

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

Twenty-Sixth Session
Geneva, February 3 to 7, 2014

REPORT OF INDIGENOUS EXPERT WORKSHOP ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS

Document prepared by the Secretariat

1. Reference is made to the decision by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC), at its Twentieth Session (see document WIPO/GRTKF/IC/20/10, par. 801 (d)), to support the organization of an Indigenous Expert Workshop preceding one upcoming IGC Session as set out in paragraphs 10 and 11 of the Draft Study on the Participation of Observers in the Work of the IGC (see document WIPO/GRTKF/IC/20/7).
2. Pursuant to the decision of the IGC, the WIPO Secretariat, in cooperation with the Secretariat of the United Nations Permanent Forum on Indigenous Issues (the Secretariat of the Permanent Forum), organized an *Indigenous Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (the Workshop), from April 19 to 21, 2013, at WIPO headquarters.
3. Seven indigenous experts, one from each of the seven socio-cultural indigenous regions recognized by the Permanent Forum, were selected by the WIPO Secretariat and the Secretariat of the Permanent Forum to participate in the Workshop, together with one Member of the

Permanent Forum and one member of the Secretariat of the Permanent Forum. Member States and accredited observers to the IGC were also invited to participate in the Workshop as observers, in accordance with the IGC decision. The indigenous experts elected Mr. Estebancio Castro Díaz, from Panama, and Mrs. Jennifer Tauli Corpuz, from the Philippines, respectively, as Chair and Rapporteur of the Workshop.

4. In a letter dated June 25, 2013 and a follow up letter dated November 15, 2013, the Secretariat of the Permanent Forum, as an accredited observer to the IGC, requested the WIPO Secretariat to submit to the IGC, as an information document, the report of the Workshop that was adopted by the indigenous experts. This report, as received, is attached as Annex I. The list of the experts is attached as Annex II.

5. The IGC is invited to take note of this document and the Annexes to it.

[Annexes follow]

Indigenous Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions

Geneva, 19 to 21 April, 2013

WORKSHOP REPORT

1. The Indigenous Expert Workshop was held in Geneva from 19 to 21 April, 2013. Experts were selected from the seven socio-cultural indigenous regions recognized by the United Nations Permanent Forum on Indigenous Issues (“the Permanent Forum”) to give broad representation to the world’s indigenous peoples.
2. The Workshop was opened by the co-organizers, Mr. Simon Legrand and Mr. Q’apaj Conde Choque of the WIPO Secretariat and Ms. Sonia Smallacombe of the Secretariat of the Permanent Forum.
3. Mr. Estebancio Castro Diaz was elected as Chair and Mrs. Jennifer Tauli Corpuz as Rapporteur. Mr. Paul Kayinke Sena participated on behalf of the Permanent Forum.
4. The Experts identified and discussed key legal, policy, and institutional issues related to Intellectual Property and Genetic Resources (GRs), Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs). A commentary was provided, addressing the issues identified.

IDENTIFYING KEY LEGAL, POLICY, AND INSTITUTIONAL ISSUES

5. Reflecting on a number of international instruments pertaining to the rights of Indigenous Peoples, the Experts highlighted that Indigenous Peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
6. Indigenous Peoples have permanent sovereignty over their resources, as expounded in a study commissioned by the United Nations General Assembly and conducted by the Special Rapporteur of United Nations Working Group on Indigenous Populations, Ms. Erica Irene Daes. By virtue of this sovereignty, they retain their rights over their resources even in cases of unauthorized access and when the term of legitimate use has expired.
7. There is an inherent incompatibility between the existing intellectual property regime, which is trade and market-based, and the way Indigenous Peoples view their GRs, TK, and TCEs.
8. Based on these reflections, key issues were identified, such as:
 - Indigenous Peoples' concept of, relationship to, and protection of their GRs, TK, and TCEs;
 - Respect for the rights contained in the United Nations Declaration on the Rights of Indigenous Peoples (“the UNDRIP”), including free, prior and informed consent (FPIC);
 - Indigenous Peoples' traditional and contemporary institutions and laws in the implementation and enforcement of a TK protection treaty.

