

CALL OF THE EARTH LLAMADO DE LA TIERRA

ISSUES IN INTELLECTUAL PROPERTY POLICY 2

What are the Intellectual Property Related Rights of Indigenous Peoples and Where they are Discussed?

International

At the international level, issues relating to Indigenous Peoples' traditional knowledge, cultural expressions and genetic resources are discussed in number of different international fora. The policy and legal approaches, as well as the driving interests of these fora vary. The extent of Indigenous participation in these debates is discussed in Issues Backgrounder 6 'Indigenous Participation'.

The following discussion will highlight the international law and policy fora most relevant to Indigenous cultural resources. This is arranged by instrument and/or organization. It encompasses a discussion of the existing rights of Indigenous Peoples and how these inform current debates.

United Nations Based Law and Processes

1. The International Labor Organization (ILO) Conventions

There are two conventions of the ILO that focus specifically on the rights of Indigenous Peoples. Convention 169 is viewed as superseding convention 107. However, convention 107 remains in force for those that have not ratified Convention 169. This discussion, will be limited to Convention 169, as it is the product of a revision of Convention 107 and reflects a more modern statement of Indigenous rights. While negotiations for Convention 169 did not directly consider Intellectual Property Rights, many provisions have relevance to the associated issues.

The Convention recognizes, in its preamble 'the aspirations of (Indigenous and Tribal) peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages, religions within the framework of the States in which they live' (ILO 1989). While recognizing these aspirations, it does not go so far as to state the existence of control in a form consistent with the fullest interpretation of the right to self-determination. (Note also that the use of the term 'peoples' in Convention 169 is not indicative of the support for the application of the principle of self determination being applied to Indigenous Peoples. While many of the provisions are consistent with the principle of self-determination the Convention does not recognise this right as such).

While being the most comprehensive statement of indigenous rights actually in force, Convention 169 makes very little direct comment on the rights of Indigenous Peoples in respect of cultural resources. The existence of a right to control (whether or not enacted in law) in relation to cultural resources is a critical premise of the position that the use

and appropriation of indigenous cultural resources by outsiders without informed consent, is, in fact, misuse and misappropriation. The substantive articles of the Convention arguably fall short of recognising such a right directly in relation to cultural resources.

In article 2.2(b), the Convention deems that governments shall have the responsibility for taking action to promote the ‘the full realization of the social, economic and cultural rights of (Indigenous and Tribal) peoples with respect for their social and cultural identity, their customs and traditions and their institutions’. What are these rights? The most direct reference to resources is made in relation to those connected with the lands of Indigenous Peoples. The Convention prescribes in Article 15.1 that ‘the rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded’. It goes on to suggest that ‘these rights include the right of these peoples to participate in the use, management and conservation of these resources’. However, where the State retains ownership of rights to resources pertaining to lands, governments only need ‘establish or maintain procedures with a view to ascertaining whether and to what degree’ the interests of Indigenous Peoples would be prejudiced before allowing any exploration or exploitation of the resources (article 15.2). Thus, while this provision would likely include biological resources within Indigenous lands, governments maintain no real obligation to take action to prevent such exploration or exploitation on the basis of prejudice to the interests of Indigenous Peoples. In any case, it is not clear whether that interpretation of ‘resources’ would extend to traditional biological knowledge associated with resources situated upon Indigenous land, as opposed to the resources themselves.

The only other direct reference to cultural resources is the reference to certain activities in article 23.1 which requires governments to ensure that the ‘handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognized as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted’. As with the previous articles that relate to cultural resources, this article cannot be interpreted to confer control over the use and appropriation of these resources.

While Convention 169 makes little direct mention of cultural resources, a number of more general provisions are relevant. National laws and regulations must, in their application to Indigenous Peoples, be applied with due regard to customs and customary law (article 8.1). Where customs and traditions are not incompatible with fundamental rights, Indigenous Peoples have the right to retain their own customs and institutions (article 8.1). Convention 169 also sets out rights to consultation and participation when plans and programs for national development may affect them directly, as well as a right to decide their own priorities for development and ‘to exercise control, to the extent possible, over their own economic, social and cultural development’ (article 7.1). If control over the use and appropriation of cultural resources can be characterized as a mode of control over development, and there are many arguments that it could, then this article is relevant. It is weakened, however, by the phrase ‘to the extent possible’. The conditions under which control is no longer ‘possible’ are not made clear by this provision.

In sum, while the Convention espouses a trend towards Indigenous control over lands, resources and other elements of Indigenous Peoples' lives, and while it requires consultation (article 6.1) and participation on matters that affect Indigenous Peoples, it does not require consent (Pritchard & Heindow-Dolman 1998). Thus, while the provisions of the Convention indicates a preference towards many measures consist with self-determination, (without actually stating the existence of the right (article 1.3)), it does not recognise a right of control. Regardless of the rights the Convention may or may not establish, the implementation of the Convention relies on the will on the will of State Parties. There is no coercive mechanism.

