

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

**Forty-First Session  
Geneva, August 30 to September 3, 2021**

### **UPDATE OF THE TECHNICAL REVIEW OF KEY INTELLECTUAL PROPERTY-RELATED ISSUES OF THE WIPO DRAFT INSTRUMENTS ON GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS WITHIN THE FRAMEWORK OF INDIGENOUS HUMAN RIGHTS**

*Document prepared by the Secretariat*

1. Acknowledging the contribution to the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”) by the *Technical Review of Key Intellectual Property-related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (WIPO/GRTKF/IC/29/INF/10) (“the Technical Review”), which was prepared by an indigenous expert, namely Professor James Anaya, and with reference to the recommendation made by the United Nations Permanent Forum on Indigenous Issues (“the UNPFII”) at its Eighteenth Session in 2019, the Committee, at its Fortieth Session, requested the Secretariat to commission, within existing resources, the updating by an indigenous expert of the Technical Review for the Committee’s consideration during the biennium 2020-2021.<sup>1</sup>
2. Pursuant to the decision above, Ms. Neva Collings, Board Director, NSW Aboriginal Housing Office, Department of Family and Community Services, Australia, and Mr. Elifuraha Laltaika, Senior Lecturer and Director, Research Tumaini University Makumira, United Republic of Tanzania, were commissioned to update the Technical Review, which was blind peer reviewed by two indigenous experts. The Annex to this document contains the Updated Technical Review provided by the commissioned indigenous experts.

3. *The Committee is invited to take note of the Annex to this document.*

[Annex follows]

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<sup>1</sup> See Decisions of the Fortieth Session of the Committee, page 3.



## **Update of the Technical Review of Key Intellectual Property-Related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions within the Framework of Indigenous Human Rights**

By Mr. Elifuraha Laltaika and Ms. Neva Collings

### **BACKGROUND AND INTRODUCTION**

1. During the 18<sup>th</sup> session of the United Nations Permanent Forum on Indigenous Issues (UNPFII), which took place from April 22 to May 3, 2019, the UNPFII extended a recommendation to the World Intellectual Property Organization (WIPO)<sup>2</sup> to commission and finance an indigenous expert to undertake an update of the technical review of the key intellectual property-related issues of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) draft instruments on genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs) within the framework of indigenous human rights (hereinafter the “Technical Review”), which was undertaken in 2014 by Professor James Anaya.<sup>3</sup>
2. The UNPFII recommended the update of the Technical Review “to reflect current issues, with an emphasis on concepts such as ‘balancing’ and ‘public domain’ and how these might conflict with indigenous peoples’ human rights and customary laws, and the obligation to incorporate and respect human rights in the work of WIPO.”<sup>4</sup> The present report encompasses the requested update of the Technical Review.
3. Professor Anaya’s Technical Review represents a work of enduring conceptual and practical relevance for drawing a link between intellectual property protection and human rights of indigenous peoples. It grounds the centrality of obtaining indigenous peoples’ consent as a precondition for accessing indigenous TK, TCEs and GRs.<sup>5</sup>
4. This Updated Technical Review thus builds on Professor Anaya’s work as requested by the UNPFII. It reviews the current IGC draft texts on TK, TCEs and GRs within the framework of indigenous human rights by examining how the concepts such as “balancing” and “public domain”, as well as “databases”, “tiered approach” and “disclosure requirements”, might conflict with indigenous peoples’ human rights discussed in the Technical Review by Professor James Anaya.
5. In terms of organization, this Update is divided into three parts. Part one covers an updated review of the IGC Draft Articles on TK<sup>6</sup> and TCEs.<sup>7</sup> Part two encompasses an updated review of the Consolidated Document Relating to Intellectual Property and GRs (hereinafter the

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<sup>2</sup> United Nations Permanent Forum on Indigenous Issues, Report on the 18<sup>th</sup> Session, E/2019/43-E/C.19/2019/10. See paragraph 10 of the document, available at <https://www.un.org/development/desa/indigenouspeoples/news/2019/06/18-session-report/>.

<sup>3</sup> Document WIPO/GRTKF/IC/29/INF/10, available at [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_29/wipo\\_grtkf\\_ic\\_29\\_inf\\_10.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_29/wipo_grtkf_ic_29_inf_10.pdf).

