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**TOWARDS A CLEARER DEFINITION AND UNDERSTANDING OF "INDIGENOUS
COMMUNITY" FOR THE PURPOSES OF THE INTELLECTUAL PROPERTY LAWS
AMENDMENT BILL, 2010: AN EXPLORATION OF THE CONCEPTS "INDIGENOUS"
AND "TRADITIONAL"**

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**TOWARDS A CLEARER DEFINITION AND UNDERSTANDING OF "INDIGENOUS
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S Geyer**

1 Introduction

In intellectual property law it is important to know *what* is being protected. The nature of the legal object will determine which intellectual property rights can apply thereto. Copyright, for example, protects only legal objects that qualify as "works". The Copyright Act 98 of 1978 lists and defines nine types of works¹ and if something does not fall into one of these categories, it cannot enjoy copyright. If it does fall into one of the categories, it then has to be determined further if the requirements for copyright, such as originality and material form, are met.

The Intellectual Property Laws Amendment Bill, 2010² *inter alia* proposes the insertion of a tenth category of copyrightable works into the Copyright Act, namely "traditional works". "Traditional work" is defined (in the Bill) as a work which originated and acquired traditional character from an indigenous community. The existence of a "traditional work" (as a legal object in which legal subjects can enjoy copyright) therefore heavily depends on one's being able to identify the relevant indigenous community.

Further, in the Memorandum on the Objects of the Bill, it is repeatedly stated that this legislation is for the benefit of indigenous communities.³

* This article is based on a paper delivered at the Conference on Traditional Knowledge in Legal Context held at the Potchefstroom Campus of North-West University, South Africa, on 17 and 18 March 2009.

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¹ These are literary works, musical works, artistic works, cinematographic films, sound recordings, broadcasts, programme-carrying signals, published editions and computer programmes (listed in S 2(1) of the *Copyright Act* 98 of 1978).

² Hereinafter referred to as "the Bill".

³ See *inter alia* par 1.7, par 2.1(d) and par 2.2 of the Memorandum to the Bill.

Subsequently a crucial question with regard to the proposed legislation is: what is an indigenous community? Although the Bill provides a definition of indigenous community, it does so in a very superficial way that neither addresses the complexities of indigenusness, nor the intricacies of community. To complicate matters further, the word "traditional" also frequents the Bill, but not necessarily as a mere synonym for "indigenous".⁴

Hence the aim of this article is, firstly, to draw attention to the importance of the concept of an "indigenous community" in the Bill and, secondly, to point out the current confusion and contradictions regarding this concept. This will be done by analysing the use of certain words and phrases in the Bill, as well as the wording of the definition of "indigenous community". Aspects emphasised are the unregimented use of the word "community" in the said definition and its apparent inconsistency with the meaning of the phrase "indigenous community" in other South African legislation. The definition of an "indigenous community" in the Bill is further contrasted to the much narrower understanding and/or defining of indigenous communities in Malaysia and the Phillippines, as well as the United Nations. Thirdly, the role that the definition of an "indigenous community" can/should play to communicate the legislator's intention is investigated, and certain recommendations are made in conclusion.

2 A simple content analysis of the use of the words "indigenous" and "traditional" in the Bill

The Bill (excluding its Memorandum) was searched for all appearances of the word "indigenous" therein. "Indigenous" was found 53 times. It further appeared that "indigenous" was used as part of the phrase "indigenous community"/"indigenous communities" (41 times), or as part of the phrase "indigenous origin" (8 times), or as part of the phrase "indigenous knowledge" (4 times).

The same type of search was done for all appearances of "traditional" in the Bill. The word "traditional" was found 139 times. It further appeared that "traditional" was used

⁴ The word "traditional" is also not defined in the Bill.
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frequently (103 times) as part of different phrases that describe some sort of legal object (eg "traditional performance/s" or "traditional [copyright] work"). The word "traditional" appears a further 36 times as part of the following phrases that do not directly describe the object of a specific intellectual property right: "traditional intellectual property", "traditional character", "traditional healers" and "traditional cultures and values".

