



Information Note by the  
World Intellectual Property Organization (WIPO)

Tenth 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 negotiations that are currently taking place regarding an international legal instrument or instrument(s) for the effective protection of Genetic Resources (GRs), Traditional Knowledge (TK) and Traditional Cultural Expressions (Expressions of Folklore) (TCEs) in the framework of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC); (ii) measures regarding the participation of indigenous and local communities in WIPO's work; and, (iii) examples of practical capacity-building initiatives that have been undertaken by WIPO in the course of 2010.

*On-going negotiations regarding an international legal instrument or instrument(s) for the effective protection of GRs, TK and TCEs.*

1. The protection of TCEs, TK and GRs against misappropriation and misuse is the subject of full-fledged and active negotiations and capacity-building programs at WIPO. The negotiations 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 may be considered 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 expressions”.
3. WIPO Member States and indigenous observers alike have repeatedly called for accelerated progress in this area and underlined 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 (IP) aspects of access to and benefit-sharing in GRs.

4. In the course of its past discussions, the IGC had examined, among other documents, draft principles, objectives and substantive provisions<sup>1</sup> that illustrated what *sui generis* instruments for the protection of TK and TCEs may look like at the international level. Principles such as the effective recognition of the collective interests of indigenous and local communities in TK and TCEs, free, prior and informed consent (FPIC) and benefit-sharing were reflected in those suggested provisions, as was due consideration of customary laws and practices. In line with the views of many indigenous communities, those drafts did not require the positive assertion of new exclusive property rights over TK or TCEs, but only accommodated this possibility as an option for indigenous peoples and communities themselves to consider. Similarly, prior registration or documentation of TK and TCEs is not a precondition for protection under those provisions<sup>2</sup>.

5. Those draft provisions, as well as the numerous studies and working documents that were submitted for consideration by the IGC, draw upon a wide range of community, national and regional experiences and comments from Member States, indigenous peoples and other traditional and cultural communities, civil society organizations and a range of other interested parties, including the UN Permanent Forum and its Secretariat, regarding the needs and expectations of the custodians of TK and TCEs.

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<sup>1</sup> 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](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](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_5.doc).

<sup>2</sup> 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).

6. In order to bring about and accelerate progress towards concrete outcomes, the 2009 WIPO General Assembly adopted a robust and enhanced negotiating mandate<sup>3</sup> 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 (or instruments), which would ensure the effective protection of GRs, TK and TCEs. The mandate provides for three inter-sessional meetings of working groups (IWGs) in addition to the four regular sessions of the IGC that would take place during the biennium. 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 WIPO General Assembly would then decide on convening a Diplomatic Conference.

7. Three IGC sessions (December 7 to 11, 2009, May 3 to 7, 2010 and December 6 to 10, 2010), as well as the TCEs-focused meeting of the first IWG (IWG1) that took place from July 19 to 23, 2010, enabled the WIPO Member States and observers, including representatives of indigenous and local communities, to engage in intense technical discussion and drafting that led to amended versions of the draft provisions. IWG1 submitted a new interim draft regarding TCEs protection for further redrafting by the December 2010 IGC<sup>4</sup>. Discussions on GR saw the introduction of new proposals by several Member States.

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<sup>3</sup> Full text of this new mandate is available on the following webpage :  
[http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_15/wipo\\_grtkf\\_ic\\_15\\_ref\\_decision\\_28.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_15/wipo_grtkf_ic_15_ref_decision_28.pdf)

<sup>4</sup> See [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_17/wipo\\_grtkf\\_ic\\_17\\_9.doc](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_9.doc)

8. New documents have been issued in the margins of those negotiations, including an extensive study on the concept of the “public domain” with special reference to the protection of TK and TCEs<sup>5</sup>. The WIPO indigenous panel that was held before the most recent IGC session on December 6, 2010 focused on the role of this concept<sup>6</sup>. An International Symposium took place in Saint Petersburg, Russian Federation, from October 31 to November 3, 2010. Officials and representatives of indigenous and local communities from the Russian Federation as well as other countries discussed IP issues relevant to GR, TK and TCEs protection. The host country provided a report on this Symposium to the December 2010 IGC Session<sup>7</sup>.

9. All current drafts, drafting proposals, 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 Arabic, Chinese, English, French, Russian and Spanish at < [http://www.wipo.int/meetings/en/topic.jsp?group\\_id=110](http://www.wipo.int/meetings/en/topic.jsp?group_id=110) >.

*Participation of indigenous peoples and local communities.*

10. 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

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<sup>5</sup> See [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_17/wipo\\_grtkf\\_ic\\_17\\_inf\\_8.doc](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_inf_8.doc)

<sup>6</sup> See the contributions of panelists on

[http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_17/wipo\\_grtkf\\_ic\\_17\\_inf\\_14.doc](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_inf_14.doc)

<sup>7</sup> [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_17/wipo\\_grtkf\\_ic\\_17\\_inf\\_14.doc](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_17/wipo_grtkf_ic_17_inf_14.doc)

sessions in particular.

