly, although TRIPS expanded intellectual property protection through international trade mechanisms, many activists criticized it for failing to protect the underlying raw materials.<sup>64</sup>

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56. *Id.*

57. See Secretariat of the Permanent Forum on Indigenous Issues for the Expert Workshop on the Disaggregation of Data, United Nations Dept. of Econ. & Social Affairs, Div. for Social Pol’y & Dev., *The Concept of Local Communities*, U.N. Doc. PFII/2004/WS.1/3/Add.1 (Jan. 19–21, 2004), available at <http://www.cbd.int/doc/meetings/tk/aheg-lcr-01/information/aheg-lcr-01-inf-01-en.pdf>.

58. See *supra* Part I.A.1–2.

59. See OGUAMANAM, *supra* note 32, at 3.

60. See *id.* at 4.

61. See Drahos & Frankel, *supra* note 32, at 1–2.

62. See *id.* at 7–9.

63. See OGUAMANAM, *supra* note 32, at 4–5; Kremers, *supra* note 12, at 45.

64. See Hughes, *supra* note 31, at 1234–35.

When CBD and TRIPS failed to complement each other to effectuate a complete framework to protect traditional knowledge,<sup>65</sup> WIPO, a UN agency dedicated to stimulating innovation through the use and protection of intellectual property,<sup>66</sup> emerged as the body focused on providing a comprehensive legal instrument or set of instruments to promote a system of protective rights for indigenous groups' TK, TCE, and GR.<sup>67</sup>

Fifty-one nations launched WIPO in 1967,<sup>68</sup> and WIPO presently has 186 member states.<sup>69</sup> According to WIPO, states represent all interested parties within their borders.<sup>70</sup> WIPO maintains a "one state, one vote" rule, but WIPO members avoid voting.<sup>71</sup> Committee work is generally consensus based, so action committees do not act unless all states agree.<sup>72</sup> Currently, WIPO is the only international organization examining these issues from a technical standpoint.<sup>73</sup>

WIPO's most important decision-making body is the General Assembly, which the WIPO Secretariat (Secretariat) leads.<sup>74</sup> Participants include the heads of national or regional intellectual property offices.<sup>75</sup> At this level, ambassadors often direct their

65. See Drahos & Frankel, *supra* note 32, at 7–9.

66. See *What is WIPO?*, WIPO, <http://www.wipo.int/about-wipo/en> (last visited Jan. 18, 2014). Implicit in WIPO's stated objectives is the assumption that protecting intellectual property is an appropriate and worthwhile goal that will ultimately spur innovation. See *id.*; cf. Debora J. Halbert, *The World Intellectual Property Organization: Past, Present and Future*, 54 J. COPYRIGHT SOC'Y U.S.A. 253, 263 (2007) ("It is exactly this assumption that was of concern to developing countries involved in the Stockholm Convention.")

67. See ANDERSON, *supra* note 1, at 2 ("[WIPO] is the primary international body through which discussions and debates have been filtered.")

68. Halbert, *supra* note 66, at 265.

69. *Member States*, WIPO, <http://www.wipo.int/members/en> (last visited Jan. 18, 2014). Membership is open to any member of the Berne Union or Paris Union. *Id.*; Coenraad Visser, *The Policy-Making Dynamics in Intergovernmental Organizations: A Comment on the Remarks of Geoffrey Yu*, 82 CHI.-KENT L. REV. 1457, 1458 (2007).

70. *Id.*

71. *Id.*; Geoffrey Yu, *The Structure and Process of Negotiations at the World Intellectual Property Organization*, 82 CHI.-KENT L. REV. 1445, 1452 (2007) ("[W]e try to avoid voting . . . [and instead go with] consensus building.")

72. See Robin Gross, *World Intellectual Property Organisation (WIPO)*, GISWATCH.ORG, available at [http://www.giswatch.org/sites/default/files/gisw\\_wipo\\_0.pdf](http://www.giswatch.org/sites/default/files/gisw_wipo_0.pdf) (last visited Jan. 18, 2014).

73. See Kremers, *supra* note 12, at 47–48.

74. See Yu, *supra* note 71, at 1447; see Gross, *supra* note 72, at 1. The Secretariat has "enormous" power to influence and define the organization's objectives. *Id.* In addition to the General Assembly, WIPO also has two other governing bodies: the WIPO Conference Committee and the WIPO Coordination Committee. See *Decision-Making and Negotiating Bodies*, WIPO, [http://www.wipo.int/about-wipo/en/decision\\_bodies.html](http://www.wipo.int/about-wipo/en/decision_bodies.html) (last visited Jan. 18, 2014).

75. See Yu, *supra* note 71, at 1448.

delegations from behind the scenes.<sup>76</sup> The General Assembly considers all issues from the committees' work at once.<sup>77</sup>

WIPO also has Standing Committees and Permanent Committees.<sup>78</sup> The Standing Committees do the preparatory work for any new international intellectual property instrument,<sup>79</sup> while Permanent Committees are known as the "Committees of Experts."<sup>80</sup> The IGC is one of WIPO's Permanent Committees and is the assigned forum for discussing issues concerning TK, TCE, and GR.<sup>81</sup>

### *C. Development and Evolution of the IGC*

The IGC's establishment in 2000 stemmed from two WIPO pursuits.<sup>82</sup> In the late 1990s, concerns about TK and GR made their way to WIPO's Standing Committee on Patents when member states raised concerns while preparing for the WIPO Diplomatic Conference for the adoption of the new Patent Law Treaty.<sup>83</sup> Meanwhile, WIPO's Secretariat requested and pursued a series of fact-finding missions in the late 1990s to analyze the needs and expectations of indigenous groups and government representatives regarding traditional knowledge protection.<sup>84</sup> Participants met with indigenous groups and local communities in twenty-eight countries.<sup>85</sup> At the end of these missions, WIPO concluded that traditional knowledge had been per se excluded from intellectual property protection and that even if some forms had been protected, current enforcement regimes did not sufficiently protect this knowledge.<sup>86</sup>

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76. See *id.* at 1449. The Deputy Director General of WIPO, Geoffrey Yu, described these interactions as a kind of tit-for-tat, where individuals negotiate: "If I give you a certain thing in this area, I expect movement in the other area." *Id.* at 1450.

77. See *id.* at 1449.

78. *Decision-Making and Negotiating Bodies*, *supra* note 74.

79. Visser, *supra* note 69, at 1458–59.

80. *Decision-Making and Governing Bodies*, *supra* note 74. There are currently four Permanent Committees: the Program and Budget Committee (PBC); the Committee on Development and Intellectual Property (CDIP); the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC); and the Advisory Committee on Enforcement (ACE). *Id.*

81. See *id.*

82. See BACKGROUND BRIEF NO. 2, *supra* note 5, at 1–2.

83. See *id.* at 2.

84. See *id.*; Quinn, *supra* note 45, at 293. The missions included investigative pursuits, regional consultations, workshops, and roundtables concerning GR, TCE, and TK. BACKGROUND BRIEF NO. 2, *supra* note 5, at 2; MATTHEWS, *supra* note 13, at 70.

85. MATTHEWS, *supra* note 13, at 70.

86. See Quinn, *supra* note 45, at 305. In April 2001, the findings of these missions were published in the report, "Intellectual Property Needs Expectations of Traditional Knowledge Holders: Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge." See MATTHEWS, *supra* note 13, at 70.

WIPO member states recognized the crosscutting effects TK, TCE, and GR had on conventional intellectual property rights when they created the IGC.<sup>87</sup> During this time, discussions centered on how these segments would fit into existing international and national intellectual property systems and whether *sui generis* forms of protection were better suited for dealing with new concerns.<sup>88</sup>

The IGC's initial mandate was to study and make recommendations to the General Assembly concerning intellectual property issues arising from (1) access and benefit-sharing pertaining to GR; (2) the protection of TK, innovation, and creativity, whether or not associated with any GR; and (3) the protection of expressions of folklore, including handicrafts.<sup>89</sup> At the IGC's inception, its mandate did not define its ultimate goal, nor did it articulate whether the final product would be a legal instrument or set of legal instruments recommending certain action or a ratifiable treaty.<sup>90</sup>

The IGC's current mandate is to engage in text-based negotiations for an international legal instrument that would effectively protect GR, TK, and TCE.<sup>91</sup> Nevertheless, as of 2013, it is still unclear whether the final instrument will bind member states and by what means WIPO could enforce it.<sup>92</sup>

#### *D. The Current Structure of the IGC*

Practically, IGC participants include governmental representatives from recognized nation states, bureaucrats from relevant international agencies, intergovernmental organizations, NGO representatives, and select indigenous representatives who have

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87. CTR. INT'L ENVTL L. [CIEL], THE GAP BETWEEN INDIGENOUS PEOPLES' DEMANDS AND WIPO'S FRAMEWORK ON TRADITIONAL KNOWLEDGE 2 (2007) [hereinafter THE GAP BETWEEN], [http://www.ciel.org/Publications/WIPO\\_Gap\\_Sept07.pdf](http://www.ciel.org/Publications/WIPO_Gap_Sept07.pdf).

88. See *id.* at 3. Academic debates continue to rage on about whether an intellectual property regime is really the best-suited mechanism to protect traditional knowledge. See ANDERSON, *supra* note 1, at 27–40.

89. See Kremers, *supra* note 12, at 51.

90. See BACKGROUND BRIEF NO. 1, *supra* note 34, at 1; BACKGROUND BRIEF NO. 2, *supra* note 5, at 1.

91. See Assemblies of Member States of WIPO 40th Sess. (20th Ordinary Sess.), Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Agenda Item 31: Decision (Sept. 26 to Oct. 5, 2011), available at [http://www.wipo.int/tk/en/documents/pdf/decision\\_assemblies\\_2011.pdf](http://www.wipo.int/tk/en/documents/pdf/decision_assemblies_2011.pdf); ANDERSON, *supra* note 1, at 2; *Differences Plague WIPO Negotiations on Traditional Knowledge*, INT'L CENTRE FOR TRADE & SUSTAINABLE DEV., 16 (16) BRIDGES WEEKLY TRADE NEWS DIGEST (Apr. 25, 2012), available at <http://ictsd.org/i/news/bridgesweekly/131986>.