For ease of reference the above findings are also set out in Table 1 below.

Table 1: Intellectual Property Laws Amendment Bill, 2010 – Use of the words "indigenous" and "traditional"

Frequency of the word "indigenous" in the Bill:	53
Indigenous community/communities	41
Indigenous origin	8
Indigenous knowledge ⁵	4
Frequency of the word "traditional" in the Bill:	139
Traditional design/s	35
Traditional [copyright] work/s	30
Traditional term/s and/or expression/s	23
Traditional performance/s	13
Traditional ... arts	1
Traditional innovations	1
Total: "traditional" used to describe a legal object	103
Traditional intellectual property	26
Traditional character	8
Traditional healers	1
Traditional cultures and values	1
Total: "traditional" not used to describe a legal object	36

⁵ It is interesting to note that the four occurrences of the phrase "traditional knowledge" in the 2007 version of the Bill (all in S 40B(1) and (4)) were replaced by "indigenous knowledge" in the 2010 Bill.

From the above analysis it appears that "indigenous" and "traditional" are not used as mere synonyms in the Bill and that different roles are assigned to each of these words. In the Bill, the word "indigenous" is predominantly used in relation to the origin of the legal object. "Traditional", on the other hand, is mainly used to describe the nature of the (new) object of an intellectual property right, for example the performance, copyright work, trade mark or design in question. Significantly, nowhere in the Bill is the word "traditional" used to describe a community.

It is especially important, as will be explained in more detail below, that phrases containing the word "indigenous" and phrases containing the word "traditional" are used together to define the new legal objects created by the Bill. Although certain attributes of both indigenesness and traditionality need to be present in a legal object for it to qualify for protection under this Bill, neither of these fundamental concepts is defined in the Bill.

3 The close connection between "indigenous" and "traditional" in defining legal objects

Although "traditional" is not defined, the Bill does define some of the legal objects that the word "traditional" forms part of. A "'traditional performance' means a performance which is recognised by an indigenous community as a performance having an indigenous origin and a traditional character",⁶ "a 'traditional work' means a work which originated and acquired traditional character from an indigenous community",⁷ "a 'traditional term or expression' means a term or expression which is recognised by an indigenous community as a term or expression having an indigenous origin and a traditional character and which is used to designate, describe or refer to goods or services",⁸ and "a 'traditional design' means any design applied to any article ... which design is recognised by an indigenous community as having an indigenous origin and a traditional character".⁹

⁶ S 1(g) of the Bill.

⁷ S 5(a) of the Bill.

⁸ S 18(e) of the Bill.

⁹ S 27(g) of the Bill.

The above four definitions are unpacked in Table 2 below. It illustrates how all of the above "traditional" legal objects are defined in terms of "traditional character" *and* indigenusness.

Table 2: Intellectual Property Laws Amendment Bill, 2010 – Definitions of the legal objects

Word	Meaning	
traditional performance	a performance	that is recognised by an indigenous community as having an indigenous origin and a traditional character
traditional term or expression	a term or expression	
traditional design	any design applied to any article ...	
traditional work	the work	which originated and acquired traditional character from an indigenous community ¹⁰

It therefore appears that, for a legal object to enjoy protection as a result of the Bill, it must meet the requirements of relating to an "indigenous community", and having an "indigenous origin" and a "traditional character". In other words, if all of the said three requirements are not present – if they do not hold hands - there is no legal object. Indigenusness is, therefore, a key element of two of the said three requirements that determine whether something will qualify for protection under the proposed new legislation.

4 A definition of "indigenous community"

Although the Bill does not define "indigenous", it does propose the insertion of the following definition of "indigenous community" into the Performers' Protection Act,¹¹ the Copyright Act,¹² the Trade Marks Act¹³ and the Designs Act:¹⁴

¹⁰ In the previous draft of the Bill a "traditional work" was defined as "a literary work, an artistic work or a musical work which is recognised by an indigenous community as a work having an indigenous origin and a traditional character".

¹¹ 11 of 1967.

