

A New Norm-Maker on the IP-Creating Bloc: China's Push to Advance Equity Through WIPO

Julia Wang*

On May 24, 2024, the Member States of the World Intellectual Property Organization (WIPO) adopted the historic Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge (GRATK Treaty). This agreement comes after decades of negotiations and advocacy primarily by Indigenous peoples, local communities, and developing countries, which have long advocated for an international framework to protect against the misappropriation of genetic resources (GRs), traditional knowledge (TK), and traditional cultural expressions (TCEs).

As the first disseminators of intellectual property (IP) laws, developed countries have had the most bargaining power in international IP lawmaking, often prioritizing their own economic interests at the expense of those of developing countries. However, China's rise as an aggregate IP creator, along with its greater engagement in multilateral fora, has allowed it to introduce new norms within international IP negotiations. Although the global IP regime typically favors developed countries, the new GRATK Treaty, as well as the continuing negotiations on TK and TCEs, signal a shift in international IP lawmaking by advancing a norm of equity that benefits China and other developing countries.

In this Note, I analyze the ways that China has promoted its own interests, as well as those of other developing countries, within WIPO and other multilateral fora on the issues of GRs, TK, and TCEs. I argue that China wants to be seen as a leader in international IP lawmaking, exemplified by its building of coalitions with other developing countries, enhancing of its own negotiating leverage within

DOI: <https://doi.org/10.15779/Z38MG7FZ0S>

* J.D. 2024, University of California, Berkeley, School of Law; Judicial Law Clerk, United States District Court for the District of Oregon. Many thanks to Annie Di for conversations that inspired a large part of this research and to Professor Katerina Linos and my classmates in International Organizations for thoughtful comments and questions that greatly improved this Note. I am also very grateful to Sara Siler, Jona Boçari, Maya Prakash, Amelia Zoernig, and the *Berkeley Journal of International Law* team for their excellent editorial assistance and feedback.

the global IP regime, and offering of domestic initiatives as “bottom-up” examples for international lawmaking. China’s actions, in concert with the efforts of other developing countries, led to the remarkable convening of the diplomatic conference on GRs and associated TK and subsequent treaty. As China continues to devise its own IP strategy, it appears to be building goodwill among developing countries to establish itself as a future norm-maker in the global arena of IP lawmaking.

Introduction	64
I. The Global Intellectual Property Regime	67
A. Origins of WIPO	68
B. Development of TRIPS	69
C. Regime Shifting in Intellectual Property	70
II. Norm-Shifting in Intellectual Property	71
A. Norm-Breakers, Takers, Shakers, and Makers	72
B. China’s Rise as an Aggregate IP Creator	74
C. China’s Rise as an IP Norm-Maker	76
III. Advancing Equity in International IP Lawmaking	78
A. Equity as a Norm	79
B. IP Issues in GRs, TK, and TCEs	80
1. Access and Benefit-Sharing	80
2. Patent Disclosure	81
3. Tiered Protection of TK and TCEs	83
C. Pursuit of International Treaties for GRs, TK, and TCEs	85
1. China’s Initial Passivity	85
2. China’s Alignment with Demandeurs	87
3. China’s Active Role in Negotiations	89
4. 2024 Diplomatic Conference and Treaty	90
5. Continued Work on TK and TCEs	93
D. Challenges and Implications	95
Conclusion	97

INTRODUCTION

WIPO’s most important objective is “to promote the protection of intellectual property throughout the world.”¹ However, countries have vastly

1. Convention Establishing the World Intellectual Property Organization, pmbl., July 14, 1967, 828 U.N.T.S. 3 [hereinafter WIPO Convention]; Arpad Bogsch, *Brief History of the First 25 Years of the World Intellectual Property Organization*, in *THE FIRST TWENTY-FIVE YEARS OF THE WORLD*

differing views of what types of “intellectual property” should be promoted and protected. Since the establishment of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994,² parties have made 44 requests for consultation under TRIPS before the Dispute Settlement Body (DSB) of the World Trade Organization (WTO).³ Early on, these requests for consultation were made almost exclusively by the United States and European Union, often against developing States like Indonesia, India, Argentina, Brazil, and China.⁴ Since 2010, countries like India, Honduras, Qatar, and China have also brought claims of TRIPS violations before the DSB, largely against developed States,⁵ but these claims come in the midst of US efforts to dismantle the WTO’s dispute settlement system on the grounds that the DSB fails to protect US interests.⁶

Developing countries have long argued that the global IP regime protects the economic interests of developed countries at their expense.⁷ As early as the 1970s, there have been concerns over bioprospecting or biopiracy, through which ethnopharmacologists used traditional practices among Indigenous and local communities to develop biotechnological innovations, resulting in a “wave of

INTELLECTUAL PROPERTY ORGANIZATION, FROM 1967 TO 1992 31 (World Intell. Prop. Org. ed., 1992).

2. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

3. *Disputes Concerning the TRIPS Agreement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/intel5_e.htm (last visited Mar. 16, 2025) (click “search” under “Search Documents Online”; then filter by keyword “Requests for consultations”).

4. See, e.g., Request for Consultations by the United States, *Indonesia—Certain Measures Affecting the Automobile Industry*, WTO Doc. WT/DS59/1 (Oct. 15, 1996); Request for Consultations by the European Communities, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS79/1 (May 6, 1997); Request for Consultations by the United States, *Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals*, WTO Doc. WT/DS171/1 (May 10, 1999); Request for Consultations by the United States, *Brazil—Measures Affecting Patent Protection*, WTO Doc. WT/DS199/1 (June 8, 2000); Request for Consultations by the European Communities, *China—Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, WTO Doc. WT/DS372/1 (Mar. 5, 2008).

5. See, e.g., Request for Consultations by India, *European Union and a Member State—Seizure of Generic Drugs in Transit*, WTO Doc. WT/DS408/1 (May 19, 2010); Request for Consultations by Honduras, *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/1 (Apr. 10, 2012); Request for Consultations by Qatar, *Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/1 (Oct. 4, 2018); Request for Consultations by China, *United States—Measures on Certain Semiconductor and Other Products, and Related Services and Technologies*, WTO Doc. WT/DS615/1 (Dec. 15, 2022).

6. Jennifer Hillman, *A Reset of the World Trade Organization’s Appellate Body*, COUNCIL ON FOREIGN RELS. (Jan. 14, 2020), <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body>.

7. See Peter Drahos, *Developing Countries and International Intellectual Property Standard-Setting*, 5 J. WORLD INTELL. PROP. 765, 767–69 (2002); EMMANUEL HASSAN, OHID Yaqub & STEPHANIE DIEPEVEEN, RAND CORP., INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES: A REVIEW OF THE LITERATURE 1 (2010), https://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR804.pdf.

exploitation” by multinational corporations.⁸ Since then, countries have criticized the lack of protection of genetic resources (GRs),⁹ traditional knowledge (TK),¹⁰ and traditional cultural expressions (TCEs),¹¹ as well as the decontextualization of their significance through their commercialization.¹² Since 1999, WIPO has acknowledged the urgent need to prevent misappropriation of these resources and knowledge. In 2001, it created the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC) to provide a multilateral forum for discussing and negotiating these issues. After 25 years of negotiations, WIPO Member States convened a historic diplomatic conference in May 2024, in which they adopted the groundbreaking Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge (GRATK Treaty).¹³ Despite this significant step, however, there is no international agreement regarding the protection of TK more generally, or of TCEs.

Of note is China’s evolving role in these negotiations, through which the dynamics of international IP lawmaking seem to have begun to change. Although the global IP regime typically promotes the interests of developed countries, the negotiations of international protections for GRs, TK, and TCEs over the past two decades represent a shift in international IP lawmaking, in which China and other

8. Martin Fredriksson, *Dilemmas of Protection: Decolonising the Regulation of Genetic Resources as Cultural Heritage*, 27 INT’L J. HERITAGE STUD. 720, 722 (2021).

9. Genetic resources (GRs) are any material of plant, animal, microbial, or other origin of actual or potential value, like plant varieties, animal breeds, and genetic sequences. *Genetic Resources*, World Intell. Prop. Org., <https://www.wipo.int/tk/en/genetic> (last visited Mar. 16, 2025); see also Convention on Biological Diversity, art. 2, *opened for signature* June 5, 1992, 1750 U.N.T.S. 79 (entered into force Dec. 29, 1993).

10. Traditional knowledge (TK) is knowledge, know-how, skills, and practices that are developed, sustained, and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. *Traditional Knowledge*, World Intell. Prop. Org., <https://www.wipo.int/tk/en/tk/> (last visited Mar. 16, 2025).

11. Traditional cultural expressions (TCEs) can be considered any forms in which traditional culture is expressed, such as music, dance, art, performances, ceremonies, and narratives. *Traditional Cultural Expressions*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/tk/en/folklore/> (last visited Mar. 16, 2025). States have used the terms “traditional cultural expressions” and “expressions of folklore” interchangeably in WIPO discussions. I use the term “traditional cultural expressions” to encompass both ideas because it is the term that States have used in negotiations.

12. See STEFAN GROTH, *Negotiation Tradition on the Global Stage*, in NEGOTIATING TRADITION: THE PRAGMATICS OF INTERNATIONAL DELIBERATIONS ON CULTURAL PROPERTY 25, 34 (2012) (describing WIPO and UNESCO’s work in the 1970s and 1980s on the possibility of developing an international treaty on folklore); RUTH L. OKEDIJI, CTR. FOR INT’L GOVERNANCE INNOVATION, TRADITIONAL KNOWLEDGE AND THE PUBLIC DOMAIN 3–4 (2018); Bram De Jonge & Niels Louwaars, *The Diversity of Principles Underlying the Concept of Benefit Sharing*, in GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND THE LAW: SOLUTIONS FOR ACCESS AND BENEFIT SHARING 37, 38–39 (Evanson C. Kamau & Gerd Winter eds., 2009); Fredriksson, *supra* note 8, at 722–23.

13. Press Release, World Intell. Prop. Org., WIPO Member States Adopt Historic New Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge (May 24, 2024), https://www.wipo.int/pressroom/en/articles/2024/article_0007.html [hereinafter Member States Adopt Historic New Treaty].

developing countries are advancing the norm of equity to achieve their IP objectives. As China rises as an aggregate IP creator and stronger voice in multilateral negotiations, it not only benefits from the heightened IP standards promoted by developed countries but also seeks to advance stronger protections for GRs, TK, and TCEs, an area of particular domestic importance. China's role in the extended negotiations over GRs, TK, and TCEs is a unique instance of the country pushing a positive norm in IP lawmaking, contrary to the frequent claims of China's violations of other countries' intellectual property.¹⁴ Notably, it is also a positive norm opposed by developed countries, primarily on the grounds that it will impose additional and unnecessary burdens on innovation. In this context, China seeks to be a norm-maker in international IP lawmaking, especially on the issues of GRs, TK, and TCEs.¹⁵ To develop its norm-making ability, it has built coalitions with other developing countries, increased its own negotiating leverage within the global IP regime, and created domestic examples of laws regarding GRs, TK, and TCEs to support a "bottom-up" lawmaking approach.

Part I explains the role of developed countries in creating the modern global IP regime. Part II describes norm-shifting within international IP lawmaking and the rise of China as a new power player and norm-maker in this space. Part III analyzes China's role in pushing forward the norm of equity in the negotiations for protection of GRs, TK, and TCEs within WIPO.

I. THE GLOBAL INTELLECTUAL PROPERTY REGIME

To understand the magnitude of China's rise in international IP lawmaking, it is important to briefly review the history of IP law and the importance of US and European interests in the development of these standards. The global IP regime consists of two major international organizations: WIPO and WTO. While WIPO administers 26 treaties, covering basic IP protection standards, the harmonization of global filing systems, and the creation of classification systems,¹⁶ the WTO instead administers one of the most important IP treaties, the TRIPS agreement. TRIPS is the most comprehensive multilateral agreement on intellectual property to date and folds into the WTO an enhanced set of patent,

14. JON BATEMAN, CARNEGIE ENDOWMENT FOR INT'L PEACE, *Countering Unfair Chinese Economic Practices and Intellectual Property Theft*, in U.S.-CHINA TECHNOLOGICAL "DECOUPLING" 97, 97-98 (2022); Anshu Siripurapu & Noah Berman, *The Contentious U.S.-China Trade Relationship*, COUNCIL ON FOREIGN RELS. (Dec. 2, 2022), <https://www.cfr.org/backgroundunder/contentious-us-china-trade-relationship>.

15. See Tracy Qu & Jane Zhang, *China Wants to Be a "Powerful Intellectual Property Nation" by 2035 Amid Tech Race with the US*, S. CHINA MORNING POST (Sept. 23, 2021), <https://www.scmp.com/tech/policy/article/3149818/china-wants-be-powerful-intellectual-property-nation-2035-amid-tech>.

16. *WIPO-Administered Treaties*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/treaties/en/> (last visited Mar. 16, 2025).

copyright, trademark, and other private rights for IP owners.¹⁷ Together, WIPO and WTO coordinate the modern global regime of IP protection.

A. *Origins of WIPO*

The Paris Convention for the Protection of Industrial Property, adopted in 1883, was the first major step in helping creators protect their intellectual works in other countries, providing protections for patents, trademarks, utility models, and industrial designs.¹⁸ The Berne Convention for the Protection of Literary and Artistic Works soon followed in 1886, giving creators the right to control and receive payment for their creative works.¹⁹ Both Conventions established their respective Unions, creating a set of (mostly developed) countries that committed to protecting intellectual property on a global scale.

