

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

Elifuraha Laltaika,
Senior Lecturer of Human Rights Law & Policy,
Director of Research and Consultancy,
Tumaini University Makumira, Tanzania
Elifuraha.laltaika1@gmail.com

Outline

- * Background to the update
- * Methodology for the update
- * Issues covered:
 - * Part one Balancing, Redress, Public domain, Exceptions and limitations , Scope of protection: the tiered approach & Data-bases and Knowledge registers
 - * Part two: Indigenous peoples rights to genetic resources, Mandatory disclosure, Dispute resolution & Traceability
- * Final thoughts and conclusion

Background to the Assignment

- * The 18th session of the United Nations Permanent Forum on Indigenous Issues (UNPFII), which took place from April 22 to May 3, 2019
- * WIPO to commission and finance an indigenous expert to undertake an update of the technical review.
- * Professor James Anaya made the Technical review and prepared a ground-breaking report in 2014.
- * PF suggested the scope, and “within the framework of indigenous Human rights”
- * Reviewed by Ms. Neva Collings and Mr. Elifuraha Laltaika

Methodology for updating

- * Guided by the scope suggested by PFII
- * Framework of indigenous human rights.
- * Desk Review: independence and consultative
- * Blind Peer reviewed by two indigenous experts
- * Experts incorporated review comments
- * Produced final report.

An overview of selected aspects covered in the report:

- * BALANCING
- * 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.
- * IP Protection tends to focus on individual or corporate innovators, while indigenous peoples hold knowledge in a collective setting.
- * 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.
- * Indeed, preventing misappropriation of TK may require positive measures that include creating *sui generis* intellectual property regimes.

Redress

- * UN Declaration on the Rights of indigenous peoples, article 11(2) provides for the right to redress.
- * Including restitution for cultural and intellectual property taken without FPIC, and that may involve adopting special concrete measures
- * Elements suggested by the indigenous caucus: non-exclusion for patent-holding and repatriation (historical misappropriation).

Public Domain

- * Simply refers to “expiry of exclusive rights,”
- * The intention is to foster access to information and materials needed for future creative works
- * It is at odds with indigenous peoples’ human rights enshrined in authoritative international instruments such as the UNDRIP
- * It is also misaligned to indigenous peoples’ customary laws.
- * negates the limitless and trans-generational nature of rights associated with TK and TCEs among indigenous peoples.

Exceptions and limitations

- * There is a potential risk that such exclusion run counter indigenous peoples' right to self-determination and the principle of FPIC.
- * Indigenous peoples have the right to autonomy and self-governance in matters relating to their internal affairs.
- * FPIC must be obtained prior to drafting exceptions and limitations touching on indigenous peoples' TK and TCEs.

Scope of Protection: the tiered approach

- * An innovative idea
- * 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.
- * Conceptually, the tiered approach is more aligned with the indigenous peoples' rights framework.
- * Refer Para 33 of the report on the potential challenges including choice of law: contract or customary law/legal traditions

Databases and Knowledge Registers

- * Aims at preventing undeserved granting of intellectual property rights protection.
- * An invention must be new, inventive and capable of industrial application
- * It must be a patentable subject matter, and adequately disclosed to allow for a person having ordinary skill in the art to practice it.
- * 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.
- * participation in such schemes should be voluntary, not a prerequisite for protection of TK and TCEs.

Indigenous peoples rights to genetic resources.

- * Professor Anaya, indigenous peoples' resource rights encompass all forms of 'natural resources' including GRs, customarily used by indigenous peoples according to well defined patterns
- * The impact of emerging technologies
- * Enables GRs to be digitally sequenced
- * This may become relevant for indigenous peoples' rights to own and control their GRs and associated TK.
- * It requires consideration under the IGC draft texts in due course

Final thought

- * 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.
- * 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.
- * 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