¹² 98 of 1978.

¹³ 194 of 1993.

¹⁴ 195 of 1993.

"indigenous community" means any community of people currently living within the borders of the Republic, or who historically lived in the geographic area currently located within the borders of the Republic.¹⁵

Generally speaking, a "community" can, *inter alia*, be defined in terms of the *area* in which a group of people lives or in terms of a group of people's *common background or shared interests* or it can refer to the *public or society in general*.¹⁶

As regards the "area" facet of the concept "community", the Bill clearly limits the relevant area to the Republic of South Africa (RSA). Communities who previously lived within the current borders of the country are also included. That means, for example, that the Ndebele of Zimbabwe may also be regarded as indigenous to South Africa, as they are the result of a nineteenth century migration from South Africa under the leadership of Mzilikazi, the founder of the Ndebele nation¹⁷. A further example may be that of the Boer community of Patagonia, Argentina, who emigrated there in around 1902 after the Anglo Boer War and are apparently still holding on to their South African traditions.¹⁸

What can further be deduced from the definition of an "indigenous community" is that the word "any" is an indication that the phrase "indigenous community" does not refer to the public or society in general, that is, to South Africans generally, but to a plurality of groups.

The definition can, therefore, be said to be clear on *where* to look for indigenous communities – in the RSA, now or in history – and that there is likely to be a *plurality* of such communities, but it is very vague as to which groups exactly will qualify as

¹⁵ See S 1(c) (re amendment of *Performers' Protection Act*); S 5(d) (re amendment of *Copyright Act*); S 18(d) (re amendment of the *Trade Marks Act*); and S 28(e) (re amendment of the *Designs Act*).

¹⁶ *Encarta Dictionary*: "1. *people in area* a group of people who live in the same area, or the area in which they live; a close-knit fishing community 2. *People with common background* a group of people with a common background or with shared interests within society; the financial community ... 4. *society* the public or society in general; a useful member of the community"

¹⁷ Lindgren 2004 *Africa*173.

¹⁸ Coviello 2004 www.roepstem.net/argentina.html.

being indigenous. It is, for example, unclear whether the current definition includes post-colonial indigenous communities, and even pre-colonial communities who are no longer living in traditional homesteads.

The definition of an "indigenous community" in the Bill can further be described as wide, especially when compared with the definitions of an "indigenous community" and a "traditional community" as they appear in other South African legislation. The South African Regulations on Bio-Prospecting, Access and Benefit-Sharing¹⁹ provide a quite detailed definition of an "indigenous community", which *inter alia* requires the relevant community to be "living or having rights or interests in a distinct geographical area within the Republic of South Africa" and to have a leadership structure. In terms of the Traditional Leadership and Governance Framework Act,²⁰ a community may be recognised as a traditional community if it is subject to a system of traditional leadership in terms of that community's customs and observes a system of customary law. The premier of a province may, under certain circumstances, recognise a community as a traditional community by notice in the *Provincial Gazette*.

It therefore appears that, in South African legislation in general, the existing definitions of an "indigenous community" and a "traditional community" are not only similar, but are also a great deal narrower than the definition of an "indigenous community" in the Bill. These narrower definitions require elements such as land rights or interests and/or occupation, traditional leadership and adherence to customary law. This apparent disparity between the concept of an indigenous community in the Bill and the concept of an indigenous/traditional community in other South African legislation is underlined by paragraph 4 of the Memorandum on the Objects of the Bill, which states that it is not necessary to refer the Bill to the National

¹⁹ GN R138 in GG 30739 of 8 February 2008.

²⁰ 41 of 2003, S 2(1). The Income Tax Act 58 of 1962 further explains the term "traditional community" as having the meaning provided in the Traditional Leadership and Governance Framework Act. In terms of the Income Tax Act the receipts and accruals of any traditional community established or recognised in terms of the Traditional Leadership and Governance Framework Act shall be exempted from normal tax (s 10(1)(t)(vii) of Act 58 of 1962). Donation tax is further not payable in respect of a donation made to a traditional community (s 56(1) of Act 58 of 1962).