92. See *WIPO Assemblies Approve IGC Roadmap*, INT'L CENTRE FOR TRADE & SUSTAINABLE DEV., 12 (17) BRIDGES TRADE BIORES (Oct. 15, 2012), <http://ictsd.org/i/news/biores/147217>.

received permission to participate in some capacity.<sup>93</sup> Attendees meet in Geneva, Switzerland, for sessions, each lasting about ten days, several times per year to discuss each one of the subareas individually.<sup>94</sup> Because the IGC is member-state driven,<sup>95</sup> however, government representatives are the only participants that have the power to offer proposals, amendments, and motions.<sup>96</sup> They are also the only participants entitled to vote.<sup>97</sup>

Beyond member-state participants, the IGC accredits organizations to be ad hoc observers through its fast-track accreditation process and allows WIPO-accredited permanent observers to attend and participate in a limited way.<sup>98</sup> Accredited observers cannot make or vote on proposals, amendments, or motions.<sup>99</sup> Evidence from 2011 suggests that over half of these accredited observers are indigenous peoples and local communities, while the other half are international NGOs or industry groups involved with broader intellectual property issues.<sup>100</sup>

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93. See ANDERSON, *supra* note 1, at 5; see also *Participating in the IGC*, WIPO, <http://www.wipo.int/tk/en/igc/participation.html> (last visited Feb. 20, 2014) (providing link to list of accredited observers, which include intergovernmental organizations and NGOs).

94. See MATTHEWS, *supra* note 13, at 74; *Intergovernmental Committee on Intellectual Property & Genetic Resources, Traditional Knowledge and Folklore (IGC)*, WIPO, [http://www.wipo.int/meetings/en/topic.jsp?group\\_id=110](http://www.wipo.int/meetings/en/topic.jsp?group_id=110) (last visited Jan. 18, 2014) [hereinafter *Meetings*].

95. See Kremers, *supra* note 12, at 55. At the most recent IGC session, 110 member states were in attendance. *IGC 23 Update: Negotiators Advance on Text on Intellectual Property and Genetic Resources*, WIPO (Feb. 11, 2013), [http://www.wipo.int/tk/en/news/igc/2013/news\\_0003.html](http://www.wipo.int/tk/en/news/igc/2013/news_0003.html).

96. See Yu, *supra* note 71, at 1448 (“proposals can only come from governments”); *Practical Guide for Observers*, *supra* note 9, at 1 (“The right to submit proposals, amendments and motions and the right to vote are exclusive rights of Members States at the IGC.”).

97. See Convention Establishing the World Intellectual Property Organization art. 6, signed July 14, 1967 (as amended Sept. 28, 1979), 828 U.N.T.S. 3, available at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283854](http://www.wipo.int/treaties/en/text.jsp?file_id=283854).

98. See GRABER ET AL., *supra* note 14, at 192; *Practical Guide for Observers*, *supra* note 9, at 1; *Frequently Asked Questions*, *supra* note 32; *infra* Part II.C. The difference between “permanent observers” and “ad-hoc observers” is that WIPO Permanent Observers are accredited by the Assemblies of the Member States of WIPO and they are entitled to attend and participate in sessions of all WIPO’s Committees and in the annual General Assembly, while ad-hoc observers accredited to the IGC may, however, participate only in IGC sessions. See *Frequently Asked Questions - Accreditation to the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)*, WIPO, [http://www.wipo.int/export/sites/www/tk/en/igc/pdf/accreditation\\_faq.pdf](http://www.wipo.int/export/sites/www/tk/en/igc/pdf/accreditation_faq.pdf) (last visited Feb. 5, 2014) [hereinafter *Accreditation FAQ*]; see *infra* Part II.C. WIPO distinguishes between intergovernmental organizations and NGOs in their permanent-observer application process. See *Observers*, *supra* note 10. But see *Participating in the IGC*, *supra* note 93 (illustrating one accreditation form for observer applicants).

99. See *Practical Guide for Observers*, *supra* note 9, at 1.

100. See MATTHEWS, *supra* note 13, at 71.

Although most, if not all, of the substantive participatory rights extend to member states only,<sup>101</sup> WIPO allows accredited observers to substantively contribute to the IGC in some ways.<sup>102</sup> The IGC Chair generally allows observers to intervene during sessions on any agenda item and to make drafting proposals for member-states' collective consideration; such proposals are incorporated into the discussion as long as one member state serves as a sponsor.<sup>103</sup> However, the IGC Chair has the power to limit the intervention of observers for relevance or timing reasons.<sup>104</sup> WIPO also incorporates observers' ideas into session reports, which WIPO publishes after each session.<sup>105</sup> Although these informal accommodations prevent accredited observers from being completely shut out of the process, indigenous groups and their advocates argue they effectively are.<sup>106</sup>

## II. INDIGENOUS GROUPS' STRUGGLES FOR REPRESENTATION IN THE IGC

Although the IGC has made significant efforts to enhance participation by indigenous groups, critics continue to reiterate their concerns and reservations regarding the IGC's work.<sup>107</sup> They claim that, so far, the IGC has developed documents without the broad-based participation of indigenous groups.<sup>108</sup> They also argue that working documents do not satisfactorily reflect indigenous groups' perspectives.<sup>109</sup> If this is the case, the question remains as to what the best options are, in terms of feasibility and satisfaction, for

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101. See *Note on Existing Mechanisms*, *supra* note 11, at 1; see also Kremers, *supra* note 12, at 55 ("Currently, [WIPO's] work is necessarily constrained to reflect the interests and policy goals of national governments, which in many cases may not reflect the interests of indigenous people. One of the problems the IGC has faced in its work on TKGRF is that WIPO's organizational structure is not conducive to participation by non-state actors.").

102. See *Note on Existing Mechanisms*, *supra* note 11, at 1–2.

103. See *id.* at 1.

104. See WIPO Secretariat, *Draft Study on the Participation of Observers in the Work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore 7* [hereinafter *Draft Study on Participation*], available at [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_20/wipo\\_grtkf\\_ic\\_20\\_7-annex1.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_20/wipo_grtkf_ic_20_7-annex1.pdf).

105. See *Note on Existing Mechanisms*, *supra* note 11, at 1.

106. See *infra* Part II.D.

107. See *infra* Part II.D.

108. THE GAP BETWEEN, *supra* note 87, at 2; see also MATTHEWS, *supra* note 13, at 72 (explaining how there is a perception that the intellectual property system has allowed for the misappropriation of traditional knowledge and has not been as successful at providing indigenous and other local communities with remedies).

109. See THE GAP BETWEEN, *supra* note 87, at 4.

modifying the way the IGC operates to incorporate indigenous groups' perspectives in a meaningful way.<sup>110</sup>

### A. Why Participation Matters

There are important reasons to support facilitating and increasing indigenous groups' participation in the IGC.<sup>111</sup> These include, but are not limited to: ensuring the legitimacy of the IGC's final instruments,<sup>112</sup> upholding human rights and development principles,<sup>113</sup> and aligning WIPO's work with UN declarations.<sup>114</sup>

#### 1. The Legitimacy of the Document

Many scholars and indigenous groups stress that the IGC's final instrument(s) will lack legitimacy if they do not incorporate and reflect indigenous communities' perspectives.<sup>115</sup> They argue that the IGC will create an agreement or set of agreements that will affect indigenous groups' rights without duly considering their perspectives.<sup>116</sup> Even though the member states may be well-intentioned and intelligent contributors to the dialogue, they typically lack either first-hand knowledge or cultural and customary legal context, if not both.<sup>117</sup> Without the substantive participation of indigenous groups, the instrument(s) produced will not include these important elements—elements that outsiders cannot easily perceive or protect without guidance.<sup>118</sup>

Without incorporating this first-hand experience, the solutions may prove inappropriate and run counter to the way many indigenous peoples conceive of their intellectual property.<sup>119</sup> The more indigenous groups participate in debates about the challenges they face when

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110. Cf. *id.* at 10–12. (positing reasons why the IGC's work has not succeeded in fully reflecting the demands of indigenous and local communities).

111. See *infra* Part II.A.

112. See *infra* Part II.A.1.

113. See *infra* Part II.A.2.

114. See *infra* Part II.A.2.

115. See, e.g., Kremers, *supra* note 12, at 57; Catherine Saez, *Indigenous Peoples Walk Out of WIPO Committee on Genetic Resources*, INTELLECTUAL PROPERTY WATCH (Feb. 22, 2012, 12:57 PM) [hereinafter *Indigenous Peoples Walk Out*], <http://www.ip-watch.org/2012/02/22/indigenous-peoples-walk-out-of-wipo-committee-on-genetic-resources>.

116. See Kremers, *supra* note 12, at 57; *Indigenous Peoples Walk Out*, *supra* note 115.

117. See Kremers, *supra* note 12, at 58.

118. See *id.*

119. See *id.*



traditional knowledge intersects with intellectual property law, the more likely it is that the IGC will create an appropriate policy.<sup>120</sup>

## 2. The Human Rights Perspective

Indigenous groups' involvement and representation in the IGC is also a human rights issue.<sup>121</sup> Since indigenous groups tend to be among the poorest and most disadvantaged in the world, they often lack the infrastructure and raw resources to effectively engage with their national governments, let alone an international body like the IGC.<sup>122</sup>

Critics of the IGC's current framework assert that indigenous groups' lack of participation infringes on their right to self-determination.<sup>123</sup> They call for adherence to the principle of free, prior, and informed consent (FPIC), which has been acknowledged by various documents within the field of international human rights law.<sup>124</sup> In this context, this principle would call for a process free from coercion, intimidation, and manipulation.<sup>125</sup> It would only recognize consent if indigenous groups had sufficient notice and appropriate access to the relevant information and then provided consent through

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120. See ANDERSON, *supra* note 1, at 7.

121. See LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE 49 (2011); Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 97, 105–06 (2007).

122. See Hughes, *supra* note 31, at 1256; Sunder, *supra* note 121, at 112.

123. See S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 79 (1996); OGUAMANAM, *supra* note 32, at 154; Mary Ellen Turpel, *Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 CORNELL INT'L L.J. 579, 591–92 (1992); S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 79 (1996); OGUAMANAM, *supra* note 32, at 154. Self-determination can be thought of as a principle requiring that every culturally and historically distinct people have the right to choose its political status by democratic means, under international supervision, and with international support. See Turpel, *supra*, at 592.