ADDRESSING SUBSTANTIVE ISSUES

9. The following principles, inter alia, guided Experts' positions in the IGC negotiations:
- (a) States comply with their international human rights obligations in relation to Indigenous Peoples.
 - (b) Indigenous Peoples' have a right to maintain, control, protect, and develop their intellectual property interests over GRs, TK, and TCEs, and to financial and technical assistance.
 - (c) Indigenous Peoples' laws and protocols, institutions, and procedures, including FPIC, govern decision-making over their knowledge and resources.
 - (d) Indigenous Peoples' GRs, TK, and TCEs are integral features of their distinct characteristics as peoples and crucial in maintaining their survival and well-being.
 - (e) Where intellectual property has been placed in the public domain without proper authorization, Indigenous Peoples retain their rights over the property and are entitled to a remedy.
 - (f) Fair and equitable benefit-sharing whenever Indigenous Peoples' knowledge and resources are utilized.
 - (g) Indigenous Peoples have the right to economic development and, without impairing their permanent sovereignty over their resources, may utilize their knowledge and resources to further this objective.

SPECIFIC COMMENTS ON SUBSTANTIVE ISSUES

10. The Experts decided not to submit a text that would serve as an alternative to the existing Draft Articles on the protection of TK and TCEs and the Consolidated Document relating to intellectual property and GRs. Rather, a commentary based on key principles identified was provided.

COMMENTARY ON THE PROTECTION OF TK AND TCEs

I. SUBJECT MATTER OF PROTECTION – DEFINITION OF TK AND TCEs, AND CRITERIA FOR ELIGIBILITY

The definition of Indigenous Peoples' TK and TCEs should be guided by the UNDRIP and recommendations of the United Nations mandates on Indigenous Peoples' rights. An internationally-drafted list of TK and TCEs might not cover the diversity of contexts of Indigenous Peoples.

In relation to WIPO/GRTKF/IC/24/4, one of the Experts felt strongly that Article 1.2 (d), (e), and (f) in the Optional Additions to the Facilitator's Text should be deleted.

II. BENEFICIARIES OF PROTECTION

The use of the term “Indigenous Peoples” is consistent with Indigenous Peoples' rights, and should be used consistently throughout the text(s). Beneficiaries are Indigenous Peoples and local communities only but not other communities.

While the concept of “peoples” includes “nations” and acknowledges that within a “people”, families, individuals, and other subsets thereof may have closer association to the TK and TCEs, ownership of the knowledge remains with the collective. Thus it is not necessary to enumerate subsets of peoples when identifying beneficiaries.

III. SCOPE OF PROTECTION

Indigenous Peoples have the right to maintain, control, protect, and develop their intellectual property interests over their TCEs, TK and GRs.

Indigenous Peoples have primary responsibility for protecting their intellectual property through Indigenous laws, customs and regulations, administered through their own institutions and decision-making procedures. States will need to take effective measures, including financial and technical assistance, to ensure that Indigenous Peoples are empowered to exercise these rights at the local, national, regional and international levels.

To prevent unauthorized access to or utilization of their TK and TCEs, Indigenous Peoples should be empowered to: define the subject matter using their terms; identify rightful holders; affirm that agreements are reached with FPIC and mutually-agreed terms (MAT); ensure fair and equitable benefit-sharing; ensure adequate and appropriate disclosure, and; determine limitations on the utilization of TK and TCEs.

States may be required to affirm these provisions in national laws but in no way should such laws deprive Indigenous Peoples of their rights.

The standard for protection should be equal and be based on whether or not FPIC has been obtained prior to access and utilization of the knowledge, even if it is not secret or sacred.

IV. SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS / APPLICATION

Access to and use of TK and TCEs require FPIC from Indigenous Peoples. Failure to obtain FPIC, in accordance with requirements of Indigenous Peoples' laws, is an infringement of their intellectual property rights.

Indigenous Peoples should have access to just and fair procedures for resolving disputes and to effective remedies for infringements of their intellectual property rights over TK and TCEs. Such procedures and remedies shall give due consideration to the customs, traditions, rules and legal systems of the Indigenous Peoples concerned and international human rights.

Where intellectual property has been placed in the public domain without proper authorization, Indigenous Peoples retain their rights over such property and are entitled to a remedy, including timely repatriation.

National laws, developed in full consultation with and appropriate authority from Indigenous Peoples, may provide for protection of Indigenous Peoples' intellectual property rights over

their TK and TCEs. National laws shall not interfere in the customary procedures associated with Indigenous Peoples' TK and TCEs, unless they specify otherwise.