House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, since it does not contain provisions pertaining to customary law and the customs of traditional communities.²¹

As land rights or interests and/or occupation, having a traditional leadership and adherence to customary law are elements in the above definitions, it is interesting to note the very detailed approach to defining "indigenous" and/or "local communities" that is followed in Malaysian and Philippine legislation. Here the relevant communities are defined not only in terms of area and plurality, but also very strongly in terms of the common background or shared interest of the community.

In Malaysia, indigenousness²² is strongly defined in terms of nativeness,²³ which generally appears to be an important and meticulously defined term in Malaysian law.

²¹ However, in A 3 of the Memorandum on the Objects of the Bill it is stated that "Traditional Leaders in KZN and North West Provinces" were consulted.

²² S 2 of the *Sabah Biodiversity Enactment* 2000: "'indigenous or local community' means 'any group of natives as defined under section 2 of the Interpretation (Definition of Native) Ordinance who share a knowledge tradition and have common interests in the utilisation and conservation of biodiversity'".

²³ The definition of "native" in S 2 of the Interpretation (Definition of Native) Ordinance (Sabah Cap. 64): "(1) Wherever the word 'native', used as a substantive, occurs in any written law in force at the commencement of this Ordinance, other than the Ordinances set out in the Schedule to this Ordinance, or in any written law coming into force after the commencement of this Ordinance, unless expressly otherwise enacted therein, it shall mean either – (a) any person both of whose parents are or were members of a people indigenous to Sabah; or (b) any person ordinarily resident in Sabah and being and living as a member of a native community, one at least of whose parents or ancestors is or was a native within the meaning of paragraph (a) hereof; or (c) any person who is ordinarily resident in Sabah, is a member of the Suluk, Kagayan, Simonol, Sibutu or Ubian people or of a people indigenous to the State of Sarawak or the State of Brunei, has lived as and been a member of a native community for a continuous period of three years preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in Sabah is not limited under any of the provisions of the Immigration Act, 1959/63: Provided that if one of such person's parents is or was a member of any such people and either lives or if deceased is buried or reputed to be buried in Sabah, then the qualifying period shall be reduced to two years; or (d) any person who is ordinarily resident in Sabah, is a member of a people indigenous to the Republic of Indonesia or the Sulu group of islands in the Philippine Archipelago or the States of Malaya or the Republic of Singapore, has lived as and been a member of a native community for a continuous period of five years immediately preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in Sabah is not limited under any of the provisions of the Immigration Act, 1959/63. (2) In the definition of 'native' set out in subsection (1) hereof – (a) 'ancestor' means progenitor in the direct line other than a parent; (b) 'native community' means any group or body of persons the majority of whom are natives within the meaning of paragraph (a) of subsection (1) and who live under the jurisdiction of a Local Authority established under the provisions of the Rural Government Ordinance* or of a Native Chief or Headman appointed under the provisions of

The Malaysian Federal Protection of New Plant Varieties Act²⁴ makes a distinction between a "local community"²⁵ and "indigenous people".²⁶ While "indigenous people" is defined with reference to the term "native",²⁷ which is also very comprehensively defined, the definition of a "local community" does not refer to nativeness in any way. It is also interesting to note that with regard to Sarawak, persons of mixed blood deriving exclusively from the specified races are also regarded as being native. However, in the Malaysian Act as a whole, although a "local community" and "indigenous people" are separately and differently defined groups, they are consistently referred to in the same breath and are apparently given the same rights throughout the Act.

The Philippine Indigenous Peoples Rights Act²⁸ also gives a very detailed definition of the terms "indigenous cultural communities/indigenous peoples"²⁹ and it is

that Ordinance; (c) "parent" includes any person recognised as a parent under native law or custom. (3) No claim by any person to be a native by virtue of the provisions of paragraphs (b), (c) and (d) of subsection (1) shall be recognised as valid unless supported by an appropriate declaration made by a Native Court under section 3."

²⁴ 2004.

