

THE UNITED NATIONS UNIVERSITY INSTITUTE OF ADVANCED STUDIES  
(UNU-IAS)

*The following comments were received through a communication from the United Nations University Institute of Advanced Studies (UNU-IAS)*

### *1. Introduction*

The United Nations University Institute of Advanced Studies (UNU-IAS) wishes to congratulate the Secretariat for the comprehensive and thought-provoking nature of the documents prepared for IGC 7, in particular documents 7/3 and 7/5. These documents constitute a significant advance in the development of proposals for the development of international mechanisms to effectively recognize, respect and protect the rights of indigenous peoples and local communities over their TK. The present communication seeks to contribute to the discussion by considering in more detail a number of the key notions mentioned in document 7/5, some of which are equally relevant to document 7/3.

Document 7/5 serves as a useful basis for the discussion on the content of a regime of protection for traditional knowledge. It brings together three elements: policy objectives, general guiding principles, and specific substantive principles, and also provides specific definitions of traditional knowledge<sup>1</sup> and protection<sup>2</sup>. The proposal for a system to protect traditional knowledge as set out in the document centers around the principle of misappropriation which, at least in part, provides a justification for protection, the objectives of protection and the scope or the content of protection. The document also sets down a list of questions that must be answered in order to develop any legal system of intellectual property protection.

UNU-IAS has been carrying out research into a number of issues relating to protection of traditional knowledge and the following commentary builds heavily upon this research. The commentary is set out in seven general sections.

In the first place, we observe that the notion of misappropriation offers an organizing principle for discussion of development of mechanisms for the protection of TK. Secondly we note that misappropriation serves as a justification for the creation of a regime. Thirdly we argue that, while the notion of misappropriation (rights-based or moral-based justification), provides a strong argument for convincing people of the

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<sup>1</sup> “The term traditional knowledge refers to the content or substance of traditional know-how, innovation, information, practices, skills and learning”. However, doc 7/5, par.31 adds “rather than to the forms of its expression” which might be problematic as it seems difficult if not impossible to design property rights without considering the form of the object of protection (*Cf. infra*)

<sup>2</sup> The term protection refers to protection such as that provided by IP laws, essentially to provide legal means to restrain third parties from undertaking certain unauthorized acts that involve the use of the protected material. (par 33)

need for a protection regime it provides little help in designing the precise content of such a regime. Fourthly, the present document suggests that a utilitarian justification could contribute to designing customized instruments of protection. Fifthly, with regard to international action we suggest that each possible instrument of protection should be considered in the light of the extent to which protection can be secured through existing law or modification of national or regional law as opposed to requiring international action. Sixthly, we argue that customary law and practice has an important role to play in protection of TK and suggest that one means for securing the effective enforcement of customary law rights may be through a system of licenses and contracts. In order to support such a system it is argued that there will be a need for some form of recognition of rights over TK, sui generis or otherwise. Finally, the present document includes some comments on the possible interaction between the principle of Prior Informed Consent and Compensatory Liability Rules.

## *2. Misappropriation as an organizing principle*

The use of the notion of “misappropriation” as an organizing principle to design a protection regime is potentially useful as a first step in a process of consensus building on TK protection. Interestingly, the expression chosen – misappropriation – does not imply the granting of a right or a protection but rather the idea of a sanction for the breach of right or for reprehensible acts in relation to protected knowledge<sup>3</sup>. The expression “misappropriation” allude to the establishment of a system entitling to a remedy to prevent, compensate for, or otherwise mitigate, the effects of misappropriation but it does not in itself create a new right nor identify an existing right on TK.

Document 7/5 identifies various forms of misappropriation<sup>4</sup>

- a) Acquiring invalid IP rights over TK
- b) Acquiring TK in violation of PIC
- c) Acquiring and commercially using TK contrary to honest practices or for inequitable benefit, such as through failing to share benefit equitably.

