

Information Note by the
World Intellectual Property Organization (WIPO)

Ninth Session of the
Permanent Forum on Indigenous Issues (UNPFII)

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Executive summary

In this Information Note, the World Intellectual Property Organization (WIPO) would like to draw attention to: (i) the new 2010-2011 mandate that has been given to the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in pursuing effective protection of Genetic Resources (GRs), Traditional Knowledge (TK) and Traditional Cultural Expressions (Expressions of Folklore) (TCEs); (ii) WIPO's comments on the special theme of the ninth session of the UNPFII on "Indigenous Peoples: Development with Culture and Identity"; (iii) several practical capacity-building initiatives that have been undertaken by WIPO in the course of 2009; (iv) the participation of indigenous and local communities in WIPO's work; and (v) and, the recent launch of the WIPO Indigenous Intellectual Property Law Fellowship Program.

A new negotiating mandate for the WIPO Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in pursuing effective protection of GRs, TK and TCEs.

1. The protection of TK and TCEs against misappropriation and misuse is the subject of full-fledged and active policy development, norm-building and capacity-building programs at WIPO. Policy development and norm-building take place within the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC).
2. The scope and content of the work of the IGC could be seen as an important contribution to implementation of Article 31 of the UN Declaration on the Rights of Indigenous Peoples adopted on September 13, 2007 which provides, *inter alia*, that indigenous peoples “have the right to maintain, control, protect and develop their intellectual property over cultural heritage, traditional knowledge, and traditional cultural expression”.
3. WIPO Member States and indigenous observers alike have repeatedly called for accelerated progress in this area and stressed the “international dimension” of these questions. They have also clearly underscored that WIPO’s work should not prejudice developments in other forums, recognizing that the work of WIPO – addressing the legal protection of TK and TCEs from misappropriation and misuse – is an element of and a contribution to the overall and holistic preservation, promotion and protection of TK and TCEs. Similarly, WIPO’s work on GRs addresses only the intellectual property aspects of access to and benefit-sharing in GRs.
4. In the course of its past discussions, the IGC had examined, among other documents¹, draft principles, objectives and substantive provisions² that could shape

¹ A review of the main documents that have been discussed so far by the IGC is available on http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_14/wipo_grtkf_ic_14_4.doc (on TCEs) and

sui generis instruments for the protection of TK and TCEs. This approach to protection could recognize, amongst other things, collective interests of the local and indigenous communities in TK and TCEs which are characteristic of a distinct cultural identity. These interests would be respected for as long as a traditional community continues to be associated with the knowledge or cultural expressions. The protection mechanism could include compliance with the “free, prior and informed consent” (FPIC) and benefit-sharing principles, as well as the recognition of customary laws and practices. In line with the views of many indigenous communities, these drafts do not require the assertion of new exclusive property rights over TK or TCEs, but only accommodate this possibility as an option, should communities wish to take it up. Similarly, prior registration or documentation of TK and TCEs is not a precondition for protection.

5. Those drafts draw upon a wide range of community, national and regional experiences, and have been developed over several years by and in consultation with Member States, indigenous peoples and other traditional and cultural communities, civil society organizations and a range of other interested parties. They directly incorporate drafting proposals made by many participants in the commentary processes, including indigenous communities. The Secretariat of the Permanent Forum has also contributed valuable comments as part of these commenting processes³.

6. In order to bring about and accelerate concrete outcomes, the 2009 WIPO General Assembly adopted a robust and enhanced mandate⁴ for the IGC in view of the biennium 2010-2011. Member States agreed that the IGC would undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument

http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_14/wipo_grtkf_ic_14_5.doc. (on TK).

² See WIPO working documents WIPO/GRTKF/IC/9/4 on TCEs and WIPO/GRTKF/IC/9/5 on TK, including the draft texts as well as comments. Both documents are available on http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_4.doc and http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_5.doc.

³ Other details on those drafts are available in a previous information note addressed by WIPO to the seventh session of the UNPFII (see E/C.19/2008/4/Add.13, pp. 11-12).