²⁵ "[L]ocal community' means a group of individuals who have settled together and continuously inherit production processes and culture or a group of individuals settled together in a village or area and under an eco-cultural system".

²⁶ "[I]ndigenous people' means persons who fall within the definition of the 'aborigine' or 'native' as defined respectively in Clause (2) of Article 160 and clause (6) of Article 161A of the Federal Constitution".

²⁷ Definition of "native" in clause (2) of a 160 of the Constitution of Malaysia: "'aborigine' means an aborigine of the Malay Peninsula". Clause (6) of a 161A: "'native' means – "(a) In relation to Sarawak, a person who is a citizen and either belongs to one of the races specified in Clause (7) as indigenous to the State or is of mixed blood deriving exclusively from those races; and (b) In relation to Sabah, a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day or not) either in Sabah or to a father domiciled in Sabah at the time of the birth. ... (7) The races to be treated for the purposes of the definition of "native" in Clause (6) as indigenous to Sarawak are the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kalabit, Kayans, Kenyags (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lehanans, Punans, Tanjongs dan Kanowits, Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits."

²⁸ 1997.

²⁹ S 3: "For purposes of this Act, the following terms shall mean: ... h) *Indigenous Cultural Communities/Indigenous Peoples* – refer to a group of people or homogenous societies identified by self-ascription and ascription by other, who have continuously lived as an organised community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed customs, tradition and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonisation, non-indigenous religions and culture, became historically differentiated from the majority of Filipinos. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the

interesting to note the following "narrow" concepts appearing in this Act: "self-ascription", "continuously lived", "claims of ownership since time immemorial" and "differentiated from the majority".

5 The United Nations' understanding of indigenusness

The United Nations (UN) Developmental Group Guidelines on Indigenous People's Issues (Feb 2008) confirmed the prevailing views regarding indigenusness with reference to three UN documents: The *Martinez Cobo Report*,³⁰ the *International Labour Organisation (ILO) Indigenous and Tribal Peoples Convention*³¹ and the *Working Paper on the Concept of "Indigenous People"*.³² An analysis of the adjectives used in these three reports shows that all three of the said documents use the following characteristics to describe "indigenous peoples": pre-colonial, pre-conquest or before the establishment of the present state boundaries; distinctiveness; having their own customs and/or traditions, laws, language, religion etc; being determined to preserve their own institutions, customs and so forth; and identifying themselves as being distinct/tribal/indigenous.

Therefore, at the heart of the UN understanding of indigenusness lies self-identification as being clearly different from others, and the determination to preserve that distinctiveness. It is quite certain that not *all* South African communities (*vide* the current definition of "indigenous community" in the Bill), including communities who previously lived in the RSA, whether pre-colonial or not, would pass this test.

country, at the time of conquest or colonisation, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains."

³⁰ UN *Martinez Cobo Report* 1986.

³¹ ILO *Indigenous and Tribal Peoples Convention* 1989.

³² UN *Working Paper on the Concept of "Indigenous People"* 1996.

6 The see-saw metaphor

In mathematical equations, the left side of an equation has to be equal to the right. Similarly, the definition of a term may be viewed as an equation. When looking at the dictionary or ordinary meaning of a word, one will find that the "left side" (the term or phrase) generally equals the "right side" (the meaning of the term or phrase). In addition, a word may also have a technical meaning that is generally accepted within a certain profession or context, like the meaning of the term "indigenous peoples" from a UN perspective. However, statutory definitions may be used to give a word a meaning that differs from the ordinary meaning, including meanings that the term may have acquired in a certain context. In order to accomplish this, the legislator generally has to add to the "right side" of the "equation" to alter the "ordinary" meaning of the term appearing on the "left". The statutory definition, therefore, creates a technical meaning of the term for purposes of that piece of legislation.