The very notion of misappropriation as an organizing principle requires identifying

- What right has been breached or what acts are being repressed as acts of misappropriation (scope of protection)
- What is the object of the right (subject matter and conditions of protection)
- Who are the right holders (beneficiaries)
- What are the sanctions for the breach of right

Document 7/5 includes a similar list of questions and provides a beginning of answer that need to be further discussed.

<sup>3</sup> As such, it may be seen as being analogous to acts of unfair competition, which are sanctioned by antitrust/competition law

<sup>4</sup> WIPO/GRTKF/IC/7/5 p. 6. In the Annex 1, p.5 the presentation is different but the content is similar.

Other potential acts involving a breach of a right over TK might include passing off, damaging moral rights of the author or authors of a work, misrepresentation as to the source of TK, failure to recognize the origin/ source of TK, etc. whether such and other similar acts would be protected under a system of misappropriation requires further consideration

### *3. Misappropriation as a justification for protection*

The concept of misappropriation does not only include the idea of a right for TK holders to be protected against acts which violate the principles of equity and fairness, but it also contains more or less explicitly a justification of a protection regime for traditional knowledge. Indeed, the concept of misappropriation echoes the numerous books and articles written on traditional knowledge protection that justify the need for a protection regime on the basis of natural or moral rights. The numerous advocates of such a justification observe that there seems to be a growing consensus with the idea that there is something wrong in the use and appropriation of TK without prior permission and compensation of TK custodians. The strength of such justification can be observed in the fact that TK protection is now discussed in many international forums and WIPO is considering the possibility for negotiation of an international agreement.

However, if rights-based justifications play an important role in convincing people of the need of a protection regime, they do not lend themselves so easily to designing the precise content of a protection regime. Moral justifications do not provide criteria precise enough to identify the object of protection, the form and the scope of protection nor the beneficiaries.

Accordingly, some of the answers provided in document 7/5 to these questions require further precision, for instance:

- Paragraph b.2 *Legal form of protection* provides a long list of legal instruments that could be useful for TK protection. There is a need to identify connections between different (existing or to be created) legal instruments, different objects they can protect and different beneficiaries.
- Paragraph b.3 *General scope of subject matter* provides a useful definition of TK and states that protection should not be limited to any technical field. It is an important precision, and an international instrument may include a general and comprehensive requirement to protect TK. However, at the implementation level, it might be necessary to distinguish different uses of TK to be able to design the most suitable instrument(s) for its protection.
- Paragraph b.4 *Eligibility for protection* establishes the traditional character of knowledge as the requirement for its protection. Knowledge must come from a traditional context, be associated with a traditional or indigenous community, and be part of the cultural identity of this community. To some

extent this repeats what is already said in paragraph b.3 and it may be useful to seek to more fully develop the issues in paragraph b.4.

Firstly, if the traditional character of knowledge is to be selected as a criteria for protection, one must explain how to check that the conditions for protection are met; who will check it; whether there will be an *ex ante* examination, like in patent, or an *ex post* examination, when TK custodians will claim that part of their knowledge has been misappropriated; and whether there will be a system to indicate to third parties what knowledge is protected.

Secondly, identifying knowledge by its traditional character comes down to identification of the object for protection by the beneficiaries. This may lead to confusion between two different questions, i.e. meeting the requirements for protection and identification of the right holder. The problem is further complicated by the fact that the next paragraph (b.5) identifies beneficiaries of protection as TK holders. There is thus a circular definition: the object of protection is defined by its beneficiaries and beneficiaries are identified by the object of protection and none of them is defined independently.<sup>5</sup>

Another issue, which will need to be considered, is at what stage eligibility for protection may be exhausted. Indeed, traditional knowledge is not static but is rather dynamic, ever evolving and is more and more adapting itself to respond to new challenges and opportunities arising through interaction in a global economy, and in the face of external impacts upon local development and subsistence strategies. Therefore, one must take into consideration the fact that it is possible that any TK regime may in some cases be exploited to secure extended rights over knowledge for commercial rather than spiritual or cultural purposes, beyond a similar period for protection of non-traditional knowledge. It would appear to be counter-productive to develop a regime for protection of traditional knowledge against misappropriation if the result was to further promote the commoditization of knowledge. To do so would run contrary to the frequently expressed wishes of indigenous and local communities to avoid creating new forms of monopolistic property rights and to avoid commoditization of TK.