In view of the international dimension of utilization of TK and TCEs, there should be reciprocity between States, such as that protection should apply across jurisdictions.

V. ADMINISTRATION OF RIGHTS

Indigenous Peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions.

The establishment of any national administrative body should be upon the request of Indigenous Peoples, in full partnership with them, for their benefit and only with their FPIC.

Indigenous institutions at the national level, created by Indigenous Peoples themselves, and provided with financial and administrative support from the Government, would be an appropriate institution for protection of Indigenous Peoples' rights to their TK and TCEs.

VI. EXCEPTIONS AND LIMITATIONS

Limitations on utilization of TCEs and TK should be determined by Indigenous Peoples.

VII. TERM OF PROTECTION

Indigenous Peoples own their TK and TCEs in perpetuity. Thus, legitimate utilization should be for a term agreed upon, provided that all rights over the knowledge revert to Indigenous Peoples upon expiration of the agreed term.

VIII. FORMALITIES

Protection of Indigenous Peoples' TK and TCEs shall not be subject to any formality.

IX. TRANSITIONAL MEASURES

Indigenous Peoples should be given an opportunity to account for knowledge that has been misappropriated from their communities and provided with fair, independent, impartial, open and transparent remedies to address misappropriated TK and TCEs.

X. CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

The instrument shall be mutually supportive of and not run counter to international and national law specifically concerning Indigenous Peoples.

XI. TRANS-BOUNDARY COOPERATION

A regional indigenous body, set up with minimal intervention from States, could be a model for dealing effectively with Indigenous Peoples' TK in a trans-boundary context.

COMMENTARY ON THE CONSOLIDATED DOCUMENT RELATING TO INTELLECTUAL
PROPERTY AND GENETIC RESOURCES REV.2 (February 8, 2013)

I. LIST OF TERMS

Misappropriation occurs when Indigenous Peoples' GRs and associated TK are accessed without FPIC. Indigenous Peoples have the right to redress, restitution or, just, fair and equitable compensation, for resources, which they have traditionally owned or used, that have been confiscated, taken, used or damaged without their FPIC.

For Indigenous Peoples, a “competent national authority” is a national-level body established upon their request, in full partnership with them, for their benefit and with their FPIC. Indigenous institutions at the national level, created by Indigenous Peoples themselves, and provided with financial and administrative support from the Government, would be the appropriate competent authority for the protection of Indigenous Peoples' rights to their GRs.

II. PREAMBLE

The key principles in paragraph 9 and the “Conclusions and Recommendations” of this report should be reflected in the preamble.

III. POLICY OBJECTIVES

The intellectual property system amply protects intellectual creations that are not based on TK. The purpose of the IGC negotiations is the development of an effective system for protection of GRs, TK and TCEs, which do not currently enjoy adequate protection from the intellectual property system.

IV. SUBJECT MATTER OF PROTECTION

Protection under the instrument extends to any intellectual property derived from the utilization of GRs of Indigenous Peoples.

V. BENEFICIARIES

Use of the term “Indigenous Peoples” across all three documents (on TCEs, TK and GRs) should be consistent. Indigenous Peoples and local communities are the beneficiaries of protection.

VI. SCOPE

The third and fourth paragraphs under “SCOPE OF PROTECTION” in the commentary on protection of TK and TCEs are adopted under this section.

Any internationally recognized certificate of compliance required under a disclosure requirement must include information on the Indigenous People where the knowledge or resource was obtained and evidence of FPIC, MAT, and equitable benefit-sharing.

Databases generated pursuant to a disclosure requirement must be created, controlled, and managed by the Indigenous Peoples. While the database itself may be managed by a designated institution, ownership of the information contained in the database, as well as the associated resource, remains with the holders of TK and associated GRs.

The application of a disclosure requirement should be wide-ranging in order to be effective. Derivatives, commodities, TK in the public domain, and GRs acquired before implementation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization should not be excluded from protection.

Patent offices should have the obligation to verify contents of disclosure. Indigenous Peoples should be informed by intellectual property offices receiving applications where they have been declared as the source of GRs and associated TK.

There should be no hierarchy of remedies available to Indigenous Peoples. A range of remedies should be available, including civil and criminal sanctions.