<sup>4</sup> E/2019/43-E/C.19/10 at para 10.

<sup>5</sup> WIPO/GRTKF/IC/29/INF/10 at para 11.

<sup>6</sup> The Fifty-First (24 Ordinary) Session of the WIPO General Assembly: Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) (WO/GA/51/12), Annex I: The Protection of Traditional Knowledge: Draft Articles, Facilitators Rev. (June 19, 2019), available at [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=443934](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=443934).

<sup>7</sup> The Fifty-First (24 Ordinary) Session of the WIPO General Assembly: Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) (WO/GA/51/12), Annex II: The Protection of Traditional Cultural Expressions: Draft Articles, Facilitators Rev. (June 19, 2019), available at [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=443934](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=443934).

“Consolidated Document”), and the Draft International Legal Instrument relating to intellectual property, GRs and TK associated with GRs, prepared by the IGC Chair (hereinafter the “Chair’s text”).<sup>8</sup> Part three covers final considerations.

6. The authors are solely responsible for the preparation of this Update. It does not in any way reflect the views of the WIPO Secretariat, WIPO’s Member States or Observers.

## **PART 1: IGC DRAFT TEXTS ON TK AND TCES**

### **Balancing**

7. The concept of “balancing” as applied in the intellectual property rights protection system creates mutual advantages for the holders of the subject matter of protection and the users, with the view to inter alia fostering innovation and creativity. A towering example of the concept’s application in international legal instruments features under Article 7 of the World Trade Organization’s Agreement on Intellectual Property-Related Aspects of Intellectual Property Rights (TRIPS). It provides: “The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”<sup>9</sup>

8. A major challenge exists where intellectual property tends to focus on individual or corporate innovators, while indigenous peoples hold knowledge in a collective setting. Conceptually, “balancing” thus involves an attempt at safeguarding intellectual property rights of indigenous peoples as a group, while simultaneously upholding the rights enjoyed by the rest of society. However, the concept is problematic to indigenous peoples because TK and TCEs are integral to their identity as a group, and are intergenerational. Significantly, indigenous TK and TCEs contain stories, customary laws and protocols, ceremonies, ways of life and worldviews, which are not meant to be commoditised.

9. While “balancing” is justifiable in a setting involving individuals and corporate entities, the concept may undermine indigenous peoples who own their TK and TCEs collectively and who have the right to self-determination under international law.<sup>10</sup> This right encompasses many indigenous peoples’ desire to enact laws dealing with their language, culture and arguably their intellectual property. A challenge is how the intellectual property regime can recognize indigenous peoples’ customary laws, offer protection, and support the transfer of TK and TCEs based on access and benefit-sharing (ABS) mechanisms and mutually agreed terms (MAT), in line with the principle of free prior and informed consent (FPIC).<sup>11</sup>

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<sup>8</sup> The Fifty-First (24 Ordinary) Session of the WIPO General Assembly: Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) (WO/GA/51/12), Annex III: The Consolidated Document Relating to Intellectual Property and Genetic Resources Rev. 2 (March 23, 2018), available at [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=443934](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=443934), and Annex IV: Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources, Prepared by Mr. Ian Goss, available at [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=443934](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=443934).

<sup>9</sup> See Annex C1, available at [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf).

<sup>10</sup> The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Article 4, available at <https://undocs.org/A/RES/61/295>.

<sup>11</sup> UNDRIP, Article 19.

10. While the intellectual property system seeks to ensure that all knowledge benefits society as a whole, indigenous peoples possess human and other rights over TK and TCEs, which are integral to customary laws, culture, language, and religion. Accordingly, since human rights are long lasting, intellectual property laws cannot circumvent them; hence there should be no law or prohibition to limit indigenous peoples from using their TK and TCEs.

11. A potential solution to the above conundrum lies partly in crafting a *sui-generis*<sup>12</sup> system of protection of TK and TCEs, taking into account indigenous peoples' human rights and customary laws, as opposed to fitting it within the intellectual property system as expounded in paragraphs 12 and 13 of this Update. The envisaged *sui-generis* system should respect indigenous peoples' rights to control and protect their TK and TCEs.