- Paragraph b.5 *Beneficiaries of protection* identifies beneficiaries as the holders of knowledge in accordance with the relationship described under “eligibility of protection. The relationship between peoples and knowledge is essential in identifying beneficiaries of protection. However, further precision is needed to make the system of protection work. In addition, as we

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<sup>5</sup> It could be argued that this is also the case in other sectors of intellectual property law. For instance, in patent law, the object of protection is an *invention* and the beneficiary of the right is the *inventor*. However, the situation is different in patent law. Protection requirements identify what is protectable. For each individual patent, patentee’s claims identify the scope of protection; the examination process decides whether the invention is protected or not and provides a kind of registration and evidence of the right. Patent law therefore includes mechanisms to identify the object of protection.

mentioned in the previous paragraph there is a problem of circular definition between the paragraph on *eligibility of protection* and the one on *beneficiaries of protection*.

In brief, the answers given to these issues in document 7/5 are very broad. One reason for this might be the will to design a comprehensive protection system that includes all traditional knowledge.

This suggests the need to consider an important trade-off that must be made between flexibility and comprehensiveness on one hand and legal certainty and effectiveness on the other. Setting broad principles/definitions at the international level may offer the flexibility that countries need in order to implement a system of protection through customized implementation, which reflects their TK holders' needs and national priorities. However, broad principles/definitions may also engender legal uncertainty both for TK holders and potential users who do not know exactly what is protected and who is the rightholder.

In addition, badly defined property rights cause high transaction costs that might hinder those TK holders that want to trade their knowledge<sup>6</sup> from doing so. Theoretically, it is possible to have broad principles/definitions at the international level and to complement them by customized national principles/definitions. However, differences between national definitions hinder effective international protection, which is particularly harmful for TK protection because TK holders and TK potential users are most often in different countries.

There is another reason for broad principles/definitions: rights-based justifications provide little help in designing the precise content of a protection regime. Moral justifications do not provide criteria precise enough to identify the object of protection, the form, and the scope of protection nor the beneficiaries. In order to contribute to the necessary identification of the precise answers to those questions, it might be worthwhile to complement the rights-based justification of TK protection by a utilitarian justification.

#### *4. Utilitarianism as a complementary justification*

Considering a regime of protection of TK from a utilitarian perspective consists in looking at the consequences of the creation and attribution of rights. When it is used to explain the functioning of intellectual property law or other forms of knowledge control and exchange, utilitarianism looks at the nature of knowledge and its usefulness as the key criteria to identify the object of protection and the beneficiaries. Rights are regarded as an incentive to produce and/or disseminate the desired

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<sup>6</sup> One must keep in mind that in the protection of genetic resources, legal uncertainty and transaction costs are an important reason for the limited use of access and benefit sharing contracts.

knowledge.<sup>7</sup> Therefore a possible contribution of a utilitarian approach might be to identify different types of knowledge, their respective usefulness and the effect that different protection mechanisms could have on the provision and/or dissemination of these different types of knowledge. Such an approach might help us to find more accurate answers to the list of questions identified above. An additional advantage of a utilitarian approach is that one can benefit from the lessons of the economics of information. Any such approach must of course consider the issue not only from an economic perspective, but also on the basis the cultural, social, environmental and spiritual value and/or impact of recognizing rights over knowledge.

As an illustration, we may consider one of the forms of misappropriation of TK and a possible mechanism of protection against this form of misappropriation. See Box 1.