124. See Grand Council of the Crees (Eyou Istchee), Comments to *Note on Existing Mechanisms for Participation of Observers in the Work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Nov. 30, 2011), available at [http://www.wipo.int/export/sites/www/tk/en/documents/pdf/grand\\_council\\_of\\_the\\_crees\\_comment\\_on\\_observer\\_participation.pdf](http://www.wipo.int/export/sites/www/tk/en/documents/pdf/grand_council_of_the_crees_comment_on_observer_participation.pdf). This principle has been acknowledged in various documents within the field of international human-rights law. One notable example is Article 6 of the International Labor Organization (ILO) Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, which intends to establish mechanisms for free participation at all levels of decision-making in elective institutions and administrative bodies responsible for policies and programs that concern indigenous groups. See Secretariat of the U.N. Permanent Forum on Indigenous Issues, U.N. Workshop on Engaging the Marginalized: Partnerships Between Indigenous Peoples, Governments, and Civil Society, Background Paper: Engaging Indigenous Peoples in Governance Processes: International Legal and Policy Frameworks for Engagement 3 (Aug. 15, 2005) [hereinafter Engaging Indigenous Peoples], [http://www.un.org/esa/socdev/unpfii/documents/engagement\\_background\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/engagement_background_en.pdf).

125. See Engaging Indigenous Peoples, *supra* note 124, at 11.

freely chosen representatives or customary methods.<sup>126</sup> At a WIPO General Assembly meeting in October 2012, an indigenous representative from the International Committee for the Indians of America (Incomindios) urged WIPO to apply this principle: “It is not acceptable to reduce our rights to the lowest common denominator for Indigenous Peoples while promoting broader ‘States rights’ standards that allow States and other parties to take our property without our *free, prior and informed consent*.”<sup>127</sup>

Further, gaining intellectual property rights is connected to development because these rights relate to increasing efficiency and expanding central freedoms for indigenous groups and local communities.<sup>128</sup> Madhavi Sunder argues that the failure to recognize ownership could impede access to essential goods such as educational materials and life-saving medicines by diminishing material wealth and the capability to live a full life.<sup>129</sup> Indigenous groups will be better able to fortify their destinies if they are involved in the IGC process.<sup>130</sup>

### 3. Congruity with UN Principles

The UN supports the FPIC principle and has worked for and with indigenous groups to increase their participation in international fora.<sup>131</sup> For instance, the UNPFII develops and advocates for policies that acknowledge indigenous groups’ human rights and call for their full and effective participation in all matters that concern them.<sup>132</sup> Further, the UN Development Program’s (UNDP) overall objective is to engage indigenous peoples and foster an enabling environment where they can participate in all levels of decision-making, have their socio-political systems co-exist, and integrate their perspectives into the UNDP’s work.<sup>133</sup> Most importantly, the UN issued its Declaration of Rights of Indigenous Peoples in 2007, which articulated a commitment to indigenous groups’ right to self-determination and made a strong statement about their sovereignty relative to nation

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126. *See id.* at 4.

127. Ambassador Ronald Barnes, Statement at the 50th General Assembly of WIPO: Incomindios, Article 27 IGC on TK, GR and TCEs (Oct. 4, 2012) (emphasis added) (transcript available at <http://www.ip-watch.org/weblog/wp-content/uploads/2012/10/WIPO-GA-50-Incomindios-statement.pdf>).

128. *See* Sunder, *supra* note 121, at 121.

129. *See id.*

130. *See Draft Study on Participation*, *supra* note 104, at 5.

131. *See* Turpel, *supra* note 123, at 580.

132. *See* Engaging Indigenous Peoples, *supra* note 124, at 4–5; *see also* UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, 12TH SESSION RECOMMENDATIONS FOR UN AGENCIES (Recommendation 53).

133. *See id.*, Recommendation 25.

states.<sup>134</sup> These actions indicate that WIPO's decision-making processes should mirror its UN counterparts and should adhere to the UN's stated principles on these issues.<sup>135</sup>

### *B. Representation of Indigenous and Local Communities' Interests*

Member states, NGOs, and certain indigenous groups, arguably represent indigenous groups' interests in the IGC.<sup>136</sup> Yet, there are reasons to question whether they are true and effective representatives.<sup>137</sup>

#### 1. Member States

According to the WIPO Secretariat: "The IGC is and will remain an intergovernmental process in which decisions are taken by the Member States of WIPO."<sup>138</sup> Even so, the IGC recognizes the need to directly incorporate indigenous groups and encourages member states to include representatives from these groups in their delegations.<sup>139</sup> In practice, however, few delegations include these groups.<sup>140</sup> As a result, there is charged discourse about whether member states strive to incorporate indigenous perspectives or merely work to enhance their own interests.<sup>141</sup>

Some countries arguably advocate for indigenous groups.<sup>142</sup> Typically, these are countries where dominant indigenous cultures with strong central administrations can ensure that their governments are protecting them.<sup>143</sup> In many of these countries,

134. See *History of Indigenous Peoples and the International System*, *supra* note 49; United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 50. Regarding intellectual property protection and self-determination, Article 31 of the Declaration states: "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions." *Id.*

135. Cf. Turpel, *supra* note 123, at 580–81 (illustrating an example where mirroring UN principles may actually result in negative consequences).

136. See *infra* Part II.B.

137. See *infra* Part II.B.

138. *Draft Study on Participation*, *supra* note 104, at 5.

139. See *id.* at 2–3; Kremers, *supra* note 12, at 55.

140. See *Draft Study on Participation*, *supra* note 104, at 3.

141. See MATTHEWS, *supra* note 13, at 73; Hughes, *supra* note 31, at 1263; Kremers, *supra* note 12, at 55.

142. See Hughes, *supra* note 31, at 1260.

143. See *id.* at 1263.

domestic laws recognize indigenous rights and these national governments seek to use their experiences to assist in developing an international framework.<sup>144</sup> For instance, Australia, Brazil, Mexico, New Zealand, and the United States generally support the interests of indigenous groups at IGC sessions.<sup>145</sup>

Other countries do not advocate on behalf of these populations, for many possible reasons.<sup>146</sup> For one, indigenous groups are often among the most socially marginalized and least politically powerful in any given nation.<sup>147</sup> Further, the relationships between national governments and indigenous groups may be strained because of past land disputes, conflicts about self-determination, and the application of customary law; this may be especially true in developing nations.<sup>148</sup> Lastly, national governments may perceive indigenous groups' advocacy as a "radical assault" on the Western intellectual property tradition that encourages innovation and idea cultivation rather than stewardship.<sup>149</sup>

In contrast, some countries may be unable to advocate on the behalf of these groups.<sup>150</sup> For instance, developing countries may be at a disadvantage in the IGC, even if they want to represent indigenous interests.<sup>151</sup> Developed nations are more likely to have intellectual property experts, developed networks of indigenous groups with lobbying power, domestic laws to guide their positions, and the means to travel to weeklong IGC sessions.<sup>152</sup> Although NGOs help developing countries understand pertinent issues in many

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144. *See id.* at 1260–61.

145. *See id.* at 1260.

146. *Cf.* MATTHEWS, *supra* note 13, at 73 (explaining how many indigenous groups have tense relationships with their national governments); Kremers, *supra* note 12, at 57 (discussing how indigenous communities tend to not to be politically powerful and lack financial resources).

147. *See* MATTHEWS, *supra* note 13, at 73; Kremers, *supra* note 12, at 57.

148. *See* MATTHEWS, *supra* note 13, at 73.

149. Sunder, *supra* note 121, at 106.

150. *See generally* Duncan Matthews, *The Role of International NGOs in the Intellectual Property Policy-Making and Norm-setting Activities of Multilateral Institutions*, 82 CHI.-KENT L. REV. 1369, 1371–73 (2007) [hereinafter Matthews, *The Role*] (explaining how international NGOs try to enhance the capacity of developing nations to negotiate in multinational forums because developing nations "do not receive detailed advice, support, or feedback" from their capital cities and are "unlikely to be experts on intellectual property rights").

151. *See id.*

152. *See id.* For example, the Republic of Kazakhstan lacks mechanisms or practices regarding the legal protection of traditional knowledge, which makes it difficult for them to contribute to the dialogue. *See* COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS OF THE MINISTRY OF JUSTICE OF THE REPUBLIC OF KAZAKHSTAN (2011) [hereinafter COMMENTS FROM KAZAKHSTAN], available at [http://www.wipo.int/export/sites/www/tk/en/documents/pdf/kazakhstan\\_comments\\_on\\_observer\\_participation.pdf](http://www.wipo.int/export/sites/www/tk/en/documents/pdf/kazakhstan_comments_on_observer_participation.pdf).

instances,<sup>153</sup> this assistance cannot compensate for the lack of expertise developing countries may have about the complex issues indigenous groups face.<sup>154</sup>

Other countries pay lip service to the IGC and their indigenous constituents when they advocate for traditional knowledge protection.<sup>155</sup> They may do so in the hopes of having their national government reap the benefits of that protection rather than the indigenous and local communities themselves.<sup>156</sup> These countries may even have laws that claim to protect this knowledge domestically but use the laws to extract money from developed countries without passing that money along to the indigenous groups as the intended beneficiaries.<sup>157</sup> Fortunately, many nations are using the IGC framework to fight such misappropriation.<sup>158</sup>

Finally, another subset of countries may prefer to address these issues domestically.<sup>159</sup> Nancy Kremers, the current Intellectual Property attaché for the US embassy in China,<sup>160</sup> claims that certain developed countries would prefer a focus on national solutions, rather than an international solution, because they believe the issues indigenous groups face in other countries are not of issue to their indigenous populations.<sup>161</sup> To the contrary, spokespeople from these domestic indigenous groups claim that they do face the same difficulties and remain frustrated that the IGC has not confronted the larger philosophical and legal questions regarding traditional knowledge.<sup>162</sup>

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153. See Matthews, *The Role*, *supra* note 150, at 1371–72.

154. See *id.* at 1381.

155. Cf. Hughes, *supra* note 31, at 1260–61 (describing the phenomenon of developing-country elites extracting wealth from its people and stating, “The troubling experience of some developing countries with extractive resources and others with cash crops should be instructive because GRTKF share characteristics with each.”).

156. See *id.*

157. See *id.* at 1261; Email from Participant in WIPO IGC Negotiations from Developed Country to author (Feb. 10, 2013, 11:53 CST) (on file with author) [hereinafter Email from Participant in WIPO IGC].

