

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

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TECHNICAL REVIEW OF KEY INTELLECTUAL PROPERTY-RELATED ISSUES OF THE WIPO DRAFT INSTRUMENTS ON GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS BY PROFESSOR JAMES ANAYA

Information document submitted by the Secretariat of the United Nations Permanent Forum on Indigenous Issues

1. The United Nations Permanent Forum on Indigenous Issues (UNPFII) recommended at its Eleventh Session, which took place from May 7 to 18, 2012, that “WIPO commission a Technical Review, to be conducted by an indigenous expert, focusing on the draft texts concerning traditional knowledge, genetic resources and traditional culture expressions, and to provide comments thereon to the Intergovernmental Committee through the Forum. The review should be undertaken within the framework of indigenous human rights.”¹
2. In consultation with the Secretariat of the UNPFII, Professor James Anaya, Professor of Human Rights Law and Policy, University of Arizona, United States of America, was commissioned by the Secretariat of WIPO in 2014 to undertake this technical review under his sole responsibility. Professor Anaya completed his review (entitled “Technical Review of Key Intellectual Property-Related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions”) in 2014 and submitted it to the Secretariat of the UNPFII.

¹ See paragraph 50 of the UNPFII Report of its Eleventh Session, document E/2012/43 – E/C.19/2012/13.

3. On May 28, 2015, the Secretariat of WIPO received a request from the UNPFII Secretariat to submit the technical review undertaken by Professor Anaya to the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) as an information document.

4. The UNPFII Secretariat also requested that the technical review be submitted to future sessions of the IGC which address traditional knowledge and traditional cultural expressions respectively.

5. Pursuant to the request above, the Annex to this document contains the technical review referred to.

6. *The Committee is invited to take note of the technical review in the Annex to this document.*

Technical Review of Key Intellectual Property-Related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions

By Professor James Anaya

I. Background and introduction

1. At its 11th session the United Nations Permanent Forum on Indigenous Issues requested the World Intellectual Property Organization (WIPO) to commission an independent technical review within the framework of indigenous human rights of the draft texts developed by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. The present report contains the requested review. As instructed by the WIPO secretariat it refers to the current draft texts, which are contained in WIPO documents WIPO/GRTKF/IC/28/4, WIPO/GRTKF/IC/28/5 and WIPO/GRTKF/IC/28/6.
2. This report has been prepared under the sole responsibility of the author. It does not necessarily reflect the views of WIPO, WIPO's Member States or WIPO observers.
3. The first part of the report sets out the basic contours and content of the human rights framework that is applicable to indigenous peoples in relation to the intellectual property-related issues of the draft texts. Subsequently, key aspects of the draft texts are examined against the backdrop of the human rights framework. Limitations of space do not permit an exhaustive or more detailed review of the draft texts or of all the human rights concerns that may be raised by them.

II. The human rights framework

4. The draft texts are aimed at advancing international standards for recognizing and protecting proprietary and other interests in genetic resources (WIPO/GRTKF/IC/28/4), traditional knowledge (WIPO/GRTKF/IC/28/5), and traditional cultural expressions (WIPO/GRTKF/IC/28/6). Directly relevant to the intellectual property-related issues addressed in these texts is article 31 of the United Nations Declaration on the Rights of Indigenous Peoples, which states:

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.¹

5. This provision of the Declaration is grounded in a range of universal human rights, including rights of culture, religion, property, and self-determination, as understood in light of the fundamental norm of non-discrimination and the specific characteristics of indigenous peoples.

¹ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295 (2007), art. 31.1 ("Indigenous Declaration").

The rights to culture and religion

6. It is widely recognized that the right to the enjoyment of culture that is affirmed in multiple human rights instruments extends to the distinctive cultural characteristics of indigenous peoples, which include the traditional knowledge they have generated through their own patterns of observation and experiences, as well as their distinctive art forms and other cultural expressions.² Indigenous peoples' use of genetic resources, as with other natural resources, is also typically part of or associated with cultural identity. As stated by the Human Rights Committee in connection with the right to culture protected by article 27 of the International Covenant on Civil and Political Rights, "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples."³ In many instances these aspects of indigenous heritage are part of or related to indigenous religious belief systems and hence fall within the ambit of the right to religion.