<p><b>Box 1</b></p> <p><b>Example of a utilitarian (consequential) approach to identify forms of misappropriation and possible mechanisms of protection</b></p>
<p>The non-authorized and uncompensated use of TK by biotech companies in their R&amp;D effort to find new medicines or new seeds has been widely denounced. Several studies have concluded that TK can provide valuable inputs in a R&amp;D process by identifying plants that should be tested for pharmacological effect<sup>8</sup>. Beyond the few examples mentioned in existing surveys, it is likely that many traditional knowledge holders could provide important contributions in numerous R&amp;D projects with the possibility to obtain compensation for their contributions.</p> <p>One difficulty is that knowledge has been frequently misappropriated creating a lack of confidence in knowledge exchange. Another important difficulty is that valuable TK is not easily accessible and may be regarded as tacit knowledge. Tacit knowledge includes know-how of any sort which is best communicated through personal communication between people as opposed to codified knowledge documented in a systematic way and accessible by any entitled person. Codifying or documenting knowledge can complement the transmission of knowledge by personal communication from one generation to another, and it further enables communication of knowledge to third parties. What then would be the incentive effect of recognizing and protecting rights over such knowledge?</p> <p>A right over TK could act as an incentive to reveal knowledge and facilitate its wider utilization.</p>

<sup>7</sup> Padmashree Gehl Sampath (2003), "Defining an Intellectual Property Right on Traditional Medical Knowledge: A Process-oriented Perspective", United-Nations University, Institute for New Technologies, Discussion Paper Series, 2003-4.

<sup>8</sup> See notably Walter Reid *et al* (1993), "A New Lease on Life", in Walter Reid *et al* (eds.) *Biodiversity Prospecting: Using Genetic Resources for Sustainable Development*, World Resources Institute p.17 and Michael J. Balick (1990), "Ethnobotany and the Identification of Therapeutic Agents from the Rain Forest" in D.J. Chatwick and J. Arsh (eds.), *Bioactive Compounds from Plants*, CIBA Foundation Symposium, p. 26-28

In situations where TK custodians want to prevent dissemination and inappropriate use of some knowledge like sacred or culturally sensitive knowledge, such an incentive would have little effect because keeping the knowledge tacit and/or secret may be the best mechanism of protection even if it provides only a limited control on knowledge.

In other situations, a right over TK could act as an incentive to reveal knowledge and facilitate its wider utilization. Indeed, without clear rights, keeping knowledge tacit (secret) amounts to an imperfect means to control it, undermines possibilities to effectively trade it, where desired; and may lead to the disappearance of knowledge. At the same time, revealing and documenting knowledge without a clear right implies a loss of control over knowledge and reduces further the possibility to negotiate compensation for its use.

By contrast, a clear right enables TK holders to reveal their knowledge, where so desired, while keeping (or even increasing) their control and placing them in a position to negotiate access to their knowledge if they wish<sup>9</sup>.

Once one has identified the object of protection and the likely effect of property rights, it is necessary to look at mechanisms for protection. In the example given above, the potential utility of a mechanism for documenting TK, and holding it in some form of community register or other database may deserve further consideration, albeit as a support to the grant of and recognition of property rights over knowledge. In such a case the documentation and registering of knowledge might be linked to a system for recognition of rights thereby placing TK holders in a position of control and ability to negotiate compensation for access to the knowledge.

UNU-IAS has previously considered the potential role of TK registers and Databases in the protection of traditional knowledge in a policy report distributed at IGC 6<sup>10</sup>. This document highlighted the potential drawbacks with the development of any rights regime which is based upon the use of databases and registers without the prior recognition of property rights over traditional knowledge. We would refer you to our report for analysis on the role of databases and registers. This report also argues for the development of some form of database trust to incorporate the protection of TK which has fallen in the public domain, prior to the development of an international TK regime, and which is currently held in databases and registers which are not under the control of the rightful custodians of relevant TK.

UNU-IAS is now conducting a more extensive research of TK registers and databases in order to consider the role they may play to support a TK rights regime,

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<sup>9</sup> One potential problem with the recognition of a right over knowledge is the possibility that it will be time limited; implying a loss of control over knowledge once a specific period of protection has expired.