158. See Hughes, *supra* note 31, at 1260; Email from Participant in WIPO IGC, *supra* note 157.

159. Cf. Kremers, *supra* note 12, at 61–62 (stating that the United States’ “policy position” at WIPO is that the legal treatment of traditional knowledge should be determined domestically); THE GAP BETWEEN, *supra* note 87, at 12 (describing the myriad of types of relationships that may exist between national governments and indigenous groups at the national level and its impact on international participation).

160. See *Business*, Consulate General of the United States Wuhan, China, <http://wuhan.usembassy-china.org.cn/business.html> (last visited Feb. 20, 2014).

161. See Kremers, *supra* note 12, at 61–62 (referencing the United States).

162. See *id.* at 71.

## 2. Accredited Observers: NGOs and Indigenous Groups

The number of non-state actors that have received observer accreditation has consistently increased over the last ten years.<sup>163</sup> Presently, NGOs are numerically strong, but only a fraction of these groups directly represent the interests of indigenous peoples.<sup>164</sup>

The IGC does not distinguish between NGOs and the organizations that are directly accountable to indigenous groups when it classifies or accredits an observer.<sup>165</sup> Some of these organizations advocate for the protection of traditional knowledge;<sup>166</sup> however, there are doubts about their abilities to productively contribute to the dialogue and their conflicting motives.<sup>167</sup> Further, only a small percentage of these groups intervene in the process, which may undermine the representativeness of those who do participate.<sup>168</sup>

Kremers and others argue that NGOs are effectively shut out of negotiations because of WIPO's organizational structure.<sup>169</sup> NGOs must lobby state actors to act to have any influence because NGOs are not allowed to vote or make proposals and have only limited opportunities to participate in discussions.<sup>170</sup> It is notable that

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163. *Cf. id.* at 56 (stating that there has been an a steady increase in observer applications); MATTHEWS, *supra* note 13, at 71 (stating that no group has ever been denied accreditation).

164. *See* Email from Participant in WIPO IGC, *supra* note 157; *cf. Participating in the IGC*, *supra* note 93 (providing the list of accredited organizations). Although WIPO and the IGC accredit both NGOs and intergovernmental organizations, this Note focuses on NGOs because they represent the majority of WIPO and the IGC accredited observers. *Cf. Participating in the IGC*, *supra* note 93 (providing lists of accredited organizations in WIPO); Accredited observers to the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), WIPO, *available at* [http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc\\_observers.pdf](http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_observers.pdf) (providing list of IGC's accredited observers).

165. *See Draft Study on Participation*, *supra* note 104, at 4.

166. OGUAMANAM, *supra* note 32, at 153. *But see* Note by Secretariat, Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge & Folklore, *Revision of Participation Procedures* 1 (Dec. 5, 2011) (prepared and submitted by the Tupaj Amaru Indigenous Movement (Bolivia)), *available at* [http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc\\_observer\\_participation.pdf](http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_observer_participation.pdf) (“[T]he majority of observers are representatives of pharmaceutical companies, biotechnology industries and patent attorneys, anthropologists and powerful lobbies which defend interests alien to indigenous peoples.”).

167. *See* Matthews, *The Role*, *supra* note 150, at 1381 (“[W]hether the participation of international NGOs . . . influences policy outcomes is questionable.”).

168. *See* THE GAP BETWEEN, *supra* note 87, at 4; Email from Participant in WIPO IGC, *supra* note 157. For example, no major Native American tribe or umbrella organization for them has ever attended an IGC meeting. *See id.* Some argue this is a deliberate decision. *Id.* Others argue it is due to a lack of awareness. *See Draft Study on Participation*, *supra* note 104, at 4, 11–13.

169. *See* Kremers, *supra* note 12, at 55; THE GAP BETWEEN, *supra* note 87, at 11.

170. *See* Kremers, *supra* note 12, at 57; Email from Participant in WIPO IGC, *supra* note 157.

member states do not work with NGOs in the IGC more than they work with NGOs in other committees, despite the NGOs' claim to represent groups that are not represented by the member states.<sup>171</sup>

This lack of interaction may stem from member states' distrust of IGC-funded NGOs.<sup>172</sup> Legitimacy concerns arise because member states question the current filtering mechanism, given that no group has ever been denied accreditation.<sup>173</sup> NGOs also disagree amongst themselves about which organizations truly represent indigenous groups' interests.<sup>174</sup> Further, states may perceive NGOs as highly ideological, with fundamental views contrary to the UN's framework, let alone the IGC's, making it difficult for member states to work with them.<sup>175</sup>

Even if state actors want to consider NGO advocacy, NGOs may not be effective representatives.<sup>176</sup> There is a concern that NGOs use the IGC forum to publicize their own activities instead of offering substantive inputs for the policy debate.<sup>177</sup> Others argue that these organizations tend to simply oppose proposals rather than present convincing arguments.<sup>178</sup> These concerns are only exacerbated because member states do not have to attend pre-session presentations or read NGO-distributed statements, the only means by which NGOs can share concrete ideas.<sup>179</sup>

An additional concern is that not enough NGOs are actively taking advantage of opportunities to participate in the IGC.<sup>180</sup> Some argue this is because they lack funding,<sup>181</sup> while others suggest this is partly because the accredited groups lack the technical expertise or capacity to substantively contribute to the IGC process.<sup>182</sup> Thus, NGO

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171. Email from Participant in WIPO IGC, *supra* note 157.

172. See Matthews, *The Role*, *supra* note 150, at 1381 (“[W]hether the participation of international NGOs . . . influences policy outcomes is questionable.”).

173. See MATTHEWS, *supra* note 13, at 71.

174. Email from Participant in WIPO IGC, *supra* note 157.

175. *Id.* For example, if an NGO represents the belief that the member state is occupying the lands of indigenous groups, when sovereignty has been defined differently, it becomes more difficult to work with such organizations from the member state's perspective. *Id.*

176. See Matthews, *The Role*, *supra* note 150, at 1371.

177. See *id.*

178. See *id.* at 1381.

179. See COMMENTS OF THE UNITED STATES PATENT AND TRADEMARK OFFICE ON THE PROPOSED STUDY ON THE PARTICIPATION OF OBSERVERS IN THE WORK OF THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE [hereinafter USPTO COMMENTS], available at [http://www.wipo.int/export/sites/www/tk/en/documents/pdf/usa\\_comments\\_on\\_observer\\_participation.pdf](http://www.wipo.int/export/sites/www/tk/en/documents/pdf/usa_comments_on_observer_participation.pdf).

180. See *infra* Part II.C.

181. See *infra* Part II.C.

182. See MATTHEWS, *supra* note 13, at 71.

accreditation may add facial legitimacy to the IGC process but may not promote genuine substantive representation.<sup>183</sup>

*C. WIPO's Efforts to Increase Participation of Accredited Observers*

Only one year after its establishment, the IGC held a series of regional discussions and education meetings to increase observer participation.<sup>184</sup> Today, the IGC uses a series of mechanisms to achieve this goal.<sup>185</sup>

One of the IGC's first actions to increase observer participation was to create the fast-track accreditation process, because it recognized that many stakeholders did not have the permanent-observer status necessary to participate in the IGC sessions.<sup>186</sup> To become an ad hoc observer to the IGC via the fast-track process, an applicant organization must file an application directly with the IGC describing its mission and projects and explaining the specific relevance of intellectual property to its work.<sup>187</sup> At the beginning of every session, the IGC decides what groups will be added to the accredited observer list.<sup>188</sup>

In 2004, the IGC decided to precede its sessions with panel presentations chaired and conducted by representatives of indigenous groups.<sup>189</sup> These half-day presentations serve as a source of information on the experiences, concerns, and aspirations of indigenous groups concerning the protection, promotion, and preservation of their traditional knowledge.<sup>190</sup> The panels are not a formal part of the sessions, but WIPO includes panel summaries in session reports and online.<sup>191</sup>

183. See Matthews, *The Role*, *supra* note 150, at 1371.

184. See Kremers, *supra* note 12, at 59. WIPO has repeatedly acknowledged that “[i]ndigenous and local communities in particular need to be able to participate, express their views and have their voices heard in the IGC decision-making process . . . as the outcome will affect their rights.” BACKGROUND BRIEF NO. 2, *supra* note 5, at 2.

185. See *infra* Part II.C. One other mechanism that is less cited is WIPO's Indigenous Fellowship Program, which was created in 2009, whereby WIPO selects an “Indigenous Fellow” to complete certain tasks within the Traditional Knowledge Division for one year. See WIPO, *WIPO Indigenous Fellowship Program*, available at [http://www.wipo.int/export/sites/www/tk/en/indigenous/fellowship/pdf/indigenous\\_fellowship.pdf](http://www.wipo.int/export/sites/www/tk/en/indigenous/fellowship/pdf/indigenous_fellowship.pdf).

186. See Kremers, *supra* note 12, at 55–56. This is the same process by which organizations become ad-hoc observers, as mentioned in Part I. See *infra* Part I.D.

187. See BACKGROUND BRIEF NO. 2, *supra* note 5, at 3; *Accreditation FAQ*, *supra* note 98, at 3.

188. See *Note on Existing Mechanisms*, *supra* note 11, at 2.

189. See MATTHEWS, *supra* note 13, at 74.

190. See *Indigenous and Local Community Experiences*, WIPO, <http://www.wipo.int/tk/en/igc/panels.html> (last visited Feb. 9, 2014).

