# 1AC

## 1AC – Substance

### Plan

Note: TK = Traditional Knowledge. TM = Traditional Medicine

#### Plan Text: The member nations of the World Trade Organization ought to implement a Traditional Knowledge information disclosure requirement for all patent applications as per Gebru

* People applying for a patent have to disclose the traditional knowledge/resources that they use in their invention. There are three different levels of information usage that would have different reductions of protection and/or penalties depending on whether the info was willingly disclosed or found afterwards by an investigation. These range from invalidity/revocation of patents to fines and disgorgement of profits

Gebru 19 [Aman Gebru “Patents, Disclosure, and Biopiracy” Published: Denver Law Review, Vol. 96, No. 3, June 30, 2019] [https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3188311] [Gebru: S.J.D. U Toronto Faculty of Law. LL.M. U Washington School of Law. LL.B. Haramaya University College of Law. Assistant Professor of Law at Duquesne University School of Law.] [Brackets for gendered language] || SM

4. Guidance for Policy

The information-forcing rule literature offers guidance on how to craft an effective and efficient requirement. A well-drafted requirement would be able to address concerns around legal uncertainty and innovation-deterring burdens while still being able to encourage the disclosure of reliance on TK. If a default rule is to succeed in compelling information from a well-informed party, it should be designed against the interest of that party.213 It is because of this rule that the well-informed party reveals the socially beneficial information. In the current context, the requirement should create a penalty against the interest of an applicant, which points to the need to adopt penalties of patent invalidity for applications that violate the requirement. If the requirement is to be effective, the default-penalty rule should put the patent applicant in a worse position than she would have been in had she taken a risk and the risk materialized.

Three levels of reliance on TK could be used to further extrapolate the trigger of an obligation under the requirement. First, the minimal level of reliance could be described as “mere inspiration”—the inventor was inspired by what [they] she understood from TK, but the traditional practice was not relevant for the development of the claimed invention. A relevant example here may be the rosy periwinkle plant, which is native to Madagascar and was traditionally used to treat diabetes.214 Scientists at Eli Lilly and the University of Western Ontario, after years of research, learned that the plant has cancer-fighting qualities.215 Eli Lilly used extracts from the plant to develop vinblastine and vincristine—medicines used to treat Hodgkin’s disease and childhood leukemia.216 If the TK of using the plant for diabetes or processes of extracting ingredients did not contribute to the development of vinblastine and vincristine,217 then the duty to disclose the source of TK would be unreasonably burdensome. The inventors in this case were inspired to test it for its cancer-treating potential after being exposed to the traditional use of the plant to treat diabetes. Therefore, the traditional use is not “material for patentability.” The claimed invention is not substantively based on the TK. Thus, the scope of the patent right that will ultimately issue is not affected by disclosure of the minimal input from TK. Under this scenario, the patent applicant has an incentive to abide by the requirement because the applicant has nothing to lose—disclosure will not affect the patent scope. However, as explained in Part I,218 the duty of candor and good faith is broader than the duty to disclose material information. Any information that an examiner might have wanted to know should be included in this broader requirement of candor and good faith. Still, the patent applicants have an incentive to disclose the traditional use of the rosy periwinkle to treat diabetes for the same reason stated earlier.219

Second, a higher level of reliance on TK could be described as “substantial reliance” and could fairly give rise to a duty to disclose under 35 U.S.C. § 112 and Rule 56. Substantial reliance is a situation where, without access to the TK, the invention may not have been produced, or the process would have taken significantly more time or resources. The neem tree case discussed in the introduction to this Article is a good example of this. Presuming that Mr. Larson knew that Indian farmers have been using the neem tree extract as a pesticide and presuming a storage stable neem tree extract was not in prior use, his patent application for a storage stable neem tree extract to be used as a pesticide should be thought of as having substantially relied on TK. This is especially the case if, as claimed by representatives of W.R. Grace, the claimed compound and process resulted in increasing the stability of the extract from a couple of days to two years.220 In this case, Mr. Larson and the scientists involved in the second W.R. Grace patent should disclose that extracts of the neem tree have been used in India as a pesticide because such information is “material for patentability.” The improvement in stability of the compound depends on the extent of the traditional use in a stable neem tree extract.

In this second scenario, the level of reliance on TK is so substantial that “but for” the use of TK, the claimed invention would not have been developed. If the improvement does not develop something totally different, disclosure of “substantial reliance” on TK under this scenario may narrow the scope of the patent right. If the penalty default is the reduction of patent scope (or other similarly weak penalties such as the temporary suspension of prosecution), the applicant would have an incentive to withhold information in hopes that the PTO or third parties will not discover the information on their own. In other words, if the ex post discovery of a violation of the requirement results in the same outcomes as an ex ante disclosure, then the applicant has hardly any incentive to disclose. Therefore, legislators would need to address this incentive to withhold information by setting up a penalty resulting in the rejection of an application or the invalidity of a granted patent.

The highest level of reliance could be a claim to an “invention” that provides only minimal improvement on TK. Patent law standards of novelty221 and nonobviousness222 may be helpful here. The improvement would be minimal if the traditional use of the resource anticipates it or if it would be obvious to the average person in that field with knowledge of the relevant TK. A good example here is the patenting of a process for treating wounds by applying turmeric powder. In 1995, two researchers at the University of Mississippi Medical Center, Soman K. Das and Hari Har P. Cohly, received a U.S. patent.223 The patent covered a method of ad- ministering turmeric powder orally and topically to heal surgical wounds and ulcers.224 People in India had used turmeric powder to treat wounds for centuries.225 The Council of Scientific and Industrial Research (CSIR), an agency of the Indian government, challenged the validity of the patent in the PTO.226 The Council submitted thirty-two printed publications from India providing evidence of the use of turmeric powder to heal wounds for centuries.227 The PTO revoked all six claims in the patent for failing to meet substantive patentability requirements.228 Information about the reliance of TK in these scenarios is obviously material for patentability analysis. The patent application in this and other similar cases229 is claiming rights over the traditional uses of a resource, provides only a minimal improvement or, in the worst of cases, no improvement is made to TK at all. In these cases, Rule 56 would require the disclosure of TK.230 Furthermore, the patent application in most of these cases will fail to meet the patentability requirements.