<sup>10</sup> See Alexander et al, 2003, The Role of Registers & Databases in the Protection of Traditional Knowledge, UNU-IAS, Tokyo, 2003 available at: [http://www.ias.unu.edu/binaries/UNUIAS\\_TKRegistersReport.pdf](http://www.ias.unu.edu/binaries/UNUIAS_TKRegistersReport.pdf)

including through the creation of incentives for documentation of and as a means to provide TK holders with an enhanced position to negotiate agreements for access to their knowledge and appropriate benefit sharing. This study of the contribution of registries and databases to positive protection of TK will complement UNU-IAS's earlier report, which provided cases studies of existing TK databases and pointed to their utility and limitations as a tool for protection of TK. UNU-IAS's work will also consider the *Technical proposals on databases and registers* submitted by the Asian Group as well as the recent decision of the South Asian Association for Regional Cooperation (SAARC) to favor development of databases.

The study does not assume that TK registries or databases are a mandatory requirement of protection for a system to protect TK, but rather, explore the role of registries and databases as an optional tool in positive protection systems. As several countries are already using or considering the use of databases and registries as an instrument of defensive protection, it is worth considering whether those databases and registries could simultaneously serve as a means to provide positive protection for TK.

This is very brief presentation set out in Box 1 was only an hypothetical case study using an utilitarian (or consequential) approach involving identification of useful knowledge, of the potential incentive effect of property rights and the identification of a potential legal form of protection. In order to provide a variety of examples for consideration in future IGC meetings, it might be useful to promote cases studies using such an utilitarian (or consequential) approach for several types of knowledge, identifying their respective usefulness, the likely consequences of the creation of property right for this knowledge and then choosing an existing form of protection or designing new ones

### *5. The international dimension*

Many Member States have observed that, it is essential to keep in mind the international dimension –well analyzed in document 6/6 –when discussing the best form of protection for TK. Intellectual property legislation are by their nature national in application being limited by the bounds of national jurisdiction. Protecting someone's invention or knowledge in foreign countries has always been a delicate issue in all domains of intellectual property. Securing extra territorial protection is even more essential for TK because in many cases TK holders and potential users are not in the same country.

A few legal principles such as national treatment, the most favored nation provision, reciprocity, mutual recognition, etc may play an important role in the international protection of TK. However, whether or not these principles apply, an effective protection regime requires some international standards of protection. The need for international standards has two consequences for TK protection. First, national legislations enacting *sui generis* rights are very valuable in testing new instruments

of protection and contributing to the discussion, but they have a limited effect as they do not apply outside the country. Similar limitations in securing the rights of national governments over their genetic resources has led to the development of the concept of user measures within the international debate on access to genetic resources and benefit sharing (ABS).<sup>11</sup> Second, there are two main options for TK holder to obtain international protection either they resort to an existing system of IPRs with international standards or protection or to promote the adoption of new international standards in a widely ratified international treaty. Therefore, in the process of examining and comparing existing or potential protection instruments, there is a need to identify what TK holders can do in the current state of the law, including under customary law and practice, second whether and how a national government or regional groupings of countries may modify or adopt legislation to secure the protection of rights, and thirdly what can or must be done at the international level.

## 6. Customary Law

Document 7/5 proposes a *Principle of respect for customary use and transmission of traditional knowledge* (Principle A.8). It says *that respect for customary use, practices and norms has two aspects: ensuring that protection does not override existing customary practices, and using the customary context as a positive guide in the application of protection.*

The importance of customary law as the basis for developing mechanisms for protection of TK is receiving increased attention at the IGC, CBD and other international forums dealing with issues pertinent to the recognition and protection of the rights of indigenous peoples. Calls for recognition of the role of customary law in development of TK protection are based upon the perceptions of a strong convergence between the claims for empowerment and increased autonomy for indigenous peoples and protection of rights over TK.