11. 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 put in place since the first session of the IGC in April 2001. More than 230 organizations have received accreditation, many representing indigenous peoples<sup>8</sup>;
- (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 which are already accredited to the IGC<sup>9</sup>. In accordance with the rules of the Fund, indigenous and local representatives fully participate in the selection process. The rules of the Fund were amended by the September 2010 WIPO General Assembly in order to include the IWGs in its scope. Up until the December 2010 IGC session, funding has been provided in 99 cases. The Fund has so far received voluntary contributions from Switzerland, Norway, South Africa, the Swedish International Biodiversity Programme (SwedBio/CBM) and the

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<sup>8</sup> For a description of this fast-track accreditation procedure, see <http://www.wipo.int/tk/en/igc/accreditation.html>

<sup>9</sup> 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](http://www.wipo.int/tk/en/ngoparticipation/voluntary_fund/index.html).

Christensen Fund. These generous donations have enabled the Fund to operate efficiently until now. A replenishment campaign has been launched in 2010 in order to ensure continuity of the Fund at least until the end of the present 2010 – 2011 mandate. 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 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 the Documentation Centre for Indigenous Peoples (DoCip) during the meetings of the indigenous and local communities’ representatives. Each IGC session is preceded by an Indigenous Consultative Forum that takes place at 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 on the main proceedings of the panels;

(vi) During IGC sessions and the on-going negotiations, the indigenous and local communities' representatives may intervene as observers on any issue on the agenda and are entitled to make drafting proposals for consideration by Member States. Their comments and drafting proposals are reflected in the reports of the sessions.

*Consultancy by indigenous experts. WIPO Indigenous Intellectual Property Law Fellowship Program.*

12. 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.

13. 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 appointed several



indigenous experts as WIPO consultants on specific projects. In addition, It offers, since 2009, the opportunity for an indigenous legal expert to work at WIPO and directly participate in the delivery of core program outputs of WIPO's Traditional Knowledge Division<sup>10</sup>. Following a selection process, two successive Indigenous Fellows have worked at WIPO from August 2009 for a period of six and nine months respectively. The same opportunity has been given to a third Indigenous Fellow for a period of nine months starting from January 2011.

*Examples of capacity-building initiatives that has been undertaken by WIPO in the course of 2010.*

14. In addition to its intense norm-setting activity, WIPO has been developing technical assistance activities on the protection of TCEs, GRs and TK against misappropriation and misuse for more than ten years.

15. TCEs as well as TK are vital elements of the cultural identity of indigenous peoples and traditional communities. Protection against misappropriation and misuse may contribute to strengthen this identity. At the same time, TCEs and TK can be valuable economic assets of those communities.

16. Intellectual property plays an important - but not exclusive - role in preventing misappropriation and misuse of traditional creativity and innovation. 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.

17. Some existing features of the international IP system may be used for

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<sup>10</sup> For further details, see <http://www.wipo.int/tk/en/training/fellowship/index.html>

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.

18. Existing tools for protection, and *sui generis*<sup>1</sup> protection regimes, may efficiently complement and support empowering strategies that communities may wish to put in place in order to harness their traditional heritage for economic and social development.

19. The 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. After a pilot experience in Kenya that involved a Maasai community from Laikipia in Kenya in 2008 and 2009, WIPO is currently developing a training program for indigenous and local communities on cultural documentation and IP management in Jamaica<sup>11</sup>.

20. In the same context and as a result of a project that started in 2008, WIPO has built up a database comprising examples of codes, guides, policies, protocols and standard agreements relating to the recording, digitization and dissemination of intangible cultural heritage (ICH) and TCEs<sup>12</sup>. The database

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<sup>11</sup> For more information, see <http://www.wipo.int/tk/en/culturalheritage/>

<sup>12</sup> See [http://www.wipo.int/tk/en/databases/creative\\_heritage/index.html](http://www.wipo.int/tk/en/databases/creative_heritage/index.html)

puts emphasis on intellectual property issues as well as the rights and interests of the communities, as custodians of ICH and TCEs, to give consent and be involved in those processes. The database responds to a widely-felt need for more empirical information on current experiences and practices concerning these issues. It was complemented by surveys commissioned by WIPO and case-studies drawn from the surveys, focusing on institutions that contribute to safeguard ICH and TCEs<sup>13</sup>. A new publication that is intended to serve as a practical tool regarding those questions was issued by WIPO in December 2010<sup>14</sup>. These resources may serve as a basis for distilling IP-related “best practices” and guidelines in the future.

#### *Cooperation with other organizations and agencies*

21. 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

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<sup>13</sup> <http://www.wipo.int/tk/en/culturalheritage/surveys.html>

<sup>14</sup> Molly Torsen, Jane Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures. Legal issues and Practical Options for Museums, Libraries and Archives*, WIPO, 2010. This publication is available on-line on <http://www.wipo.int/export/sites/www/tk/en/publications/1023.pdf>

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]