The secretariats created to administer both conventions, as well as their successor, the United International Bureaux for the Protection of Intellectual Property (BIRPI), were under the “high supervision” (*haute surveillance*) of the Swiss government.²⁰ By the early 1960s, BIRPI had developed into an international secretariat, administering not only the two Conventions but also the “special agreements” concluded under the Paris Convention.²¹ In 1967, at the Stockholm Conference, the Unions effectuated a number of proposed reforms by concluding the Convention Establishing the World Intellectual Property Organization (WIPO Convention) and revising a number of important substantive provisions of the Paris and Berne Conventions and five special agreements.²² And thus, WIPO was created.

Because the WIPO Convention formally organized WIPO in a manner similar to that of United Nations (UN) Specialized Agencies, the question of the organization becoming a Specialized Agency arose. Becoming a Specialized Agency would help give WIPO’s work worldwide recognition, increase developing country membership in the organization, and streamline staff salaries

17. *TRIPS—Trade-Related Aspects of Intellectual Property Rights*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/trips_e.htm (last visited Mar. 16, 2025); Laurence Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1, 2 (2004).

18. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305; *Paris Convention for the Protection of Industrial Property*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/treaties/en/ip/paris/>.

19. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221; *Berne Convention for the Protection of Literary and Artistic Works*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/treaties/en/ip/berne/> (last visited Mar. 16, 2025).

20. Bogsch, *supra* note 1, at 21.

21. *Id.* These “special agreements” include the 1891 Madrid Agreement Concerning the International Registration of Marks, 1891 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, 1925 Hague Agreement Concerning the International Deposit of Industrial Designs, 1957 Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, and 1958 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration.

22. *Id.* at 24. See generally WIPO Convention.

and working conditions.²³ This proposal, however, raised tensions between developed and developing States. While some feared that developing countries would become a majority of WIPO membership and weaken, rather than strengthen, IP protection standards, other States argued that there were greater benefits to including developing countries in the international system to extend IP protection all over the world.²⁴ Ultimately, WIPO became a UN Specialized Agency in 1974, after the conclusion of a bilateral WIPO-UN agreement, and many developing countries joined the global IP regime for the first time.²⁵

B. Development of TRIPS

Despite the higher proportion of developed country seats in its primary decision-making bodies,²⁶ WIPO has typically been perceived as more friendly to developing countries.²⁷ Since the 1970s, the United States has been concerned with its inability to raise standards of patent protection within WIPO.²⁸ After several failed WIPO negotiations, in contrast to its success in linking IP protections to trade through bilateral consultations, the United States began to shift to a multilateral approach in its pursuit of increased protection standards.²⁹ Together with the then-European Community, the United States sought another way to achieve its IP protection objectives and found one in the General Agreement on Tariffs and Trade (GATT) and WTO.

The United States, with the European Community and Japan's support, pressed to include IP issues in the 1986 mandate of the Uruguay Round of GATT negotiations. Institutional benefits, such as the United States and European Community's significant negotiating leverage in GATT, the ability to link IP

23. Bogsch, *supra* note 1, at 28.

24. *Id.* at 28–29.

25. G.A. Res. 3346 (XXIX), annex, Agreement Between the United Nations and the World Intellectual Property Organization (Dec. 17, 1974).

26. See NIRMALYA SYAM, S. CTR., MAINSTREAMING OR DILUTION? INTELLECTUAL PROPERTY AND DEVELOPMENT IN WIPO 9–12 (2019), https://www.southcentre.int/wp-content/uploads/2019/07/RP95_Mainstreaming-or-Dilution-Intellectual-Property-and-Development-in-WIPO_EN.pdf.

27. See Ahmed Abdel-Latif, *Revisiting the Creation of the IGC: The Limits of Constructive Ambiguity?*, in PROTECTING TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 10, 23 (Daniel F. Robinson, Ahmed Abdel-Latif & Pedro Roffe eds., 2017); Helfer, *supra* note 17, at 20; WORLD INTELL. PROP. ORG., THE 45 ADOPTED RECOMMENDATIONS UNDER THE WIPO DEVELOPMENT AGENDA (2007) [hereinafter 2007 WIPO DEVELOPMENT AGENDA], <https://www.wipo.int/export/sites/www/ip-development/en/agenda/docs/recommendations.pdf>. But see SARA BANNERMAN, *The Role and Inclusion of Developing Countries in International Copyright*, in INTERNATIONAL COPYRIGHT AND ACCESS TO KNOWLEDGE 128, 128 (2016) (arguing that the Development Agenda has entrenched “WIPO’s view of intellectual property as a ‘power tool’ for development” in its partial success in giving developing countries greater influence in WIPO); SYAM, *supra* note 26, at 32–33 (arguing that the polarization of views regarding development has “rejected” or “watered down” many of the original proposals by developing countries).

28. See Helfer, *supra* note 17, at 20.

29. See *id.* at 20–21.

protection with other issue areas under a global “package deal,” and the greater effectiveness of the GATT dispute settlement system, made GATT a much more promising forum for raising IP protection standards.³⁰ By 1994, the United States and European Community had succeeded in incorporating internationally enforceable IP norms into the world trading system.³¹ TRIPS revolutionized international IP law by enhancing substantive rules found in preexisting WIPO agreements and imposing a comprehensive set of IP standards that originated from developed countries onto the entire WTO membership.³²

C. Regime Shifting in Intellectual Property

Overall, the traditional narrative of the international movement of IP standards has been a flow from developed to developing countries.³³ In many cases, the transplant of IP laws to developing countries resulted from empire building and colonization.³⁴ By the time many of these countries gained independence, they were confronted by a system designed by former colonial powers to suit their economic interests.³⁵ As developing countries began questioning the norms that had been previously established, they sought to amend the international copyright and patent regimes to align IP law more closely with their interests.³⁶ However, efforts to achieve either objective were unsuccessful.³⁷ Moving the process of heightening IP protections from WIPO to WTO further showed the dominance of developed countries in IP lawmaking. Given the entrenchment of developed countries’ control over IP law, China’s rise within this space seems even more remarkable.

Recent developments warrant a more nuanced understanding of the current state of international IP law. While the United States, Japan, and many European countries have benefited from regime shifting, the move from WIPO to TRIPS did not overshadow WIPO.³⁸ Rather, it established a new regime for trade-related IP lawmaking with greater specialization, in which the two organizations share authority according to their respective areas of expertise: for WTO, implementation, enforcement, and dispute settlement; for WIPO, treaty negotiation and administration, and technical assistance.³⁹

30. *Id.* at 21–22; Tai-Heng Cheng, *Power, Norms, and International Intellectual Property Law*, 28 MICH. J. INT’L L. 109, 130 (2006).

31. Helfer, *supra* note 17, at 23; *see also* TRIPS Agreement, *supra* note 2.

32. Helfer, *supra* note 17, at 23.

33. Drahos, *supra* note 7, at 766.

34. *See* Marie Seong-Hak Kim, *Ume Kenjirō and the Making of Korean Civil Law, 1906–1910*, 34 J. JAPANESE STUD. 1, 21–22 (2008); Drahos, *supra* note 7, at 767; Nari Lee, *Intellectual Property Law in China—From Legal Transplant to Governance*, in GOVERNANCE OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPE 5, 7–8 (2016) [hereinafter GOVERNANCE OF IP RIGHTS].

35. Drahos, *supra* note 7, at 767.

36. *Id.* at 768–69.

37. *Id.* at 769.

38. *Id.*; Helfer, *supra* note 17, at 25.

39. Helfer, *supra* note 17, at 25.

This dual-organization system has ultimately facilitated the expansion of IP standards.⁴⁰ WIPO, in which developing countries retain considerable influence, is “exceptionally active in negotiating new treaties and in undertaking an ambitious program of soft lawmaking.”⁴¹ Moreover, “WIPO’s increased output has begun to create a normative feedback loop in the WTO, influencing both TRIPS dispute settlement and Member States’ proposals to amend or supplement TRIPS.”⁴² Through their own uses of regime shifting, developing countries have also expanded IP lawmaking to diverse international fora with values that are more closely aligned with their interests.⁴³ With WIPO’s continued importance in international IP lawmaking, along with growing criticisms of the WTO and TRIPS,⁴⁴ the global IP regime appears ready for new norms. And China, in particular, seems willing to step up as a future norm-maker.

II. NORM-SHIFTING IN INTELLECTUAL PROPERTY

Understanding the significance of China’s actions within the global regime requires a review of the role of norms and norm-shifting in international IP lawmaking. Norms generally refer to standards and expectations of appropriate behavior, expressing certain values and the means of realizing those values.⁴⁵ Developed countries have leveraged their negotiating power to create a global IP regime that values strengthened IP protections and stricter enforcement.⁴⁶ As China has risen as an aggregate IP creator and worked together with other developing countries, it has engendered the greater influence of the norm of equity in IP negotiations. This shift is exemplified by China’s push to use international IP lawmaking to extend higher standards to the area of genetic resources (GRs), traditional knowledge (TK), and traditional cultural expressions (TCEs), which raises conflicts with many of the current IP regime’s dominant norms. As such, China is emerging as a new norm-maker through proactively advancing the norm of equity within the global IP sphere.

40. *Id.*

41. *Id.* at 25–26 (footnotes omitted).

42. *Id.* at 26.

43. *Id.* at 6.

44. See Mark L. Movsesian, *Sovereignty, Compliance, and the World Trade Organization: Lessons from the History of Supreme Court Review*, 20 MICH. J. INT’L L. 775, 778–79 (1999); Helfer, *supra* note 17, at 24. But see Joshua Meltzer, *State Sovereignty and the Legitimacy of the WTO*, 26 U. PA. J. INT’L ECON. L. 693, 696 (arguing that the effects of the WTO on states’ sovereignty and the legitimacy of the WTO will vary between states and that WTO can be understood as a positive force for sovereignty).

45. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 891 (1998); Tore Nyhamar, *How Do Norms Work? A Theoretical and Empirical Analysis of African International Relations*, 5 INT’L J. PEACE STUD. 27, 28 (2000).

46. See T. Cheng, *supra* note 30, at 112.

A. Norm-Breakers, Takers, Shakers, and Makers

The economic importance of intellectual property invites a form of norm competition, in which different norms, laws, and standards on IP use and protection compete on an international scale.⁴⁷ Participants in the IP system want to preserve the economic value of their own intellectual property and gain economic benefits from third-party users of their intellectual property.⁴⁸ As such, aggregate IP creators, like the United States, Japan, and Germany, consistently advocate for greater IP protections.⁴⁹ Conversely, states also want to lower the cost of using and accessing others' intellectual property.⁵⁰ Aggregate IP users, such as India and Mexico, thus often object to stronger IP protections at multilateral trade negotiations.⁵¹ Given the dominance of aggregate IP creators in international lawmaking, the norms of strengthened IP protections and stricter enforcement have guided the global regime toward higher standards.⁵² These norms affect the creation of international IP instruments, which "usually develop 'bottom-up' by building upon and harmonizing existing national regimes that are considered 'successful' and representative of widespread practice."⁵³

To understand a country's engagement with international and regional norms, scholars have advanced the typology of norm-breaker, norm-taker, norm-shaker, and norm-maker.⁵⁴ A norm-breaker refuses or fails to conform to established norms, whereas a norm-taker accepts those norms.⁵⁵ A norm-shaker undermines, challenges, or disrupts norms to test their boundaries on a defensive basis, whereas a norm-maker creates new norms on a proactive basis.⁵⁶ Building

47. Lee, *supra* note 34, at 5.

48. T. Cheng, *supra* note 30, at 114–15.

49. *Id.* at 115.

50. *Id.*

51. *Id.*

52. *See id.* at 112.

53. Wend Wendland, *Multilateral Matters #4: Intellectual Property Norm-Building: Some Reflections on the Interplay Between the National and International Dimensions*, UNIV. OF CAPE TOWN INTELL. PROP. UNIT (Sept. 3, 2019) [hereinafter *IP Norm-Building*], <http://ip-unit.org/2019/multilateral-matters-4-intellectual-property-norm-building-some-reflections-on-the-interplay-between-the-national-and-international-dimensions-2/>.

54. *See* Peter K. Yu, *The Middle Kingdom and the Intellectual Property World*, 13 OR. REV. INT'L L. 209, 211–12 (2011) [hereinafter *Middle Kingdom*]; Henry Gao, *China's Ascent in Global Trade Governance: From Rule Taker to Rule Shaker and Maybe Rule Maker?*, in MAKING GLOBAL TRADE GOVERNANCE WORK FOR DEVELOPMENT: PERSPECTIVES AND PRIORITIES FROM DEVELOPING COUNTRIES 153 (Carolyn Deere Birkbeck ed., 2011); Sikina Jinnah, *Makers, Takers, Shakers, Shapers: Emerging Economies and Normative Engagement in Climate Governance*, 23 GLOB. GOVERNANCE 285, 287–89 (2017); CARMEN WUNDERLICH, *The Ugly? Rogue States as Norm Entrepreneurs*, in ROGUE STATES AS NORM ENTREPRENEURS: BLACK SHEEP OR SHEEP IN WOLVES' CLOTHING? 71, 71–72 (Antje Wiener ed., 2020) [hereinafter *ROGUE STATES AS NORM ENTREPRENEURS*].