⁴ Full text of this new mandate is available on the following webpage :

http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_14/wipo_grtkf_ic_14_decision_item_28.pdf

(or instruments), which would ensure the effective protection of GRs, TK and TCEs.

The mandate provides for three inter-sessional meetings of working groups in addition to the four regular sessions of the IGC in the biennium.

7. The current negotiations which were formally launched during the fifteenth session of the IGC that took place from December 7 to 11, 2009, build on the previous work of the IGC and any relevant WIPO working documents on GRs, TK, and TCEs, including the draft principles, objectives and substantial provisions already mentioned. The IGC is to submit to the 2011 WIPO General Assembly the text (or texts) of an international legal instrument(s) which would ensure the effective protection of GRs, TK and TCEs. The 2011 session of the General Assembly would then decide on convening a Diplomatic Conference. The next IGC session will take place from May 3 to 7, 2010.

8. All working documents, comments, papers, studies, databases, questionnaires, and other materials prepared for consideration by the IGC, as well as comprehensive reports of its sessions, are publicly available, in English, French and Spanish at <http://www.wipo.int/tk/en/igc/documents/index.html>. Certain publications are also available in Arabic, Chinese and Russian.

WIPO's comments on the special theme of the ninth session of the UNPFII on "Indigenous peoples: Development with Culture and Identity"

9. As already highlighted, WIPO has been developing a full-fledged program of norm-setting and technical-assistance activities on the protection of TCEs, GRs and TK against misappropriation and misuse at least for the last ten years. This program lies squarely within the special theme of "Development with Culture and Identity".

10. TCEs as well as TK are vital elements of the strong cultural identity of indigenous peoples and traditional communities, and their protection against misappropriation and misuse strengthens this identity. At the same time, TCEs and TK can be valuable economic assets of those communities. Should communities wish to take up this possibility, TCEs and TK may be leveraged to create, trade or license in new, distinctive and locally-rooted cultural goods and services.

11. TCEs and TK are, therefore, worthy of protection against misappropriation and misuse by third parties, not only as they are a core component of indigenous and traditional communities' cultural identity, but also as a potential tool that can be used by them for their own development.

12. Intellectual property plays an important - but perhaps not exclusive - role in preventing misappropriation and misuse of traditional creativity and innovation, since IP-like rights over TCEs and TK (such as a right of FPIC) may grant communities a decisive say over if and how their TCEs and TK can be used by third parties.

13. Some existing features of the international IP system may also be used for these purposes. For example, conventional copyright protects contemporary expressions of traditional cultures. Performances of TCEs are already protected by related rights, as the 1996 WIPO Performances and Phonograms Treaty recognizes. Trademarks may be used by indigenous and traditional communities to curb the sale of fake traditional creative arts

and to reinforce their strong cultural identity.

14. But the legal and policy issues relating to the protection of TK and TCEs that are currently addressed by the WIPO IGC exceed the scope of the existing features of the international intellectual property system, since any intellectual property protection mechanism aimed at TK and TCEs should appropriately address their specific characters and value, in terms of identity and development, for the indigenous and local communities concerned. The draft principles, objectives and substantive provisions referred to that could shape *sui generis* instruments for the protection of TK and TCEs take full account of those particular concerns.

15. Existing rights for protection, as well as those which might be eventually adopted, may efficiently complement and support empowering strategies that communities may wish to put in place in order to harness their heritage for economic and social development.

16. As an example of how to promote best practices and guidelines in relation with cultural identity and development, WIPO's *Creative Heritage Project* aims at assisting communities and cultural institutions to manage IP options so as to both preserve documented cultural heritage and protect it against misappropriation and misuse. In this context, WIPO offers a training program for indigenous communities on cultural documentation and IP management⁵.

⁵ For further details, see the next par. of the present Information Note.

Some practical capacity-building initiatives that has been undertaken by WIPO in the course of 2009

17. New recording technologies provide indigenous communities with fresh opportunities to document and digitize expressions of their traditional cultures. Yet, these new forms of documentation and digitization can leave this cultural heritage vulnerable to unwanted exploitation beyond the traditional circle. By empowering the community to record its own traditions and creative expressions, the *WIPO Cultural Documentation and IP Management Training Program*⁶, which is part of the WIPO's *Creative Heritage Project*, allows the community to create its own intellectual property in the form of photographs, sound recordings and databases.