In this third scenario, the patent applicant has an incentive to violate the requirement because compliance with the rule will result in the same outcome as the penalty. In this scenario, the requirement will have little incentive to disclose reliance on TK because the penalty for violation is the same as the outcome from compliance. Thus, policy makers should adopt a harsher penalty than patent invalidity. This includes disgorgement of profits or levying fines. One additional benefit of the requirement to note is that the penalty default will discourage researchers from going to the PTO before making a considerable improvement on TK resources, which is a socially desirable outcome. Thus, in addition to compelling information from applicants, the requirement may impact patenting behavior. The three scenarios outlined above are a simplified version of what might happen in bioprospecting projects, and they are used here to illustrate the various incentive structure of the patent applicant.

Conceiving the requirement as an information-forcing default rule solves two of the three issues of concern. First, it solves the questions of what type of penalty to impose for violations of the requirement. If the requirement is conceived of as an information-forcing rule, then the penalty for infringement in the first two cases would have to be a rejection of a patent application and invalidity of a granted patent. For the third scenario, because the applicant knows [they] she does not have a patentable invention in the first place, patent invalidity will not be sufficient. In these types of cases, a harsher penalty such as disgorgement of profits or fines is needed to compel information.

For the first two scenarios, anything short of patent invalidity or non- enforcement would fail to encourage patent applicants to disclose their reliance on TK resources. A voluntary system in which patent applicants will face no repercussions for noncompliance would mean a reasonable applicant would not risk patent invalidity or the reduction of the scope of her patent by providing potentially damaging information. There are no benefits to doing so unless the applicant wants to fulfill some form of moral obligation. The cost-benefit analysis is similar under a regime in which the penalty is suspension of patent prosecution. If, for example, Mr. Larson’s patent over storage stable neem tree extract would be narrowed down upon his disclosure of traditional practices in India, he would initially take a risk of noncompliance. If on the off chance that the patent examiner discovers the traditional practice in India (which in most cases is very unlikely), then Mr. Larson can comply with the requirement. This would result in most applicants being noncompliant.

Most cases of bioprospecting or biopiracy can be expected to fall under either the first or second scenario. This is because TK tends to involve basic information231 about the benefits of biodiversity resources on which researchers could relatively easily make considerable improvements. For example, Indian farmers had used the neem tree as a pesticide for centuries,232 but the PTO found Mr. Larson’s “improvement”233 of creating a storage stable neem tree extract innovative enough to grant it a patent.234 Furthermore, because of the uncertainty regarding the validity of a patent application, patent applicants can reasonably expect that the scope of their patent application will only be narrowed rather than completely rejected.

#### Status quo IP regimes are incompatible with the way TM functions and is shared

Iya 17 [Philip F. Iya, “Challenges facing traditional medicine: towards new approaches for protecting and promoting Intellectual Property Rights (IPR) of practitioners in South Africa” Published: University of Botswana, December 16, 2017] [http://ubrisa.ub.bw/handle/10311/2130] [Iya: Professor of law at University of Fort Hare, South Africa] || SM

There is this common understanding that instead of being practiced systematically i.e. using scientific Western Eurocentric approaches, traditional medicine (TM) is practiced in accordance with the responses of individual or collective knowledge holders and practitioners to the cultural environment with which they interact. The implication of this is that in the practice of traditional medicine, existing formal intellectual property (IP) regimes of Western Eurocentric origin and nature, and intended to protect the knowledge holders, cannot fully respond to the needs of the essentially cultural nature i.e. the informal IP of the knowledge. The above kind of thinking has indeed tasked the minds of not only the traditional knowledge holders/practitioners themselves but, even more so, the minds of Western, modern and scientific practitioners of the Western medicine, One of the reasons for this kind of problematic thinking is because the Western Eurocentric (or formal) IP regime has been designed to protect individualized trade- related activities, it does not take into account the activities of traditional knowledge which are essentially of cultural nature and involves individual and community challenges caused by their social environment. Given the above broad preliminary background discussion over IK, IKS and the health care systems, especially the practice of TM, this paper describes some aspects of IK including challenges facing current holders and practitioners of TM in relation to their intellectual property rights (IPR). In doing so, the following sub-themes will guide the discussion:

#### Strategic weaponization and alterations of settler patent systems by Indigenous groups are valuable, even if those systems are flawed. The 1AC is part and parcel with a long legacy of resistance.

Younging 10 “Intergovernmental Committee On Intellectual Property And Genetic Resources Traditional Knowledge And Folklore” Seventeenth Session Geneva, December 6-10, 2010 Wipo Indigenous Panel On The Role Of The Public Domain Concept: Experiences In The Fields Of Genetic Resources, Traditional Knowledge And Traditional Cultural Expressions: Experiences From Canada Document prepared by Mr. Gregory Younging [Creative Rights Alliance, Kelowna, Canada, Opaskwayak Cree Nation-Canada] <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_inf_5_a.pdf> SM

The precept that all Intellectual Property, including TK, is intended to eventually enter the Public Domain is a problem for Indigenous peoples because Customary Law dictates that certain aspects of TK are not intended for external access and use in any form. As a response to this, there have been circumstances where indigenous people have argued that some knowledge should be withdrawn from circulation and that for specific kinds of knowledge, protection should be granted in perpetuity. 29 Examples of this include, sacred ceremonial masks, songs and dances, various forms of shamanic art, sacred stories, prayers, songs, ceremonies, art objects with strong spiritual significance such as scrolls, petroglyphs, and decorated staffs, rattles, blankets, medicine bundles and clothing adornments, and various sacred symbols, designs, crests, medicines and motifs. However, the present reality is that TK is, or will be, in the Public Domain (i.e., the IPR system overrides Customary Law.)