VII. RELATIONSHIP WITH INTERNATIONAL AGREEMENTS

Any instrument developed by WIPO that has an impact on the rights of Indigenous Peoples over their knowledge and resources shall be mutually supportive of and not run counter to international and national law specifically concerning Indigenous Peoples.

The “Protect, Respect and Remedy” Framework developed by John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises should be taken into account in the instruments.

The Framework rests on three pillars: The State's duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, and; the need for greater access by victims to effective remedy, both judicial and non-judicial.

VIII. INTERNATIONAL COOPERATION

States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their FPIC before adopting and implementing legislative or administrative measures that may affect them. The same shall apply when States develop guidelines for administrative disclosure of origin or source by international search and examination authorities.

IX. TRANS-BOUNDARY COOPERATION

Where the same GRs are found in in situ conditions within the territory of more than one Indigenous People, they shall cooperate by making use of their Indigenous Peoples' laws. Where the same GRs are found within the territory of more than one Indigenous Peoples that are found in more than one Party, those Parties shall cooperate, in full partnership with Indigenous Peoples, by taking measures that use Indigenous Peoples' laws and protocols.

X. TECHNICAL ASSISTANCE, COOPERATION AND CAPACITY BUILDING

Indigenous Peoples have the right to access financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in the UNDRIP.

CONCLUSIONS AND RECOMMENDATIONS

- (a) The definition of Indigenous Peoples' TCEs, TK and GRs should be guided by the UNDRIP, and developed by the United Nations mandates on Indigenous Peoples' rights.
- (b) Access to and use of GRs, TK and TCEs requires FPIC from Indigenous Peoples. Failure to obtain FPIC in accordance with the requirements of Indigenous Peoples' laws is an infringement of their intellectual property rights.
- (c) Where Indigenous Peoples' intellectual property has been placed in the public domain without proper authorization, Indigenous Peoples retain their rights over their intellectual property and are entitled to remedy.
- (d) National laws, developed in full consultation with and appropriate authority from Indigenous Peoples, may provide for protection of Indigenous Peoples' intellectual property rights.
- (e) Indigenous Peoples should have access to just and fair procedures to resolve disputes over their rights, and to effective remedies for infringements of their intellectual property rights. Such procedures and remedies shall give due consideration to the customs, traditions, rules and legal systems of the Indigenous Peoples concerned and international human rights.
- (f) Indigenous Peoples own their knowledge in perpetuity. As such, rights over their knowledge revert to Indigenous Peoples upon expiration of the agreed term of utilization.
- (g) Protection of TCEs and TK shall not be subject to any formality.
- (h) Any instrument developed by WIPO that has an impact on the rights of Indigenous Peoples over their knowledge and resources shall be mutually supportive of and not run counter to international and national law specifically concerning Indigenous Peoples.
- (i) A regional indigenous body, set up with minimal intervention from States, could be a model for dealing effectively with Indigenous Peoples' TK in a trans-boundary context.
- (j) Any database generated pursuant to a disclosure requirement must be created, controlled, and managed by the Indigenous Peoples; they retain ownership over the information even when a database is managed by a designated institution.
- (k) The "Protect, Respect and Remedy" Framework should be taken into account in the instruments.

[Annex II follows]

LIST OF INDIGENOUS INVITED EXPERTS FROM THE SEVEN GEO-CULTURAL REGIONS OF
THE UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES

(in the alphabetical order of the geo-cultural regions)

AFRICA

Eliamani LALTAIKA, Tumaini University Iringa, United Republic of Tanzania

ARCTIC

Jon Petter GINTAL, Saami Parliament, Norway

ASIA

Jennifer TAULI CORPUZ (Mrs.), Tebtebba Foundation, Philippines

LATIN AMERICA

Estebancio CASTRO DÍAZ, *Fundación para la Promoción del Conocimiento Indígena*, Panama

NORTH AMERICA

Stuart WUTTKE, Assembly of First Nations, Canada

PACIFIC REGION

Robert Les MALEZER, National Congress of Australia's First Peoples, Australia

EASTERN EUROPE, RUSSIAN FEDERATION, CENTRAL ASIA AND TRANSCAUCASIA
REGION

Gulnara ABBASOVA (Ms.), Foundation for Research and Support of the Indigenous Peoples of
Crimea, Ukraine

[End of Annexes and of document]