55. *See* Peter K. Yu, *The Rise of China in the International Intellectual Property Regime*, in HANDBOOK ON THE INTERNATIONAL POLITICAL ECONOMY OF CHINA 424, 426–29 (Ka Zeng ed., 2019).

56. *Id.*

on this basic typology, some scholars have illuminated further nuances in the roles that a state can play, including norm-entrepreneur (who advocates for the adoption or institutionalization of a norm), norm-defender (who attempts to protect or defend the status quo), and norm-resister (who opposes the norm-making role of others).⁵⁷ These complexities illustrate that norm socialization is “not unilinear, but rather ‘two-way’ or ‘reciprocal,’ wherein developing countries are both socializees and socializers of international norms.”⁵⁸

Discussion of China’s engagement with international norms typically focuses on norm-breaking and norm-taking.⁵⁹ As a norm-breaker, China has often been criticized for infringing IP standards. For example, nearly every year the US Trade Representative puts China on its Watch List or Priority Watch List for serious concerns about “particular problems [that] exist . . . with respect to IP protection, enforcement, or market access for US persons relying on IP,” such as its forced technology transfer policies or discrimination against foreign entities.⁶⁰ In terms of norm-taking, scholars have examined phenomena like China’s IP reform and acceptance of WTO-plus commitments to enter the WTO and the attempted transfer of EU-specific norms and standards to China through recent EU technical assistance programs.⁶¹

More recently, however, this discussion has expanded to norm-shaking and norm-making.⁶² Scholars have focused on China’s pragmatism in engaging in IP reforms, balancing external pressures with domestic needs when selecting which reforms to enact and which to ignore.⁶³ China’s actions post-WTO membership also demonstrate its selective challenges against or introduction of norms within IP lawmaking. For example, China joined a group of developing countries in 2006 to propose a new Article 29*bis* into the TRIPS Agreement that would create a disclosure obligation, which received wide support from many developing countries and strong opposition from the United States and Japan.⁶⁴ Although this

57. See, e.g., Jinnah, *supra* note 54, at 289.

58. *Id.* at 288 (emphases omitted).

59. Peter K. Yu, *Building Intellectual Property Infrastructure Along China’s Belt and Road*, 14 U. PA. ASIAN L. REV. 275, 304 (2019) [hereinafter *Building IP Infrastructure*].

60. Peter K. Yu, *The Transplant and Transformation of Intellectual Property Laws in China*, in GOVERNANCE OF IP RIGHTS, *supra* note 34, at 28 [hereinafter *Transplant and Transformation*]; see OFF. OF THE U.S. TRADE REPRESENTATIVE, 2022 SPECIAL 301 REPORT 6, 44–53 (2022), <https://ustr.gov/sites/default/files/IssueAreas/IP/2022%20Special%20301%20Report.pdf>; Jyh-An Lee, *Forced Technology Transfer in the Case of China*, 26 B.U. J. SCI. & TECH. L. 324, 326 (2020); Keith E. Maskus, *China’s Uneasy Engagement with Intellectual Property Reforms During Its Globalization*, 22 BROWN J. WORLD AFFS. 137, 142 (2016).

61. See Yu, *Middle Kingdom*, *supra* note 54, at 223; Natalia Wyzycka & Reza Hasmath, *The Impact of the European Union’s Policy Towards China’s Intellectual Property Regime*, 38 INT’L POL. SCI. REV. 549, 550 (2017).

62. Yu, *Building IP Infrastructure*, *supra* note 59, at 304; Yu, *Transplant and Transformation*, *supra* note 60, at 29.

63. See Maskus, *supra* note 60, at 146–47; Pitman Potter, *China and the International Legal System: Challenges of Participation*, in CHINA’S LEGAL SYSTEM: NEW DEVELOPMENTS, NEW CHALLENGES 145, 147–48 (Donald C. Clarke ed., 2008).

64. See Yu, *Middle Kingdom*, *supra* note 54, at 239.

attempt failed, China has used later bilateral agreements and domestic legal reform to garner greater support for a disclosure requirement in multilateral fora.⁶⁵ China has also strengthened protections for its own geographical indications, such as Jingdezhen porcelain, Pu'er and Tie Guanyin teas, and Longquan celadon, through bilateral treaties.⁶⁶ These actions demonstrate that China seeks ways to advance its own interests and make its IP regime work for its domestic constituents while building broader support for these equitable principles in bilateral and multilateral arenas.

B. China's Rise as an Aggregate IP Creator

To contextualize China's role as a norm-maker, it is important to understand the impact of external and internal pressures in the development of its domestic IP regime and the magnitude of its rise as an aggregate IP creator. Initially, China's IP laws and regulations were largely transplanted from developed countries, with limited modifications.⁶⁷ China introduced its first set of modern IP laws at the turn of the twentieth century after much pressure from colonial powers and foreign trading partners.⁶⁸ When China re-opened trade in the 1970s, it signed a trade agreement with the United States, which called for reciprocal protection of copyrights, patents, and trademarks.⁶⁹ In the late 1980s and early 1990s, the United States threatened China "with a series of economic sanctions, trade wars, non-renewal of most-[favored]-nation status[,] and opposition to China's entry into the [WTO]" to incentivize further IP reform.⁷⁰ During these decades, China adopted domestic copyright and unfair competition laws, amended its trademark and patent laws, joined WIPO, and acceded to the Paris and Berne Conventions.⁷¹

65. See *id.* at 245; see, e.g., Free Trade Agreement between the People's Republic of China and the Swiss Confederation, China-Switz., art. 11.9, July 6, 2013 [hereinafter China-Switz. FTA], https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Freihandelsabkommen/partner_fha/partner_weltweit/china/Abkommensteile.html; Free Trade Agreement between the People's Republic of China and Costa Rica, China-Costa Rica, art. 111, Apr. 8, 2010 [hereinafter China-Costa Rica FTA], <http://fta.mofcom.gov.cn/topic/encosta.shtml>.

66. See, e.g., Agreement between the Government of the People's Republic of China and the Government of the Republic of Chile on Revising China-Chile Free Trade Agreement and Supplementary Agreement on Trade in Services of the Free Trade Agreement, China-Chile, art. 10, Nov. 11, 2017, http://fta.mofcom.gov.cn/topic/china_chile_upgrade.shtml; China-Switz. FTA, *supra* note 65, at art. 11.13; China-Costa Rica FTA, *supra* note 65, at art. 116; Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Peru, China-Peru, Annex 10, Apr. 28, 2009, <http://fta.mofcom.gov.cn/topic/enperu.shtml>.

67. Peter K. Yu, *When the Chinese Intellectual Property System Hits 35*, 8 QUEEN MARY J. INTELL. PROP. 3, 4 (2018) [hereinafter *Chinese IP System Hits 35*].

68. Yu, *Transplant and Transformation*, *supra* note 60, at 22.

69. Yu, *Chinese IP System Hits 35*, *supra* note 67, at 4.

70. Yu, *Transplant and Transformation*, *supra* note 60, at 25.

71. Yu, *Chinese IP System Hits 35*, *supra* note 67, at 3–4.

A second phase of standardization and customization began when China prepared to join the WTO.⁷² To ensure that its IP system complied with TRIPS, China amended its Patent Law again in 2000 and Copyright and Trademark Laws in 2001.⁷³ Notwithstanding China's willingness to make significant sacrifices to join the WTO,⁷⁴ these changes were also a way to adapt its IP system to changing local conditions, like the emergence of private property rights, increasing concerns about state-owned enterprises, and the government's active push for modernization.⁷⁵

After joining the WTO in 2001, China began to indigenize and transform IP laws to suit its interests. Although it initially kept a low profile, China became more assertive a few years into WTO membership.⁷⁶ For example, it announced a National Intellectual Property Strategy in 2008 and National Patent Development Strategy for 2011–2020, reflecting an internal push to become an aggregate IP creator.⁷⁷ The patent development strategy set an annual target for patent applications at two million by 2015, and although the then-director of the US Patent and Trademark Office found the goal “mind-blowing,” China reached that figure in 2012, three years early.⁷⁸ Alongside these policy developments, China overhauled its IP system by again amending its three major IP statutes.⁷⁹

These advances have succeeded in making China a significant IP player. In 2010, China ranked forty-third in the world in the Global Innovation Index, and by 2023, it had skyrocketed up to twelfth in the world, and first in its income group.⁸⁰ In 2022, IP offices in Asia received more than two-thirds of world IP filings for industrial designs, patents, trademarks, and utility models.⁸¹ China accounted for 46.8 percent of all total patent and utility model applications, 48.3 percent of total trademark applications, and 53.8 percent of industrial design applications.⁸² In China, the number of patents in force has increased from

72. *Id.* at 4.

73. *Id.* at 5.

74. Yu, *Transplant and Transformation*, *supra* note 60, at 26.

75. Yu, *Chinese IP System Hits 35*, *supra* note 67, at 5.

76. *Id.*

77. *See id.*; Changyu Shen, *China—On Course to Become an IP Powerhouse*, WIPO MAG. (Nov. 2016), https://www.wipo.int/wipo_magazine/en/2016/si/article_0002.html.

78. Yu, *Chinese IP System Hits 35*, *supra* note 67, at 5.

79. *Id.*

80. WORLD INTELL. PROP. ORG., *THE GLOBAL INNOVATION INDEX 2011: ACCELERATING GROWTH AND DEVELOPMENT* xviii (2011), https://www.wipo.int/edocs/pubdocs/en/economics/gii/gii_2011.pdf; WORLD INTELL. PROP. ORG., *GLOBAL INNOVATION INDEX 2022: INNOVATION IN THE FACE OF UNCERTAINTY* 19 (2023), <https://www.wipo.int/edocs/pubdocs/en/wipo-pub-2000-2023-en-main-report-global-innovation-index-2023-16th-edition.pdf>.

81. WORLD INTELL. PROP. ORG., *WIPO IP FACTS AND FIGURES 2023* 7 fig.2 (2023) [hereinafter 2023 FACTS & FIGURES], <https://www.wipo.int/edocs/pubdocs/en/wipo-pub-943-2023-en-wipo-ip-facts-and-figures-2023.pdf>.

82. *Id.* at 9 fig.4, 16 fig.11, 21 fig.16.

600,000 in 2010 to almost 1.5 million in 2015 and 4.2 million in 2022.⁸³ China also currently has over half of active trademarks and almost half of industrial design registrations in force in the world.⁸⁴ China clearly seeks to continue this dominance, as shown when it unveiled its 15-year “Guidelines for Building a Powerful Intellectual Property Nation” for 2021 to 2035.⁸⁵ By developing as an IP powerhouse, China is increasing its bargaining power for future IP negotiations.

C. China’s Rise as an IP Norm-Maker

With greater leverage in IP-related negotiations comes more opportunities for China to advance new norms. As China continues to decide which norms it will follow, undermine, or create, a greater focus on norm-making will help China counter external pressure from the United States and European Union while developing international norms that benefit China in its negotiations of future IP treaties and resolutions of IP-related WTO disputes.⁸⁶ China’s status as an aggregate IP creator suggests that it would support advancing higher protections in traditional IP spheres; in fact, China has begun to protect its intellectual property more strongly as it develops its technology industries.⁸⁷ Alongside its pivotal roles in promoting broader regional and multilateral initiatives,⁸⁸ China clearly sees itself as a future leader in the international IP space. For example, as part of the Belt and Road Initiative, China has collaborated several times with WIPO to host conferences on IP issues and provide technical assistance.⁸⁹

Throughout this process, China has seemingly chosen to advance the principle of increased recognition and protection of the rights of Indigenous Peoples and local communities⁹⁰ over GRs, TK, and TCEs. Although the United States and other developed countries often cast China’s interactions with IP norms

83. WORLD INTELL. PROP. ORG., WIPO IP FACTS AND FIGURES 2016 9 (2016), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_943_2016.pdf [hereinafter 2016 FACTS & FIGURES]; WORLD INTELL. PROP. ORG., 2023 FACTS & FIGURES, *supra* note 81, at 8.

84. WORLD INTELL. PROP. ORG., 2023 FACTS & FIGURES, *supra* note 81, at 8.

85. See Qu & Zhang, *supra* note 15.

86. See Yu, *Middle Kingdom*, *supra* note 54, at 247, 250.

87. See T. Cheng, *supra* note 30, at 15–16.

88. Yu, *Building IP Infrastructure*, *supra* note 59, at 275–76. These initiatives include the BRICS Summit, Regional Cooperation Economic Agreement, and Belt and Road Initiative. *Id.*

89. See Song Qu, *Intellectual Property Cooperation Assists Belt and Road Construction*, PEOPLE’S DAILY (Apr. 18, 2019), <http://en.people.cn/n3/2019/0418/c90000-9568188.html>.