Customary law has been described as one of the three pillars of traditional resource protection and is seen as playing an important role in regulating access to genetic resources and traditional knowledge.<sup>12</sup> Recognition of customary law is important because any form of knowledge, including TK, is not only the product of individuals but also the result of an innovation system where control and exchange of knowledge is often ruled by social norms or customary law. Maintenance of these customary

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<sup>11</sup> See UNU-IAS report "User Measures: Options for Developing Measures in User countries to implement the Access and Benefit Sharing Provisions of the Convention on biological Diversity" for a detailed discussion of potential user measures, including the issues of disclosure of origin and access to justice, some of which may be relevant for the development of an international regime on protection of TK. The report is available at [http://www.ias.unu.edu/binaries/UNUIAS\\_UserMeasures\\_2ndEd.pdf](http://www.ias.unu.edu/binaries/UNUIAS_UserMeasures_2ndEd.pdf)

<sup>12</sup> See Brendan Tobin, *Customary law as the basis for Prior Informed Consent of local and indigenous communities*, available at: [http://www.ias.unu.edu/binaries2/Tobin\\_PIC\\_Customary\\_Law.doc](http://www.ias.unu.edu/binaries2/Tobin_PIC_Customary_Law.doc)  
<http://www.canmexworkshop.com/documents/papers/III.4.1.pdf>

laws or social norms is often closely linked to the maintenance and continuing growth of knowledge and innovation systems.<sup>13</sup>

In developing an international system for protection of TK the challenge will be to determine the relationship between customary, national, regional and international norms, identifying clearly the contribution/place of customary law in the protection of TK. One possible and often mentioned contribution consists in using customary law as a base to build an international regime for the protection of TK. The challenge in doing so would be to develop a system which is sufficiently flexible to allow for due recognition of the multiplicity of customary law regimes which exist, sufficiently precise to provide legal certainty for providers and users of TK, and sufficiently robust to stand alongside other international law securing TK rights in the face of potential overlaps and conflicts with trade and IP regimes.

Building an international regime based upon customary law and practice could prove an arduous and long process, as in many cases it will first require the legal recognition of local and indigenous communities' customary law by their own States. This can be a lengthy process as many states may not be convinced of the need to provide such recognition. Added to this will be the difficulty of securing agreement to enforce customary law in foreign jurisdictions, especially where the application of customary law may depend upon arbitrary exercise of power by chiefs with little or no exercise of judicial or quasi judicial proceedings or due process. In addition, there will be the added difficulty of identification of the exact content of customary law provisions on intellectual property, where existing. In many countries and amongst many indigenous peoples and local communities the concept of ownership over knowledge is alien, however, ownership rights of differing levels; from full ownership to custodian responsibilities do exist for many communities. As mentioned above, both the recognition and the identification difficulties are further complicated by the great variations among customary law and the fact that most often TK holders and potential TK users will not be in the same state.

Another possible and rarely mentioned contribution to the expansion of the remit of customary law could be called "Contracting in to customary law". Under such a system a community of TK holders granted internationally recognized rights over their knowledge could use licenses to contractually construct or strengthen a regime for the control and sharing of knowledge that takes into account their customary law both among members of the community and in their relations with third parties. As an illustration, one might look at biotech US academic scientists who draw a Uniform Biological Material Agreement that regulates the exchange of research material according to preexisting norms of science<sup>14</sup>. Initiatives such as those

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<sup>13</sup> See for example the work of Professor Rebecca Eisenberg and Professor Arti Rai on the norms of science and the Bayh-Dole Act, notably Arti K. Rai (1999), "Regulating Scientific Research : Intellectual Property and the Norms of Science. 94 NORTH WESTERN LAW REVIEW 77

<sup>14</sup> See <http://www.autm.net>

involving open -software<sup>15</sup> or that of creative commons<sup>16</sup> are other examples of use of IPRs and licenses to take into account collective innovation and sharing of them.

