

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

**Twenty-Ninth Session**

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**Indigenous Panel: Keynote Address**

**“Intellectual Property, Genetic Resources and Associated Traditional Knowledge: Indigenous and Local Community Perspectives”.**

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Thank you very much for inviting me to this 29th session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. I was one of the indigenous peoples’ representatives during the first sessions of this IGC where we put the key issues which we think should be dealt with by this body. Coming back after more than 10 years reminds me of those early years of debates. I am quite pleased to see that the Consolidated Document Relating to Intellectual Property and Genetic Resources.Rev.2<sup>1</sup>, still reflects the issues we raised in those early years.

I welcome the resumption of the work of the IGC, after a year’s hiatus. I congratulate WIPO Member States, who displayed remarkable political will in enabling the renewal of the mandate of the IGC and adopting a work program for this biennium. I regret, though, that the outcome of these many years of work ended just with this consolidated document which has no status. I certainly hope that this document will still remain as the main basis of the further work of the IGC in these two years.

At the same time, I have observed that the work of the IGC is under keen scrutiny, and the results of its negotiations eagerly awaited, by other related processes, which have been proceeding more quickly with their work on access to genetic resources and the sharing of benefits arising from their use. Among such bodies are the Nagoya Protocol on Access and Benefit Sharing, Convention on Biological Diversity, International Treaty on Plant Genetic Resources for Food and Agriculture, the FAO’s Commission on Genetic Resources for Food and Agriculture, and the World Health Organization, among others.

There are also recent decisions reached in other intergovernmental bodies which reinforce further the importance of recognizing rights of indigenous peoples and their important contributions of their traditional knowledge in addressing the global environment and development crises.

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<sup>1</sup> WIPO/GRTKF/IC/29/4. ANNEX

The Paris Agreement which was agreed upon at the 21st Conference of Parties (COP) of the UNFCCC now contains references to rights of indigenous peoples and importance of their traditional knowledge. Earlier, during the 16<sup>th</sup> Conference of Parties in 2010, the final outcome which is the Cancun Decision included Appendix 1 which are known as the REDD+ Safeguards. These included the need to respect the rights and traditional knowledge of indigenous peoples in local communities in the REDD +<sup>2</sup> decisions.

2. When undertaking the activities referred to in paragraph 70 of this decision, the following safeguards should be promoted and supported:

(c) Respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples;

Indigenous peoples and various Special Rapporteurs, including myself, were actively engaged in the COP to get human rights recognized in the Paris Agreement. The global indigenous peoples' caucus pushed the Parties to put into the final decisions the recognition of indigenous peoples' rights and traditional knowledge, their effective and full participation in climate change mitigation and adaptation processes, among others. To a certain extent we did succeed in including human rights, including indigenous peoples' rights, into the COP decisions and the Paris Agreement.

Preambular Paragraph 8 of the Paris Agreement (FCCC/CP/2015/L.9/Rev.1) links the need to respect, promote and consider the respective obligations of Parties on human rights and the list of rights mentioned included indigenous peoples' rights .

*Acknowledging* that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,

Additionally Paragraph 136 of the Paris Agreement states ;

136. *Recognizes* the need to strengthen knowledge, technologies, practices and efforts of local communities and indigenous peoples related to addressing and responding to climate change, and *establishes* a platform for the exchange of experiences and sharing of best practices on mitigation and adaptation in a holistic and integrated manner;

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<sup>2</sup> FCCC/CP/2010/7/Add.1. Appendix I "Guidance and safeguards for policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries"

As you may know, the Sustainable Development Goals (SDGs) have been adopted by the United Nations General Assembly last year. These are goals and targets agreed by all states which should be achieved by 2030.<sup>3</sup> The document recognizes that indigenous peoples are among those who have to be empowered so that the pursuit of the SDGs will impact on them positively and they can also participate effectively in achieving these goals. The document clearly recognized the importance of the need to respect human rights;

8. We envisage a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realization of human potential and contributing to shared prosperity.

Furthermore, in compliance with the Nagoya Protocol, indigenous peoples are strengthening their customary laws and documenting their community protocols in order to put others on notice regarding rules for access to their genetic resources, and clarify benefit-sharing mechanisms. These protocols are also intended to form part of the compliance regime for legally binding instruments that they hope WIPO will adopt for the protection of indigenous peoples' traditional knowledge.

Meanwhile, misappropriation of the genetic resources and associated traditional knowledge of indigenous peoples continues unabated and indigenous peoples are put in the difficult situation of tracking and prosecuting cases of misappropriation of their knowledge.

It is in this light that I urge WIPO Member States to speedily conclude the IGC negotiations and adopt a legally binding treaty that would provide effective protections for the rights of indigenous peoples and local communities over their genetic resources, traditional knowledge and traditional cultural expressions.

As the independent expert of the UN Human Rights Council focusing on the rights of indigenous peoples, it is within my mandate to provide an analysis of how the human rights of indigenous peoples' to their genetic resources, traditional knowledge, and related intellectual creations are being respected and protected. Thus, it is my function to look at the developments around these issues and provide technical advice to States or the WIPO if there is a request for this.

I will be building on the work of my predecessor, Professor James Anaya, who has presented his views to the IGC several times in the past. Mr. Anaya has also authored a technical review, provided as one of the documents for this session, that I urge everyone to read.