191. See *Note on Existing Mechanisms*, *supra* note 11, at 2.



Another major focus has been the WIPO Voluntary Fund for Accredited Indigenous Communities (Voluntary Fund), which seeks to facilitate and increase indigenous groups' participation in the IGC by funding travel and other incidental expenses associated with attendance.<sup>192</sup> Attendance costs can be prohibitively expensive for many, if not the majority, of these groups.<sup>193</sup> Governments, NGOs, and public entities finance the Voluntary Fund through voluntary contributions.<sup>194</sup> The Advisory Board,<sup>195</sup> a rotating committee that the IGC elects at every session,<sup>196</sup> selects recipients at the margin of the sessions,<sup>197</sup> administers the Voluntary Fund,<sup>198</sup> and notifies the accredited observer at one session if they will be funded for the subsequent session.<sup>199</sup> It costs the IGC approximately \$18,500 to fund five organizations.<sup>200</sup> The Advisory Board consists of nine members, three of whom are accredited observers representing indigenous groups.<sup>201</sup> Since 2005, the Voluntary Fund has sponsored more than eighty groups.<sup>202</sup>

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192. See *Participating in the IGC*, *supra* note 93. Funding generally covers flight expenses and a daily subsistence allowance at a rate previously determined. See WIPO, BOOKLET NO. 3: A STRONGER VOICE FOR INDIGENOUS AND LOCAL COMMUNITIES IN WIPO'S WORK ON TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND GENETIC RESOURCES: THE WIPO VOLUNTARY FUND 16 [hereinafter VOLUNTARY FUND BOOKLET], available at [http://www.wipo.int/freepublications/en/tk/936/wipo\\_pub\\_936.pdf](http://www.wipo.int/freepublications/en/tk/936/wipo_pub_936.pdf). Only accredited observers can be sponsored under the Voluntary Fund. See *id.*

193. MATTHEWS, *supra* note 13, at 74.

194. VOLUNTARY FUND BOOKLET, *supra* note 192, at 12.

195. "The members of the Advisory Board are elected by the IGC plenary on the proposal of its Chair. They meet during the IGC session in which they are participating and are required to conclude their deliberations before the end of the session, when their mandate expires. The Advisory Board comprises nine members, including: (i) the Chair or one of the Vice-Chairs of the IGC appointed *ex officio*; (ii) five members from the delegations of WIPO Member States taking part in the IGC sessions, reflecting appropriate geographical balance; and (iii) three members from accredited observers representing indigenous or local communities. The members of the Advisory Board serve in an individual capacity." *Draft Study on Participation*, *supra* note 104, at 7–8.

196. See VOLUNTARY FUND BOOKLET, *supra* note 192, at 20.

197. See *id.*

198. See *id.* at 8.

199. See *id.* at 14–15.

200. See William New, In "Great Shame," WIPO Fund for Indigenous Peoples' Participation Running Dry, INTELLECTUAL PROPERTY WATCH (Apr. 26, 2013, 8:13 AM), <http://www.ip-watch.org/2013/04/26/in-great-shame-wipo-fund-for-indigenous-peoples-participation-running-dry>.

201. See VOLUNTARY FUND BOOKLET, *supra* note 192, at 20.

202. See BACKGROUND BRIEF NO. 2, *supra* note 5, at 3; see also VOLUNTARY FUND BOOKLET, *supra* note 192, at 8–9 (explaining how Voluntary Fund applicants are reviewed for eligibility). The Voluntary Fund currently requires the applying accredited organization to nominate a representative who will attend the relevant IGC session on behalf of the group if funds are allotted to the applying organization. See WIPO, APPLICATION FORM TO BE SUBMITTED BY AN APPLICANT WISHING TO RECEIVE SUPPORT FROM THE WIPO VOLUNTARY FUND FOR

The IGC has also made efforts to provide information to indigenous groups in many ways.<sup>203</sup> The IGC includes extensive documentation of its meetings, agendas, panel discussions, and informational guides on relevant issues, most of which are provided in six languages on its website.<sup>204</sup> WIPO also provides a best-practices tip sheet for observers to review before they attend a session.<sup>205</sup> For IGC sessions, WIPO finances interpretation and translation support.<sup>206</sup> Upon request or on its own accord, the Secretariat also provides briefings on the work of the IGC to representatives of NGOs and civil society.<sup>207</sup> Also, WIPO has held workshops and lunch meetings to introduce the topics the IGC addresses.<sup>208</sup>

#### *D. WIPO's Efforts Criticized as Insufficient*

Despite the IGC's efforts, critics argue that the concerns and demands of these communities continue to receive insufficient attention.<sup>209</sup> Many indigenous groups, as recently as 2012, have voiced frustration that they do not have a real avenue to participate.<sup>210</sup>

Regarding the fast-track accreditation process, scholars like Kremers worry it remains too time consuming and cumbersome because of the time lag between the application deadline and the IGC's decision, which can be as long as one year.<sup>211</sup> The process also allows member states to block politically unpopular or otherwise

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ACCREDITED INDIGENOUS AND LOCAL COMMUNITIES, FOR THE TWENTY-EIGHTH SESSION OF THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 2 [hereinafter VOLUNTARY FUND APPLICATION FORM], available at [http://www.wipo.int/export/sites/www/tk/en/igc/pdf/application\\_form.pdf](http://www.wipo.int/export/sites/www/tk/en/igc/pdf/application_form.pdf).

203. See *Intergovernmental Committee (IGC)*, WIPO, <http://www.wipo.int/tk/en/igc> (last visited Feb. 9, 2014).

204. See *Meetings*, *supra* note 94; *Publications, Studies and Documents*, WIPO, <http://www.wipo.int/tk/en/resources/publications.html> (last visited Feb. 9, 2014).

205. See WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE: MAKING YOUR INTERVENTION..., WIPO, available at <http://www.wipo.int/export/sites/www/tk/en/igc/pdf/intervention.pdf>.

206. See *Note on Existing Mechanisms*, *supra* note 11, at 3.

207. See *id.* at 2.

208. See *id.* at 3.

209. See MATTHEWS, *supra* note 13, at 74.

210. See Kaitlin Mara, *Indigenous People Seek Recognition at WIPO Meeting on Their Rights*, INTELLECTUAL PROPERTY WATCH (Oct. 23, 2008, 6:56 PM), <http://www.ip-watch.org/2008/10/23/indigenous-people-seek-recognition-at-wipo-meeting-on-their-rights>; William New, *WIPO Members (Again) Intensify Talks on Genetic Material, TK, Folklore*, INTELLECTUAL PROPERTY WATCH (Oct. 7, 2012, 1:32 PM), <http://www.ip-watch.org/2012/10/07/wipo-members-again-intensify-talks-on-genetic-material-tk-folklore>.

211. See Kremers, *supra* note 12, at 55–56; MATTHEWS, *supra* note 13, at 74.

undesirable organizations from participating.<sup>212</sup> The latter concern intensifies as the drafting process becomes more politicized.<sup>213</sup>

Scholars criticize the pre-session panels for being merely a farce to increase indigenous groups' apparent participation without improving their influence.<sup>214</sup> Some worry that the panel discussions themselves further sideline the views of these groups since the panels are not incorporated into the IGC sessions.<sup>215</sup> Many member-state representatives "often leave the room for most or all of these presentations" since attendance is not mandatory.<sup>216</sup> Others emphasize that the NGOs that are likely to speak at these panel discussions may do so for public-relations purposes rather than to voice real concerns or propose constructive solutions.<sup>217</sup>

As for the Voluntary Fund, the IGC can only finance applicants to the extent that resources allow.<sup>218</sup> Over the past several sessions, there has been a dramatic decline in contributions, decreasing the potential effective participation of indigenous groups.<sup>219</sup> WIPO's Director General, Francis Gurry, commented in July 2013 that the Voluntary Fund was "bereft of funds" and predicted to run out after the Twenty-Fourth Session in April 2013.<sup>220</sup> This is particularly troublesome because the sessions have become increasingly about negotiating the language of the final legal instrument and less about fact-finding.<sup>221</sup> As Debra Harry,<sup>222</sup> who presented on behalf of more than a dozen indigenous organizations at WIPO in 2010, stated, "when [the Voluntary Fund] shrinks and [WIPO is] only able to support five

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212. See Kremers, *supra* note 12, at 56.

213. See *id.*

214. Cf. MATTHEWS, *supra* note 13, at 74.

215. See *id.*

216. USPTO COMMENTS, *supra* note 179 ("[M]any people often leave the room for most or all of these presentations.").

217. See *supra* Part II.B.

218. Cf. VOLUNTARY FUND BOOKLET, *supra* note 192, at 8 (stating that the IGC relies "exclusively on voluntary contributions by governments, NGOs and other private or public entities" to finance the Voluntary Fund).

219. See INDIGENOUS PEOPLES COUNCIL ON BIOCOLONIALISM, COMMENTS SUBMITTED BY THE INDIGENOUS PEOPLES COUNCIL ON BIOCOLONIALISM RE: WIPO CIRCULAR C. 8029 (Nov. 30, 2011) [hereinafter IPCB COMMENTS], available at [http://www.wipo.int/export/sites/www/tk/en/documents/pdf/ipcb\\_comments\\_on\\_observer\\_participation.pdf](http://www.wipo.int/export/sites/www/tk/en/documents/pdf/ipcb_comments_on_observer_participation.pdf).

220. William New, *WIPO Scrounges for Funds for Indigenous Participants in Key Treaty Negotiations*, INTELLECTUAL PROPERTY WATCH (July 15, 2013, 1:36 PM), <http://www.ip-watch.org/2013/07/15/wipo-scrounges-for-funds-for-indigenous-participants-in-key-treaty-negotiations>. WIPO was able to fund four people to attend the Twenty-Fifth Session only because Australia and New Zealand came to the rescue at the last minute. See *id.*

221. See *id.*

222. Debra Harry is a Paiute from Pyramid Lake, Nevada. See Toensing, *supra* note 8.

Indigenous People from around the world to attend, that's hardly fair representation of the world[s] . . . Indigenous Peoples."<sup>223</sup>

The Voluntary Fund's Advisory Board also faces criticism because it allegedly does not pay much attention to the selection or fundraising processes.<sup>224</sup> This criticism stems from the fact that the Board meets at the margins of sessions, which limits the time they spend on Voluntary Fund deliberations.<sup>225</sup>

Although it is commendable that WIPO provides informational support and posts all documents online, the website is not user-friendly, which is especially troubling for groups that may have limited access to mentors or information for further guidance.<sup>226</sup> Also, the IGC-sponsored lunch meetings, which many member states and observers claimed were helpful, no longer occur.<sup>227</sup>

### *E. Institutional Efforts to Improve Observer Participation*

As recently as 2012, the IGC has sought suggestions from its member states and accredited observers to increase and facilitate indigenous groups' participation.<sup>228</sup>

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223. *Id.*

224. *See Draft Study on Participation, supra* note 104, at 9.

225. *See id.*

226. *See* USPTO COMMENTS, *supra* note 179. While preparing this Note for publication, WIPO has begun phasing-in a new website. *See Coming Next Week – A New WIPO Website*, WIPO: NEWS ARCHIVE 2013 (Oct. 29, 2013), [http://www.wipo.int/portal/en/news/2013/article\\_0044.html](http://www.wipo.int/portal/en/news/2013/article_0044.html).