UNU-IAS is currently exploring further how TK holders could resort to similar mechanisms, and is seeking to build collaborations to promote such research.

### *7. Prior Informed Consent and Compensatory Liability Rule*

In paragraph B.6, document 7/5 notes that the principle of prior informed consent (PIC) has been central to policy debate on TK protection since the inception of the Committee. Simultaneously, in paragraph B.5, document 7/5 takes into consideration proposals for compensatory liability rules<sup>17</sup> that *grant a right to compensation for commercial follow -on uses, but not a right to block such follow -on uses and do not remove knowledge from the public domain; this arrangement could be loosely compared to a paying public domain.*

PIC and compensatory liability rules are important concepts and for the clarity of the debate, it is important to clarify how these, two interplay. The principle of PIC means first that a potential user may not access knowledge before having the consent of the knowledge holder and second that compensation and other conditions of access will be mutually negotiated. Compensatory liability rules have a double characteristic. First, it suppresses the need to obtain the consent of knowledge holder. Second, compensation and other conditions of access are settled by a collective valuation mechanism rather than by a face to face negotiation between the parties. Therefore, PIC and compensatory liability rules are a priori two opposite notions. However, if both notions cannot simultaneously apply, they can apply at different moments. For instance, at a preliminary stage, TK holders can give their prior informed consent for placing their knowledge in a system applying compensatory liability for the determination of compensation and then, in a second stage, make the information held in this system accessible for users under a compensatory liability rule.

Compensatory liability rules are useful because they reduce transaction costs. In a context of collective innovation, exchanges of knowledge are very frequent. Obtaining prior informed consent might be lengthy and negotiating compensation for each transaction might be difficult, especially because the value of a piece of knowledge is difficult to evaluate before a commercial product is put on the market. Therefore, compensatory liability rules can potentially reduce transaction costs and facilitate collective innovation by suppressing the need for individual negotiations

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<sup>15</sup> See <http://www.gnu.org/home.html>

<sup>16</sup> See <http://www.creativecommons.org>

<sup>17</sup> See notably Jerome Reichman (2000), "Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation" 53 VANDERBILT LAW REVIEW 6 at 1743 or Tracy Lewis and Jerome Reichman (2005) "Using Compensatory Liability Rules to Stimulate Innovation in Developing Countries" in Keith Maskus and Jerome H. Reichman (eds.) *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime*, Cambridge University Press (to be published in May 2005)

for PIC and providing a standardized set of terms and conditions to apply to valuation of the transferred knowledge.

An additional step to reduce transaction costs and facilitate knowledge exchange might be the use of collective administration and management of IP rights mentioned in document 7/5, paragraph B.8(g). A compensatory liability rule could reduce one kind of transaction costs sometimes referred as bargaining cost, that is to say the cost of negotiating compensation and other conditions of access. Collective management of rights may also help reduce other types of transaction costs. This could potentially help TK holders and potential users to identify each other, reducing search costs. It can also reduce enforcement costs by helping TK holders to monitor the use of their knowledge and sanction misappropriation.

Development of any compensatory liability regime would likely involve the use of collection societies for the collection and distribution of benefits. This could help to reduce transaction costs. Collection societies established, managed and run by indigenous and local community organizations could help to develop more community sensitive negotiating strategies promote collective interests of local and indigenous communities and develop the portfolios of knowledge necessary to negotiate major agreements with industry. Once again these are issues which require the full and active involvement of indigenous and local communities in their consideration and development.

As a conclusion, UNU-IAS would like to insist that whatever means is taken it should be recognized that any system, which is developed without the full and effective participation of indigenous and local communities, will be unlikely to succeed. Therefore, at the earliest possible moment there will be a need for a concerted international consultation process with local and indigenous communities to secure their informed and active participation

UNU-IAS welcomes the opportunity, which WIPO through the IGC has provided for the receipt of commentaries on these important documents. The Institute looks forward to continuing to play an active role in the work of the IGC and to submitting further input to the development of international law and policy in this area.