Certain aspects of TK should not enter the public domain (as deemed under Customary Law) and should remain protected as such into perpetuity, which could be expressed as a form of “Indigenous private domain.” (Younging 2007). Indigenous peoples’ historical exclusion from the broad category of ‘public’ feeds part of the differences in objectives. Indigenous peoples also present different perceptions of knowledge, the cultural and political contexts from which knowledge emerges, and the availability, or perceived benefits of the availability, of all kinds of cultural knowledge. 30

Copyright Case Study: The Cameron Case

In 1985 the Euro-Canadian author Anne Cameron began publishing a series of children’s books though Harbour Publications based on Westcoast Indigenous traditional stories. These books include: The Raven, Raven and Snipe, Keeper of the River, How the Loon Lost Her Voice, Orca’s Song, Raven Returns the Water, Spider Woman, Lazy Boy and Raven Goes Berrypicking. Cameron had been told the traditional stories by Indigenous storytellers and/or had been present at occasions where the stories were recited. The original printing of the books granted Anne Cameron sole authorship, copyright and royalty beneficiary, and gave no credit to the Indigenous origins of the stories. As the discourse around Indigenous cultural appropriation emerged in the 1990s, Cameron’s books came under severe Indigenous criticism; not only on the grounds of cultural appropriation, but the Indigenous TK holders asserted that some of the stories and aspects of the stories were incorrect.

This led to a major confrontation with Indigenous women authors at a women writer’s conference in Montreal in 1990. At the end of the confrontation Cameron agreed not to publish any more Indigenous stories in the series: however, she did not keep her word and the books continued to be reprinted and new books in the series continued to be published (Armstrong and Maracle1992). Some minor concessions have been made in subsequent reprints of books in the series and new additions. Reprints of the books that were produced after around 1993/94 contained the disclaimer: “When I was growing up on Vancouver Island I met a woman who was a storyteller. She shared many stories with me and later gave me permission to share them with others… the woman’s name was Klopimum.” However, Cameron continued to maintain sole author credit, copyright and royalties payments. In a further concession, the 1998 new addition to the series T’aal: the One Who Takes Bad Children is co-authored by Anne Cameron and the Indigenous Elder/storyteller Sue Pielle who also shares copyright and royalties.

Patent Case Study: The Igloolik Case

An example of the failure of the Patent Act In Canada to respond to Inuit designs is the Igloolik Floe Edge Boat Case.31 A floe edge boat is a traditional Inuit boat used to retrieve seals shot at the floe edge (the edge of the ice floe), to set fishing nets in summer, to protect possessions on sled when travelling by snowmobile or wet spring ice, and to store hunting or fishing equipment. In the late 1980’s the Canadian government sponsored the Eastern Arctic Scientific Research Center to initiate a project to develop a floe edge boat that combined the traditional design with modern materials and technologies. In 1988 the Igloolik Business Association (IBA) sought to obtain a patent for the boats. The IBA thought that manufactured boats using the floe edge design would have great potential in the outdoor recreation market. To assist the IBA with its patent application the agency, the Canadian Patents and Developments Limited (CPDL) initiated a pre-project patent search that found patents were already held by a non-Inuit company for boats with similar structures. The CPDL letter to the IBA concluded that it was difficult for the CPDL to inventively distinguish the design from previous patents and, therefore, the IBA patent would not be granted. The option of challenging the pre-existing patent was considered by the IBA, however, it was decided that it would not likely be successful due to the high financial cost and risk involved in litigation.

Trademark Case: The Snumeymux Case

As most Indigenous communities are far behind in terms of establishing businesses most trademarking of TK involves a non-Indigenous corporation trademarking an Indigenous symbol, design or name. Again, many cases could have been examined in this section but only two have been chosen: one case involving the Snumeymux Band trade marking petroglyphs through the Canadian Patent Office, and one involving an international corporation’s patent licence being the subject of an intense international Indigenous lobbying effort.

The Snumeymux people have several ancient petroglyphs located off their reserve lands near False Narrows on Gabriola Island, BC. In the early 1990s non-Indigenous residents of Gabriola Island began using some of the petroglyph images in coffee shops and various other business logos. In the mid-1990s the Island’s music festival named itself after what had become the local name of the most well known petroglyph image, the dancing man. The Dancing Man Music Festival then adopted the image of the dancing man as the festival logo and used it on brochures, posters, advertisements and T-shirts.

The Snuneymux Band first made unsuccessful appeals to the festival, buisnesses and the Gabriola community to stop using the petroglyph symbols. In 1998 the Snuneymux Band hired Murry Brown as legal counsel to seek protection of the petroglyphs (Manson-2003). At a 1998 meeting with Brown, Snuneymux Elders and community members on the matter, The Dancing Man Festival and Gabriola business’ and community representatives were still defiant that they had a right to use the images from the petroglyphs (Brown-2003).

On the advice of Murry Brown, The Snuneymux Band filed for a Section 91(n) Public Authority Trademark for eight petroglyphs and was awarded the trademark in October of 1998 (Brown2003). The trademark protects the petrogylphs from “all uses” by non-Snuneymux people and, therefore the Dancing Man Festival and Gabriola Island business and community representatives were forced to stop using images derived from the petroglyphs. In the Snuneymux case the petroglyphs were trademarked for “defensive” purposes. The Snuneymux case represents an innovative use of the IPR system that negotiated within the systems limitations and found a way to make it work to protect TK.