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<sup>3</sup> A/RES/70/1 (70/1. "Transforming our world: the 2030 Agenda for Sustainable Development"

He reiterated in his Technical Review<sup>4</sup> a key point which we should all bear in mind as the negotiations under this Intergovernmental Committee are pursued.

“As part of their right to self-determination, indigenous peoples “have the right to autonomy or self-government in matters relating to their internal and local affairs”.<sup>5</sup> This right necessarily implies a right of indigenous peoples to manage and regulate the use of their genetic resources, traditional knowledge and cultural expression, in accordance with their own customs, laws and traditions. An important component of indigenous peoples’ control over their resources and aspects of their cultural heritage is the right to determine to what extent and under what conditions such subject matter can be accessed and used by others. “

Article 31 of the UN Declaration on the Rights of Indigenous Peoples clearly sets out the substance of the rights of indigenous peoples over their traditional knowledge, natural resources and other cultural property.

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.<sup>6</sup>

Other related provisions clarify that indigenous peoples are the owners of natural resources within their territories, and that they have the right to give or withhold their consent to use of such resources. This includes genetic resources. I know this Article by heart as I was part of the indigenous team which led the drafting and negotiations of this Article and getting the governments to agree to it. I still remember clearly the arguments put by a few governments who were not particularly happy with the draft article. Amongst us, indigenous peoples representatives present in the negotiations, we had to debate whether we are going to use the term “intellectual property” in the article. In the end we agreed to use this phrase.

Article 42 of the UNDRIP requires the United Nations, its bodies and specialized agencies to promote respect for and full application of the Declaration. This means that WIPO has the obligation to fully implement Article 31, and ensure the protection of indigenous peoples’ rights to their traditional knowledge, traditional cultural expressions and other intellectual creations.

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<sup>4</sup> WIPO/GTRKF/IC/29/INF/10, ANNEX, para 9, p.3

<sup>5</sup> Indigenous Declaration, Art. 4

<sup>6</sup> UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 (2007), art. 31.1 and 2.

The jurisprudence and practice developed by various human rights bodies are contained in the technical review provided by Professor Anaya.

Most of the Member States of WIPO have endorsed the UNDRIP and have undertaken, through various human rights mechanisms and bodies, to ensure the protection of the rights of indigenous peoples. It is not unreasonable for indigenous peoples to expect these WIPO Member States, through the IGC process, to develop treaties to protect their rights to their TK.

The proposal for a mandatory disclosure mechanism could provide an effective mechanism for protecting the rights of indigenous peoples to their genetic resources and associated traditional knowledge. Such a mechanism should, of course, require disclosure of the origin of the genetic resources and associated TK, whether such resources and TK are from an indigenous peoples' community, as well as evidence of free, prior and informed consent and benefit sharing.

Where indigenous peoples have decided to grant access to and allow the use of their genetic resources and traditional knowledge, it should be pointed out that after the expiration of the agreed term of use, rights to the genetic resources and TK reverts back to the indigenous peoples who own the knowledge and does not pass into the public domain. This is based on the right of indigenous peoples to permanent sovereignty over their natural resources, as well as international human rights instruments and standards.

Negotiations within the IGC have to recognize that there is a staggering amount of information on indigenous peoples' genetic resources and traditional knowledge that has been placed in databases, registers, publications, archives, libraries, gene banks, or otherwise made publicly available without the consent of indigenous peoples. Any instrument that the IGC adopts must take this into consideration and put in place an accessible mechanism for redress and repatriation.

While databases and registers may provide defensive protection for indigenous peoples' genetic resources and associated traditional knowledge, indigenous peoples must be able to retain control over the information put into databases and must be part of the management structure of such registers and databases.

It is almost sixteen years since the work of the IGC started, and almost twenty years since WIPO conducted its fact-finding missions to identify the intellectual property needs and expectations of traditional knowledge holders. I urge WIPO Member States to seek creative solutions that would unblock the negotiations and enable a diplomatic conference within the next two years.

In particular, the proposal for a "graded approach" that has emerged in recent years within the framework of the WIPO IGC, is an interesting proposal that could potentially unblock the negotiations. Of course, as they say, the devil is in the details,

but such proposals are very promising as they bring us closer to a frank discussion and examination of the details, of the various contexts under which TK and TCEs are held, rather than dwelling on entrenched positions and general statements.

Finally, recognition of the right of indigenous peoples over their genetic resources and traditional knowledge is part of their right to development. The CBD takes this approach, when it recognized that indigenous peoples have the right to benefit from the use of their GRs and TK so that they can continue to practice their conservation and sustainable use practices, as well as their traditional livelihoods. A TK-protection treaty developed by the WIPO IGC, in order to comply with the right of indigenous peoples to development, must recognize and protect the right of indigenous peoples to benefit from GRs and TK that they have maintained since time immemorial, and enable indigenous peoples to maintain the traditional practices that have resulted in their vast and useful genetic diversity in the first place.

In closing, I would like to point out that the flexibility of the intellectual property system has allowed it to adjust to changing contexts and technologies, such as the advent of the internet and the demand that the intellectual property system address the situation of the visually impaired. I believe that the time is ripe for WIPO to once again exercise its flexibility by finally addressing the intellectual property needs and expectations of traditional knowledge holders through the adoption of a treaty that recognizes and protects the rights of indigenous peoples to their genetic resources and traditional knowledge.