12. Indeed, preventing misappropriation of TK may require positive measures that include creating *sui generis* intellectual property regimes as stand-alone legislation for the protection of TK from unauthorised access and utilisation, database-related rights and compensation or restitution.<sup>13</sup> The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) affirms the right of indigenous peoples to restitution or just, fair and equitable compensation for resources taken and used without their FPIC.<sup>14</sup>

13. Key elements of *sui generis* regimes should include attribution requirements of indigenous peoples' TK, development of databases by indigenous peoples, and obtaining FPIC before third parties can access and utilise indigenous peoples' TK.<sup>15</sup> The development of TK databases and registries by indigenous peoples with FPIC may require financial and technical assistance by Member States and be based on a fundamental respect for the customary laws and cultural integrity of indigenous peoples and local communities.<sup>16</sup>

## Redress

14. Indigenous peoples' right to redress for the unauthorised utilisation and exploitation of their TK, TCEs, GRs and associated TK is affirmed by the UNDRIP, requiring States to provide redress through effective mechanisms including restitution for cultural and intellectual property taken without FPIC, and that may involve adopting special concrete measures.<sup>17</sup> State parties are thus obliged to adopt concrete measures to ensure the full enjoyment of human rights by indigenous peoples through effective mechanisms that provide restitution for cultural heritage and intellectual property taken without FPIC.<sup>18</sup>

15. The WIPO IGC indigenous caucus has put forward, as an essential element of redress, indigenous peoples' right to continued use of their TK, TCEs and TK associated with GRs without prohibitions. Moreover, if a company holds a patent, this fact should not prevent indigenous peoples -the original holders of the relevant TK- from using the patented invention.

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<sup>12</sup> *Sui Generis* according to Black's Law Dictionary means of its own kind or class, unique or peculiar.

<sup>13</sup> UNDRIP, art. 28(1); Natalie P Stoianoff and Alpana Roy, *Indigenous Knowledge and Culture in Australia — The Case for Sui Generis Legislation* (SSRN Scholarly Paper No ID 2765827, Social Science Research Network, 31 December 2015), 748. <<https://papers.ssrn.com/abstract=2765827>>; Graham Dutfield, 'Legal and Economic Aspects of Traditional Knowledge' in Keith E Maskus and Jerome H Reichman (eds), *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge University Press, 1<sup>st</sup> ed, 2005), 506.

<sup>14</sup> UNDRIP, art. 28(12).

<sup>15</sup> Natalie P Stoianoff and Alpana Roy, *Indigenous Knowledge and Culture in Australia — The Case for Sui Generis Legislation* (SSRN Scholarly Paper No ID 2765827, Social Science Research Network, 31 December 2015), 748. <<https://papers.ssrn.com/abstract=2765827>>.

<sup>16</sup> UNDRIP, art. 32(2), art 18, art. 34; The Report on Traditional Knowledge Registers and Related Traditional Knowledge Databases - UNEP/CBD/WG8J/4/INF/9.

<sup>17</sup> UNDRIP, art. 11(2), art 28; International Convention on the Elimination of All Forms of Racial Discrimination (*ICERD*), art. 2(2).

<sup>18</sup> UNDRIP, art. 11(2).

Another element of redress is repatriation. As the indigenous caucus has stated before, the legal instrument should include repatriation on the basis that ‘negotiations could not just address future practices related to patent issues’ but should also address ‘historical misappropriations and wrongdoings’.<sup>19</sup>

16. Of some relevance to restitution are the Convention of Biological Diversity (CBD) *Rutzolijirisaxik Voluntary Guidelines for the Repatriation of Traditional Knowledge Relevant for the Conservation and Sustainable Use of Biological Diversity*, which provide guidance on repatriation efforts including on benefit-sharing.<sup>20</sup>

17. The Rutzolijirisaxik Guidelines provide that “repatriation may include efforts to restore indigenous peoples and local communities governance of their traditional knowledge” which relates to governance of prior and informed consent, free, prior and informed consent, or approval and involvement, as appropriate, MAT, and benefit-sharing arrangements concerning access to utilised genetic resources and associated traditional knowledge.<sup>21</sup>

### Public Domain

18. Commonly used as a copyright concept, “public domain” refers, as an example, to “expiry of exclusive rights,” including discontinuation of obligations on the part of users of a literary work to provide benefits to rights holders or obtain their consent prior to using the protected subject matter.<sup>22</sup> This means that after the exclusive economic rights expire, the creative works become freely available to the public. The intention is to foster access to information and materials needed for future creative works.<sup>23</sup>

19. In view of the above, justifications exist for time-limited intellectual property protection. However, this practice can potentially deepen evident dissonance existing between intellectual property systems more generally with indigenous peoples’ values and indigenous peoples’ human rights as enshrined in various international human rights standards.<sup>24</sup>

20. Unlike songs, plays or movies where entertaining individuals for profit is sought, TK and TCEs may contain indigenous peoples’ customary laws, customs, ceremonies, and worldviews that are integral to their collective culture. It is difficult for this kind of innovations to enter the public domain when TK and TCEs are so closely tied to a nation, group or community identity.