### Advantage – Neo-Colonialism

#### TM has historically been impacted and subordinated by Western colonization

* T&CM = Traditional and Complementary Medicine

Ijaz and Boon 18 [Nadine Ijaz, Heather Boon “Statutory Regulation of Traditional Medicine Practitioners and Practices: The Need for Distinct Policy Making Guidelines” Published: The Journal of Alternative and Complementary Medicine, Vol 24, No. 4, April 2018] [https://doi.org/10.1089/acm.2017.0346; pdf available upon request] [Ijaz: PhD U Toronto, Assistant Professor in the Department of Law and Legal Studies at Carleton U in Canada] [Boon: Professor and Dean of the Leslie Dan Faculty of Pharmacy at U of Toronto. Chair of the Council of Health Services.] || SM

An important issue that frequently goes unaddressed in scholarly discussions of T&CM pertains to the historical and ongoing impacts of European colonization on traditional medicine systems and practices across the globe. As documented and discussed elsewhere, traditional medicine treatments and practices have long been subjugated, devalued, co-opted, and in some cases decimated across the globe within the context of European colonization. Still today, many indigenous healthcare systems remain under threat due to colonization’s impacts.

Biomedicine’s globalized dominance, as Hollenberg and Muzzin have elaborated, is far less the result of biomedical science’s evidenced efficacy than it is a feature of the ongoing sociopolitical subordination of precolonial indigenous knowledge systems and related healthcare practices. Traditional medicine continues to be in widespread use, and in many jurisdictions (particularly in the global South) represents the ‘‘mainstay of healthcare delivery.’’ However, considerable political, research, economic, and institutional capital continues to sustain biomedicine’s pre-eminence in state healthcare systems worldwide. Regardless, indigenous systems of medical knowledge remain important resources not only within their specific cultural contexts but also as ‘‘critical alternative models for resolving health crises on a global scale where biomedical and technological solutions fall increasingly short.’’

#### Specifically, legal regimes are key to upholding modern day neo-colonialism

Rahmatian 10 [Andreas Rahmatian “Neo-Colonial Aspects of Global Intellectual Property Protection” Published: The Journal of World Intellectual Property, Vol. 12, No. 1, pp. 40-74, 2010] [https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1629228] [Rahmatian: University of Glasgow, Professor of Commercial Law. PhD in Private Law from the University of Vienna. LLM from the University of London in comparative law and intellectual property law.] || SM

An essential instrument in the process of neo-colonialisation by economic means is the establishment of a legal framework of international trade which confers legally enforceable rights that support and safeguard economic penetration and control. This includes, as a prerequisite for the making of an “informal empire” like in colonial times, the creation of property rights and the guarantee of protection of foreign property rights in dependent regions. However, unlike in the colonial era, the most important property rights, which fulfil this role in the twenty-first century, are intellectual property rights. This is because intellectual property rights do not attach to objects of physical substance, like land, raw material or plant and machinery, but are abstract legal concepts of unlimited flexibility as regards extent and time. The fairly recent implementation of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) is one major device which drives economic neo-colonialism forward, and the process of the making of TRIPs also demonstrates instructively this development. The history and “colonising” effects of TRIPs on developing countries will be discussed below under Section Two. As TRIPs is the central international intellectual property instrument today, there is no need to discuss additionally the relevant treaties of the World Intellectual Property Organisation (WIPO)6 in the following, but what will be said with regard to TRIPs, generally also applies to these. In contrast to the international intellectual property regime of TRIPs modelled on Western laws, a seemingly anti-proprietarian approach (Drahos, 1996, p. 210-12) to indigenous resources seeks to introduce a cultural resource protection regime.7 But this idea of a protection of traditional cultural expressions is, in so far it covers artistic expressions in a broad sense, an equally neo-colonial measure, perhaps an even more insidious one. This will be discussed under Section Three.

#### Western IPRs lead to rampant Biopiracy where corporations patent and sell things which have been practiced in communities for generations, using the law to prop up systems of domination

Efferth PhD et al 18 [Thomas Efferth “Biopiracy versus One-World Medicine–From colonial relicts to global collaborative concepts” Published: Phytomedicine Vol 53, May 10, 2018] [https://doi.org/10.1016/j.phymed.2018.06.007; pdf available upon request] [Efferth: Professor at Johannes Gutenberg University. PhD from German Cancer Research Center. Director, Institute of Pharmaceutical and Biomedical Sciences] || SM

The charge of biopiracy is inextricably intertwined with the notions of epistemology on the one hand and the legal notions of intellectual property on the other hand. Epistemology denotes forms of knowing, which are in their turn connected to forms and concepts of explanatory power, which often leads to concepts of ownership, e.g. in processes of patenting. Thus, historically, indigenous communities from across the globe — from Native Americans in the US to Maori in New Zealand, and Aborigines in Australia — have held the notion that land cannot be owned. Their sense that neither land nor nature could be anyone’s property, but needed to be cherished and sustained led to colonial practices of what legal scholar Lindsay Robertson has called conquest by law. Thus, the epistemologies of indigenous communities and settler communities were fundamentally at odds with one another, and they proved to be mutually exclusive. The act of conquest thus also implied that one epistemological framework assumed precedence over another. The Western notion of land as something which could be owned, something which could become property, overrode indigenous concepts of the land, which held such ownership to be impossible. The law, in turn, cemented Western concepts in a way that their assumed superiority was then reframed not only as intellectually or culturally superior, but as legal. Epistemology and law are — especially if routed in the tradition of Roman law - inseparable in this context.