90. The UN Programme of Work on Protected Areas introduced the term “Indigenous Peoples and local communities” in the Convention on Biological Diversity, recognizing the contributions of Indigenous Peoples and local communities in protecting and maintaining biodiversity and cultural diversity. I use “Indigenous Peoples and local communities” throughout this Note because it is the term commonly used by international organizations. However, I recognize that the conflation of these two populations does not acknowledge their distinct interests and rights. See *Statement Towards Discontinuing the Use of the Collective Term “Indigenous Peoples and Local Communities” or “IPLC,”* CULTURAL SURVIVAL (Oct. 26, 2022), <https://www.culturalsurvival.org/news/statement-towards-discontinuing-use-collective-term-indigenous-peoples-and-local-communities>.

in a negative light,⁹¹ China's focus on the protection of GRs, TK, and TCEs aligns with traditional biases toward "feel-good" norm entrepreneurship, or norm advocacy that focuses on "ethically good" principles or "typically respect-worthy actors pressing for salutary or at least reasonable changes."⁹² In pushing for this morally desirable principle, China is also advocating for an approach that largely goes against the economic interests of developed countries, as shown by their strong opposition to greater protections for GRs, TK, and TCEs that would make their use and commercialization of such resources more costly.⁹³

Although China's IP regime originated from transplants of foreign laws, legal transplant, as a theory in comparative law to explain norm and systemic interactions in laws across different cultures, is not without its controversy.⁹⁴ Analyses of legal transplants have expressed skepticism about the direct "borrowing" of solutions developed in one system to resolve problems in another.⁹⁵ This skepticism rings true here, as shown by how China transformed transplants from developed countries to create a modern IP regime that responds to cultural context and domestic needs. However, this also raises the questions of when and to what extent the models that China is now developing will spread around the world in its attempt to be a norm-maker.

Despite these theoretical questions on China's future success as a norm-maker, China's story shows an IP system that has changed from transplanting laws

91. See Jonathan E. Hillman, statement before the U.S.-China Econ. & Sec. Rev. Comm'n, *A "China Model"? Beijing's Promotion of Alternative Global Norms and Standards* 6–8 (Mar. 13, 2020), https://csis-website-prod.s3.amazonaws.com/s3fs-public/congressional_testimony/ts200413_Jonathan_Hillman.pdf (describing China's activities to advance its own interests in its leadership in the International Civil Aviation Organization, International Telecommunication Union, and Food and Agriculture Organization, and in its selective engagement with other existing institutions).

92. WUNDERLICH, *Dedicated to the Good: Norm Entrepreneurs in International Relations*, in *ROGUE STATES AS NORM ENTREPRENEURS*, *supra* note 54, at 15, 42–45 (citing Maria Green Cowles, *Non-State Actors and False Dichotomies: Reviewing IR/PE Approaches to European Integration*, 10 J. EUR. PUB. POL'Y 102, 111 (2003); David E. Pozen, *We Are All Entrepreneurs Now*, 43 WAKE FOREST L. REV. 282, 308 (2008)).

93. WUNDERLICH, *Introduction: Norm Breakers as Norm Makers?*, in *ROGUE STATES AS NORM ENTREPRENEURS*, *supra* note 54, at 1–3; see also Yixian Sun & Bowen Yu, *Greening China's Belt and Road Initiative: From Norm Localization to Norm Subsidiarity?*, 23 GLOB. ENV'T POL. 91, 105–09 (2023) (identifying China's use of the norm of "inclusive dialogue" to advance environmental efforts as part of the Belt and Road Initiative).

94. Lee, *supra* note 34, at 8.

95. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1227 (1999); see also J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT'L L. & BUS. 354, 355 (1997) ("The dangers of 'borrowing' from one legal system to another are famous: the law of any polity is a construct embedded in a specific social and political culture and its transmutation to other polities is not easily achieved."); ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21–30 (1974) (explaining cross-cultural transplants of law). Other scholars contend that legal transplants are even impossible. See, e.g., Pierre Legrand, *The Impossibility of "Legal Transplants"*, 4 MAASTRICHT J. EUR. COMPAR. L. 111, 115–17 (1997) (arguing that rules are necessarily an "incorporative cultural form," their meanings are "culture-specific," and the crucial element of a rule—its meaning—"does not survive the journey from one legal system to another").

from abroad to seeking to lead the international IP space by 2035. By making itself an aggregate IP creator, China can both greater benefit from the current global regime and increase its negotiating power on IP issues going forward.⁹⁶ China is now at a crossroads that requires it to devise its own IP strategy.⁹⁷ Recent IP law reform in China shows that the state has increasingly taken the role of “norm-maker” to govern local actors.⁹⁸ In this context, China has also moved toward global norm-making by promoting the norm of equity in international negotiations.⁹⁹

III. ADVANCING EQUITY IN INTERNATIONAL IP LAWMAKING

As early as the 1970s, developing countries have urged greater protections of resources and knowledge that are commonly held by Indigenous Peoples and local communities but insufficiently protected on a global level.¹⁰⁰ Many of their arguments have centered on principles of equity and balance in international IP law, particularly in the context of GRs, TK, and TCEs. Work on the relationship between intellectual property and GRs, TK, and TCEs stems from concerns regarding the role that IP laws can and should play in achieving global policy objectives, including biodiversity conservation, food security, free and fair trade, and international and regional development.¹⁰¹

Despite the presence of traditional treaty problems,¹⁰² negotiations over protecting GRs, TK, and TCEs have persisted and resulted in the historic GRATK Treaty.¹⁰³ As China has realized the potential of IP law for promoting innovation, culture, and trade, it has become a vocal advocate in multilateral fora to reform international IP law in line with its ideas about GRs, TK, and TCEs.¹⁰⁴

96. See *infra* Part III.B.

97. Peter K. Yu, *A Half-Century of Scholarship on the Chinese Intellectual Property System*, 67 AM. U. L. REV. 1045, 1050 (2018).

98. Lee, *supra* note 34, at 18.

99. See Yu, *Chinese IP System Hits 35*, *supra* note 67, at 5–6; see also Matt Ho, *Intellectual Property: China's Evolution from “Norm Taker” to “Norm Setter,”* S. CHINA MORNING POST (May 5, 2021), <https://www.scmp.com/news/china/politics/article/3131750/intellectual-property-chinas-evolution-norm-taker-norm-setter>.

100. See GROTH, *supra* note 12, at 34.

101. World Intell. Prop. Org., THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 21 (2015), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_2.pdf [hereinafter THE WIPO IGC].

102. See Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 580–82 (2005).

103. World Intell. Prop. Org., Member States Adopt Historic New Treaty, *supra* note 13.

104. Rens Steenhard, *China's Ascendancy as Vanguard of Traditional Knowledge in International Law Fora*, PEACE PALACE LIBR. (Aug. 24, 2017), <https://peacepalacelibrary.nl/blog/2017/chinas-ascendancy-vanguard-traditional-knowledge-international-law-fora>.

A. Equity as a Norm

To comprehend how and to what extent China is promoting the norm of equity in the IP sphere, it is worth first discerning how equity is currently manifested in the form of “fair and equitable benefit sharing” in international IP law. Fair and equitable benefit sharing is a “diffuse legal phenomenon” that is remarkably unclear on a conceptual level.¹⁰⁵ However, it can be defined most clearly in reference to the Convention on Biological Diversity (CBD), which has significantly contributed to the normative development of benefit sharing by gradually building consensus among 196 parties.¹⁰⁶ In the IP lawmaking context, fair and equitable benefit sharing refers to the dissemination of monetary and other benefits that arise from the use of GRs, TK, and TCEs to the holders of such resources.¹⁰⁷

And these potential benefits abound. Companies benefit from GRs when researching or commercializing new medicines, cosmetics, or agricultural and horticultural products, often using associated TK in the process.¹⁰⁸ Parties also use the TK of Indigenous Peoples when reproducing traditional artwork, designs, or practices, and appropriate TCEs when manufacturing products embodying the TCE outside the area of origin, often removing the control that Indigenous Peoples and local communities have over their own traditions and identities.¹⁰⁹ The holders of GRs, TK, and TCEs stand a lot to gain, both economically and culturally, by sharing in the benefits of these acts of commercialization.

Providing greater protections for GRs, TK, and TCEs would have a significant impact on China. As a country with a wealth of biological resources and traditional practices, medicines, and knowledge, China seeks to use international IP lawmaking to protect its resources against dangers like misappropriation, while also benefiting from third-party use of its resources and supporting other developing countries in their pursuits of similar goals.¹¹⁰ These objectives, if achieved, can contribute to an international IP regime that is more

105. Elisa Morgera, *The Need for an International Legal Concept of Fair and Equitable Benefit Sharing*, 27 EUR. J. INT'L L. 353, 354–56 (2016).

106. *Id.* at 361.

107. See Elisa Morgera, *Benefit-Sharing as a Tool for Equitable Change*, EUR. RSCH. COUNCIL (Nov. 27, 2019), <https://erc.europa.eu/projects-figures/stories/benefit-sharing-tool-equitable-change>.

108. See KERRY TEN KATE & SARAH A. LAIRD, *Introduction*, in *THE COMMERCIAL USE OF BIODIVERSITY: ACCESS TO GENETIC RESOURCES AND BENEFIT-SHARING* 2 tbl.1.1 (1999).

109. See JANE ANDERSON, *Examples of Use and Misuse of Indigenous Knowledge*, in *INDIGENOUS/TRADITIONAL KNOWLEDGE & INTELLECTUAL PROPERTY* 9–16 (2010), https://web.law.duke.edu/cspd/pdf/ip_indigenous-traditionalknowledge.pdf; Luminița Olteanu, *Riding on the Coat-Tails of Traditional Cultural Expressions*, 34 INT'L J. FOR SEMIOTICS L. 861, 868–69 (2020).

110. Steenhard, *supra* note 104; see also Xiaou Zheng, *Key Legal Challenges and Opportunities in the Implementation of the Nagoya Protocol: The Case of China*, 28 REV. EUR., COMPAR. & INT'L ENV'T L. 175, 176 (2019); Hepeng Jia, *China Faces Uphill Battle Against “Biopiracy,”* SCIDEV (Apr. 23, 2003), <https://www.scidev.net/global/news/china-faces-uphill-battle-against-biopiracy/>;

equitable and balanced among developed and developing countries, while rectifying the injustices of colonial or neo-colonial expropriation.¹¹¹

B. IP Issues in GRs, TK, and TCEs

Major IP issues in the context of GRs, TK, and TCEs include access and benefit-sharing (ABS), patent disclosure, and tiered protection. While prior international agreements may have discussed these issues, they have not adequately protected GRs, TK, and TCEs through their existing frameworks.¹¹² In this context, China has created several domestic analogs, seemingly seeking to develop national examples that can be used in multilateral negotiations on these issues.

1. Access and Benefit-Sharing

Out of these three issues, ABS has the most established existing framework within international law. Stemming from concerns over the growth of biopiracy, the CBD was adopted in 1993 and has three primary objectives: the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from GRs.¹¹³ The Nagoya Protocol, adopted in 2010, expands on the CBD's third objective.¹¹⁴ The protocol requires creating clear procedures for obtaining prior informed consent or approval and involvement of the Indigenous Peoples or local communities who hold the GRs and associated TK and ensuring that both monetary and non-monetary benefits are shared in a fair and equitable way with the traditional holders, based on mutually agreed terms.¹¹⁵ Finally, the International Treaty on Plant Genetic Resources for Food and Agriculture aims to guarantee food security through the conservation, exchange, and sustainable use of plant GRs.¹¹⁶

As a key provider of GRs and TK, China is a popular destination for scientific and commercial prospecting.¹¹⁷ However, while China continues its rapid economic development and increased investment in biotechnology, it is also

111. See Valbona Muzaka & Omar Ramon Serrano, *Teaming Up? China, India, and Brazil and the Issue of Benefit-Sharing from Genetic Resource Use*, 25 NEW POL. ECON. 734, 748 (2020).

112. See María Vásquez Callo-Müller, Diego F. Ortega Sanabria & Alejandro Matsuno Remigio, *The WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge: Situating a Landmark Development in International Intellectual Property Governance*, 73 GRUR INT'L 1128, 1129 (2024).

113. Convention on Biological Diversity, *supra* note 9, art. 1.

114. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity art. 1, Oct. 29, 2010, 3008 U.N.T.S. 3 [hereinafter Nagoya Protocol].

115. *Id.* at art. 5.

116. See International Treaty on Plant Genetic Resources for Food and Agriculture art. 1, *opened for signature* Nov. 3, 2001, 2400 U.N.T.S. 303 (entered into force June 29, 2004).

117. Zheng, *supra* note 110, at 176.

strengthening its role as a “user country” in the ABS context.¹¹⁸ As such, China is incorporating ABS as a legal concept into its laws and regulations. For example, its 2017 Law on Traditional Chinese Medicine explicitly required users of TK to obtain prior informed consent and share benefits with holders of traditional medicinal knowledge.¹¹⁹ Additionally, China circulated a draft regulation on ABS for public consultation in 2017, although it has been stymied, somewhat ironically for a country known for its centralized governance, by competing actors at the national and local levels.¹²⁰

Since 2019, China has been the largest contributor to the core budget of the CBD and its protocols, showing the importance of these obligations to the country.¹²¹ Moreover, during its 2022 leadership of the United Nations Biodiversity Conference (COP15), the main governing body of the CBD, China used its platform to show that it is contributing positively to broader discussions on global environmental issues that are beyond its national interests.¹²² In negotiating a set of ambitious goals, it emphasized the importance of overcoming disagreements between developed and developing countries and providing technical support through South-South cooperation.¹²³

However, on a global scale, the CBD still suffers from a lack of monitoring and compliance mechanisms, and its rules have not been widely implemented.¹²⁴ As such, despite the proliferation of ABS provisions in multilateral and bilateral treaties,¹²⁵ the lack of binding international obligations means that commercial misappropriation of GRs, TK, and TCEs still persists.¹²⁶

2. Patent Disclosure

Given the rights-based framework that governs the global IP regime, developing countries have sought to prevent misappropriation through a

118. *Id.*

119. *Id.*

120. *Id.*; Muzaka & Serrano, *supra* note 111, at 742–43.

