

AN INDIGENOUS VOICE AT WIPO?

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INTRODUCTION

The demands for the recognition of rights for Indigenous peoples over time has led to the emergence of a common body of opinion based on long standing principles of international human rights law and policy.¹ The existence of these rights for Indigenous people is unequivocal. The road to recognition has been arduous. The United Nations Declaration on the Rights of Indigenous Peoples [the Declaration] is the only international instrument that views Indigenous rights through an indigenous lens,² crystallising many of the fundamental human rights of Indigenous peoples. The Declaration provides a framework and benchmark for the United Nations Permanent Forum on Indigenous Issues [the Permanent Forum].

This note reviews the background to the Declaration, and examines the role of the Permanent Forum, highlighting the connection between the two with a case study on intellectual property rights. It also offers comments about the future of Indigenous rights and the role of the Permanent Forum in promoting them.

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The Declaration was the initiative of the Working Group on Indigenous Populations [WGIP], which was established in 1982. The mandate of WGIP was to develop international standards concerning Indigenous peoples' rights. The Declaration was to manifest this mandate by providing a clear articulation of international standards on the rights of Indigenous peoples. It was not until 25 years later, in September 2007, however, that the final text was adopted by the General Assembly by a majority of 143 states. Eleven states abstained.³ Four states opposed adoption: Australia; Canada; the United States of America [United States]; and, New Zealand. This position has now changed, with Australia⁴, New Zealand⁵, Canada⁶ and the United States⁷ all signaling

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¹ A/66/288 Rights of indigenous peoples, 10 August 2011, para 62.

² United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/61/L.67 (2007) [the Declaration]. ILO Convention 107 and 169 also recognise indigenous rights. However unlike the ILO Conventions 107 and 169, the Declaration has been adopted and/or endorsed by a majority of States.

³ Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine.

⁴ See "Statement on the United Nations Declaration on the Rights of Indigenous Peoples" <http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx>.

⁵ See "New Zealand Statement of Support for the Declaration" <www.converge.org.nz/pma/NZ%20UNDRIP%20statements.pdf>.

⁶ See Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples <<http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp#tphp>>.

⁷ See Announcement of United States Support for the United Nations Declaration on the Rights of Indigenous People. Available at <<http://www.usun.state.gov>>.

support for the Declaration. This support means that, arguably, the Declaration now enjoys a more robust position in these countries, by setting a benchmark against which to measure minimum standards for recognition of Indigenous Rights.

UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES

The Declaration is the guiding instrument for the Permanent Forum, which is an advisory body to the United Nations Economic and Social Council [ECOSOC]. The Permanent Forum is tasked with promoting respect for, and full application of, the provisions of the Declaration, and with following up on its effectiveness.⁸

The genesis of the Permanent Forum began with discussions at the World Conference in Vienna in 1993. The subsequent Vienna Declaration and Programme of Action recommended that such a body be established within the first United Nations International Decade of the World's Indigenous People. A working group was formed to achieve this. Against the growing awareness and recognition of the importance of rights for Indigenous peoples amongst governments and within the United Nations system, the Permanent Forum was eventually established on 28 July 2000.⁹

The Permanent Forum provides expert advice and recommendations to ECOSOC, within the mandated areas of economic and social development, culture, the environment, education, health and human rights. The Permanent Forum is also tasked with raising awareness and promoting the integration and coordination, preparation and dissemination of information on Indigenous issues.

The Permanent Forum is one of three United Nations bodies that are specifically mandated to investigate Indigenous peoples' issues. The other two bodies are the United Nations Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur Rights of Indigenous Peoples.

The Permanent Forum comprises sixteen representatives, eight members are state elected and eight are Indigenous nominated. The State elected members are nominated by governments and then elected by ECOSOC based on the five regional groupings used at the United Nations. They are: Africa; Asia; Eastern Europe; Latin America and the Caribbean; and, Western Europe and Other States. The eight Indigenous nominations are appointed by the President of ECOSOC and represent the seven socio-cultural regions determined to give broad representation to the world's indigenous peoples. These regions are: Africa; Asia; Central and South America and the Caribbean; the Arctic; Central and Eastern Europe, Russian Federation, Central Asia and Transcaucasia; North America; the Pacific; and, one additional rotating seat among the three first listed above. During the current 2011–2013 term the rotating seat was filled by Central and South America and the Caribbean, and in the 2013–2016 term by Central Asia and Transcaucasia.

⁸ Article 42 of the Declaration.

⁹ ECOSOC Resolution E/2000/22.

The first meeting of the Permanent Forum was held in May 2002 and subsequent annual two-week sessions take place in New York. Following each session the Forum formulates substantive recommendations to governments, the United Nations system and Indigenous people. These recommendations are tabled with ECOSOC and eventually adopted by the United Nations Human Rights Council, which provides a very high level endorsement.