What historically applied to differing epistemological notions of the land also held true for different definitions of nature. Here, too, local and indigenous communities held that nature could not be owned, nor could it consequently be patented. Local and indigenous knowledge of the medicinal power of plants, for instance was recorded in documents which, in Western categories, could not be clearly classified. Thus, the Indian epic of the Bhagavad Gita recorded the use of turmeric and its anti-inflammatory medicinal properties; yet, the Bhagavad Gita was seen as a text which linked cultural, legal, social and medical forms of knowledge. As a hybrid text which was unclassifiable in the sense of Western systems of classification, the Bhagavad Gita hence held little value as a document with which Indian ownership of knowledge with regard to spices such as turmeric could be proved. It was this incompatibility of epistemologies and of traditions of knowledge transfer, which could serve as proof of ownership and of intellectual, property rights which made the court decisions of the 1980s possible, which found in favor of the defendant (e.g. Monsanto) and against the plaintiff (e.g. the government of India).

#### Traditional patent law and IPP legitimize biopiracy’s control over dominated subjects, turning them into capital.

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**Through biopiracy, outside corporations and nations can quickly take resources and secure their control through international intellectual property rights and patents.** **The legitimation for these corporations stems from this westernized, neoliberal economy and the reduction in trade barriers that benefits the wealthier areas of the world at the expense of marginalized peoples**. Power over these populations becomes normalized as a conception of power over dominated subjects. Indigenous communities are generally smaller populations that remain on the margins within the nation-state until they are found to have economic value. Peripheral governance then becomes more pervasive in their lives under neoliberalism and the erosion of international trade barriers and increases in foreign investors. Under neoliberalism, market rationality is extended to all aspects of life. According to Wendy Brown, and her reading of Weber, there is nothing outside of the market. This is a system that allows for transnational entities to have greater control than individual sovereignties. The deregulation of the market, the elimination of tariffs and social safety nets, and an increase in the decimation of the environment and marginalized cultures are all hallmarks of neoliberalism.xvii **When societies and their traditional resources are incorporated into the economy, they become a form of capital**. Essentially, in relation to resources and traditional knowledge, neoliberalism’s desire for profit creates a political tension between national interests and globalized capital.xviii

#### This represents a form of cultural genocide of Indigenous peoples – Western preoccupations with objectivity ignore the communal nature of Indigenous “ownership”.

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When indigenous cultural property rights are defined by western concepts of ‘property ownership’, they risk the fate of indigenous land rights. Where entire continents were lost under terra nullius, indigenous peoples’ descendants now face a ‘cultural genocide’ with ‘discovered’ culture appropriated to benefit the ‘greater good’. Human rights issues resurface; would cultural property rights be better protected via segregation or ‘integration’ into majority cultures? Should rights be framed as collective ‘group’ claims or as ‘matters for individuals’?[2] If so, might cultural property be capable of ‘self-determination’? If ‘cultural secession’ occurs, demands for defined territories become paramount. Human Rights lawyers may have to revise emerging customary norms given recent cases highlighting western judicial bias, where European definitions of ‘land use’ disregard the nomadic, ‘hunter-gatherer’ nature of many indigenous populations, Anglo-western preoccupation with ‘alienability’ conflicts with the ‘perpetual’ nature of indigenous ownership[3] and the ‘individualistic orientation of Anglophone countries’[4] ignores the communal, ‘caretaker’ nature of aboriginal ownership. Although Mabo[5] appeared to extinguish terra nullius, its legacy lingers on. This paper examines whether legal ‘blemishes of the past ... translate into current inequities’. The ‘evolving character’ of international jurisprudence initially sought to justify colonialism’s ‘brutal settlement patterns’.[7] Early defenders of aboriginal rights[8] highlighted the ‘essential humanity of the Indians’[9] and ‘condemned’ colonial abuses, but nevertheless made ‘integrationist assumption(s)’[10] that colonisation was ‘an incessant trend, heralding a new era of progress and prosperity’.[11] The concept of ‘noble primitive, close to nature’,[12] needing fiduciary protection to use property correctly, runs through nineteenth-century American jurisprudence[13] and treaties.[14] These ‘constrained claims and kinds of remedies’[15] displaced the ‘personal and cultural identity’[16] of native people, who were forced to ‘adopt a view of themselves ... that fits with the rights-conferring political machinery of the state’.[17] With cultural property rights, loss of identity is pronounced, and the consequences profound; ‘what was fluid, changeable and non-material, becomes ... a predictable objective of a colonial state.’[18] Just as land was state-ceded in return for rights to ‘reserve’ some of it, the ‘contrivance of sameness’[19] now seems necessary to protect cultural rights. Assimilationist government policies, despite ‘politically correct language of participation and citizenship,’[20] frequently ‘deny difference’; underlying colonialism ensures that native populations remain ‘haphazard aggregations’[21] rather than distinct, rights-bearing state ‘beneficiaries’.

#### Biopiracy wipes out cultures and biological resources

Akurugoda 13 [C.L. Akurugoda “Bio Piracy And Its Impact On Bio Diversity: A Critical Analysis With Special Reference To Sri Lanka” Published: International Journal of Business, Economics and Law, Vol 2, Issue 3, June 2013] [http://ijbel.com/wp-content/uploads/2014/07/Bio-Piracy-And-Its-Impact-On-Bio-Diversity-%E2%80%93-A-Critical-Analysis-With-Special-Reference-To-Sri-Lanka-C.L.Akurugoda.pdf] [Akurugoda: Department of Public & International Law, Faculty of Law, University of Colombo, Sri Lanka] || SM

As a result of bio piracy there are many negative effects on bio diversity such as extinction of endemic living organisms, depletion of bio diversity, and privatization of bio treasures of the country. Further, this practice affects the economy of the country as well. Bio piracy is an extremely lucrative business. Due to the profitable nature of this process most racketeers tend to exploit bio resources of developing countries and obtain Patent for those. The emergence of monopoly over seeds and medicines through patents is becoming a major threat to farmers, livelihoods and public health. Not only the economical disadvantages but cultural and social aspects of human life have been threatened by bio piracy. Bio piracy directly attacks the upper hand that Sri Lanka enjoys on the top of the list of countries with biodiversity. Furthermore, it affects the cultural identity and the traditional knowledge of the indigenous people in the country. Privatization of traditional knowledge through Patenting has created severe consequences on living patterns of people. As such, bio piracy does irreparable damage to bio diversity which ultimately leads to destruction of the entire environment.