121. *Biodiversity Conservation in China*, STATE COUNCIL INFO. OFF. (Oct. 8, 2021), http://english.scio.gov.cn/whitepapers/2021-10/08/content_77795608_6.htm; see also Dennis Normile, *Biodiversity Summit Offers China a Chance to Burnish Its Environmental Credentials*, SCIENCE (Oct. 8, 2021), <https://www.science.org/content/article/biodiversity-summit-offers-china-chance-burnish-its-environmental-credentials>.

122. Abhishek Sharma, *China and COP15: From Follower to Active Participant*, INST. FOR SEC. & DEV. POL’Y (Feb. 1, 2023), <https://isdpeu.china-and-cop15-from-follower-to-active-participant/>.

123. *Id.*

124. See Morgera, *supra* note 105, at 362; Vásquez Callo-Müller, Ortega Sanabria & Matsuno Remigio, *supra* note 112, at 1129.

125. See JEAN-FRÉDÉRIC MORIN & MATHILDE GAUQUELIN, CTR. FOR INT’L GOVERNANCE INNOVATION, TRADE AGREEMENTS AS VECTORS FOR THE NAGOYA PROTOCOL’S IMPLEMENTATION 1–4 (2016), <https://www.cigionline.org/static/documents/documents/Paper%20no.115.pdf>.

126. See NIRMALYA SYAM & THAMARA ROMERO, S. CTR., MISAPPROPRIATION OF GENETIC RESOURCES AND ASSOCIATED TRADITIONAL KNOWLEDGE: CHALLENGES POSED BY INTELLECTUAL PROPERTY AND GENETIC SEQUENCE INFORMATION 2–11 (2021), <https://www.southcentre.int/wp-content/uploads/2021/04/RP-130.pdf>.

mandatory patent disclosure requirement.¹²⁷ A patent disclosure requirement provides one approach to implementing benefit sharing obligations by requiring patent applicants to disclose the origin or source of any GRs or associated TK upon which a claimed invention is based. China has argued that the WTO TRIPS Council should be the major forum for negotiating such an obligation, even while the United States and other developed countries have suggested shifting the negotiations to WIPO in the hopes that discussions would stall there.¹²⁸

The idea of a patent disclosure requirement first came to WIPO through a 1999 proposal by Colombia, which catalyzed the creation of the IGC.¹²⁹ In 2006, Brazil, China, Colombia, Cuba, India, Pakistan, Peru, Thailand, and Tanzania attempted to advance a patent disclosure requirement in the WTO through amending TRIPS. Their proposed amendment, Article 29*bis*, provided that members would, in cases where the subject matter of a patent application involved the use of GRs or associated TK, require applicants to disclose the country of origin of such resources and the source in the country providing the GRs and associated TK.¹³⁰ It also aimed to incorporate an ABS mechanism of the Nagoya Protocol as a TRIPS requirement.¹³¹ The text of Article 29*bis* was consistent with that of China's Patent Law after a 2008 amendment to incorporate a disclosure obligation for GRs and TK used in patent applicants' inventions.¹³² Although this attempt to amend TRIPS ultimately failed after several years of discussion, this proposal underpins some of the theoretical claims about China's efforts to proffer its domestic examples in multilateral negotiations.¹³³

Despite its failure in the WTO, China continued to push forward a disclosure requirement through incorporating a disclosure obligation in Chinese bilateral free trade agreements.¹³⁴ Additionally, in negotiating the Regional Comprehensive Economic Partnership (RCEP), China played a leading role in establishing a disclosure provision, despite opposition from Australia, India, Japan, New

127. See Chidi Oguamanam, *Understanding African and Like-Minded Countries' Positions at WIPO-IGC*, 60 IDEA 386, 390 (2020); SYAM & ROMERO, *supra* note 126, at 3.

128. WENTING CHENG, *China Engages in International Regulation of Disclosure Obligation, in CHINA IN GLOBAL GOVERNANCE OF INTELLECTUAL PROPERTY* 106 (2023).

129. Vásquez Callo-Müller, Ortega Sanabria & Matsuno Remigio, *supra* note 112, at 1129; Peter K. Yu, *WIPO Negotiations on Intellectual Property, Genetic Resources and Associated Traditional Knowledge*, 57 AKRON L. REV. 277, 315 (2024) [hereinafter *WIPO Negotiations*]; Wend Wendland, *The New WIPO Treaty 25 Years in the Making: What Does It Mean and What Happens Next?*, WIPO MAG. (Oct. 2024), <https://www.wipo.int/web/wipo-magazine/articles/the-new-wipo-treaty-25-years-in-the-making-what-does-it-mean-and-what-happens-next-68223>.

130. See Trade Negotiations Comm., World Trade Org., Doha Work Programme—The Outstanding Implementation Issue on the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity, Communication from Brazil, China, Colombia, Cuba, India, Pakistan, Peru, Thailand, and Tanzania, WT/GC/W/564/Rev. 2, at 2 (July 5, 2006) [hereinafter *Article 29bis Proposal*].

131. W. Cheng, *supra* note 128, at 106.

132. *Id.* at 107.

133. See *id.*

134. See *id.* at 108–10; Vásquez Callo-Müller, Ortega Sanabria & Matsuno Remigio, *supra* note 112, at 1134–35.

Zealand, and South Korea.¹³⁵ The language of its proposed provision, once again, resembled that of its own Patent Law.¹³⁶ And although RCEP mostly incorporates existing obligations from TRIPS and other multilateral agreements, the treaty, which entered into force in 2022, contains a unique provision on GRs, TK, and TCEs that explicitly allows countries to take measures to protect these resources.¹³⁷ Finally, these efforts, among many others, have culminated in the GRATK Treaty, which is the first international agreement to impose a patent disclosure obligation. When the treaty comes into effect, it will provide minimum standards for disclosure and sanctions, as discussed further in Part III.C.4.¹³⁸ Notable are its similarities with the 2006 Article 29*bis* proposal advanced in the WTO by multiple developing countries.¹³⁹ However, there remain several ambiguities, including the extent to which the GRs or associated TK must be mentioned to trigger the disclosure requirement, the scope of associated TK, how to disclose the origin or source of transboundary TK, whether the disclosure requirement applies to digital genetic sequence information, and whether countries that already have broader disclosure requirements will need to amend their regulations while becoming parties to the treaty.¹⁴⁰

3. Tiered Protection of TK and TCEs

Doubts surrounding the adequacy of IP laws to safeguard TK and TCEs have long plagued international efforts to protect these forms and expressions of traditional culture. Especially for TCEs, defining the subject matter of protection has been a fundamental challenge, with developed and developing countries, as well as Indigenous Peoples, disagreeing over the types of TCEs to be protected and the scope of protection.¹⁴¹

135. Peter K. Yu, *The RCEP and Trans-Pacific Intellectual Property Norms*, 50 VAND. J. TRANSNAT'L L. 673, 716 (2017) [hereinafter *Trans-Pacific IP Norms*].

136. Peter K. Yu, *The RCEP Negotiations and Asian IP Norm Setters*, in *THE FUTURE OF ASIAN TRADE DEALS AND IP 96* (Kung-Chung Liu & Julien Chaisse eds., 2019); Peter K. Yu, *Trans-Pacific IP Norms*, *supra* note 135, at 716–17.

137. Regional Comprehensive Economic Partnership art. 11.53, Nov. 15, 2020, <https://rcepsec.org/wp-content/uploads/2020/11/All-Chapters.pdf>.

138. NIRMALYA SYAM & CARLOS M. CORREA, S. CTR, UNDERSTANDING THE NEW WIPO TREATY ON INTELLECTUAL PROPERTY, GENETIC RESOURCES AND ASSOCIATED TRADITIONAL KNOWLEDGE 3 (2024) [hereinafter UNDERSTANDING THE NEW WIPO TREATY], https://www.southcentre.int/wp-content/uploads/2024/07/PB131_Understanding-the-New-WIPO-Treaty-on-Intellectual-Property-Genetic-Resources-and-Associated-Traditional-Knowledge_EN.pdf.

139. Yu, *WIPO Negotiations*, *supra* note 129, at 316.

140. *See id.* at 3, 5; Vásquez Callo-Müller, Ortega Sanabria & Matsuno Remigio, *supra* note 112, at 1131–32.

141. *See* World Intell. Prop. Org., Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Forty-Fifth Session, Geneva, Dec. 5 to 9, 2022, *The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis*, WIPO/GRTKF/IC/45/7, at 3 (2022) [hereinafter TCE Gap Analysis], https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_45/wipo_grtkf_ic_45_7.pdf.

China has some of the oldest examples of national laws that protect TK and TCEs. For example, its 1992 Regulations on Protection of Traditional Chinese Medicines and 1997 Regulations on Protection of Traditional Arts and Crafts provide for the subject matter, scope, and conditions of protection, reflecting the public health issues related to traditional medicines as well as a statewide policy of promoting traditional arts and crafts.¹⁴² More recently, China enacted the 2017 Law on Traditional Chinese Medicine, aiming to promote the development and practice of Chinese medicine by requiring local governments to launch traditional medicine institutions, increasing funding for research and development, and expanding traditional medicine education.¹⁴³

Although China provides one example of establishing regulations, reaching international agreement on a system that would apply to a broad set of countries has been challenging. In 2002, the Pacific Islands Forum produced a first-of-its-kind Model Law for the Protection of Traditional Knowledge and Expressions of Culture, creating a *sui generis* mechanism that allowed property holders to publish their materials on a database and required users to acknowledge the source of TK and TCEs and share benefits with the traditional owners.¹⁴⁴ However, although the Model Law contributed to the IGC's early work, absent an international treaty or extraterritorial application of such a law, a regional system could not adequately combat bioprospecting and biopiracy on an international level.¹⁴⁵ The Model Law fails to provide any mechanism for custom owners to recoup their cultural rights after losing their TK or TCEs to other parties.¹⁴⁶ Nor does it protect disseminated TK, which is no longer closely held by particular communities but still forms part of their cultural heritage.¹⁴⁷ This suggests the need for a tiered approach on an international scale to protect TK and TCEs that acknowledges the

142. See WORLD INTEL. PROP. ORG., COMPILATION OF INFORMATION ON NATIONAL AND REGIONAL SUI GENERIS REGIMES FOR THE INTELLECTUAL PROPERTY PROTECTION OF TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS (2022), https://www.wipo.int/export/sites/www/tk/en/resources/pdf/compilation_sui_generis_regimes.pdf; Regulations on Protection of Traditional Chinese Medicines (promulgated by the State Council, Oct. 14, 1992, effective Jan. 1, 1993), <https://www.wipo.int/wipolex/en/text/337301>; Regulations on Protection of Traditional Arts and Crafts (promulgated by the State Council, May 20, 1997), <https://www.wipo.int/wipolex/en/text/198447>.

143. Cody Abbey, *New Law Sparks Debate Over Future of Traditional Chinese Medicine*, CNN (June 30, 2017), <https://www.cnn.com/2017/06/29/health/china-new-law-traditional-chinese-medicine-tcm/index.html>.

144. Salvin S. Nand, *Protecting and Revitalizing Traditional Knowledge and Expressions of Culture: For an Equitable Future in Fiji*, 2 WIPO-WTO COLLOQUIUM PAPERS 55, 59 (2011).

145. *Id.* at 65; see World Intell. Prop. Org., Gen. Assembly, Fifty-Fifth (30th Extraordinary) Session, Geneva, July 14 to 22, 2022, Rep., WO/GA/55/12, ¶ 177 (2022) [hereinafter GA Fifty-Fifth Session Report], https://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_55/wo_ga_55_12.pdf (statement of Samoa, on behalf of the Pacific Islands Forum).

146. Nand, *supra* note 144, at 61.

147. See TERRI JANKE, LAURA CURTIS, PATRICK GOULDING, SAM MCNEILL, JUANITA MUNDINE & RHIANNON AULDE, ASEAN-AUSTL.-N.Z. FREE TRADE AREA ECON. COOP. SUPPORT PROG., COMPARATIVE STUDY ON GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS (GRKTCE) 58 (2021), https://www.aseanip.org/docs/default-source/asean-ip-publications/comparative-study-grktce_final-for-public.pdf?sfvrsn=90ebf633.

varying nature of these resources and provides corresponding rights, as elaborated in Part III.C.5.¹⁴⁸

C. Pursuit of International Treaties for GRs, TK, and TCEs

After decades of developing countries¹⁴⁹ demanding greater protection of GRs, TK, and TCEs, China's changing role in negotiations has helped effectuate demandeurs' objectives and advance the norm of equity, despite many obstacles from developed countries. The WIPO General Assembly established the IGC in 2001 to create a forum for direct discussion on the IP issues that arise in the context of access to GRs and benefit-sharing, as well as the protection of TK and TCEs.¹⁵⁰ Under its mandate, which must be renewed every year, the IGC undertakes negotiations on GRs, TK, and TCEs to develop consensus on unresolved issues.