To support and promote the mandate of the Permanent Forum, the Inter-Agency Support Group [IASG] on Indigenous Issues was established. The IASG comprises thirty-one members, including the United Nations Development Program [UNDP]; the Secretariat for the Convention on Biological Diversity [CBD]; the World Bank; the European Union; the United Nations Environment Programme [UNEP]; the World Health Organisation [WHO]; the Office of the United Nations High Commissioner for Human Rights [OHCHR]; and, the World Intellectual Property Office [WIPO].

The mandate of the IASG was subsequently expanded to include support for indigenous related mandates throughout the inter-governmental system. The effect of this expansion allows the United Nations system and other intergovernmental organizations to analyse recommendations made by the Permanent Forum with a view to facilitating comprehensive and coordinated responses.

In an effort to address many of the issues faced by Indigenous people each year the Permanent Forum provides a theme to be discussed during the two-week session. Past themes have included “Indigenous Women and Gender” during the third session, “Millennium Development Goals” during the fourth and fifth session, and, in the recent session, “the Doctrine of Discovery”.

ISSUES AND CASE STUDIES

Each member of the Permanent Forum chooses a portfolio, and, in addition to their major portfolio, contributes to four additional portfolios. Each portfolio corresponds to a support agency, so that, for instance, the Traditional Knowledge portfolio holder liaises with the World Intellectual Property Organization, and the Environmental portfolio holder liaises with the United Nations Environment Programme.

WIPO

The recent Wai 262 Report produced by the Waitangi Tribunal¹⁰ and the current initiatives proposed by WIPO to capture Indigenous knowledge, make it timely to consider the role of the Permanent Forum and the effect of the Forum’s recommendations from the eleventh session held in New York during May, 2012.¹¹

WIPO was established in 1967. It is a specialised United Nations agency with 185 Member States. The mission of WIPO is to “promote innovation and creativity for the

¹⁰ *Ko Aotearoa Tenei: a Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity*. Available at <http://www.waitangi-tribunal.govt.nz/news/media/wai262.asp>.

¹¹ United Nations Permanent Forum on Indigenous Issues Report of the eleventh session held 7-18 May, 2012. E/2012/43-E/C.19/2012/13.

economic social and cultural development of all countries through a balanced and effective international intellectual property system". The Traditional Knowledge section was established in 1998. Indigenous participation at WIPO has been focused on ensuring, first, that adequate measures against misuse and misappropriation of their traditional knowledge, genetic resources and traditional cultural expressions, are developed together, and second, that indigenous peoples receive an equitable share of any resulting commercial benefits.

The WIPO Inter Governmental Committee [IGC] was established by the WIPO General Assembly in 2000, to provide a forum for States to discuss intellectual property issues relating to traditional knowledge, genetic resources and traditional cultural expressions. In 2009, the WIPO General Assembly authorised the IGC to undertake negotiations with the intention of reaching an agreement on the text of an international instrument to protect traditional knowledge, genetic resources and traditional cultural expressions. The WIPO IGC is currently drafting three texts to capture and control the use and dissemination of traditional knowledge, genetic resources and traditional cultural expressions.

Notwithstanding the participation of Indigenous peoples within the WIPO IGC, their "standing" is not equivalent to that of a Member State. The comments on the three texts provided by Indigenous participants cannot be accepted by the WIPO IGC unless support is offered by a Member State. Furthermore, Indigenous peoples are not accorded any voting rights. These are crucial issues because once agreement is reached on the three texts by the WIPO IGC it will provide the basis for an international legally binding instrument to control, protect and develop traditional knowledge, genetic resources and cultural expressions.

Whilst WIPO recognises traditional knowledge, genetic resources and cultural expressions as being economic and cultural assets that belong to indigenous and local communities and their countries, the role of indigenous peoples within this process is limited. During the recent eleventh session of the Permanent Forum in New York, held in May, 2012, WIPO provided a half-day session articulating the role of WIPO and how the rights for indigenous peoples are considered and implemented. During this session many Indigenous Organisations provided interventions for the consideration of the Permanent Forum. In drafting these three texts, WIPO seeks to address the role that intellectual property principles and systems can play in protecting traditional knowledge, genetic resources and cultural expressions from misappropriation, providing support for generating benefits (including the equitable sharing of the benefits produced as a result of commercialisation) and, strengthening the role of intellectual property in providing access to, and benefit-sharing in, genetic resources.¹²

WHAT IS WRONG WITH THE WIPO PROCESS?