The metaphor of a playground see-saw may be used to illustrate this point further. As the Bill stands, an "indigenous community" = "any community of people currently living within the borders of the Republic, or who historically lived in the geographic area currently located within the borders of the Republic". This means that on the one end of the bar (on the ground) are two big children called "Indigenous" and "Community" and on the other end of the bar (up in the air) sits a small boy called "RSA". The notion of the "indigenous", which is a quite narrowly defined concept in international law, is not addressed (broadened) on the "right-hand side" of the definition at all. "Community", a complex concept that can be described from many points of view, is defined only with regard to the "area" (the RSA) aspect thereof. Therefore, in order to balance the right side of the definition with its left side – according to the apparent intention of the legislator that "indigenous community" should have a broad meaning – either the left side needs to be made lighter or the right side heavier. Since the word "indigenous" appears 53 times in the Bill, it is probably too late to ask indigenouness to climb off, and "Community" will almost certainly also have to stay.

Generally, the more vague or unclear the "right side" of a statutory definition, the more room is left for interpretation. As the Bill currently stands, the meaning of "indigenous community" depends heavily on the meaning of "any community", which can mean many different things to different people, ranging from meanings as narrow and precise as the examples from Malaysia and the Philippines described above, to literally *any* RSA community. Take, for instance, the following observation made by Ngonyama and Modipa within the context of community psychology, which serves to illustrate just how narrow the meaning of "community", and consequently that of an "indigenous community", can be interpreted within the South African context:

It seems that the use of the term "community" in South Africa has come almost automatically to refer to economically disadvantaged groups, which, given the history of apartheid, and the ongoing economic divisions characteristic of the post-apartheid era, are typically those of black South Africans ... for how often does one speak of "white communities" ... ?³³

7 Conclusion and recommendations

Having looked at other South African legislation, examples of definitions from other jurisdictions, as well as the UN's understanding of indigenesness, it is concluded that the term "indigenous" generally refers to a quite narrow concept. Although in the Bill the concept seems intended to go beyond these narrow parameters, the wording of the definition of "indigenous community" in the Bill is not quite "heavy" enough to give such a wider meaning thereto. The intention of the legislator as to who may qualify as an "indigenous community" – the definition which determines *what* is protected by the Bill and *who* will benefit from it – is therefore not clear.

Recommendations are made below as to how the definition in the Bill may be rephrased to more clearly address these uncertainties.

³³ Ngonyama Ka Sigogo and Modipa "Critical Reflections" 2.1-2.2.
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Rengecas³⁴ submits that "the definition of indigenous community should be amended to *any community of people currently living within the borders of the Republic, or who historically lived in the geographic area currently located within the borders of the Republic and which maintain and develop traditional lifestyles*" (emphasis in the original).

Rengecas³⁵ further suggests (with reference to Bo Hammer Jensen) that an indigenous community may not include communities defined by "other criteria", such as religion or gender, but that it may include immigrant groups in the sense of "communities that may be uniquely South African but may not necessarily be considered indigenous in the strict interpretation of the word". If this understanding of "indigenous communities" is added to her proposed definition above, one has an even more "balanced" definition (still thinking in the context of the see-saw metaphor)..

Since the phrase "traditional lifestyle" involves issues degree, with a community in the form of a remote Zulu homestead in KwaZulu-Natal on the one end and a community such as an urban South African Chinese community on the other end of the continuum, an indication as to where the legislator's sentiments lie could be very helpful. The legislator could even consider inserting a "for example, but not limited to" phrase into the definition, referring to examples of immigrant communities that may qualify as "indigenous communities".

In the light of the above, including the suggestions by the said authors and depending on the legislator's exact intentions, it is proposed that the definition of "indigenous community" in the Intellectual Property Laws Amendment Bill, 2010 may be amended to read as follows:

"indigenous community" means any community of people currently living within the borders of the Republic or which historically lived in the

³⁴ Rengecas 2008 *De Rebus* 26.

³⁵ Rengecas 2008 *De Rebus* 26.

geographic area currently located within the borders of the Republic and which maintains and develops traditional lifestyles, whether its members live closely together or not, including immigrant communities that are uniquely South African, but excluding communities defined by criteria other than indigenusness, such as religion or gender.

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List of abbreviations

ILO	International Labour Organisation
UN	United Nations