18. The intellectual property training component of the program enables the community to make informed decisions about how to manage intellectual property assets in a way that corresponds with its values and development goals. In particular, it provides practical training to indigenous and local communities in recording, digitizing and disseminating their creative cultural expressions and in managing intellectual property issues and options when doing so.

19. WIPO, in collaboration with the American Folklife Center (AFC) at the Library of Congress in Washington D.C. and the Center for Documentary Studies (CDS) at Duke

⁶ For more information, see <http://www.wipo.int/tk/en/folklore/culturalheritage/wipo-afc-cds.html>

University in North Carolina and the National Museums of Kenya, ran a pilot of such a training program for a Maasai community from Laikipia, Kenya, in 2008 and 2009. The intensive hands-on curriculum included project planning, research ethics, photography, sound and audio-visual recording techniques, digital archiving methods, and database and website development. WIPO staff provided the IP component of the training. WIPO also purchased a basic kit of recording and other ICT equipment for the community, helped the community to develop its own IP policies and protocols and further developed linkages between the community, the national museum and the national IP offices in Kenya.

20. As another example of close collaboration with indigenous communities in addressing intellectual property issues related to protection of TK, TCEs and GRs, WIPO supported the edition, printing and promotion of a bilingual publication in English and Russian on *Traditional Knowledge & Indigenous Peoples* issued jointly by L'auravetl'an Information & Education Network of Indigenous Peoples (LIENIP) from Russia and WIPO. A side-event organized on the margins of the 2009 session of the UNPFII launched the publication.

21. Another important technical assistance initiative that was launched in 2009 relates to the Pacific Region *Traditional Knowledge Action Plan*. It results from a partnership between WIPO, the Pacific Islands Forum Secretariat (PIFS), the Secretariat of the Pacific Community (SPC) and the Secretariat of the Pacific Regional Environmental Program (SPREP) to provide assistance on intellectual property and TK/TCE/GR matters

to six Pacific Island countries, namely Cook Islands, Fiji, Kiribati, Palau, Papua New Guinea and Vanuatu.

23. WIPO is also providing technical advice and assistance to the Secretariat of the Pacific Community (SPC) in the development of strategies and practical tools to enable countries which host the 2012 Festival of Pacific Arts (FOPA) to manage intellectual property (IP) issues at the Festivals. A report on “Solomon Islands Festival of Pacific Arts: IP Scoping Study” that has been prepared by an expert indigenous person is available.

24. A similar initiative is underway in the Caribbean Region, as a result of the 2006 Ministerial Resolution calling for the establishment of a *Regional Caribbean Framework on TK, TCEs and GRs* with WIPO’s assistance.

Participation of indigenous peoples and local communities

27. The Member States of WIPO have repeatedly stressed the priority attached to facilitating and enhancing the participation and direct involvement of the Forum and indigenous representatives in the work of WIPO and in IGC sessions in particular.

28. In this regard, a number of practical steps have already been undertaken, including:

- (i) A fast-track accreditation procedure for all non-governmental and

intergovernmental organizations has been in place since the first session of the IGC in April 2001. More than 230 organizations have received accreditation, the majority representing indigenous peoples⁷;

(ii) the WIPO General Assembly has extended a formal invitation to the Forum to take part in sessions of the IGC and many participants have welcomed the active participation of the Forum;

(iii) in 2005 the WIPO General Assembly established the WIPO Voluntary Fund for Accredited Indigenous and Local Communities (the Fund) in order to enhance the participation in sessions of the IGC of representatives of indigenous and local communities, and other customary holders or custodians of TK and TCEs, which are already accredited to the IGC⁸. In accordance with the rules of the Fund, indigenous and local representatives fully participate in the selection process. Up until the last IGC session that took place in December 2009, funding has been provided in 71 cases. The Fund has so far received voluntary contributions from Switzerland, Norway, South Africa, the Swedish International Biodiversity Programme (SwedBio/CBM) and the Christensen Fund. These generous donations enabled the Fund to operate efficiently until now. The Forum at its fifth session noted “with appreciation the establishment of a Voluntary Fund by WIPO to enable the participation of indigenous representatives in the work of the WIPO

⁷ For a description of this fast-track accreditation procedure, see <http://www.wipo.int/tk/en/igc/accreditation.html>

⁸ Details about the Fund, its operation, and the application procedure, are set out on the WIPO website: http://www.wipo.int/tk/en/ngoparticipation/voluntary_fund/index.html.