21. Based on the above, “public domain” reflects divergent opinions on TK and TCEs protection. One approach states that TK is a “valuable, owned information for which permission to use must be obtained largely irrespective of traditional knowledge’s age or public availability,” while another posits that “publicly available traditional knowledge is in public domain and therefore available as prior art, but otherwise free for use without compensation.”<sup>25</sup>

22. Examined from the indigenous peoples’ perspectives, public domain is at odds with indigenous peoples’ human rights enshrined in authoritative international instruments such as

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<sup>19</sup> Report of the 35<sup>th</sup> Session of the IGC, March 12 to 23, 2018, Statement by Tebtebba Foundation on behalf of the Indigenous Caucus, para 23. document WIPO/GRTKF/IC/35/10.

<sup>20</sup> Refer to: <https://www.cbd.int/doc/guidelines/cbd-RutzolijirisaxikGuidelines-en.pdf>.

<sup>21</sup> Rutzolijirisaxik Guidelines, par. 11(k).

<sup>22</sup> See the discussion in Patricia L. Judd, The Difficulties in Harmonizing Legal Protections for Traditional Knowledge and Intellectual Property. *The Washburn Law Journal*. Vol. 58, 2019. p. 249-270.

<sup>23</sup> Ruth L. Okediji, Traditional Knowledge and the Public Domain. *CIGI Paper No. 176 June 2018* at p. 8 available at <https://www.cigionline.org/sites/default/files/documents/Paper%20no.176web.pdf>.

<sup>24</sup> See paragraphs 4 to 6 of the “Technical Review” available at [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_29/wipo\\_grtkf\\_ic\\_29\\_inf\\_10.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_29/wipo_grtkf_ic_29_inf_10.pdf).

<sup>25</sup> Bagley, *ibid*.

the UNDRIP. It is also misaligned to indigenous peoples' customary laws. While the concept is premised on time-limited rights, indigenous peoples regard TK and TCEs and human rights associated to them, such as the right to self-determination, the principle of FPIC<sup>26</sup>, and associated rights to lands, territories and resources, to be timeless. Correspondingly, subjecting indigenous peoples' TK and TCEs to time limitation negates the limitless and trans-generational nature of rights associated with TK and TCEs among indigenous peoples.

23. Compounding the dissonance stated above, no internationally agreed understanding of the relationship between public domain and the protection of TK and TCEs exists. This gap may necessitate defining the concept's contours in accordance with national laws or practices applicable in various jurisdictions. Since national laws of some jurisdictions conflict with indigenous peoples' customary laws, institutions and values, this may not be a preferable trajectory. The challenge for the IGC is to create a space for an alternative framework for the protection, use and sharing of TK and TCEs to be thoughtfully developed by, and with indigenous peoples.

24. Additionally, digital libraries and modern advances have exacerbated the potential for increased circulation of TK and TCEs indigenous peoples seek to protect. As a response, some indigenous representatives in the IGC have argued that some knowledge should be withdrawn from circulation and repatriated to the indigenous groups who created the TK or TCEs.

### **Exceptions and Limitations**

25. In the field of intellectual property protection, justifications exist for exempting users from their obligations to abide by the conditions attached to a subject matter protected by intellectual property rights under particular conditions. The practice is referred to as "exception(s) and limitations".<sup>27</sup> Reasons for exception(s) and limitations include availing knowledge for study and education, non-commercial uses, museums, and libraries.<sup>28</sup>

26. The concept of "limitations and exceptions" does not refer to limitations on indigenous peoples' use of TK and TCEs. Rather, it refers to conditions under which TK and TCEs are excluded from intellectual property protection. However, there is a potential risk that such exclusion run counter indigenous peoples' right to self-determination and the principle of FPIC.