227. *See Note on Existing Mechanisms, supra* note 11, at 3 (“[I]n the earlier years of the IGC, the Secretariat provided a briefing for observers during the lunch-break on the first day of each session. As attendance at such briefings waned, perhaps because observers became more familiar with the IGC process, these briefings were discontinued in 2009.”); *see also* TRADITIONS FOR TOMORROW, OBSERVATIONS OF TRADITIONS FOR TOMORROW CONCERNING THE STUDY PROVIDED ON THE PARTICIPATION OF OBSERVERS IN THE WORK OF THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (IGC) 2 (Dec. 2, 2011) [hereinafter TRADITIONS FOR TOMORROW COMMENT ON NOTE], *available at* [http://www.wipo.int/export/sites/www/tk/en/documents/pdf/traditions\\_pour\\_demain\\_comments\\_on\\_observer\\_participation.pdf](http://www.wipo.int/export/sites/www/tk/en/documents/pdf/traditions_pour_demain_comments_on_observer_participation.pdf) (suggesting the IGC reinstate lunch meetings).

228. *See infra* Part II.E.

### 1. The Secretariat's Note

In October 2011, the WIPO Secretariat issued the “Note on Existing Mechanisms for Participation of Observers in the Work of the WIPO IGC” (Secretariat’s Note), which outlined WIPO’s then-current practices to facilitate observer participation and sought feedback to enhance observer contribution.<sup>229</sup> Six countries and ten accredited observers responded.<sup>230</sup>

### 2. Responses to the Secretariat's Note

Many respondents called for the expansion of the Voluntary Fund’s financial and administrative capacity and sources of funding.<sup>231</sup> Some suggestions for achieving these goals included replacing the current rotating–Advisory Board model with a more stable,<sup>232</sup> term-based system and using other UN bodies as models for restructuring the Advisory Board to include more indigenous representatives.<sup>233</sup> Alternatively, the United States suggested the IGC explore remote participation to increase involvement without disturbing the Voluntary Fund.<sup>234</sup>

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229. See *Note on Existing Mechanisms*, *supra* note 11, at 1. Member states and accredited observers were invited to respond to three overarching questions: 1) “Is there any existing mechanism or practice to facilitate direct participation of observers in the work of the IGC or to strengthen their capacity to contribute to the process that has not been reflected above?” 2) “What are the options for enhancing the existing mechanisms and practices?” 3) “What draft recommendations should the twentieth session of the IGC consider with a view to enhancing the positive contribution of observers to the work of the IGC?” See *id.* at 1, 3.

230. See *Draft Study on Participation*, *supra* note 104, at 1–2. The following countries filed comments to the Secretariat’s Note: The United States; Pakistan; Mexico; Kazakhstan; The Russian Federation; Colombia. *Id.* at 1 n.3. The following accredited observers filed comments to the Secretariat’s Note: Association of Students and Researchers on the Governance of Island States (AECG); Foundation for Aboriginal and Islander Research Action (FAIRA); Grand Council of the Crees (Eeyou Istchee); Indigenous People (Bethchilokono) of Saint Lucia Governing Council (BCG); Indigenous Peoples Council of Biocolonialism (IPCB); Intangible Cultural Heritage Network (Ichnet); Kanuri Development Association; Traditions for Tomorrow; Tupaj Amaru Indigenous Movement; United Nations Office of the High Commissioner for Human Rights (OHCHR). *Id.* at 2 n.4.

231. See *id.* at 8.

232. See *id.* at 7–8; FOUND. FOR ABORIGINAL & ISLANDER RESEARCH ACTION [FAIRA], SUBMISSION TO THE WIPO SECRETARIAT ON INDIGENOUS PEOPLES EFFECTIVE PARTICIPATION IN WIPO IGC ON GRTKF [hereinafter FAIRA SUBMISSION], *available at* [http://www.wipo.int/export/sites/www/tk/en/documents/pdf/faira\\_comments\\_on\\_observer\\_participation.pdf](http://www.wipo.int/export/sites/www/tk/en/documents/pdf/faira_comments_on_observer_participation.pdf).

233. See *Draft Study on Participation*, *supra* note 104, at 8. For instance, the Executive Secretary of the CBD has an Advisory Selection Committee that meets remotely and consults with a committee of representatives from seven socio-cultural regions recognized by the UNPFII. See *id.*

234. See USPTO COMMENTS, *supra* note 179.

Many who commented on the Secretariat's Note were also dissatisfied with how the IGC transmits observers' expertise to member states at the IGC sessions.<sup>235</sup> Mexico suggested each member state include in its delegation an indigenous representative lawfully elected by the indigenous peoples and communities of that country to incorporate their points of view.<sup>236</sup> One of the commenting observers, The Tradition for Tomorrow, called for exchange sessions between states and observers and suggested the IGC reinstate lunch meetings.<sup>237</sup>

The commenters also suggested ways to increase the involvement of currently accredited observers.<sup>238</sup> One commentator, the Indigenous Peoples Council on Biocolonialism, suggested that the IGC place observers on more equal footing with states by allowing them to present texts at IGC sessions.<sup>239</sup> Similarly, FAIRA, an accredited observer, suggested the IGC accept indigenous peoples' delegations into drafting groups.<sup>240</sup>

To assuage the concern about the legitimacy or representativeness of the current observers, the commenters proposed changes to the accreditation process.<sup>241</sup> For instance, Mexico proposed analyzing whether the currently accredited observers participating in the IGC sessions "are sufficiently representative" of the communities they claim to represent and whether they are reporting back to the indigenous communities to clarify the relationships of the accredited organizations with the indigenous communities.<sup>242</sup>

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235. See *id.*; *Draft Study on Participation*, *supra* note 104, at 10–11.

236. See COMMENTS OF THE GOVERNMENT OF MEXICO ON EXISTING MECHANISMS FOR PARTICIPATION OF OBSERVERS IN THE WORK OF THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY, GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (IGC) [hereinafter MEX. COMMENT ON NOTE], available at [http://www.wipo.int/export/sites/www/tk/en/documents/pdf/mexico\\_comments\\_on\\_observer\\_participation.pdf](http://www.wipo.int/export/sites/www/tk/en/documents/pdf/mexico_comments_on_observer_participation.pdf).

237. TRADITIONS FOR TOMORROW COMMENT ON NOTE, *supra* note 227, at 2.

238. See *Draft Study on Participation*, *supra* note 104, at 10–11.

239. See IPCB COMMENTS, *supra* note 219.

240. See FAIRA SUBMISSION, *supra* note 232. In the Secretariat's Draft Study on Participation, as addressed in Part II.E.2, the Secretariat contributed to this suggestion and presented examples from other UN bodies like the CBD, which allow working groups to be co-chaired by a representative proposed by the indigenous and local community organizations present at a given meeting. See *Draft Study on Participation*, *supra* note 104, at 12.

241. See *Draft Study on Participation*, *supra* note 104, at 3–5.

242. See MEX. COMMENT ON NOTE, *supra* note 236. The Secretariat echoed this sentiment in its Draft Study on Participation, suggesting the fast-track accreditation process be adjusted to make a distinction between those applicants who represent and are accountable to indigenous groups from those organizations that claim to represent their viewpoints through a standing accreditation advisory mechanism. See *Draft Study on Participation*, *supra* note 104, at 5. This would be helpful for identifying which indigenous peoples and local communities should be

To facilitate dialogue and indigenous groups' preparedness for the sessions, some commenters suggested mechanisms to improve access to information.<sup>243</sup> For example, some suggested WIPO improve the WIPO and IGC websites<sup>244</sup> or to at least provide a supplementary guide to explain how to use the current websites.<sup>245</sup> Another suggestion was to expand the mediums of information to publicly accessible podcasts, webinars, audio briefings, and beginner's guides in "plain English."<sup>246</sup>

### 3. WIPO's Response

In response to these suggestions, WIPO published the "Draft Study on the Participation of Observers in the WIPO IGC" (Draft Study) in February 2012 that narrowed the aforementioned described suggestions to nine proposals.<sup>247</sup> The IGC discussed those proposals at the Twentieth Session and requested that the Secretariat draft another document reviewing three of them.<sup>248</sup> At the subsequent

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beneficiaries of Voluntary Fund monies, who should be invited to participate in panel discussions, and who should be considered for delegations. *See id.*

243. *See Draft Study on Participation, supra* note 104, at 12.

244. *See* USPTO COMMENTS, *supra* note 179.

245. *See* RUSSIAN FEDERATION, RE: CIRCULAR LETTER C.8029, *available at* [http://www.wipo.int/export/sites/www/tk/en/documents/pdf/russian\\_federation\\_comments\\_on\\_observer\\_participation.pdf](http://www.wipo.int/export/sites/www/tk/en/documents/pdf/russian_federation_comments_on_observer_participation.pdf).

246. *See* USPTO COMMENTS, *supra* note 179.

247. *See Draft Study on Participation, supra* note 104, at 13–16. The proposals were stated as follows: "Proposal 1: Clarifying relationship with diverse categories of observers"; "Proposal 2: Cooperating in a spirit of partnership"; "Proposal 3: Substantiating policy debate through enhanced engagement"; "Proposal 4: Facilitating coordinated expert advice and input"; "Proposal 5: Enhancing national and regional dialogue and awareness-raising"; "Proposal 6: Fortifying financial and other means of support for direct participation"; "Proposal 7: Expanding interaction through information exchange"; "Proposal 8: Awareness-raising and communications tools"; "Proposal 9: Strengthening cooperation with other United Nations bodies, programs and agencies). *Id.* at 13–16.