Intergovernmental Committee on traditional knowledge and traditional cultural expressions, and encourages donors to contribute to the Trust Fund.”;

(iv) Specific briefings and consultations for NGO representatives, particularly representatives of indigenous and local communities, are undertaken within the framework of meetings of the IGC. WIPO also finances the logistical support that it is provided by DoCip during the meetings of the indigenous and local communities representatives. Each IGC session is preceded by an Indigenous consultative Forum that take place in WIPO’s premises where indigenous and local communities representatives can prepare and meet with the WIPO secretariat and with various Member States officials, including the Chair of the IGC;

(v) The IGC decided in November 2004 that future sessions of the Committee should also be preceded by panel presentations chaired by a representative of an indigenous or local community. The panels comprise seven participants from indigenous and local communities in the geo-cultural regions recognized by the Forum. Their participation is funded by WIPO or by the WIPO Voluntary Fund. The Chair of the indigenous panel reports directly to the IGC on the main proceedings of the panels;

(vi) During the sessions themselves, the indigenous and local communities representatives may intervene as observers on any issue on the agenda and their views are reflected in the reports of the session.

The WIPO Indigenous Intellectual Property Law Fellowship Program

29. The law and practice of intellectual property is of increasing interest to indigenous peoples, stemming from concerns that TCEs, GRs and TK should be recognized and dealt with in conformity with the interests, values and customary practices of their legitimate custodians. Many communities have active practical programs to protect and develop their intellectual property interests, and many also take an active role in international policy debates touching on intellectual property law.

30. Building on the initiatives that have been taken to ensure indigenous peoples' participation in the activities of WIPO relevant to TK and TCEs, WIPO seeks to foster the strong legal expertise that already exists within indigenous communities. With this end in mind, WIPO has already appointed several indigenous experts as WIPO consultants on specific projects. It offers now the opportunity for an indigenous legal expert to work at WIPO and directly participate in the delivery of core program outputs of the WIPO Traditional Knowledge Division. This program has been launched and, following a selection process, an Indigenous Fellow began to work at WIPO in August 2009 for a period of six months⁹. The same opportunity will be given to another Indigenous Fellow for a period of nine months in the course of 2010¹⁰.

⁹ For further details on these Program and appointment, see http://www.wipo.int/export/sites/www/tk/en/fellowship/pdf/laltaika_bio.pdf

¹⁰ For the practical details on the vacancy announcement, see http://www.wipo.int/export/sites/www/tk/en/fellowship/pdf/fellowship_2010_interest.pdf

Cooperation with other organizations and agencies

31. As requested by WIPO's Member States and as recommended by the Permanent Forum, WIPO continues to cooperate with other organizations and agencies on issues of concern to the Forum, and to ensure that its work on the recognition and protection of TCEs, GRs and TK is complementary to and supportive of their work. These include: the Secretariat of the Convention on Biological Diversity (SCBD), the Food and Agricultural Organization (FAO), the International Labour Organization (ILO), the International Trade Centre (UNCTAD/WTO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Environment Programme (UNEP), the United Nations Conference on Trade and Development (UNCTAD), the Office of the High Commissioner for Human Rights (OHCHR), the World Health Organization (WHO), the United Nations Development Program (UNDP) and the United Nations Industrial Development Organization (UNIDO). WIPO has also coordinated with the World Bank and the World Trade Organization, and a range of regional bodies and NGOs. WIPO plays also an active role in the proceedings of the Inter-Agency Support Group on Indigenous Peoples' Issues (IASG).

[End of Note]