## 1AC – Framing [ROB]

### Fwk – ROB

#### 1] The role of the ballot is to center indigenous knowledge – Our work connects different discussions of indigeneity and decolonization to the rest of the globe.

Sium et al 12 (Aman Sium, Chandni Desai, Eric Ritskes, Ontario Institute for Studies in Education, University of Toronto, Sium identifies as being Tigrinya, indigenous, African, and Eritrean, Ritskes is Zhaganash, Towards the ‘tangible unknown’: Decolonization and the Indigenous future, Decolonization: Indigeneity, Education & Society ¶ Vol. 1, No. 1, 2012, pp. I-XIII, JKS)

Decolonization does not exist without a framework that centers and privileges Indigenous life, community, and epistemology. In that regards, it becomes vitally important, despite our goals of understanding and promoting a global Indigenous undertaking, to center and recognize the local settler colonial contexts on which we, as authors, are situated. As we write this, we are on unceded Haudenosaunee and Mississauga land. We do not state this to signal a particular understanding of the complexity of issues, resistance and life that this statement entails, nor in belief of an (perceived and imposed) alliance with Anishinaabeg peoples. Too often talk of ¶ solidarity and alliance gets co-opted in these ways, as ‘magic words’ to state and dispense with complexity, not understanding why they are said or what responsibility and action they might entail. We state these words as a contestation of colonial logic that, as Andrea Smith (2006) notes, “holds that Indigenous people must disappear. In fact, they must always be disappearing, in order to allow non-Indigenous peoples rightful claim over the land” (p. 68). The history of settler colonialism is one of displacement and replacement and we are each implicated in this. We state these words in recognition of the Anishinaabeg peoples’ continued right to this land, to sovereignty, and indeed, their right to exist beyond the often fetishized historical memory of settler colonialism. We do not need to state this to make it true, it simply is. ¶ It is important to recognize this particular history of colonialism, and subsequent (temporary) interruption of sovereignty, because it affects each of us. There is no escaping complicity within a settler colonial state, especially for those of us who have settled here, though complicity looks different for each of us. Complicity cannot be collapsed into simple and neat categories without historicizing the political legacy of colonialism and the way in which it manifested and continues to manifest itself both here and across the globe. It is important to consider the process and logics of colonial modernity and white supremacy, the way in which Europeans defined and classified people – as human and non-human – and then used this as a basis to conquer land and subjugate populations through enslaving, indenturing in labour, genociding and warring (Wynter, 2003, Smith, 2006). It is crucial to consider the particularities of forced movement and involuntary migrations of various diasporas and their distinction from (European) settlers that colonized and settled various lands for the purpose of capitalist expansion rooted in notions and the epistemology of “possessive individualism” (Mohanram, 1999). ¶ That being said, for those who have settled here, we have a history of interruption to recognize and rectify; as Waziyatawin (in this issue) notes, Indigenous peoples recognized, from the beginning, how Western thought and presence displaced and endangered Indigenous ways of knowing and relationships to the earth, as well as the earth itself. We have a responsibility to honor the Indigenous ‘laws of the land’ and to restore right relationships. Often the call for sustainability and ecological responsibility is framed from a settler vantage point, in belief that “this land is your land, this land is my land” so we must take care of it. For those of us who are not Indigenous to Turtle Island, we must recognize our particular responsibility to this land and its stewards. All of this is interwoven into this work and our beginning point. ¶ As such, the starting point of decolonization is not a rejection of colonialism. Rather than replace the dominant with the marginalized, or as Fanon (1968) puts it, make it so “the last shall be first and the first last” (p. 37), the decolonizing project seeks to reimagine and rearticulate power, change, and knowledge through a multiplicity of epistimologies, ontologies and axiologies. Decolonization cannot take place without contestation. It must necessarily push back against the colonial relations of power that threaten Indigenous ways of being. Alfred (2009b) and others have suggested that decolonization can only be “achieved through the resurgence of an Indigenous consciousness *channeled into contention with colonialism*” (p. 48; emphasis ¶ added). Indigenous knowledges are the starting point for resurgence and decolonization, are the medium through which we engage in the present, and are the possibility of an Indigenous future. Without this power base, decolonization becomes a domesticated industry of ideas. Decolonization is not always about the co-existence of knowledges, nor knowledge synthesis, which inevitably centers colonial logic. Whiteness does not ‘play well with others’ but, rather, fragments and marginalizes - so it must be asked: Co-existence at what cost and for whose benefit? Decolonization necessarily unsettles. In the face of the beast of colonialism, thirsty for the blood of Indigeneity and drunk on conquest, assimilation is submission and decolonization calls on those who will “beat the beast into submission and teach it to behave” (Alfred, 2009a, p. 37).

#### 2] Educational spaces serve as grounds for combatting neocolonialism

De Lissovoy 10 [Noah De Lissovoy “Decolonial Pedagogy and the Ethics of the Global” Published: Discourse Studies in the Cultural Politics of Education, Vol. 31, No. 3, pp. 279-293, July 2010] [https://www.academia.edu/1039091/Decolonial\_Pedagogy\_and\_the\_Ethics\_of\_the\_Global] [De Lissovoy: PhD, UCLA. Professor, Department of Curriculum and Instruction at UT Austin.]