27. With regards to self-determination as indicated above, indigenous peoples have the right to autonomy and self-governance in matters relating to their internal affairs. Accordingly, a decision to place exceptions and limitations to their TK and TCEs without obtaining their FPIC as expounded below may contravene their right to autonomy and self-governance.

28. The principle of FPIC, in relation to the protection of TK and TCEs, forbids acquiring or using indigenous peoples' TK and TCEs in violation of indigenous peoples' laws, traditions and customs, and without first obtaining indigenous peoples' FPIC.<sup>29</sup> Accordingly, FPIC must be obtained prior to drafting exceptions and limitations touching on indigenous peoples' TK and TCEs.

29. Additionally, there should be a general exception for indigenous peoples to continue to preserve their collective's ability to maintain and recreate diverse content of TCEs and TK, as recognized in UNDRIP and other human rights instruments. This would enable indigenous

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<sup>26</sup> UNDRIP, article 19.

<sup>27</sup> See WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment. Standing Committee on Copyright and Related Rights. Geneva, June 23 to 27, 2003, available at [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_9/sccr\\_9\\_7.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf).

<sup>28</sup> See WO/GA/51/12 Annex I on page 18 on "Exceptions and Limitations".

<sup>29</sup> UNDRIP Articles 11(2) and 19.

peoples to protect their culture through TK and TCEs and demonstrate that reforms to the intellectual property regime can be achieved while enabling indigenous peoples to maintain their identity and cultural sovereignty. This type of exception is found in some trade agreements, notably the *US-Canada-Mexico Free Trade Agreement*.<sup>30</sup>

### **Scope of protection: The Tiered Approach**

30. The tiered approach is an innovative idea that divides TK and TCEs into categories, and proposes that the scope of protection be commensurate to the level of sensitivity indigenous peoples place on the TK or TCEs category in question.

31. Conceptually, the tiered approach is more aligned with the indigenous peoples' rights framework. It does not undermine indigenous peoples' agency and autonomy in withholding TK and TCEs they consider more attached to spiritual purposes, and, hence, inappropriate to be made public. Additionally, the approach is premised on the recognition that indigenous peoples do not consider all TK and TCEs types to be of the same value or requiring the same level of treatment.

32. Accordingly, if formulated in tandem with the obligation to obtain indigenous peoples' FPIC, the approach is a welcome move. Inclusion of a requirement to remedy historical injustices by way of repatriation of misappropriated TK and TCEs can further strengthen the tiered approach.

33. In spite of the above, four elements make the tiered approach particularly problematic. Firstly, it raises the question of whether the available range of rights that attach to TK and TCEs across all tiers would be subject to contract law or the legal traditions of indigenous peoples. While breach of contracts is expensive to litigate, judges may not fully understand or appreciate the indigenous legal traditions especially in relation to spiritual connections. Secondly, sacred and secret TK and TCEs are not concerned with whether they are widely or narrowly diffused. The fact that they were diffused should not be determinative. Where such TK and TCEs have been illegally taken or without FPIC, those who appropriated the TK or TCEs should not be rewarded by asking the original owners to surrender their rights. Thirdly, discussions continue whether an objective (mainstream) or subjective (indigenous peoples' views) test govern diffusion. Finally, some indigenous peoples representatives at the IGC are averse to the alignment of rights under the tiered approach with those of conventional intellectual property systems.<sup>31</sup>

### **Databases and Knowledge Registers**

34. In the field of patent protection, the use of databases aims at preventing undeserved granting of intellectual property rights protection. To qualify for patent protection under laws of many jurisdictions, an invention must be new, inventive and capable of industrial application. Additionally, it must be a patentable subject matter, and adequately disclosed to allow for a person having ordinary skill in the art to practice it.<sup>32</sup>

35. The use of databases thus works by signalling existence of "prior art", implying some proof that the invention in question does not meet the conditions mentioned above because it is already publicly available. In this way, it prevents erroneous grant of intellectual property rights.

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<sup>30</sup> See Article 32.5, available at

[https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/32\\_Exceptions\\_and\\_General\\_Provisions.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/32_Exceptions_and_General_Provisions.pdf).

<sup>31</sup> Report of the 38<sup>th</sup> Session of the IGC, December 10 to 14, 2018, Statement by CEM-Aymara on behalf of the Indigenous Caucus, paras 197 and 215. document WIPO/GRTKF/IC/38/16.