For Maori, as an indigenous people, various threads provide a clear recognition for rights to their cultural heritage, traditional knowledge, treasures and all manifestations

¹² For example, whether in the future Maori should apply to WIPO for protection of matauranga such as rongoa and waiata.

termed “intellectual property”. Article 2 of the Treaty of Waitangi guaranteed to Maori exclusive possession of their taonga (treasure). Article 31 of the United Nations Declaration on the Rights of Indigenous People recognises that Maori, as Indigenous People, have a right to maintain, control and protect their culture.

Article 31 of the Declaration provides:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 3, the Declaration’s most notable provision, states:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 31, when read together with Article 3, provides that indigenous people, including Maori, 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, as well as the right to freely determine and pursue their cultural development. Furthermore, the State should undertake measures to ensure these rights are recognised and protected. Unless these rights have been clearly extinguished by agreement with the rights holder, through legislation, or by another means, these rights still remain.

The process undertaken by WIPO is procedurally defective in that it fails to provide a mechanism whereby Indigenous Peoples are able to participate meaningfully in the process when the subject of the texts (for instance traditional knowledge) derives from, and belongs to, indigenous peoples. The process fails to substantively recognise the intrinsic rights indigenous peoples have to their treasures, culture and traditional knowledge (matauranga).

PERMANENT FORUM RECOMMENDATIONS TO IMPROVE THE PROCESS

Following on from the interventions provided by the Indigenous organisations and States, and the session provided by WIPO, the relevant Permanent Forum recommendations formulated included:¹³

46. The Permanent Forum recommends that WIPO seek the participation of experts on international human rights law specifically concerning indigenous peoples so that they provide input into the substantive consultation process, in particular with reference to the language in the draft text where indigenous peoples are “beneficiaries” and other language that refers to indigenous peoples as “communities” as well as the general alignment of the draft text of the Intergovernmental Committee with international human rights norms and principles.

47. The Permanent Forum *demands* that WIPO recognize and respect the applicability and relevance of the United Nations Declaration on the Rights of Indigenous Peoples as a significant international human rights instrument that must inform the Intergovernmental Committee process and overall work of WIPO. The minimum standards reflected in the Declaration must either be exceeded or directly incorporated into any and all WIPO instruments that directly or indirectly impact the human rights of indigenous peoples.

49. The Permanent Forum *welcomes* the decision of the Intergovernmental Committee to organize, in cooperation, with the Forum, expert preparatory meetings on the Intergovernmental Committee process for indigenous peoples representing the seven geopolitical regions recognize by the Forum.

50. The Permanent Forum *requests* 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 cultural 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

51. The Permanent Forum *calls upon* States to organize regional and national consultations to enable indigenous peoples to prepare for and participate effectively in sessions of the Intergovernmental Committee.

52. Consistent with *article 18* of the United Nations Declaration on the Rights of Indigenous Peoples, the Permanent Forum requests member States to explore and establish modalities to ensure the equal, full and direct participation of indigenous peoples in all negotiations of the Intergovernmental Committee.

53. As highlighted in *article 31* of the Declaration, the Permanent Forum *requests* that both WIPO and States take effective measures and to establish mechanisms to recognize the right of indigenous peoples to protect their intellectual property, including their cultural heritage, traditional knowledge an 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.

¹³ E/2012/43-E/C.19/2012/13.

54. The Permanent Forum *calls upon* WIPO to strengthen its efforts to reach out to indigenous peoples and to continue to provide practical assistance and capacity strengthening for and in cooperation with indigenous peoples.

55. The Permanent Forum *calls upon* the Intergovernmental Committee to appoint representatives of indigenous peoples as members of any Friends of the Chair groups and as co-chairs of any working groups and drafting groups that may be established by the Committee. It also calls upon the Committee to appoint an indigenous person as a co-chair of the Committee as a whole (my emphasis).

WIPO recognise that the process is problematic and in response these recommendations employ strong language, such as “demand”¹⁴ “calls upon”¹⁵ “requests”¹⁶. Furthermore, onus is placed on the relevant articles of the Declaration¹⁷ to support the participation of indigenous peoples in the WIPO IGC negotiations as a procedural right, as well as recognising the substantive right of indigenous peoples to their intellectual property.

IMPLEMENTATION OF THE RECOMMENDATIONS

The Declaration explicitly states that the specialised agencies of the United Nations system, such as WIPO, “shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of Indigenous peoples on issues affecting them shall also be established”.¹⁸

Members of the Permanent Forum dialogue with United Nations agencies at the highest level. This communication is pivotal in order to reinforce the basic rights contained within the Declaration and to ensure that they are incorporated into the policies and processes of United Nations Agencies. Furthermore, dialogue allows for the possibility to formulate recommendations with United Nations Agencies that can be promptly implemented.