Since 2002, the WIPO General Assembly has renewed the IGC's mandate every year. However, this has not been without conflicts, as illustrated by the backtracking, delays, and disagreements between developed and developing countries. In the early years, the IGC's work combined fact-gathering, technical analyses, and exchanges of practical experiences. This focus on non-normative work led to a number of practical outcomes, such as concrete first steps toward the defensive protection of TK through enhanced recognition as prior art.¹⁵¹ However, negotiators could not agree on norm-setting, especially for the positive or direct protection of TK and TCEs.¹⁵² Since the beginning, many developed countries have been content with the status quo and supported the idea of the IGC as a "process without an outcome," keeping the issues on WIPO's agenda without intentions to reach any concrete normative results.¹⁵³

1. China's Initial Passivity

After four sessions, the differences in expectations among states as to the IGC's purpose and anticipated outcomes became clearer. In July 2003, the IGC could not agree on its new mandate for 2004–2005, marking the Committee's first

148. See OKEDIJI, *supra* note 12, at 14–16; Chidi Oguamanam, *Towards a Tiered or Differentiated Approach to Protection of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs) in Relation to the Intellectual Property System*, 23 AFR. J. INFO. & COMM'C'N 1, 6–9 (2019).

149. This Note focuses on the roles of States, and especially China, in the negotiations of GRs, TK, and TCEs. The roles of Indigenous and local community demandeurs, such as the Saami Council, Tulalip Tribes of Washington, and GRAIN (representing Indigenous peoples of Colombia), although crucial and deserving of more inclusion in these negotiations, are outside the scope of this Note.

150. World Intell. Prop. Org., THE WIPO IGC, *supra* note 101, at 1.

151. Wend Wendland, *International Negotiations on Indigenous Knowledge to Resume at WIPO: A View of the Journey So Far and the Way Ahead*, WIPO MAG. (Feb. 2022) [hereinafter *International Negotiations to Resume*], https://www.wipo.int/wipo_magazine_digital/en/2022/article_0001.html.

152. *Id.*

153. Abdel-Latif, *supra* note 27, at 23; see also Oguamanam, *supra* note 148, at 3–4.

real crisis.¹⁵⁴ Some states, including Myanmar, Zambia, the Philippines, Egypt, Venezuela, Nigeria, Brazil, and Kenya, believed that the urgent need to protect GRs, TK, and TCEs necessitated the conclusion of a specific, legally binding international instrument.¹⁵⁵ Others, like France, New Zealand, Canada, Australia, the United States, Norway, and Japan, believed that it was premature to pursue legally binding outcomes before securing broader agreement on objectives and guiding principles.¹⁵⁶ While China supported the Asian Group's statement, it emphasized the need for "continued discussion" on the use of existing IP systems to protect GRs, TK, and TCEs and an "in-depth, comprehensive and extensive analysis on a *sui generis* system," which was much weaker than the legally binding instrument that its Asian Group counterparts demanded.¹⁵⁷

At the 2003 WIPO Assembly, Member States agreed on a carefully worded mandate, referring for the first time to an "international instrument or instruments."¹⁵⁸ Although this marked an explicit pivot towards normative work, because no member state had formally proposed a comprehensive negotiating text, developing countries soon grew skeptical about the IGC's effectiveness in norm-setting.¹⁵⁹

In 2005, after several sessions with little progress, WIPO's Traditional Knowledge Division published draft articles on TK and TCEs as working documents.¹⁶⁰ These drafts were useful in pinpointing areas of disagreement; however, non-demandeurs like Luxembourg, Japan, United States, Australia, Canada, New Zealand, and Switzerland were not ready to work on draft articles because they thought it was "premature" to imply the establishment of a single

154. Wendland, *International Negotiations to Resume*, *supra* note 151; see World Intell. Prop. Org., Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Fifth Session, Geneva, July 7 to 15, 2003, Rep., WIPO/GRTKF/IC/5/15, ¶ 176 (2003) [hereinafter IGC Fifth Session Report], https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_5/wipo_grtkf_ic_5_15.pdf.

155. *Id.* ¶¶ 16, 48, 123–24, 127, 130, 135–37; Press Release, World Intell. Prop. Org., Next Steps for International Protection of Traditional Knowledge in View (July 21, 2003) [hereinafter Next Steps for TK Protection], https://www.wipo.int/pressroom/en/prdocs/2003/wipo_upd_2003_201.html.

156. See World Intell. Prop. Org., IGC Fifth Session Report, *supra* note 154, ¶¶ 14, 18, 41–42, 125, 128, 131, 138, 145, 152; World Intell. Prop. Org., Next Steps for TK Protection, *supra* note 155.

157. See World Intell. Prop. Org., IGC Fifth Session Report, *supra* note 154, ¶ 126.

158. Wendland, *International Negotiations to Resume*, *supra* note 151; see World Intell. Prop. Org., Gen. Assembly, Thirtieth (16th Ordinary) Session, Geneva, Sept. 22 to Oct. 1, 2003, Rep., WO/GA/30/8, ¶ 93 (2003), https://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_30/wo_ga_30_8.pdf.

159. Wendland, *International Negotiations to Resume*, *supra* note 151.

160. See World Intell. Prop. Org., Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Eighth Session, Geneva, June 6 to 10, 2005, The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles, WIPO/GRTKF/IC/8/4 (2005), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_4.pdf; World Intell. Prop. Org., Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Eighth Session, Geneva, June 6 to 10, 2005, The Protection of Traditional Knowledge: Revised Objectives and Principles, WIPO/GRTKF/IC/8/5 (2005), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_5.pdf.

legal regime through a treaty-like text.¹⁶¹ On the other hand, China believed that the draft articles on TK and TCEs “embodi[ed] the expressions of the developing countries” with the objective of “balanc[ing] economic distribution on a global level.”¹⁶² In evoking principles of equity and balance, it hoped to further refine the policy objectives and guidelines in the draft articles.¹⁶³ Similarly, countries like Iran, Bolivia, Morocco, Congo, Burkina Faso, Zambia, Egypt, South Africa, Mexico, and India viewed the draft articles as a welcome concrete step in the direction toward a legal instrument.¹⁶⁴ Nigeria noted that the negotiation process has been going on for “quite a while” and that this stage of draft articles could hardly be described as “hasty” or “premature.”¹⁶⁵ Ultimately, however, developed countries prevailed, and work on the draft articles was replaced by discussions of “issues,” yet again stalling negotiations for a legal instrument.¹⁶⁶

2. *China’s Alignment with Demandeurs*

After much difficulty in achieving consensus regarding the form of the IGC’s future work, the IGC Chair held several informal consultations with each regional group and certain individual delegations, with active participation from many developing countries.¹⁶⁷ A broader swath of *demandeurs* began calling for a legal instrument.¹⁶⁸ The African Group cited the inadequacy of existing IP tools to protect GRs, TK, and TCEs and the urgent need to end misappropriation of cultural heritage, and its proposal explicitly called for a legally binding instrument, text-based negotiations, and a definite timeline.¹⁶⁹ Tunisia, on behalf of the Group of Arab States, supported the African Group’s proposal,¹⁷⁰ and Ecuador, Burundi, Iran, Peru, Mexico, Algeria, Yemen, and Malaysia, among others, made individual statements explicitly calling for legally binding instruments.¹⁷¹ While China had not committed to a binding agreement in previous IGC sessions, here, its stance began to change. China expressly agreed with the African Group’s proposal in setting up a clear work program and

161. See World Intell. Prop. Org., Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Eighth Session, Geneva, June 6 to 10, 2005, Second Draft Rep., WIPO/GRTKF/IC/8/15 Prov. 2, ¶¶ 86–89, 93, 99, 105, 123, 134–36, 140, 142, 147 (2005) [hereinafter IGC Eighth Session Report], https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_15_prov_2.pdf.

162. *Id.* ¶ 91.

163. *See id.*

164. *See id.* ¶¶ 92, 95, 102, 104, 107, 112, 113, 118, 128, 141, 148, 150, 153–56.

165. *Id.* ¶ 109.

166. Wendland, *International Negotiations to Resume*, *supra* note 151.

167. See World Intell. Prop. Org., Gen. Assembly, Thirty-Eighth (19th Ordinary) Session, Geneva, Sept. 22 to Oct. 1, 2009, Rep., ¶¶ 153–56 (2009) [hereinafter GA Thirty-Eighth Session Report], https://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_38/wo_ga_38_20.pdf.

168. *See id.* ¶ 155.

169. *See id.* ¶¶ 156, 176.

170. *See id.* ¶ 159.

171. *See id.* ¶¶ 155, 160–61, 163–64, 166, 168–69, 172–73, 176.

conducting text-based negotiations toward a legally binding instrument.¹⁷² Meanwhile, the European Community's proposal called for the preparation of a non-binding WIPO declaration about GRs, TK, and TCEs and an enhanced IGC mandate.¹⁷³

With the “overwhelming support” for the African Group’s proposal, in 2009, the WIPO General Assembly agreed to a much stronger mandate for 2010–2011.¹⁷⁴ This was the first IGC session to have a mandate to conduct “text-based negotiations” to reach an agreement on an international legal instrument regarding GRs, TK, and TCEs.¹⁷⁵ The mandate also endorsed the organization of inter-sessional working groups (IWGs) to continue discussions during periods when the IGC did not formally meet.¹⁷⁶ The strengthened mandate continued into 2012–2013, which called for the IGC to “expedite” its text-based negotiations.¹⁷⁷

This progress, however, once again received pushback from developed countries. The African Group called for a Diplomatic Conference in 2014 and the re-introduction of the IWGs, but neither idea made it into agreed workplans.¹⁷⁸ Delegates became bogged down in details, and drafting groups became less efficient.¹⁷⁹ Demandeurs became frustrated at the lack of substantive progress, with some delegations again refusing to accept an outcome that would have a treaty-like effect, and the African Group refusing to accept a mandate that did not include convening a Diplomatic Conference in 2016.¹⁸⁰ The IGC mandate still called for “expedit[ing]” its work, including text-based negotiations, but the gap between the IGC’s mandate and actual progress continued to widen, and the IGC did not meet in 2015.¹⁸¹

172. *See id.* ¶ 171.

173. *See id.* ¶ 158.

174. *See id.* ¶¶ 178, 217.

175. Press Release, World Intell. Prop. Org., WIPO Member States Advance Work on Traditional Knowledge, Folklore and Genetic Resources (May 7, 2010), https://www.wipo.int/pressroom/en/articles/2010/article_0012.html.

176. *See* World Intell. Prop. Org., GA Thirty-Eighth Session Report, *supra* note 167, ¶ 217.

177. *See* World Intell. Prop. Org., Gen. Assembly, Fortieth (20th Ordinary) Session, Geneva, Sept. 26 to Oct. 5, 2011, Rep., WO/GA/40/19, ¶ 181 (2011); World Intell. Prop. Org., Gen. Assembly, Fortieth (20th Ordinary) Session, Geneva, Sept. 26 to Oct. 5, 2011, Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WO/GA/40/7, ¶ 16 (2011), https://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_40/wo_ga_40_7.pdf.

178. Abdel-Latif, *supra* note 27, at 47.

179. *See id.* at 49.

180. *See id.* at 49–50.

181. *See* World Intell. Prop. Org., Gen. Assembly, Forty-Seventh (22nd Ordinary) Session, Geneva, Oct. 5 to 14, 2015, Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WO/GA/47/12, ¶ 2 (2015), https://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_47/wo_ga_47_12.pdf.

3. *China's Active Role in Negotiations*

At this point, the draft text on GRs had reached a certain level of maturity, with the remaining gaps being more political than technical.¹⁸² New approaches on TK and TCEs needed to be refined but also proposed a path forward.¹⁸³ After reaching a delicately constructed compromise, the IGC held three sessions in 2016, this time with a mandate that broadened the IGC's work beyond solely text-based negotiations, provided for the "balanced" protection of GRs, TK, and TCEs, and called for inter-sessional workshops and "a common understanding" on certain core issues.¹⁸⁴

At these sessions, Nigeria, speaking on behalf of the African Group, and Brazil both invoked the idea of a more equitable and balanced IP system by referring to the WIPO Development Agenda.¹⁸⁵ China aligned itself with Nigeria and Brazil's statements and hoped to "realize the aspirations of developing countries, particularly least developed countries," in protecting GRs, TK, and TCEs.¹⁸⁶ Many developing countries reiterated their demands for "a minimum standard, functional, international legally binding instrument" and "maximum possible protection."¹⁸⁷ In doing so, they referred to the immense commercial value of GRs, TK, and TCEs that could not be effectively protected without a binding agreement and called for the promotion of TK and equitable economic benefits and moral rights for the owners of TK.¹⁸⁸ Once again, many developed countries, including Greece, Latvia, Canada, and Japan, urged that the IGC's mandate should focus on "discussions" and warned against a legally binding instrument.¹⁸⁹ However, text-based negotiations continued, and the IGC continued to make progress on draft legal instruments for TK and TCEs.¹⁹⁰

182. See Abdel-Latif, *supra* note 27, at 50.

183. See *id.*

184. See World Intell. Prop. Org., Gen. Assembly, Forty-Eighth (26th Extraordinary) Session, Geneva, Oct. 3 to 11, 2016, Rep. on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WO/GA/48/9, ¶¶ 2, 4 (2016) [hereinafter GA Forty-Eighth Session IGC Report], https://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_48/wo_ga_48_9.pdf (providing that the IGC will "continue to expedite its work, with a focus on narrowing existing gaps, with open and full engagement, *including* text-based negotiations, with the objective of reaching an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs).") (emphasis added); see also Abdel-Latif, *supra* note 27, at 50.