248. *See* INTERGOVERNMENTAL COMM. ON INTELL. PROP. & GENETIC RES., TRADITIONAL KNOWLEDGE & FOLKLORE, WIPO., SESSION No. 20, DRAFT REPORT (2012) [hereinafter TWENTIETH SESSION DRAFT REPORT], *available at* [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_21/wipo\\_grtkf\\_ic\\_21\\_ref\\_grtkf\\_20\\_10\\_prov.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_21/wipo_grtkf_ic_21_ref_grtkf_20_10_prov.pdf). The three proposals were: Proposal 1 (regarding revision of the application form for *ad hoc* accreditation to the IGC and the establishment of a standing advisory mechanism on accreditation applications), Proposal 3 (regarding revisions to the format of the Indigenous Panel) and Proposal 6 (regarding establishment of a standing Advisory Board for the WIPO Voluntary Fund for Accredited Indigenous and Local Communities). *See id.* The Secretariat appeared willing to entertain Proposal 1 and Proposal 3, but wanted to maintain the status quo as per Proposal 6. *See* INTERGOVERNMENTAL COMM. ON INTELLECTUAL PROP. & GENETIC RES., TRADITIONAL KNOWLEDGE & FOLKLORE, WIPO, SESSION No. 21, PARTICIPATION OF OBSERVERS (2012), *available at* [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_21/wipo\\_grtkf\\_ic\\_21\\_6.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_21/wipo_grtkf_ic_21_6.pdf).

session, the IGC did not adopt any of these three proposals.<sup>249</sup> As for the other six proposals, the Committee supported and encouraged many of them.<sup>250</sup> Some have even prompted action.<sup>251</sup> For example, one proposal was to facilitate expert advice and input through a workshop, and in response to it, in April 2013 the WIPO Secretariat and the UNPFII Secretariat organized an “Indigenous Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions.”<sup>252</sup> In the Draft Study, the Secretariat also explained that there are two best-case-scenario alternatives for increasing indigenous groups’ participation: give indigenous groups (1) the right to vote or (2) the right to make proposals, motions, and amendments.<sup>253</sup> Nevertheless, discussions raged on regarding how the IGC could increase indigenous groups’ influence and participation.<sup>254</sup>

#### 4. Indigenous Proposals at Twenty-First IGC Session

At the Twenty-First Session, the Indigenous Caucus, with Mexico’s sponsorship, presented another set of suggestions:

- (1) [A] new status being that of Indigenous Peoples, separate from observers, be established within the Committee,<sup>255</sup> (2) indigenous peoples be represented . . . within

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249. See INTERGOVERNMENTAL COMM. ON INTELLECTUAL PROP. & GENETIC RES., TRADITIONAL KNOWLEDGE & FOLKLORE, WIPO, SESSION No. 21, DRAFT REPORT (2012), available at [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_23/wipo\\_grtkf\\_ic\\_23\\_ref\\_grtkf\\_21\\_7\\_prov\\_2.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_23/wipo_grtkf_ic_23_ref_grtkf_21_7_prov_2.pdf).

250. See INTERGOVERNMENTAL COMM. ON INTELLECTUAL PROP. & GENETIC RES., TRADITIONAL KNOWLEDGE & FOLKLORE, WIPO, SESSION No. 20, REPORT (2012), available at [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_21/wipo\\_grtkf\\_ic\\_21\\_ref\\_grtkf\\_20\\_10.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_21/wipo_grtkf_ic_21_ref_grtkf_20_10.pdf). The Committee “strongly encouraged” that member states organize regional and national consultations, agreed that the website needed to become more user-friendly and suggested observers submit comments online for member states to view, and welcomed the continued cooperation of the WIPO Secretariat and other UN bodies and intergovernmental bodies. See *id.*

251. See, e.g., INTERGOVERNMENTAL COMM. ON INTELL. PROP. & GENETIC RES., TRADITIONAL KNOWLEDGE & FOLKLORE, WIPO, SESSION NO. 25, *Report of Indigenous Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, WIPO/GRTKF/IC/25/INF/9 (2013), available at [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_25/wipo\\_grtkf\\_ic\\_25\\_inf\\_9.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_25/wipo_grtkf_ic_25_inf_9.pdf).

252. *Id.* at 1. The Secretariat stated the workshop was developed as a result of a proposal in the Draft Study. *Id.*

253. See INTERGOVERNMENTAL COMM. ON INTELL. PROP. & GENETIC RES., TRADITIONAL KNOWLEDGE & FOLKLORE, WIPO, SESSION NO. 22, *Participation of Observers*, WIPO/GRTKF/IC/22/INF/10 (2012) [hereinafter SESSION NO. 22, *Participation of Observers*], available at [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_22/wipo\\_grtkf\\_ic\\_22\\_inf\\_10.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_22/wipo_grtkf_ic_22_inf_10.pdf).

254. See *supra* Part II.E.3.

255. The proposed new participant category would allow indigenous groups and local communities to submit proposals, amendments and motions. THE INDIGENOUS PEOPLES CAUCUS



any “Friends of the Chair” groups that may be established from time to time, (3) representatives of indigenous peoples be . . . appointed as co-chairs of working and drafting groups, (4) equal representation with Member States on the Advisory Board of the WIPO Voluntary Fund . . . (5) the Secretariat consult with the Chair of the Indigenous Caucus, intersessionally, regarding selection of panelists for the Indigenous Panel, and (6) panelists of the Indigenous Panel be invited to address the substantive working documents of the Committee session concerned in order to contribute directly to the development of the work of the IGC . . . .<sup>256</sup>

These suggestions prompted the Secretariat to create a document describing the practical, procedural, and budgetary implications thereof.<sup>257</sup> At the Twenty-Second IGC session, the IGC discussed these implications, but took no action regarding them.<sup>258</sup> There have been no further discussions regarding potential solutions aside from talks about the Voluntary Fund’s survival.<sup>259</sup>

### III. BALANCING REALITY AND ASPIRATIONS

There is little doubt that indigenous groups face an uphill battle to increase their role in the IGC because of the institutional, financial, and political challenges they face.<sup>260</sup> WIPO is a member-centric body, where member states have the power to include or exclude groups and perspectives as they see fit.<sup>261</sup> While members consider UN principles and their respective public images, they are not likely to sacrifice their interests easily.<sup>262</sup>

Nevertheless, the IGC is in a particularly unique position because the instrument(s) it is drafting will affect individuals who are

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AT THE IGC-22 POSITION ON INDIGENOUS PEOPLES PARTICIPATION, (2012), *available at* [http://www.docip.org/fileadmin/user\\_upload/ENG\\_WIPO\\_IPStatement110712\\_signed.pdf](http://www.docip.org/fileadmin/user_upload/ENG_WIPO_IPStatement110712_signed.pdf).

256. SESSION NO. 22, *Participation of Observers*, *supra* note 253.

257. *See generally id.*

258. INTERGOVERNMENTAL COMM. ON INTELL. PROP. & GENETIC RES., TRADITIONAL KNOWLEDGE & FOLKLORE, WIPO, SESSION NO. 22, *Decisions of the Twenty-Second Session of the Committee* (2012), *available at* [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_22/wipo\\_grtkf\\_ic\\_22\\_ref\\_decisions.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_22/wipo_grtkf_ic_22_ref_decisions.pdf).

259. *See* INTERGOVERNMENTAL COMM. ON INTELL. PROP. & GENETIC RES., TRADITIONAL KNOWLEDGE & FOLKLORE, WIPO, SESSION NO. 23, *Draft Report*, WIPO/GRTKF/IC/23/8 (2013), *available at* [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_23/wipo\\_grtkf\\_ic\\_23\\_8\\_prov\\_2.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_23/wipo_grtkf_ic_23_8_prov_2.pdf); INTERGOVERNMENTAL COMM. ON INTELL. PROP. & GENETIC RES., TRADITIONAL KNOWLEDGE & FOLKLORE, WIPO, SESSION NO. 24, *Report*, WIPO/GRTKF/IC/24/8 (2013), *available at* [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_24/wipo\\_grtkf\\_ic\\_24\\_8.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_24/wipo_grtkf_ic_24_8.pdf); INTERGOVERNMENTAL COMM. ON INTELL. PROP. & GENETIC RES., TRADITIONAL KNOWLEDGE & FOLKLORE, WIPO, SESSION NO. 24, *Decisions of the Twenty-Fifth Session of the Committee*, (2013), *available at* [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_25/wipo\\_grtkf\\_ic\\_25\\_ref\\_decisions.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_25/wipo_grtkf_ic_25_ref_decisions.pdf).

260. *See supra* Part II.B.

261. *See supra* Part I.D.

262. *Cf. supra* Part II.B.1 (illustrating that not all member states are amenable to indigenous groups’ needs and perspectives).

not necessarily represented at the negotiating table.<sup>263</sup> Thus, the IGC should take steps to involve more sufficiently representative indigenous groups and employ mechanisms to allow these representatives to influence the final instrument(s).<sup>264</sup> The means to achieve these objectives are proposed in this section with the realities of the day and the underlying principles of self-determination and human rights in mind.<sup>265</sup> The purpose of this section is to present solutions that are pragmatic and potentially viable.

A key problem facing the IGC is that it is unclear who is representing indigenous groups' interests at IGC sessions.<sup>266</sup> This is especially true for indigenous groups that have strained relationships with their governments or have yet to develop rapport with their governing nation state.<sup>267</sup> Adding to the confusion is the fact that the IGC does not distinguish between accredited observers that directly represent indigenous groups and those that represent other interests.<sup>268</sup> Thus, the voices from those organizations that do have the requisite authority and legitimacy are muddled.<sup>269</sup>

To confront these concerns, the IGC must ensure that representative indigenous groups attend and participate in the IGC sessions.<sup>270</sup> Member states are more likely to take indigenous groups' ideas seriously if they come from a group of representative and qualified individuals.<sup>271</sup> As an initial step, the IGC should confirm that the currently accredited organizations that claim to represent indigenous groups are sufficiently representative and that their claimed constituents have given them the requisite authority to represent them.<sup>272</sup>

The accreditation process must also be improved because there is currently no real barrier to becoming an accredited observer.<sup>273</sup>

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263. See *supra* Part II.A.

264. See *supra* Part II.E.

265. Cf. *supra* Parts II.A & II.C.

266. See *supra* Part II.B.

267. See *supra* Part II.B.

268. See *supra* Part II.B.2.

269. See *supra* Part II.B.2.

270. See *supra* Part II.B.2.

271. See *supra* Part II.B.1.

272. Cf. MEX. COMMENT ON NOTE, *supra* note 236 (suggesting the IGC review currently accredited observers). WIPO should create a mechanism for determining when an organization is "sufficiently representative." Cf. Hugo Slim, GLOBAL DEVELOPMENT RESEARCH CENTER, *By What Authority? The Legitimacy and Accountability of Non-governmental Organisations* (2002), available at <http://www.gdrc.org/ngo/accountability/by-what-authority.html>. This may be a difficult task given the lack of common vocabulary and consensus regarding who "owns" traditional knowledge. See, e.g., KONGOLO, *supra* note 38, at 39.