<sup>32</sup> See Anupam Chander and Madhavi Sunder, *The Romance of Public Domain*, California Law Review [Vol. 92:2004].



36. While registers and databases play the above crucial role, they cannot be solely controlled by national governments. Accordingly, indigenous peoples have expressed reservations regarding the use of databases; citing likelihoods of free dissemination of the information to third parties. Indigenous peoples are hence emphatic that any documentation and recording of TK and TCEs should primarily benefit indigenous peoples; and their participation in such schemes should be voluntary, not a prerequisite for protection of TK and TCEs.<sup>33</sup>

37. Another concern of the indigenous caucus at the WIPO IGC is that accessibility of TK and TCEs databases to the public may increase the likelihood of such information being used without permission of indigenous peoples - the TK and TCEs holders.<sup>34</sup>

38. Significantly, for instance, where a patent application is rejected, reasons for rejection are usually communicated to the applicant in writing. The wider public could also be availed the reasons, especially in jurisdictions where patent application rejections are challenged in courts of law. In this way, databases are not entirely secure for indigenous peoples TK and TCEs.

## **PART 2: DRAFT TEXTS ON GENETIC RESOURCES (GRS)**

### **Indigenous peoples' rights to genetic resources**

39. The UNDRIP affirms the right of indigenous peoples to 'own, use, control and develop' the resources they possess by reason of traditional ownership or other traditional occupation and to maintain, control and develop their cultural heritage including genetic resources.<sup>35</sup>

40. Of particular relevance to the intellectual property and the negotiation of a legal instrument, the UNDRIP affirms indigenous peoples' right to self-determination and the centrality of FPIC for the utilisation and exploitation of their resources and associated TK. FPIC is a principle based on the right to self-determination.<sup>36</sup> The WIPO draft instruments propose mutual supportiveness with international human rights agreements as advocated by indigenous peoples. Indigenous peoples insist on the mutual supportiveness in order to foster consistent interpretation and enforcement of rights.

41. According to the Technical Review by Professor Anaya, indigenous peoples' resource rights are considered to encompass all forms of 'natural resources' including GRs, customarily used by indigenous peoples according to well defined patterns.<sup>37</sup> Indigenous peoples' rights to GRs are also affirmed by the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the CBD (Nagoya Protocol)*.<sup>38</sup> Similarly, the *ABS Interim National Report(s) on the implementation of the Nagoya Protocol* confirm indigenous peoples' rights to grant access to GRs.<sup>39</sup>

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<sup>33</sup> CBD COP decision VIII/5 B, paragraph 5; CBD COP decision IX/13 - UNEP/CBD/COP/DEC/IX/13.

<sup>34</sup> Report of the 37<sup>th</sup> Session of the IGC, August 27 to 31, 2018, Statement by the Arts Law Center on behalf of the Indigenous Caucus, document WIPO/GRTKF/IC/37/17, para 253.

<sup>35</sup> UNDRIP, art 31.

<sup>36</sup> UNDRIP, art. 4, art. 32; Document WIPO/GRTKF/IC/29/INF/10, available at [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_29/wipo\\_grtkf\\_ic\\_29\\_inf\\_10.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_29/wipo_grtkf_ic_29_inf_10.pdf).

<sup>37</sup> Document WIPO/GRTKF/IC/29/INF/10, available at [https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_29/wipo\\_grtkf\\_ic\\_29\\_inf\\_10.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_29/wipo_grtkf_ic_29_inf_10.pdf).

<sup>38</sup> *Nagoya Protocol*, art. 6(3); ABS Interim National Report on the Implementation of the Nagoya Protocol. Analysis: Breakdown by regions. Question 38: 'Do Indigenous and local communities have the established right to grant access to genetic resources in your domestic law?' - <https://absch.cbd.int/reports/analyzer> at 11<sup>th</sup> May 2020.

<sup>39</sup> ABS Interim National Reports on the Implementation of the Nagoya Protocol analyser provides a breakdown by regions in response to question 38" Do Indigenous and local communities have the established right to grant access to genetic resources in your domestic law? - <https://absch.cbd.int/reports/analyzer> at 11<sup>th</sup> May 2020.