185. World Intell. Prop. Org., GA Forty-Eighth Session IGC Report, *supra* note 184, ¶ 11; see also 2007 WIPO DEVELOPMENT AGENDA, *supra* note 27, ¶ 18.

186. World Intell. Prop. Org., GA Forty-Eighth Session IGC Report, *supra* note 184, ¶ 11.

187. See World Intell. Prop. Org., Gen. Assembly, Forty-Eighth (26th Extraordinary) Session, Geneva, Oct. 3 to 11, 2016, Rep., WO/GA/48/17, ¶¶ 170, 174, 176, 178 (2016), https://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_48/wo_ga_48_17.pdf.

188. See *id.*

189. *Id.* ¶¶ 172–73, 185–86, 190.

190. See World Intell. Prop. Org., Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Thirty-Second Session, Geneva, Nov. 28 to Dec. 2, 2016, Rep.,

Despite not speaking on behalf of a group, China was one of the most vocal delegations in these discussions, repeatedly expressing its support for statements made by delegations of developing countries like Indonesia, India, Thailand, and Nigeria in negotiations of draft language.¹⁹¹

China's proactivity corresponded with its own domestic IP overhauls and regional pushes to extend greater protection to GRs, TK, and TCEs.¹⁹² For example, China wanted to increase the influence of its domestic laws within these negotiations, as shown by its promotion of its draft "Regulation on Copyright Protection of Folk Literary and Artistic Works" and its readiness to share its national legislative experience within WIPO.¹⁹³ It also advocated for expanding the beneficiaries of protection of GRs, TK, and TCEs beyond solely Indigenous Peoples and local communities, on the grounds that some countries could not associate TK with communities or did not have any Indigenous communities at all.¹⁹⁴ It proposed an alternative proposal to this effect, which was broadened by an even stronger one from Brazil.¹⁹⁵ Some of China's other proposals were also included in the IGC draft texts, showing its more active role in negotiations of GRs, TK, and TCEs.¹⁹⁶ Through these actions, China demonstrated its intention to increase its influence in IGC negotiations.

4. 2024 Diplomatic Conference and Treaty

While delegations continued to negotiate the protection of TK and TCEs, WIPO published a report of policy questions on and national experiences with a patent disclosure requirement.¹⁹⁷ Then-IGC Chair Ian Goss also prepared a draft

WIPO/GRTKF/IC/32/11, ¶ 15 (2016) [hereinafter IGC Thirty-Second Session Report], https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_32/wipo_grtkf_ic_32_11.pdf.

191. See, e.g., *id.* ¶¶ 58, 76.

192. See *supra* Part III.B.

193. World Intell. Prop. Org., Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Thirty-Third Session, Geneva, Feb. 27 to Mar. 3, 2017, Rep., WIPO/GRTKF/IC/33/7, ¶ 17 (2017) [hereinafter IGC Thirty-Third Session Report], https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_33/wipo_grtkf_ic_33_7.pdf.

194. See World Intell. Prop. Org., IGC Thirty-Second Session Report, *supra* note 190, ¶ 76; World Intell. Prop. Org., Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Thirty-Fourth Session, Geneva, June 12 to 16, 2017, Rep., WIPO/GRTKF/IC/34/14, ¶¶ 79, 86 (2017), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_34/wipo_grtkf_ic_34_14.pdf. China frequently contends that "beneficiaries" should extend beyond Indigenous Peoples and local communities on the grounds that many countries do not have Indigenous Peoples, seemingly including itself in that description. However, this assertion is striking because China has 55 recognized ethnic minorities, which raises questions about state policy regarding ethnic minorities and its international messaging regarding the government's treatment of ethnic minorities.

195. See World Intell. Prop. Org., IGC Thirty-Third Session Report, *supra* note 193, ¶ 229.

196. See *id.* ¶ 138.

197. See generally WORLD INTELL. PROP. ORG., KEY QUESTIONS ON PATENT DISCLOSURE REQUIREMENTS FOR GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE (2d ed. 2020), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1047_19.pdf (describing patent disclosure

text of an international legal instrument on intellectual property and GRs and associated TK for the IGC's consideration.¹⁹⁸ Most notably, this draft text included a disclosure requirement, mandating that patent applicants disclose the country of origin of any GRs or the Indigenous Peoples or local community providing the associated TK if the claimed inventions are "materially" or "directly based" on such resources or knowledge.¹⁹⁹ Non-compliance with such mandatory disclosure requirements would be subject to appropriate, effective, and proportionate measures, in accordance with national law.²⁰⁰

This draft text galvanized work on GRs and associated TK. Although negotiations slowed again during the COVID-19 pandemic,²⁰¹ on July 21, 2022, the WIPO General Assembly approved convening a diplomatic conference.²⁰² This conference aimed to conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources, despite vociferous objections from the United States, Japan, and South Korea.²⁰³ In negotiating the IGC's 2022–2023 mandate, the Dominican Republic (on behalf of GRULAC), Algeria (on behalf of the African Group), Indonesia (on behalf of the LMCs), and other developing countries strongly supported the convening of the diplomatic conference.²⁰⁴ China called for a "push for an early conclusion of international instruments," supporting the call for a diplomatic conference.²⁰⁵ It also initiated the IGC International Symposium, co-organized by the China National Intellectual Property Administration and WIPO that would later occur in November 2022, hoping that

requirements and their implementation of such requirements by several countries to address different motivations).

198. See Ian Goss, Chair, Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Fortieth Session, Geneva, June 17 to 21, 2019, Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources, WIPO/GRTKF/IC/40/CHAIR TEXT, 1–2 (2019) [hereinafter 2019 IGC Chair's Draft on GRs and Associated TK], https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/wipo_grtkf_ic_40_chair_text.pdf.

199. *Id.* at 8.

200. *Id.* at 14.

201. See World Intell. Prop. Org., Gen. Assembly, Fifty-Fourth (25th Ordinary) Session, Geneva, Oct. 4 to 8, 2021, Rep. on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WO/GA/54/10, ¶ 3 (2021) [hereinafter GA Fifty-Fourth Session IGC Report], https://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_54/wo_ga_54_10.pdf.

202. A diplomatic conference is specially held for the purpose of negotiating and adopting or revising multilateral treaties. Press Release, World Intell. Prop. Org., WIPO Member States Approve Diplomatic Conferences for Two Proposed Accords (July 21, 2022) [hereinafter Member States Approve Diplomatic Conferences], https://www.wipo.int/pressroom/en/articles/2022/article_0009.html.

203. *Id.*; Chidi Oguamanam, *The 46th IGC, the 2024 Diplomatic Conference on Genetic Resources: Uncertain Times Ahead*, ABS CAN. (Feb. 22, 2023), <https://abs-canada.org/wipo-igc-46-diplomatic-conference-2024-genetic-resources/>.

204. See World Intell. Prop. Org., GA Fifty-Fifth Session Report, *supra* note 145, ¶¶ 149, 153–55, 157, 160, 162–63, 168–69, 171.

205. *Id.* ¶ 159.

“all parties would take that opportunity to further exchange views, share experiences[,] and promote the progress of the negotiations at the IGC.”²⁰⁶ And prior to the preparatory meetings ahead of the diplomatic conference, along with the regional consultations hosted by other countries, China hosted an informal cross-regional consultative session in Beijing, which included delegates from both demandeur and non-demandeur countries.²⁰⁷ Once again, China wanted to be seen as a leader in this process, showing its determination to continue pushing forward negotiations despite the lack of political will from developed countries to adopt a legally binding instrument.²⁰⁸

The Diplomatic Conference to Conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources took place from May 13 to 24, 2024, at WIPO’s headquarters in Geneva. Like many diplomatic conferences, this one concluded in the successful adoption of a treaty, despite the use of the somewhat ambiguous term “international legal instrument.”²⁰⁹ In preparation for the Diplomatic Conference, the IGC met in a Special Session in September 2023 and revised Chair Goss’s 2019 draft text as the substantive articles of the proposal to transmit to the Preparatory Committee of the Diplomatic Conference.²¹⁰ During the Special Session, the IGC agreed that the notes on each article prepared by Chair Goss would be published separately as an information document for the Diplomatic Conference.²¹¹

The diplomatic conference focused on what would trigger the mandatory disclosure requirement and sanctions and remedies for non-compliance. While Chair Goss’s proposal provided for disclosure if the claimed invention in the patent application was “materially” or “directly based on” GRs or associated TK, the final treaty text provides that the disclosure requirement applies only if the GR or associated TK is “necessary for the claimed invention” and the invention

206. *Id.*; see also *International Symposium on IP and TK/GRs*, WORLD INTELL. PROP. ORG. (Nov. 29, 2022), https://www.wipo.int/tk/en/news/igc/2022/news_0012.html.

207. *WIPO-IGC—Special Session on Genetic Resources and Preparatory Committee on the Diplomatic Conference on GRs: The Advent of the Political Process*, ABS CAN. (Sept. 3, 2023), <https://abs-canada.org/wipo-igc-special-session-on-genetic-resources-and-preparatory-committee-on-the-diplomatic-conference-on-grs-the-advent-of-the-political-process/>.

208. See World Intell. Prop. Org., GA Fifty-Fifth Session Report, *supra* note 145, ¶¶ 275–77, 279, 298, 302, 304 (statements of the United States, Japan, Canada, and South Korea opposing the convening of a diplomatic conference).

209. See Wend Wendland, *Multilateral Matters #14: WIPO Decides to Hold Two Diplomatic Conferences No Later Than 2024*, UNIV. OF CAPE TOWN INTELL. PROP. UNIT (Aug. 30, 2022), <http://ip-unit.org/2022/multilateral-matters-14-wipo-decides-to-hold-two-diplomatic-conferences-no-later-than-2024/>; Yu, *WIPO Negotiations*, *supra* note 129, at 306.

210. See World Intell. Prop. Org., Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Special Session, Geneva, Sept. 4 to 8, 2023, WIPO/GRTKF/IC/SS/GE/23/4, 2 (2023) [hereinafter IGC Special Session Decisions], https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_ss_ge_23/wipo_grtkf_ic_ss_ge_23_decision_s.pdf.

211. See *id.*

“depends on the specific properties of” the GR or associated TK.²¹² Developed countries also aimed to narrow states’ freedom to determine remedies by preventing contracting parties from revoking, invalidating, or rendering unenforceable conferred patent rights solely based on a failure to disclose, unless there is fraudulent intent.²¹³

Despite its narrow scope compared to previous proposals and some national laws, the GRATK Treaty is an important first step toward preventing the misappropriation of GRs and associated TK.²¹⁴ The treaty establishes a baseline for an international patent disclosure requirement, for which developing countries have long demanded, notably since the 2006 Article 29*bis* proposal in the WTO.²¹⁵ It is also the first WIPO treaty to refer to Indigenous Peoples as well as local communities and emphasizes the importance of consulting Indigenous Peoples and local communities in the implementation of the treaty.²¹⁶ In terms of sanctions and remedies, the treaty requires parties to put in place “appropriate, effective[,] and proportionate legal, administrative, and/or policy measures” to address non-compliance with the disclosure requirement.²¹⁷ Notably, however, it stops short of requiring patent applicants who fail to disclose to rectify their failure expeditiously or requiring patent applicants to exercise due diligence in obtaining information about the source of GRs and associated TK.²¹⁸ Despite the lack of effective sanctions and remedies, so long as the GRATK Treaty is promptly entered into force and states show further commitment to expand protections of GRs, TK, and TCEs, the possibility of implementing a more balanced and equitable IP regime remains.²¹⁹

5. Continued Work on TK and TCEs

After the General Assembly’s remarkable decision to convene a diplomatic conference, IGC Chair Lilyclaire Bellamy capitalized on this renewed interest to prepare a draft international legal instrument on intellectual property and TK and TCEs.²²⁰ Although this draft differed from former Chair Goss’s 2019 GRs draft,

212. WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge arts. 2–3, *opened for signature* May 24, 2024 [hereinafter GRATK Treaty], https://www.wipo.int/edocs/mdocs/tk/en/gratk_dc/gratk_dc_7.pdf.

213. *See id.* at art. 5.3, 5.4; *see also* SYAM & CORREA, UNDERSTANDING THE NEW WIPO TREATY, *supra* note 138, at 3.

214. SYAM & CORREA, UNDERSTANDING THE NEW WIPO TREATY, *supra* note 138, at 1.

215. GRATK Treaty, *supra* note 212, at art. 4; World Intell. Prop. Org., Member States Adopt Historic New Treaty, *supra* note 13; Yu, *WIPO Negotiations*, *supra* note 129, at 316.

216. GRATK Treaty, *supra* note 212, at pmbl.

217. *Id.* at art. 6.

218. *See id.* This lack of effective sanctions may have made it easier for demandeurs and non-demandeurs to reach a compromise. Yu, *WIPO Negotiations*, *supra* note 129, at 318.

219. *See* SYAM & CORREA, *supra* note 213, at 5.

