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WIPO PANEL ON "INDIGENOUS AND LOCAL COMMUNITIES' CONCERNS AND EXPERIENCES IN PROMOTING, SUSTAINING AND SAFEGUARDING THEIR TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND GENETIC RESOURCES"

EXPERIENCES FROM THE UNITED STATES OF AMERICA

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Document prepared by Mr. Terry WILLIAMS,
*Tulalip Tribes of Washington, United States of America**

* This document comprises the presentation in the form received from the presenter. Any views expressed in the presentation are not necessarily those of WIPO or any of its Member States.

Thank you for this opportunity to address the Committee. I would like to thank Mr. Francis Gurry, Director General of the World Intellectual Property Organization (WIPO), Ambassador Rigoberto Gauto Vielman and the contributors to the Voluntary Fund for providing indigenous peoples with this opportunity to address their concerns and experiences.

Today I will present our activities undertaken in the United States for the re-establishment of sovereignty and self-governance. I will start with illustrating some cases on how tribal treaty rights related to natural resources, in particular fishing rights, have been developed over the past four decades. I will then address how some of the relationships between Tribes and the federal government during this period have set the background for the evolving relationship on intellectual property (IP) rights.

The relationship between the United States and its indigenous peoples has gone through several stages. In some ways, what is somewhat unique to the United States, along with a few other countries, is the development of a Treaty nation. In other words, Tribal rights in the United States have been established through treaties negotiated between Tribal and federal sovereign representatives.

In the United States legal system, the interpretation of the Treaties was largely settled in three famous cases commonly known as the “Cherokee Cases” that were brought before the Supreme Court. In these cases, the State of Georgia had challenged the authority of the Cherokee Tribe on regulation of certain aspects of its governance related to the passage of American citizens into Cherokee territory and commerce with citizens of the State. This case involved a federal interpretation of the legal status and source of authority of the Tribal governments under their treaties.

Justice John Marshall issued the majority opinion of the Court. The justices concluded that the Tribes had the status of nations established under the Law of Nations. The reason for signing Treaties with the Tribes, rather than simply asserting a right of just conquest, was that they were organized into self-governing political units that had inherent rights in the land and political and social integrity. The Tribes were not interpreted to be fully sovereign. According to the treaties, they had ceded lands and some significant rights and where rights were not ceded, the Tribes retained “inherent powers of a limited sovereignty which has never been extinguished” (United States v. Wheeler, 435 U.S. 313 (1978)). In the words of Marshall, they were “domestic dependent nations”.

Note that in this system treaties were not interpreted as containing enumerated rights, but were about the types of rights – to land and authority – that the original treaty signers had ceded. The treaties indicated rights, often hunting, fishing and gathering rights that were specifically being retained as a way of emphasizing issues of high importance to them. The courts had however upheld the concept that the Tribes reserved in their treaties “those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status” (United States v. Wheeler, 435 U.S. 313 (1978)). In other words, Tribes retained their sovereign powers of governance over their affairs, unless explicitly ceded in the treaties, or abrogated/extinguished by acts of Congress, or as a “necessary result of their dependent status”.

The United States stopped negotiating treaties in 1872 and, in the intervening years, the interpretation of the Cherokee cases and related decisions by the federal government has changed. In the 20th century, the dominant interpretation focused on the idea of dependency

or wardship. The United States acted as a trustee of the Tribes and as a trustee for wards, who are not considered mature enough to manage their own affairs, the federal government made decisions on behalf of the Tribes, acting in ways that they believed were in the Tribes' self-interest.

This wardship interpretation caused many problems amongst the Indian nations. The United States decided that the collective tenure of Tribes over their territories was an impediment to their development and broke their territories into allotments. Each family was given an allotment and excess allotments were sold off. During this process, the Indian estate totaled over 150 million acres.