273. See *supra* Part II.B.2.

This may give member states the impression that observers have either not been properly vetted to speak on any group's behalf or have strong lobbying interests.<sup>274</sup> Thus, the IGC should create a more nuanced and sophisticated accreditation form that makes it more difficult to obtain accreditation, as suggested in 2012.<sup>275</sup> One way of doing this is to have the IGC require an applicant to provide a form of authorization from the claimed constituent group.<sup>276</sup> Further, the IGC should create a distinction between accredited observers that claim to represent particular indigenous groups and those that represent other interests to reduce any potential for confusion.<sup>277</sup> If an applicant-NGO does not claim to represent any particular groups' interests, then this additional proof should not be required.<sup>278</sup>

Even under the IGC's current mechanisms to increase participation at the IGC sessions, an improved verification system will not be useful to indigenous groups if the representative individuals cannot attend the IGC sessions.<sup>279</sup> Consequently, the IGC must address the constant and real challenge of the Voluntary Fund's diminishing resources and pursue innovative ways to educate and inform indigenous groups about the IGC's work.<sup>280</sup>

First, WIPO and the IGC should encourage outside benefactors, such as corporations and law firms, to donate to the Voluntary Fund.<sup>281</sup> The benefits of having corporate sponsors is evidenced by the success of other UN organizations that have taken advantage of the corporate world's growing interest in gaining consumer goodwill, brand differentiation, and enhanced employee engagement through donations to important causes.<sup>282</sup> Private actors

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274. See *supra* Part II.B.2.

275. See TWENTIETH SESSION DRAFT REPORT, *supra* note 248. *But see Observers, supra* note 10 (demonstrating that WIPO distinguishes between types of applicants and has more sophisticated application procedures for permanent-observer accreditation).

276. Neither the current accreditation form nor the applicant form to request funds from the Voluntary Fund require any additional verification or background information to confirm that the organization does truly represent the claimed groups' interests. See WIPO, RE.: REQUEST FOR ACCREDITATION AS AN OBSERVER IN FUTURE SESSIONS OF THE WIPO, *available at* [http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc\\_accreditation\\_form.pdf](http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_accreditation_form.pdf); VOLUNTARY FUND APPLICATION FORM, *supra* note 202.

277. See *supra* Part II.B.2.

278. See *supra* Part II.B.2.

279. See *supra* Part II.B.2.

280. See *supra* Part II.D.

281. See *supra* Part II.C.

282. For example, UNICEF received 74% of its fiscal revenue, amounting to almost \$12 million, from corporations in 2012. UNICEF, 2012 ANNUAL REPORT 11, *available at* <http://www.unicefusa.org/news/publications/annual-report/U-S-Fund-for-UNICEF-Annual-Report-2012.pdf>.

may find these benefits outweigh the approximately \$3,700 price tag to finance a Voluntary Fund applicant.<sup>283</sup>

Further, the Advisory Board should also begin to focus on acquiring sponsors that are willing to make in-kind service contributions, in addition to or instead of monetary contributors.<sup>284</sup> For example, the Advisory Board could reach out to international airline companies and ask them to provide free transportation or subsidized pricing to help indigenous groups get to the IGC meetings.<sup>285</sup>

If the Voluntary Fund is not a helpful mechanism for increasing participation, then WIPO needs to consider other means of participation.<sup>286</sup> One suggested route is to require member states to meet with indigenous groups domestically and come to the IGC sessions with their proposals.<sup>287</sup> This could facilitate more exchanges between member states and indigenous groups, even if many groups are unable to attend.<sup>288</sup> Another suggestion is to have the member states sponsor an indigenous-group representative who is elected democratically from the member state's caucus of groups.<sup>289</sup> It would then become the state's burden to sponsor a representative, which may make them more likely to engage in dialogue.<sup>290</sup> Admittedly, this second solution may be quite difficult to implement since many member states seem unable or unwilling to help finance the Fund; however, if certain developed countries—like the United States, Australia, and New Zealand—embark on this kind of sponsoring, others may follow suit.<sup>291</sup> If not by voluntary means, then it may be worth pressuring the General Assembly to amend the Voluntary

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283. See New, *supra* note 200.

284. Many companies contribute services in addition to funds through their corporate social-responsibility efforts. For instance, FedEx recently donated \$100,000 in transportation services to get supplies and donations to Hurricane Sandy victims. *FedEx Provides Support to Hurricane Sandy Relief*, DIRECT RELIEF (Nov. 1, 2012), <http://www.directrelief.org/2012/11/fedex-provide-support-hurricane-sandy-relief> [hereinafter *FedEx Provides Support*]. UPS has provided similar assistance. Ken Sternad, *Disaster Relief: Why Corporations Need to Give More Than Cash*, UPSIDE: THE UPS BLOG (Feb. 8, 2010), <http://blog.ups.com/2010/02/08/disaster-relief-why-corporations-need-to-give-more-than-cash>.

285. Cf. *FedEx Provides Support*, *supra* note 284 (FedEx provided cash and in-kind transportation services to Hurricane Sandy relief efforts); Sternad, *supra* note 284 (explaining why corporations should donate more than just money to disaster relief efforts).

286. See *supra* Part II.E.2.

287. See *supra* Part II.E.2.

288. See *supra* Parts II.B.1 & II.E.

289. See *supra* Part II.E.2.

290. Cf. *supra* Part II.E.2 (exploring suggestions for increasing the representativeness and legitimacy of observers).

291. See *supra* Part II.D.

Fund's rules to allow the WIPO budget to contribute to the Fund.<sup>292</sup> As a last resort, WIPO should consider how the United States' remote participation idea can be implemented.<sup>293</sup>

Even if the sufficiently representative groups are able to attend the IGC sessions or other means are created for their virtual attendance, their presence alone does not necessarily translate into influence.<sup>294</sup> Therefore, the IGC must make structural changes to remove some of the institutional barriers that prevent indigenous groups from participating and wielding influence.<sup>295</sup> Some structural changes, such as giving indigenous groups voting power or allowing them to make proposals or motions, require an amendment to WIPO's General Rules of Procedure whereas other changes can arise from member-state delegations submitting proposals to the IGC for approval.<sup>296</sup>

In the short term, there are some preliminary structural changes that could increase participation. For instance, the pre-session panels can be made mandatory, which would force member states to listen, at the very least, to accredited observers' perspectives on the relevant issues.<sup>297</sup> Another small but possibly worthwhile action for the IGC to take would be to reinstate lunch meetings, which member states and indigenous groups found particularly useful when they took place in the past.<sup>298</sup> If the interaction between indigenous groups and member states increases, even within the confines of the IGC's current structure, then there is great potential for indigenous groups to influence the final instrument(s).<sup>299</sup>

In terms of long-term structural goals, the Secretariat explained in its Draft Study on Participation that there are two best-case-scenario alternatives: give indigenous groups (1) the right to

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292. See New, *supra* note 200.

293. See *supra* Part II.E.2.

294. See *supra* Part II.D.

295. See *supra* Part I.D.

296. The IGC adopted WIPO's General Rules of Procedure in 2001 and continues to use these rules. See INTERGOVERNMENTAL COMM. ON INTELL. PROP. & GENETIC RES., TRADITIONAL KNOWLEDGE & FOLKLORE, WIPO, SESSION NO. 1, at 2, WIPO/GRTKF/IC/1/2 (2001); WIPO, WIPO's General Rules of Procedure, available at [http://www.wipo.int/freepublications/en/general/399/wipo\\_pub\\_399.html#rule21](http://www.wipo.int/freepublications/en/general/399/wipo_pub_399.html#rule21). However, member state ideas have been implemented via approval from the IGC. See *Note on Existing Mechanisms*, *supra* note 11, at 2 (discussing New Zealand's proposal for pre-session panels and the IGC's adoption of that proposal).

297. See *supra* Part II.D.

298. See *supra* Parts II.D & II.E.2.

299. See *supra* Part II.A.1.

vote or (2) the right to make proposals, motions, and amendments.<sup>300</sup> The latter is preferable for several reasons. First, the ability to present ideas to drafting groups or to the IGC may spark dialogue, allow relationships to develop, and increase the likelihood of incorporating their ideas into the final document(s).<sup>301</sup> Second, while voting carries important symbolic significance, it has few practical benefits in the WIPO context: indigenous groups would likely be outvoted or never vote because WIPO acts primarily through consensus and avoids voting.<sup>302</sup> Indigenous-group representatives should be able to participate in drafting groups directly or hold separate sessions where they can develop their ideas and later present them to the IGC.<sup>303</sup> The workshop recently organized by the IGC and UNPFII is a great start to initiate the latter.<sup>304</sup>

WIPO should also focus on improving and expanding the sources of information currently available.<sup>305</sup> To start, WIPO should make its website more user-friendly.<sup>306</sup> The website should serve as a source for any group that wants to participate to easily understand the trajectory of events that have taken place and the issues at stake.<sup>307</sup> Further, the IGC should explore other ways to reach out besides the Internet since many indigenous groups may lack access to such technology.<sup>308</sup> For instance, the IGC may seek to embark on an informational mission, similar to the missions that WIPO initiated in the 1990s, to initiate dialogue between member states and indigenous groups.<sup>309</sup>

The IGC should ultimately focus on ensuring that those who will be affected by the final instrument(s) are present, informed, and involved in the IGC's process in ways that allow them to make an impact. Potential solutions exist—all that is necessary is action.<sup>310</sup>

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300. See SESSION NO. 22; *Participation of Observers*, *supra* note 253.

301. Cf. *supra* Part II.B.1 (explaining how relationships between member states and indigenous groups may be underdeveloped or strained).

302. See *supra* Part I.B.

303. See *supra* Part II.E.2.

304. See *supra* Part II.E.3.

305. See *supra* Part II.E.2.

306. See *supra* Part II.E.2.

307. See *supra* Part II.D.

308. See *supra* Part I.C.

309. See *supra* Part I.C.

310. See *supra* Part III.

## IV. CONCLUSION

WIPO's IGC faces a difficult task: develop an international legal instrument or set of agreements for the effective protection of TK, TCE, and GR. But, the limited participation of indigenous groups threatens the final product's legitimacy and may sacrifice UN principles regarding self-determination and human rights. Although the IGC has acknowledged several potential solutions, member states hold the key to solving this problem by turning their acknowledgement into action. If this does not occur, the IGC could fail miserably at its task by allocating intellectual property rights without consulting the very people whose rights are at stake.

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