The twenty-second session of the WIPO IGC provided an opportunity for the Permanent Forum to contribute to the Indigenous Panel. The following submission was made at the WIPO IGC in July, 2012:

... At its eleventh session in May this year, the Forum held an in-depth dialogue with WIPO. The Forum commends the work of the IGC and expresses appreciation for WIPO's activities in support of indigenous peoples.

The Forum developed recommendations addressed to WIPO, contained in document E/C.19/2012/L.4, ... I would like to request that the document be reflected in the report of this session and issued as an INF document for IGC 23 and the WIPO General Assembly, through a Member State, in October this year.

In summary, the Forum recommends the following:

¹⁴ See recommendation 47.

¹⁵ See recommendation 51.

¹⁶ See recommendation 50.

¹⁷ See recommendation 52 and 53 emphasising articles 18 and 31 of the Declaration.

¹⁸ Article 41 of the Declaration.

For WIPO to seek the participation of experts on international human rights law specifically concerning indigenous peoples to ensure the alignment of the IGC draft texts with international human rights norms.

For WIPO to respect and recognise the United Nations Declaration on the Rights of Indigenous Peoples as a significant international instrument that must inform the IGC process and the overall work of WIPO.

Other recommendations include the undertaking of a study to examine the challenges in the African region on protecting GR, TK and TCEs; the organization of expert preparatory meetings of indigenous peoples on the IGC; the commissioning of a technical review by an indigenous expert of the draft texts on GR, TK and TCEs, that would feed into the IGC process; and, the establishment of modalities to ensure effective participation by indigenous peoples in the IGC process, including by appointing an indigenous representative as Co-Chair of the IGC.”

Although the Permanent Forum’s recommendations were submitted to WIPO IGC for inclusion there was no State support. Without the support of at least one State within the WIPO IGC any contribution or intervention from Indigenous participants will not be considered.

The Permanent Forum recommendations specific to WIPO that did not require the support of the WIPO IGC, will, nevertheless, still be implemented. They included:

46. The Permanent Forum recommends that WIPO seek the participation of experts on international human rights law specifically concerning indigenous peoples so that they provide input into the substantive consultation process, in particular with reference to the language in the draft text where indigenous peoples are “beneficiaries” and other language that refers to indigenous peoples as “communities” as well as the general alignment of the draft text of the Intergovernmental Committee with international human rights norms and principles.

47. The Permanent Forum demands that WIPO recognize and respect the applicability and relevance of the United Nations Declaration on the Rights of Indigenous Peoples as a significant international human rights instrument that must inform the Intergovernmental Committee process and overall work of WIPO. The minimum standards reflected in the Declaration must either be exceeded or directly incorporated into any and all WIPO instruments that directly or indirectly impact the human rights of indigenous peoples.

49. The Permanent Forum welcomes the decision of the Intergovernmental Committee to organize, in cooperation, with the Forum, expert preparatory meetings on the Intergovernmental Committee process for indigenous peoples representing the seven geopolitical regions recognize by the Forum

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traditions, literatures, designs, sports and traditional games, and visual and performing arts.

54. The Permanent Forum calls upon WIPO to strengthen its efforts to reach out to indigenous peoples and to continue to provide practical assistance and capacity strengthening for and in cooperation with indigenous peoples.

The Expert Group recommendation has since been realised. This has enabled experts from the seven regions to meet prior to each WIPO IGC to strategise on amendments to the texts and to lobby states to support amendments. During the July 2013, WIPO IGC, it was encouraging to see that Australia supported many of the proposed interventions and amendments from Indigenous members as many States still do not recognise the Declaration and its importance within this forum.

THE FUTURE OF THE UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES

The opportunity to work with other forums, including the United Nations Expert Mechanism on the Rights of Indigenous People, and the Special Rapporteur on the Rights of Indigenous People, can collectively provide greater momentum for gaining recognition of Indigenous Rights. The ability of the UNPFII to engage in high-level dialogue is a key to promoting Indigenous rights.

There is growing awareness of Indigenous Rights throughout the world. The role of the Permanent Forum is pivotal to developing greater awareness. There are many areas yet to be explored. The support of the IASG and relevant Agencies, together with the collective approach of the Special Rapporteur and the Expert Mechanism on the Rights of Indigenous Peoples can, as noted by the Special Rapporteur, “assist to harmonise the myriad of activities within the United Nations system”¹⁹. Driven by the Declaration, this provides an exciting space in which to explore the establishment of Indigenous Advisory Groups to assist and promote the recognition of Indigenous Rights within the workings and policy of these Agencies.

¹⁹ See Statement by James Anaya Special Rapporteur on the Rights of Indigenous Peoples 67th session of the General Assembly, Third committee, New York, 22 October 2012.