The right to property

7. Beyond being grounded in the right to culture, article 31 of the Declaration quoted above is an affirmation of indigenous peoples' proprietary interests in the referenced aspects of their cultural heritage. That indigenous peoples hold property rights over traditional knowledge and cultural expressions generated and created by them follows from the general idea that intellectual creativity vests its creator with moral and material interests, but is also reaffirmed in other sources such as the International Covenant on Economic, Social and Cultural Rights, article 15, paragraph 1(c), as interpreted by the Committee Economic, Social and Cultural Rights.⁴ A number of international sources of authority⁵ as well as an increasingly rich jurisprudence emanating out of regional and domestic courts and human rights bodies⁶, establish that indigenous peoples have property rights over lands and natural resources traditionally used, including, by implication, genetic resources they traditionally have used or possessed.

The right to self-determination

8. In addition, the "right to maintain, control, protect and develop" aspects of cultural heritage articulated in article 31 of the Declaration is a component of the right to self-determination, which is affirmed for "all peoples" in the international human rights covenants⁷ and for indigenous peoples in particular in article 3 of the Declaration. Interpreting the right to self-determination as enshrined in the International Covenant on Civil and Political Rights, the Human Rights Committee has emphasized, with explicit reference to indigenous peoples, that the right "requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources".⁸

² See Cmte. E.S.C.R., General comment no. 21, E/C.12/GC/21, para. 37; Universal Declaration on Cultural Diversity, UNESCO 2001, art. 4.

³ H.R. Cmte., General comment no. 23, CCPR/C/Rev.1/Add.5, para. 7.

⁴ See Cmte. E.S.C.R., General comment no. 17, E/C.12/GC/17, paras. 7, 32. See also Cmte. E.S.C.R., General comment no. 21, E/C.12/GC/21.

⁵ See e.g. Indigenous Declaration, art. 26, Cmte. E.R.D., General recommendation no. 23 and numerous country specific observations (e.g. CERD/C/SWE/CO/19-21, para. 17).

⁶ See e.g. *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. Ser (C) No. 172, Judgment of 28 Nov. 2007; *Ctr. for Minority Rights Dev. v. Kenya*, Comm. 276/2003 27th ACHRR AAR Annex (June 2009 – Nov. 2009) (Endorois case).

⁷ International Covenant on Economic, Social and Cultural Rights, art. 1; International Covenant on Civil and Political Rights, art. 1.

⁸ CCPR/C/79/Add.105, para. 8. For similar comments, see also CCPR/CO/82/FIN, para. 17 and CCPR/CO/74/SWE, para. 15.

9. 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”.⁹ 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.

The obligation of States to implement human rights

10. A corollary of all internationally recognized human rights is the duty of States to respect, protect and fulfill them. This duty is affirmed in the major United Nations and regional human rights instruments in various formulations, including in the Declaration on the Rights of Indigenous Peoples, which prescribes in relation to the rights in cultural heritage and genetic resources affirmed in article 31 that, “[i]n conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.” In adopting such effective measures, the broader interests of society and human rights of others must duly be taken into account, as stipulated by article 46 of the Declaration; but in the end the specific rights of indigenous peoples must be recognized and protected, and brought into harmony with the human rights of all.

Free, prior and informed consent

11. Among the affirmative duties of States to protect the rights of indigenous peoples is that of ensuring consultations with them to obtain their free, prior and informed consent to any measure that may materially affect the enjoyment of their rights.¹⁰ That indigenous peoples’ natural resources, including genetic resources, can ordinarily be accessed only with their consent has for instance been repeatedly confirmed by the Committee on the Elimination of Racial Discrimination.¹¹ As to traditional knowledge and cultural expressions, the Committee on Economic, Social and Cultural Rights has underscored that States “should respect the principle of free, prior and informed consent of the indigenous authors”.¹² The principle of free, prior informed consent is also gaining increasing acceptance in practice.¹³ As a general rule, therefore, indigenous peoples’ genetic resources, traditional knowledge and cultural expressions should not be accessed or used by others without consent upon terms that are consistent with the affected rights. The principle of consent functions as protective of and instrumental to the enjoyment of rights recognized in authoritative international sources, including those referred to above.

III. The draft text on genetic resources (annexed to WIPO/GRTKF/IC/28/4)

12. The draft text on the protection of genetic resources aims to prevent the misappropriation and patenting of properties of these resources and of related traditional knowledge by those who have not discovered or generated such properties or traditional knowledge.