Although education has historically claimed an ethical mission, and has attempted to articulate senses of pedagogical community that respond to social needs and dilemmas, posing the question of ethics in the context of globality implies a basic challenge to actually existing forms of teaching and learning. In the first place, the senses of community and collaboration that are predominant in educational rhetoric and methods conceal a consistent commitment to the individual. At a deeper level, dominant and progressive approaches to education are generally unreflective about the cultural and epistemological determination of their own basic senses of what counts as authentic, democratic, and ethical teaching and learning. An ethical approach to education in the present, if it is to discover the complexly shared history described above, has to first expose and challenge the historical and contemporary fact of Eurocentrism in social life, as well as in the processes of curriculum and instruction themselves.

My argument here responds to the call in recent education research for an attention to the scale of the global, and for a complex understanding of globality. Thus, Lingard (2006) argues that education scholarship needs to be deparochialized beyond the boundaries of the nation-state, and that this new focus needs to be sensitive to the complexities of globalization as a space of ongoing neocolonial relationships and cultural hybridization. Indeed, the disciplinary origin of much of the field of globalization studies in sociology and political science has meant that considerations of culture and globality have taken place under other headings in particular, anthropology and postcolonial studies (e.g. Appadurai, 1996; Said, 1993). Educational research has been influenced by this disciplinary division. By contrast, I believe that educational researchers concerned with globalization should crucially attend to culture not as separate from politics or economics, but as deeply interwoven with these spheres. In addition to challenging the economistic idiom of much globalization discourse, such a comprehensive attention can on the other hand have the salutary effect, as Rizvi, Lingard, and Lavia (2006) argue, of making postcolonial theory itself more critical, inasmuch as it is articulated to a consideration of the ongoing material legacies of imperialism. My foregrounding here of the notion of the decolonial is an effort in this direction. In contrast to the postcolonial, the decolonial emphasizes the ongoing process of resistance to colonialism, while also connoting a wider field of application one which extends from material projects that challenge the hegemony of capital to philosophical projects aimed at reconstructing fundamental understandings of ethics and ontology. Capital itself, as Hall (1997) argues, is after all not only a crude homogenizing force, but also a complex dialectic that knows how to work with and through cultural difference as it constructs the cosmopolitan consumerist spaces of the ‘global postmodern’. Critical education, in this context, should recognize cultural and philosophical questions about globalization as at once questions about power, domination, and liberation (Smith, 1999), and should imagine pedagogies informed by an understanding of the deep collaboration between capitalism and imperialism.

#### 3] Uniquely true in the case of public health

Desai interviews Perez-Escamilla 20 [Mayur M. Desai, Rafael Perez-Escamilla “Neocolonialism and Global Health Outcomes: A Troubled History” Published: Yale School of Public Health, October 12, 2020] [https://ysph.yale.edu/news-article/neocolonialism-and-global-health-outcomes-a-troubled-history/] [Desai: PhD. Yale, Associate Professor of Epidemiology (Chronic Diseases); Associate Dean for Diversity, Equity, and Inclusion, YSPH; Track Director, Applied Analytical Methods and Epidemiology, Online Executive MPH Program; Director, Advanced Professional MPH Program; Core Faculty, National Clinician Scholars Program] [Perez-Escamilla: PhD. Yale, Professor of Public Health (Social and Behavioral Sciences); Director, Office of Public Health Practice; Director, Global Health Concentration.] || SM

* SDOH = Social Determinants of Health

RP-E: The powerful global health governance alliance in place for over a century established strong partnerships with and funded prestigious U.S. and European schools of public health. As a result, these schools became the places where the most influential public health professionals, including those from less economically developed countries, were trained through a strong neocolonial lens; i.e., biomedical solutions that strongly ignored the SDOH. In my view, even though we are at a better place now, the way schools of public health continue to train students is not changing fast enough to help form the future leaders who can transform the guiding principles and architecture of the current global health system.

At the end of the day, I believe that curricular reform is needed to strongly instill and train global health students through practice-based learning approaches on: 1) SDOH and equity; 2) Bioethics; 3) Community-based participatory research (in context of cultural humility); 4)Antiracism frameworks and how to operationalize them; 5) Implementation of science/practice embedded in team and citizen’s science systems thinking; 6) Evidence-based advocacy to help redesign the strongly unjust global health and economic systems running our world these days. This is crucial because neocolonialism and neoliberal or trickle-down economics thinking go hand-in-hand and they have clearly been a catastrophe for public health and the health of our planet.

## U/V

### 1AC – Theory

#### 1AR theory –

#### A] AFF gets it because otherwise the neg can engage in infinite abuse which outweighs their arguments

#### B] Drop the debater – the time crunched 1AR can’t win substance and theory to check abuse

#### C] Competing interps – 1AR interps aren’t bidirectional so they should defend their norm and the neg can always brute force their way through reasonability debates

### Innovation

#### Traditional Knowledge is the origin for innovation, but current formal systems are built to harm Indigenous peoples – only effective policy outcomes solve.