Statistically indigenous peoples have rights to grant access to genetic resources amongst 52% of Contracting Parties. Of those 52%, prior, informed consent and mutually agreed terms of indigenous peoples is required amongst 80% of Contracting Parties.

42. In the period since the Technical Review was commissioned rapid advances arising from research in biotechnology enable GRs to be digitally sequenced and disembodied from physical genetic material and potentially by-pass requirements for prior informed consent (PIC), and MAT.<sup>40</sup> This may have implications for indigenous peoples' rights to own and control resources and to protect, maintain and control associated TK.<sup>41</sup> Indigenous peoples' property rights to own and control GRs may be adversely impacted by these developments and technological advances in terms of the scope of protection of international agreements. In particular, failure to control GRs and associated TK may further undermine food security and sovereignty, as well as traditional health systems.

43. The impact of emerging technologies on the implementation of domestic measures enabling the utilisation of GRs and associated TK, as well as on the implementation of benefit-sharing mechanisms, is under consideration by other fora including the *Ad Hoc Technical Expert Group on Digital Sequence Information on Genetic Resources* of the CBD. This impact is acknowledged by the Chair's text that is purported to have an "in-built mechanism" to address such issues as they emerge.<sup>42</sup> The impact of emerging technologies that enable GRs to be digitally sequenced may become relevant for indigenous peoples' rights to own and control their GRs and associated TK, and may require consideration under the IGC draft texts in due course.<sup>43</sup>

### **Mandatory disclosure**

44. The draft texts on GRs and associated TK, both the Consolidated Document and the Chair's text, propose a mandatory disclosure requirement for patent applicants to disclose the source of GRs that are utilised in their applications. The primary question related to GRs is whether patent law should include a new mandatory disclosure of origin requirement.

45. Mandatory disclosure is a defensive measure intended to prevent the misappropriation of GRs and associated TK.<sup>44</sup> Such a requirement would oblige the disclosure of relevant information in applications where the subject matter uses or is based on GRs and associated TK. The proposed mandatory disclosure requirement requests patent applicants to mandatorily disclose the 'country of origin' of GRs if inventions are materially/directly based on GRs.<sup>45</sup> As proposed by the draft Consolidated Document, the information required to be disclosed would include the country of origin or the source of the GRs and associated TK and/or evidence that ABS agreements are in place. The Chair's text also proposes disclosing indigenous peoples that provided the associated TK.<sup>46</sup>

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<sup>40</sup> Ad-Hoc Technical Expert Group on Digital Sequence Information on Genetic Resources (DSI-AHTEG); Manuel Ruiz Muller, *Access to Genetic Resources and Benefit Sharing 25 Years on: Progress and Challenges* (International Centre for Trade and Development, Issue Paper No.44, 2018), vii. <<https://www.voices4biojustice.org/wp-content/uploads/2018/12/Access-to-Genetic-Resources-and-Benefit-Sharing-25-Years-On-Progress-and-Challenges.pdf>> at 25<sup>th</sup> May 2020; A recent example of DSI is the source code for the COVID-19 virus shared through the *Pandemic Influenza Preparedness (PIP) Framework* that enables access to pathogens for the development of vaccines and treatments without access to genetic material; World Health Organisation, 64<sup>th</sup> Session of the World Health Assembly, Pandemic Influenza Preparedness Framework, WHA64.5.

<sup>41</sup> UNDRIP, art 31, art 23.

<sup>42</sup> CBD/COP/DEC/XIII/16 Decision adopted by the Conference of the Parties to the CBD, 16 December 2016; CBD/NP/MOP/DEC/2/14 Decision adopted by the Parties to the Nagoya Protocol, 16 December 2016; Chair's text, article 9.

<sup>43</sup> Chair's text, notes on article 9; CBD Ad Hoc Technical Group on Digital Sequence Information on Genetic Resources (AHTEG DSI), Montreal, Canada, 13-16 February 2018, CBD/DSI/AHTEG/2018/1/4.

<sup>44</sup> Chair's text, introductory remarks; Consolidated text, art.10.4.

<sup>45</sup> Chair's text, art. 3.1, art. 3.2; Consolidated text, art.10.4.

<sup>46</sup> Chair's text, art. 3, notes on art 3; Graham Dutfield, 'Legal and Economic Aspects of Traditional Knowledge' in Keith E Maskus and Jerome H Reichman (eds), *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime* (Cambridge University Press, 1<sup>st</sup> ed, 2005), 506.