⁹ Indigenous Declaration, art. 4

¹⁰ See Indigenous Declaration, art. 19.

¹¹ See, e.g. General recommendation no. 23, supra, and CERD/C/SWE/CO/19-21, para. 17.

¹² Cmte. E.S.C.R., General comment no. 17, para. 32.

¹³ In the author’s capacity as United Nations Human Rights Council’s Special Rapporteur on the rights of indigenous peoples, he devoted considerable attention to examining the contours of this principle. See, for example, A/HRC/12/34, paras. 36-57 and A/HRC/21/47, paras. 47-53 and 62-71.

Disclosure: The key mechanism of protection

13. The key mechanism for achieving this objective in the draft is a requirement that a patent applicant disclose the country or source of origin of the subject matter. This and the related operative provisions of the draft text clearly provide a certain level of defensive protection against the misappropriation of indigenous peoples' genetic resources and traditional knowledge, thereby advancing the implementation of relevant international human rights standards. Precisely how far that protection goes, however, remains ambiguous in the text, because it includes bracketed language throughout with alternative formulations of the operative provisions as well as of the preamble.

Absence of recognition of indigenous peoples as rights holders

14. In any event, with its reliance on a defensive mechanism of disclosure, the draft instrument does not go so far as to provide or require affirmative recognition of or specific measures of protection for indigenous peoples' rights in genetic resources or associated traditional knowledge. Such recognition and protection are largely left to the domestic legal systems of the countries of origin, with States not being specifically obligated in this regard beyond the obligation to impose on patent applicants the disclosure of origin requirement. The preamble does refer to ensuring the rights of indigenous peoples over genetic resources and traditional knowledge as an objective of the instrument, and one of the alternative formulations of "misappropriation" in the glossary refers to the absence of consent by holders of genetic resources and associated knowledge, implying that indigenous peoples are among such holders. But affirmation of these rights and the corresponding obligations of States do not explicitly make their way into the draft instrument's operative provisions.

15. This omission raises concern, since it may practically enable ongoing or potential resistance, both in domestic and international transactions, to treating indigenous peoples as holders of property rights in the genetic resources and associated knowledge that they have duly possessed. On the other hand, the omission, if kept, could not properly be read as implying a legal basis for such denial of indigenous peoples' rights over genetic resources, which find support in the Declaration on the Rights of Indigenous Peoples and other international sources.

IV. The draft texts on traditional knowledge (annexed to WIPO/GRTKF/IC/28/5) and on traditional cultural expressions (annexed to WIPO/GRTKF/IC/28/6)

16. The other two instruments have as their respective objectives protection of traditional knowledge and traditional cultural expressions.

Beneficiaries

17. In contrast to the instrument on genetic resources, these two instruments identify indigenous peoples as among the holders of rights or interests in relation to the subject matter. Indigenous peoples that create traditional knowledge or cultural expressions are direct beneficiaries of protection. Use of the term "peoples", however, continues to be bracketed, which is considerably out of step with the contemporary human rights regime, in which use of the term is widely accepted.

The scope of protection

18. While indigenous peoples or communities are beneficiaries of protection, the nature and degree of protection that States would be required to implement remain substantially undefined by the heavily bracketed texts. Certain general parameters and issues, however, are evident in and common to both texts.

19. Each of the draft instruments, in the parts on “scope of protection”, indicates differing levels of protection depending on the extent to which it can be established that a beneficiary has a close cultural nexus or exclusivity with the traditional knowledge or cultural expression in question. At the end of the spectrum with the highest level of protection are traditional knowledge and cultural expressions that are sacred or known only to beneficiaries. For these forms of knowledge and expression, States are to ensure beneficiaries control over the subject matter, prevention from unauthorized use or distortion, as well as attribution for and equitable benefits from any authorized use.

20. At the other end of the spectrum are traditional knowledge and cultural expressions that are now widely known or publicly available and no longer intensively used by the people or community of origin. In these cases, protection is in the realm of ensuring attribution and respectful use; more robust protections for direct control and sharing in the benefits or the use would not be required. Benefit-sharing and certain other protections would apply at the mid-range of the spectrum.