220. Lilyclaire Bellamy, Chair, Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Forty-Fifth Session, Geneva, Dec. 5 to 9, 2022, Chair’s Text of a Draft International Legal Instrument Relating to Intellectual Property and Traditional

because there is not yet agreement as to whether a legal instrument on TK and TCEs should be binding, the text addressed the issues that the IGC has focused on so far.²²¹

The draft text intends to provide effective protection of TK and TCEs, prevent the erroneous grant of IP rights over TK and TCEs, and recognize Indigenous Peoples and local communities as holders of TK and TCEs.²²² It set bounds as to the scope of protectable subject matter and provides that Indigenous Peoples and local communities are the beneficiaries of this protection, leaving to national legislation the option of considering other beneficiaries.²²³ Regarding the scope of protection, it took the tiered approach, supported by multiple developing countries,²²⁴ which proposed differentiated protection of restricted TK or TCEs (such as those that are secret or sacred) and of disseminated TK or TCEs that are no longer under the control of beneficiaries but are still distinctively associated with the beneficiaries' cultural identities.²²⁵ Although the adoption of the GRATK Treaty provides room for optimism regarding international protection of TK and TCEs, many gaps have yet to be elaborated in IGC discussions, and questions remain on whether opposing countries will ever support establishing positive rights in TK and TCEs.²²⁶ The IGC is continuing to develop draft texts on TK and TCEs as part of its 2024-2025 mandate and 2025 work program.²²⁷

Knowledge/Traditional Cultural Expressions, World Intell. Prop. Org., WIPO/GRTKF/IC/45/CHAIR TEXT, 1 (2022), [hereinafter 2022 IGC Chair's Draft on TK and TCEs], https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_45/wipo_grtkf_ic_45_chairs_text.pdf.

221. *Id.* at 1.

222. *Id.* at 2.

223. *See id.* at 4–7.

224. *See* World Intell. Prop. Org., Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Twenty-Seventh Session, Geneva, Mar. 24 to Apr. 4, 2014, Rep., WIPO/GRTKF/IC/27/10, ¶¶ 193, 271, 281, 283 (2014), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_27/wipo_grtkf_ic_27_inf_11.pdf (statements of Indonesia, Iran, India, and Brazil).

225. 2022 IGC Chair's Draft on TK and TCEs, *supra* note 220, at 8–9.

226. *See id.* at 14; World Intell. Prop. Org., Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Forty-Fifth Session, Geneva, Dec. 5 to 9, 2022, The Protection of Traditional Knowledge: Updated Draft Gap Analysis, WIPO/GRTKF/IC/45/6, 20–29 (2022), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_45/wipo_grtkf_ic_45_6.pdf; World Intell. Prop. Org., TCE Gap Analysis, *supra* note 141, at 17–21; Yu, *WIPO Negotiations*, *supra* note 129, at 312.

227. World Intell. Prop. Org., Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Forty-Ninth Session, Geneva, Dec. 2 to 6, 2014, The Protection of Traditional Knowledge: Draft Articles, WIPO/GRTKF/IC/49/4, https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_49/wipo_grtkf_ic_49_4.pdf; World Intell. Prop. Org., Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Forty-Ninth Session, Geneva, Dec. 2 to 6, 2014, The Protection of Traditional Cultural Expressions: Draft Articles, WIPO/GRTKF/IC/49/5, https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_49/wipo_grtkf_ic_49_5.pdf.

D. Challenges and Implications

WIPO has recognized a need to protect GRs, TK, and TCEs since 1997, and the IGC has been negotiating this issue since 2001.²²⁸ It took more than 20 years for WIPO to convene a diplomatic conference and adopt a treaty for GRs and their associated TK, even though the GRATK Treaty is largely similar to the Article 29*bis* proposal submitted more than 15 years ago.²²⁹ Moreover, progress on TK more generally and TCEs has not yet reached a similar stage.

Three challenges have led to the slow pace of these negotiations. First, the dominance of the rights-based IP regime makes protections for GRs, TK, and TCEs a difficult issue to advance in a multilateral context. The United States and other developed countries may be acting as norm-defenders or even norm-resisters, insisting on maintaining the status quo to protect their own economic interests. While a legal instrument protecting GRs and TK is a welcome improvement, the current draft text focuses on GRs and TK specifically as they relate to the patent system, but not in any other context.²³⁰ The fragmented treatment of issues regarding GRs, TK, and TCEs across various international fora can further complicate demandeurs' efforts to establish dynamic cross-regional coalitions.²³¹

Second, the negotiations, which seek to address environmental, human rights, and cultural issues that go beyond intellectual property, are largely driven by countries and communities that have not been demandeurs in international norm-making in the past.²³² Given the relatively low interdependence between GRs, TK, and TCEs and other issues on the international IP agenda, demandeurs have little leverage to extract concessions from non-demandeurs.

Third, while international IP instruments have usually developed "bottom-up," using standards from national systems to develop multilateral agreement, WIPO negotiations over GRs, TK, and TCEs have been more "top-down" because of the lack of national or regional regimes from which demandeurs can base their proposals.²³³ The issue of GRs, TK, and TCEs requires a high degree of substantive expertise and extensive coordination and policy coherence at the

228. See World Intell. Prop. Org., THE WIPO IGC, *supra* note 101, at 2; World Intell. Prop. Org., Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, Forty-Fifth Session, Geneva, Apr. 30 to May 3, 2001, Rep., WIPO/GRTKF/IC/1/13, at 1 (2001), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_1/wipo_grtkf_ic_1_13.pdf.

229. Yu, *WIPO Negotiations*, *supra* note 129, at 316.

230. See World Intell. Prop. Org., IGC Special Session Decisions, *supra* note 213, at Annex art. I (explaining that the objectives of the instrument are to "enhance the efficacy, transparency and quality of the patent system with regard to genetic resources and traditional knowledge associated with genetic resources" and "prevent patents from being granted erroneously for inventions that are not novel or inventive with regard to genetic resources and traditional knowledge associated with genetic resources").

231. Wendland, *International Negotiations to Resume*, *supra* note 151.

232. *Id.*

233. See Wendland, *IP Norm-Building*, *supra* note 53.

national level. The IGC only has a few successful examples of national and regional laws to draw on in creating these draft texts.²³⁴

However, China's changing role in the negotiations seems to have helped mitigate these three challenges. First, in its rise as an aggregate IP creator, China has formed coalitions with other developing countries and supported their proposals for legally binding instruments regarding GRs, TK, and TCEs.²³⁵ Additionally, China has actively pushed its domestic policy towards becoming an aggregate IP creator to give itself more leverage in negotiating IP issues with other countries, both within WIPO and in other multilateral or bilateral fora.²³⁶ Lastly, and perhaps most importantly, China seems to be taking steps to offer national examples of laws concerning GRs, TK, and TCEs to encourage a "bottom-up" approach so that demandeurs have a stronger foundation on which to base their demands. As such, China may be a unique example of "strategic consistency" in IP negotiations by favoring higher standards for both enforcement of "traditional" IP rights and protections for GRs, TK, and TCEs.²³⁷

Although China benefits from pursuing stronger protections for GRs, TK, and TCEs, such protections also present economic and social advantages to many other developing countries.²³⁸ By amending its own laws to protect GRs, TK, and TCEs, advancing these objectives in bilateral and regional fora, and supporting other developing countries' demandeurs within WIPO, China is concretizing the meaning of equity within international IP lawmaking. In doing so, China is also effectuating the principle of fair and equitable benefit sharing, which international law has claimed to value for years but only recently acted to promote.²³⁹ China's support and inclusion of developing country voices in negotiations of GRs, TK, and TCEs advances an interest that is distinct from, and even contradictory to, those of developed countries with respect to IP protections. Moreover, this focus

234. *Id.*; see also Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J.L. & MED. 345, 370–72 (2008) [hereinafter *BRICS Alliances*] (suggesting that a BRICS coalition or partial BRICS alliances could help developing countries strengthen their collective bargaining position and promote effective and democratic decision-making in the international IP regime).

235. See, e.g., World Trade Org., Article 29bis Proposal, *supra* note 130; World Intell. Prop. Org., GA Thirty-Eighth Session Report, *supra* note 167, ¶ 171 (statement of China supporting the African Group's proposal); World Intell. Prop. Org., GA Forty-Eighth Session IGC Report, *supra* note 184, ¶ 11 (statement of China aligning itself with Nigeria and Brazil's goals regarding GRs, TK, and TCEs).

236. See *supra* Part III.A.

237. See Yu, *WIPO Negotiations*, *supra* note 129, at 318–20.

238. See Abdel-Latif, *supra* note 27, at 17–19.

239. See, e.g., 2007 WIPO DEVELOPMENT AGENDA, *supra* note 27, ¶¶ 1, 18 (calling for "WIPO technical assistance [to] be . . . development-oriented, . . . taking into account the priorities and special needs of developing countries" and urging the IGC "to accelerate the process on the protection of genetic resources, traditional knowledge[,] and folklore"); Convention on Biological Diversity, *supra* note 9, art. 1 (stating that one of the CBD's objectives is "the fair and equitable sharing of the benefits arising out of the utilization of genetic resources").

on GRs, TK, and TCEs is specific enough to be achievable, as opposed to a broad but vague range of development goals.²⁴⁰

In this context, demandeurs have persevered and achieved a treaty on GRs and associated TK, despite much opposition from non-demandeurs.²⁴¹ This development has also revitalized discussions on TK and TCEs, leading to the beginnings of a draft text of a potential legal instrument for TK and TCEs.²⁴² So long as this momentum continues, the GRATK Treaty could mark the beginning of a re-imagining of the IP system as one that benefits a broad range of interests and is more flexible, equitable, and balanced.²⁴³ As a practical matter, it could also help harmonize the current checkerboard of national and regional laws, create mechanisms for the transboundary protection of GRs, TK, and TCEs, and provide more clarity and predictability for users of these resources and knowledge.²⁴⁴

CONCLUSION

Despite the United States's use of regime shifting to heighten IP standards and protect its own economic interests through the WTO, WIPO remains a forum for pushing new IP standards, as developing country demandeurs have shown in the decades-long negotiations over GRs, TK, and TCEs. The unusually extended timeline of these negotiations reflects major conflicts in the interests of developing and developed countries, as well as the entrenchment of the colonial knowledge governance standard and rights-based regime in international IP law.²⁴⁵

The recent adoption of the treaty on GRs and associated TK, despite a long, arduous, and complicated process, represents an instance in which China, along with many other developing countries, is advancing a positive norm of equity that runs counter to the interests of developed countries, which have long controlled the global IP regime. Regardless of China's motivations—whether it seeks to increase its own influence in an expanding array of issue areas,²⁴⁶ preserve state control over its resources and knowledge,²⁴⁷ or build goodwill in its relations with

240. See Brian-Vincent Ikejiaku, *International Law Is Western Made Global Law: The Perception of Third-World Category*, 6 AFR. J. LEGAL STUD. 337, 352 (2013).

241. See World Intell. Prop. Org., GA Fifty-Fifth Session Report, *supra* note 145, ¶¶ 275–77, 279, 298, 302, 304 (statements of the United States, Japan, Canada, and South Korea opposing the convening of a diplomatic conference).

242. Wend Wendland, *Is an International Agreement on IP, Genetic Resources and Associated Traditional Knowledge Finally in Sight?*, WIPO MAG. (Feb. 2023) [hereinafter *Is an International Agreement in Sight?*], https://www.wipo.int/wipo_magazine_digital/en/2023/article_0003.html. See generally 2022 IGC Chair's Draft on TK and TCEs, *supra* note 220.

243. See Wendland, *Is an International Agreement in Sight?*, *supra* note 242; Wendland, *International Negotiations to Resume*, *supra* note 151.

244. See Wendland, *International Negotiations to Resume*, *supra* note 151.

245. See Oguamanam, *supra* note 127, at 390.

246. See David Shambaugh, *China's Soft-Power Push*, FOREIGN AFFS. (June 16, 2015), <https://www.foreignaffairs.com/articles/china/2015-06-16/chinas-soft-power-push>.

247. See Muzaka & Serrano, *supra* note 111, at 741–42.

other developing countries²⁴⁸—China is proactively engaging to promote the norm of equity within IP lawmaking. It is thereby positioning itself, or at least attempting to position itself, as a norm-maker. This shift in norm-making in the global IP regime will become increasingly important to understand as the technology and trade rivalries between China and the United States continue to grow²⁴⁹ and as multilateral, bilateral, and regional fora remain important in developing more advanced rules.²⁵⁰ With China's rise as an aggregate IP creator, greater engagement in multilateral fora, and desire to be recognized as a norm-maker, the ongoing negotiations over GRs, TK, and TCEs propose a more inclusive approach to international IP lawmaking, one that hears a broader set of voices and includes new values and interests in the conversation.

248. See Yu, *BRICS Alliances*, *supra* note 234, at 369–72.

249. See, e.g., Request for Consultations by the China, *United States—Measures on Certain Semiconductor and Other Products, and Related Services and Technologies—Addendum*, WTO Doc. WT/DS615/1/Rev.1/Add.2 (Jan. 10, 2025); Alan Rappeport, *Trump Says He Will Impose 10% Tariffs on Chinese Imports on Feb. 1*, N.Y. TIMES (Jan. 21, 2025), <https://www.nytimes.com/2025/01/21/business/trump-tariffs-china.html>.

250. Vázquez Callo-Müller, Ortega Sanabria & Matsuno Remigio, *supra* note 112, at 1136.