This wardship interpretation of the treaties declined in the 1970s, starting with a Presidential Executive Order by President Richard Nixon that re-emphasized the sovereign government-to-government relationship that the Tribes held with the United States.

I will now present two cases that illustrated this change. The first involved significant events related to fishing rights that shaped the reaffirmation of Tribal reserved rights and the second involved activities the Tulalip Tribes undertook to exercise these reserved rights in relation to traditional knowledge (TK).

The Tulalip Tribes are known as the "Salmon People" and salmon are our relatives, fundamental to our identity as distinct peoples. Under the Treaty of Point Elliott, our ancestors reserved the right to fish at our "usual and accustomed places" because they knew that this right was central to our continued cultural survival. In the 1970s, the State of Washington began chasing us off our traditional fishing territories, claiming it was necessary for the conservation of the salmon. The State continued, however, to let sports and commercial fishermen to take the salmon.

The Pacific Northwest Tribes who reserved similar rights to fish in their treaties brought a lawsuit in federal court, claiming a right to "fish in common" reserved in the treaties, and an interpretation of what that meant. Nine different courts upheld the fishing rights of the Tribes against the State. The case was finally settled in 1979 in the form of the Boldt Decision, which affirmed the lower court decisions and found that the Tribes had reserved sovereign title to 50% of the available harvest. Domestically, the Tribes were recognized as co-managers of the fish stocks, having an equal seat at the decision making table as a sovereign decision maker along with federal managers.

In 1985, the United States and Canada signed the Pacific Salmon Treaty. During the negotiations over the decision making on salmon stock management, it was decided that the Tribal and Canadian authorities have the decision making roles, while the United States authorities were assigned an ex-officio position.

In 1989, the Washington State Accord was signed by the State government and all of the 27 Tribes. In this agreement, the parties agreed to a decision-making process that covered all issues affecting Tribal governance.

In 1995, I was part of a Tribal caucus that proposed and established the American Indian Environmental Office within the Environmental Protection Agency (EPA). This was the first federal office to specifically deal with environmental issues related to land, air and

water on Indian lands. I accepted the position as its first director and worked to help tribes to establish and implement Tribal regulatory authority and programs.

In 2000, the salmon of the Pacific Northwest had gone into steep decline with three salmon species listed under the Endangered Species Act and a fourth under review. The United States and the Pacific Northwest States and Tribes developed the Salmon Recovery Program as equal partners and jointly worked out planning processes, implementation and funding under the program.

In 2007, we developed a Tribal Climate Change Program, including its organization and implementation from local to national activities under federal regulation. Climate change poses special challenges for our health, cultural survival and Tribal governance. The species are changing their distributions, such that some culturally important species are becoming scarce and invasive species are moving into their place. Tribes are working with the federal government as co-managers to develop strategies to adapt to the impacts of climate change, and to participate in alternative energy projects, carbon sequestration and other activities towards mitigation. In this, we believe that TK has much to offer in terms of adaptation, as we possess deep knowledge of how to cope with climate extremes and change. As an aside, this will likely raise questions related to IP rights, access and benefit sharing, as many indigenous peoples have TK related to droughts, water harvesting, traditional architecture, agricultural varieties and many other traditional technologies and resources that may have great value in adapting to climate change.

In summary, in the past 40 years, Tribes in the United States, including the Tulalip Tribes, have moved from a position of “wardship with dependent status” to having a recognized government-to-government relationship with our federal government. We have gone from being at war with our local and state governments to be involved as equal partners in multilateral processes. The federal government is now increasingly working with us, recognizing our regulatory authority over our resources and co-managing trans-boundary and shared resources. Our sovereignty and self-determination over our traditional natural resources are acknowledged.

When we turn to the self-regulation and self-determination over our TK, however, we have yet to develop the same degree of Tribal sovereign authority. We are currently working with the federal government to explore how this might be strengthened. At Tulalip, we are contracting with the Bureau of Indian Affairs to develop a draft statute for protecting our resources and TK under our customary law, the draft Tulalip Cultural Heritage Protection Act.