Bagley et al. ’17 [Margo Bagley is a CIGI Senior fellow and is the Asa Griggs Candler Professor of Law @ the Emory University School of Law, Ruth Okediji is the Traditional Knowledge Expert Group Chair and Jerimiah Smith Jr. Professor of Law @ Harvard Law School, Kathy Hodgson Smith is a Canadian Indigenous Lawyer and a member of the Métis Communities, Jerome Reichman is a CIGI Senior Fellow and the Bunyan S Womble Professor of Law @ Duke Law School, Graham Dutfield is a Professor of International Governance & Faculty of Law at Leeds University, the video is titled “What is Traditional Knowledge?”, the article is titled “What If a Patent Is Based on Traditional Knowledge?”, 06-12-2017, Centre for International Governance Innovation, evidence is transcribed from the video using the written subtitles , 0:00 – 1:45 ,https://www.cigionline.org/multimedia/what-if-patent-based-traditional-knowledge/]//pranav

Traditional knowledge in particular, represents innovation, it represents culture, it represents history, it represents the present, it represents the future. Traditional knowledge means different things to different people. It may relate to genetic resources, plants, animals, insects, that are native to the area where that particular community resides. Indigenous peoples have an insight into sustainable development and conservation and protection of biodiversity and that there’s something important in that, that we need to hear. When Indigenous people suffer from illnesses from microbes, what have they done to combat those illnesses? Have they used plants, have they used some food? These are clues to potential sources of medicine. What this project does at CIGI, is it makes visible the people and the cultures and the norms and the values that undergird the formal systems to which we pay so much attention, to the detriment sometimes of the people who historically have been the origin of much of the innovation and much of the knowledge that we enjoy and experience today. What we need to do in our Expert Group, is to ensure that evidence is made available and packaged in a way that can actually directly transfer into policy outcomes at these important forums in Geneva and elsewhere in the world.

#### Innovation doesn’t depend on the \*degree\* of IP protection and too much harms it

Gamba 17 [Simona Gamba, Department of Economics, University of Verona, Verona, Italy, 6-25-17, “The Effect of Intellectual Property Rights on Domestic Innovation in the Pharmaceutical Sector” World Development, Volume 99, November 2017, Pages 15-27, Accessed 7-26-2021, <https://www.sciencedirect.com/science/article/abs/pii/S0305750X17302188?via%3Dihub> ww

This paper sheds some light on the role that patent protection has in stimulating pharmaceutical domestic innovation, measured as the yearly number of citation-weighted applications filed at the EPO by domestic inventors. In particular, it provides punctual estimates of the impact of two sets of IPR reforms for both developed and developing countries, filling a gap in the existing literature. ¶ Results show that the flow of domestic innovations rises dramatically following the introduction of IPR protection, with an increase in weighted applications exceeding 58% when TRIPS compliant protection is offered in developed countries. The presence of other forms of lower protection, such as process or product protection not respecting TRIPS requirements, has a similar effect, suggesting that innovation is sensitive to IPR protection but not to its degree. The positive effect of IPR protection can be explained by the strong recourse to patents, with respect to secret protection or lead time advantages, to protect innovation. The pharmaceutical sector is indeed characterized by a high number of applications and by the early stage of the research process at which applications are filed. In particular, inventors wish to protect also innovations at their preliminary stage to avoid competitors doing so. Due to the higher costs of patenting abroad (mainly indirect costs), the optimal situation for inventors is to patent these intermediate innovations at home. Therefore, when domestic patent protection is offered, innovation in the country is fostered. ¶ Developing countries benefit significantly less from IPR: for them, the effect of TRIPS compliant protection is roughly half of that for developed countries, being equal to 33%. This can be explained by the underdevelopment of innovative potential, technical infrastructure, and financial and human resources characterizing these countries at the time protection was introduced: for this reason, they were not able to fully profit from it. Moreover, forbidding imitation, patent protection limits developing countries ability to innovate through imitation. Finally, protection offered by these countries can be less effective in defending innovations. ¶ Many countries present, at least in one year, a null number of applications filed at the EPO. Zero applications can be due to two different processes: choice (the decision not to patent in Europe), and nature (the lack of innovative capabilities). Results for the ZINB model show that the choice to patent at the EPO is affected by the level of pharmaceutical export toward European countries, confirming the hypothesis found in previous literature that patents are filed in the main markets of reference. The presence of domestic protection does not negatively affect the decision to patent in Europe, but rather increase the probability to file applications at the EPO. This last result may be driven by the opportunities to develop relevant innovations in countries offering domestic protection. ¶ The positive effect that patent protection has on domestic innovation is not long lasting, persisting for six years. This limited duration has important policy implications. Indeed, after this period, countries may be induced to introduce more restrictive protection to stimulate further domestic innovation. Although my results suggest that this strategy works, an important point must be emphasized: the negative effect that IPR have on innovation increases with the level of protection. Indeed, when more protection is offered, problems such as royalty stacking or patent hold-up become more severe: further research is then obstructed by the high royalties claimed by the owners of existing patents to allow the use of their inventions, or by the risk to infringe previous patents, when the infringer, who made sunk investments for the production of its invention, can be asked to pay conspicuous royalties in order not to face a court injunction (Lemley & Shapiro, 2006). Thus, the impact that patent protection has on innovation may present an inverted U-shaped relationship, with an optimal level of patent protection beyond which its effect is no longer beneficial (Aghion, Bloom, Blundell, Griffith, & Howitt, 2005; Qian, 2007). Since pharmaceutical innovation is sensitive to IPR protection but not to its degree, it would be preferable to implement gradual reforms that slightly increase the level of protection rather than rare reforms that greatly alter it. Reaching the optimal level of protection in a gradual way is fundamental in developing countries: for them, it would be preferable to increase the level of protection when they are able to fully profit from its effect. These considerations suggest that a ‘‘one size fits all” approach can be inappropriate, while the recent extension of the transitional period for the implementation of the TRIPS Agreement in the least developed countries can be beneficial, if it is exploited to introduce gradual reforms. ¶ These policy implications are drawn by considering the effect of IPR protection on domestic innovation. However, protection may also affect other outcomes, such as the access to new drugs, in terms of delay of launches, number of drugs marketed in a country and drugs prices (see, among others, Duggan & Goyal, 2012; Goldberg, 2010; Lanjouw, 2005; Cockburn, Lanjouw, & Schankerman, 2016). Further analysis on the effect of protection on access to new drugs or on some more comprehensive outcomes, such as life expectancy, are needed to evaluate both costs and benefits of IPR protection.