46. The indigenous caucus at the IGC has broadly supported the proposal for mandatory disclosure provided that such disclosure includes evidence of indigenous peoples' FPIC based on MAT and fair and equitable benefit-sharing.<sup>47</sup>

47. It remains unclear whether the mandatory disclosure trigger for physical access to GRs also applies to access to digitally sequenced GRs. This may require further consideration by the WIPO IGC. The Chair's text and the Consolidated Document distinguish between GRs physically sourced and GRs sourced from databases and repositories but do not specify whether the mandatory disclosure trigger for physical access also applies to digitally sequenced GRs and associated TK. The traceability of indigenous peoples' rights to information on GRs and associated TK that is digitally sequenced presents unique challenges.<sup>48</sup>

### **Dispute resolution**

48. The draft texts propose dispute resolution avenues concerning disclosure of the source of GRs. The Chair's text proposes a mandatory national level dispute resolution mechanism to allow parties to negotiate mutually satisfactory solutions and that may include royalty agreements,<sup>49</sup> whereas the Consolidated Document proposes adequate dispute resolution mechanisms.<sup>50</sup>

49. From an indigenous perspective, accessibility is key, taking into account claims against non-national, international corporations and institutions based in other countries. Indigenous peoples would require standing to initiate disputes related to mandatory disclosure, and procedural fairness may require supportive measures to enable access to such mechanisms. The UNDRIP identifies a positive obligation for States to ensure indigenous peoples have access to financial and technical assistance for the enjoyment of their rights and to establish fair, independent, impartial, open and transparent processes to recognise and adjudicate the rights of indigenous peoples.<sup>51</sup>

### **Traceability**

50. The traceability of indigenous peoples' rights to own, control and benefit from inventions that utilise GRs customarily used by indigenous peoples may be challenging in circumstances where information on GRs is digitally sequenced. This may be a relevant consideration for indigenous peoples in the future negotiations of the IGC. Traceability may be assisted by technologies such as block chain.<sup>52</sup> Such innovative measures require indigenous peoples informed participation to determine risks and benefits.

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<sup>47</sup> Report of the Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Statement by Tebtebba Foundation on behalf of the Indigenous Caucus, 35<sup>th</sup> Session, Geneva, March 12 to 23 2018. WIPO/GRTKF/IC/35/10, para 23.

<sup>48</sup> CBD AHTEG DSI, 13-16 February 2018, CBD/DSI/AHTEG/2018/1/4, para 29.

<sup>49</sup> Chair's text, art. 6.5.

<sup>50</sup> Consolidated text, art. 6.4

<sup>51</sup> UNDRIP, art. 27, art 39, art 40; *International Covenant on Civil and Political Rights (ICCPR)*, General Comment 23.

<sup>52</sup> CBD AHTEG DSI, 13-16 February 2018, CBD/DSI/AHTEG/2018/1/4, para 29. Frederic Perron-Welch, Blockchain Technology and Access and Benefit Sharing, 7<sup>th</sup> August 2018.

### Part 3: FINAL CONSIDERATIONS

51. The international legal instruments on GRs and associated TK; TK; and TCEs should be mutually supportive of other international instruments, especially those related to human rights. The legal instrument(s) should not diminish rights and obligations deriving from existing international agreements and should not create a hierarchy.

52. The draft texts promote mutual supportiveness and explicitly refer to the UNDRIP. The UN General Assembly adopted the UNDRIP and countries that initially voted against it have since reversed their positions. Accordingly, the UNDRIP enjoys universal acceptance. It should thus be incorporated in the framing of legal texts touching on indigenous peoples' TK, TCEs and GRs. And based on its universal acceptance, universal implementation of its provisions is logically expected.

53. Whereas States can balance the interests of groups within their countries, rights of indigenous peoples remain valid and must be respected. Intellectual property rights of one group cannot override the enshrined rights of indigenous peoples.<sup>53</sup>

[End of Annex and of document]

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<sup>53</sup> WIPO (along with other UN agencies, funds and programmes) reports annually on relevant developments achieved in the implementation of the System-Wide Action Plan (SWAP). The UN Secretary General issued the SWAP to promote a coherent implementation of the UNDRIP.