The Act is being developed as a tribal code to regulate the use of collective cultural heritage, including areas, such as research, publications, arts, crafts, music, stories and dance, business practices, secured transactions, and genetic resources and associated TK.

Under the treaty of Point Elliott, we have reserved rights and a government-to-government relationship. In the treaty, we never surrendered our right over TK, traditional cultural expressions (TCEs) or genetic resources. As governments, we have the right to govern our own systems of knowledge, expressions and genetic resources according to our tribal and customary laws. While our approach may be related to the specific historical relationship to the United States, we believe that this approach is also supported in the rights acknowledged for all indigenous peoples in the United Nations Declaration on the Rights of Indigenous Peoples.

The Code has tow faces, one looking inward to the Tribes, and the other looking outward to non-tribal society. Internally, the code sets regulations on the ability of Tribal members to use collective intangible property in certain ways. These regulations are set by holders of TK and TCEs. They include regulation of their use in commerce and the ability to incorporate elements of traditional stories, songs, dances, symbols and similar traditional expressions in derivative works. Tribal members may be forbidden to sell or commercialize certain aspects of collective intangible property or be limited to use them in ways compatible with customary law.

Externally, we are establishing some mechanisms to regulate the use of our intangible cultural heritage (ICH) by non-tribal members. As a matter of equal standing or comity, we will be working over time for direct recognition of our Tribal cultural heritage code by the United States and perhaps other States through the work of this Committee. We see our status vis-à-vis the United States much as their relation to other nation states. As sovereigns, they have negotiated with other nations for cross-recognition and extraterritorial application of their laws. In the same way, the Tribes as sovereigns are recognizing the application of federal IP law on Tribal sovereign territory in respect to non-tribal IP. In a *sui generis* regime, we would expect equitable cross-recognition of our Tribal IP laws.

We are not yet there however. The code uses contract law as an interim mechanism to bridge customary law and the protection of TK, TCEs and genetic resources beyond our borders. Contract law can supersede copyright law, for example, through mutually agreed terms. Customary law can be reflected in contract law through setting terms of knowledge transfer and use in ways consistent to Tribal traditions.

This is similar to the increasing use of “commons licenses” as has been proposed in the Development Agenda. Some creators, unsatisfied with the terms offered by default copyright that places strong restrictions on the transmission and uses of knowledge and expressions, are writing licenses that allow wide copying and distribution of their works, subject to some restrictions.

However, licenses can also be used to place greater restrictions on use and distribution. Examples are software licenses. In the early years of computers, companies often sold software as a product. Users who bought software could make as many personal copies as they wished and could use the products as long as they had machines to run them. Most software today come with more restrictive licenses and are sold as a service rather than a product. Licenses in some cases have to be renewed on a yearly basis. In some newer models, users do not even store copies of software on their computers, but license on-line services, such as data storage and word-processors.

We adopt an “aboriginal covenants” approach, in which our traditions are reflected in the terms of our contracts. Such contracts can cover the ownership, review and control of knowledge shared with researchers, use of genetic resources obtained from our territories and specification of transfer limits to third parties. We believe that, in some cases, such licenses can be constructed to create long-term protection for indigenous intangible property, in which the terms of the contracts can specify that the terms must be accepted in transfers to third parties through gifting, inheritance or sale, such that recipients must accept the terms in order to be in legal possession.

For example, if a Tulalip artist sells a mask, the mask could contain a mark that signals a certain type of license or covenant. The purchaser could be given the right to display the mask, but be prohibited from making derivative works, such as taking photographs, making T-shirts, incorporate it in derivative arts or make obscene uses.

Another advantage of the contract approach is that there exists an established international contract law that allows for some degree of enforceability. On the other hand, we see this as an interim measure at best, as we believe that we need an international *sui generis* law for the direct recognition of our rights to control access to and use of our knowledge.

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