21. Animating the sliding scale framing of the scope of protection is the concept of public domain, which has problematic aspects in its application to indigenous peoples. This concept is inherent to conventional intellectual property rights regimes, which aspire to provide sufficient protection to spur creativity, but not more as it is held beneficial to society at large if others can eventually build on existing creativity. Public domain theory provides, generally speaking, that intellectual property rights should eventually expire and that, further, what is already known to a wider circle cannot be subject to such rights unless certain conditions related to individual creativity are met.

22. However, from a human rights perspective, this rationale does not make complete sense for determining the scope of protection of indigenous peoples’ traditional knowledge and cultural expressions. Rather, the human rights regime requires recognition that traditional knowledge and cultural expressions, irrespective of broad public awareness of them, form integral parts of indigenous peoples’ cultures and societies. As the Committee on Economic, Social and Cultural Rights has held: “While ... intellectual property rights ... may be ... limited in time and scope ... human rights are timeless expressions of fundamental entitlements of the human person”; human rights protections, moreover, safeguard the link between “peoples ... and their collective cultural heritage”.¹⁴ The major purpose of the contemporary international concern for indigenous peoples, as manifested by specific programs and standards within the human rights regime, is to address past and continuing wrongs directed against them¹⁵, including the nonconsensual taking or use of their traditional knowledge and cultural expressions. Hence, the human rights regime as applied in this context requires a wider scope of protection than follows from conventional intellectual property theory.

Term of protection

23. With regard to the term of protection, both texts include paragraphs that allow States to determine the longevity of protective measures, under alternative formulations that more or less are confined by the scope of protection to be defined by the instruments. In each case, the

¹⁴ Cmte. E.S.C.R., General comment no. 17, para. 2.

¹⁵ See S. James Anaya, *Indigenous Peoples in International Law* (Oxford Univ. Press, 2d. ed. 2004).

alternative formulations are mostly detached from the logic of the human rights norms that mandate recognition and protection of indigenous peoples' rights in traditional knowledge and cultural expressions. Conventional intellectual property theory allows for time-bound protection as a means of promoting dissemination and creativity, with an emphasis on the economic value of generated knowledge and creative work. However, the human rights regime recognizes both that traditional knowledge and cultural expressions constitute integral elements of indigenous peoples' cultures and societies, and that it is this characteristic, above their economic value, that motivates their protection. This implies that indigenous traditional knowledge and cultural expressions should be protected as long as such subject matter remains relevant to indigenous peoples' cultures.¹⁶

Exceptions and limitations

24. Closely connected to the scope and term of protection are the draft provisions on exceptions and limitations in the two draft texts. These contain a number of various draft proposals for sweeping and far-reaching exceptions and limitations that could have the same effect as a narrowly formulated scope of protection. The above has explained how the scope of protection, as a general rule, should extend also to indigenous peoples' traditional knowledge and cultural expressions that might otherwise be considered in the public domain in order to comply with the human rights standards. This necessarily implies that these human rights standards also prohibit the various substantive and far-reaching proposals for exceptions and limitations found in the draft instruments. The suggestion that it be left to national law to determine the exceptions and limitations to the scope of protection are particularly problematic, as it leaves States with latitude to decide that certain traditional knowledge and cultural expressions should not be subject to protection at all. Any potential exception or limitation should be defined and concretely formulated in the instruments, and compliance with human rights law should be ensured.

Definition of misappropriation

25. Similar to the draft articles on exceptions and limitations, the misappropriation provisions include proposals suggesting that misappropriations of traditional knowledge or cultural expressions be defined as violations of national law. Again, such proposals are problematic, since they fail to incorporate an international standard and project the possibility for traditional knowledge and cultural expressions to remain unprotected. That is, if national law does not protect traditional knowledge and cultural expressions, no misappropriation, by definition, occurs when these aspects of cultural heritage are used by other than those who generate or create them. In keeping with human rights standards, misappropriation should instead be defined as occurring when someone accesses indigenous traditional knowledge and cultural expression without consent.

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¹⁶ Recall the observation of the Committee on Economic, Social and Cultural Rights, above, that while intellectual property rights are limited in time, human rights are "timeless expressions", a point also emphasized in relation to the rights of indigenous peoples by the Indigenous Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions. See Report, WIPO/GRTKF/IC/25/INF/9, commentary to term of protection.