To date, 17 parties have ratified Convention 169. 18 have ratified convention 107.

2. The Draft Declaration on the Rights of Indigenous Peoples

The Draft Declaration on the Rights of Indigenous Peoples goes further than ILO Convention 169 by clearly acknowledging a right of control by Indigenous Peoples over their cultural resources. However, the Declaration is a draft, and it is not clear that it will be adopted in the near future, if at all. Thus it currently has only rhetorical significance. If adopted it will have the status of a declaration of the United Nations General Assembly. That is, it will have status as international customary law but will be non-binding (Pritchard & Heindow-Dolman 1998).

Article 29 of the Declaration recognizes that 'Indigenous Peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property'. They also have 'the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs and visual and performing arts'.

There are a number of other rights supportive of this right of control (articles 3, 7, 12, 13, 19, 25). For example, the Draft Declaration explicitly recognizes the right of Indigenous Peoples to self-determination (article 3). The right to self-determination is important in this context as an underlying rationale for the right to control cultural resources. Somewhat relevant to cultural resources is the collective and individual right not to be subjected to 'any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures' (article 7). The expansion of the intellectual property rights system, a system emerging out of western philosophical traditions, to cover indigenous traditional knowledge, without the full and effective participation of Indigenous Peoples in that decision, may sit uneasily with this right. The declaration also emphasizes the right of 'autonomy or self-government in matters relating to Indigenous Peoples' affairs, including culture ... land and resources management, environment and entry by non members ...'(article 31), and the right of Indigenous Peoples to fully participate at all levels of decision making in matters that may affect their rights, lives and destinies (article 19).

Although it is not certain that the Draft Declaration will be adopted by the General Assembly in its current form, a Permanent Forum for Indigenous Peoples has been established within the UN system. This forum will provide some space at least for the monitoring of States voluntary compliance with the Declaration The creation of the

Permanent Forum is one part of the duty of the United Nations articulated in article 41 to 'take the necessary steps to ensure the implementation' of the Declaration.

3. Other Human Rights Standards, Processes and Instruments

Both ILO Convention [169] and the Draft Declaration explicitly recognize that Indigenous People are entitled to the full complement of human rights enjoyed by all individuals.

A number of human rights instruments, charter and treaty-based bodies are thus relevant to the recognition and implementation of rights applicable to Indigenous People. These include the International Convention on the Elimination of all Forms of Racial Discrimination (CERD)(Supervised by the Committee on the Elimination of Racial Discrimination), the International Covenant on Civil and Political Rights (ICCPR)(Supervised by the Human Rights Committee) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)(Supervised by the Committee on Economic, Social and Cultural Rights).

While there is little in this body of law that reflects specifically on rights to cultural resources, general comments and recommendations on the application of certain rights to Indigenous Peoples have been made in supervising committees. Certain of these are relevant to Indigenous cultural resources. In the Committee on the Elimination of Racial Discrimination, for example, recommendations were made that called State parties to recognize and respect Indigenous Peoples' distinct culture, to provide Indigenous Peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics, and to recognize and protect the rights of Indigenous Peoples to own, develop, control and use their communal lands, territories and resources (Pritchard & Heindow-Dolman 1998). In addition, the application to Indigenous People of article 27 of the ICCPR, that provides for the right of minorities to enjoy their own culture, has been expounded by the Human Rights Committee.

Of importance, is the treatment of the right of self-determination by the human rights instruments and bodies. This right is not clearly extended to Indigenous Peoples, except in the Draft Declaration on the Rights of Indigenous Peoples. Although it is clear that Indigenous People enjoy the individual rights enjoyed by all people it is less clear whether they enjoy the right of self-determination enjoyed by all 'peoples' (ICCPR, article 1; ICESCR article 1). There has not been comment by the Human Rights Committee on this matter (Pritchard & Heindow-Dolman 1998). Thus, while the human rights instruments have a useful application to Indigenous People as individuals they are less clear in application to possible collective rights of Indigenous Peoples.

Although the human rights instruments (other than the Draft Declaration) may not be the most extensive statements of Indigenous rights, they do have the advantage of supervisory and enforcement mechanisms. For example, governments must make reports to the CERD committee on the measures they have taken to come into compliance with the CERD, State parties can report on another state's non-compliance and, where States have given CERD the competence, individuals who claim their rights under CERD can petition the CERD Committee after national remedies have been exhausted (Pritchard & Heindow-Dolman 1998). Likewise, the Human Rights Committee requires state parties to submit reports on measures taken to give effect to the ICCPR and there is a mechanism,

although based on the declaration by states of the Competence of the Human Rights Committee, for state parties to communicate claims of other state parties non-compliance with the ICCPR. Additionally, through the First Optional Protocol to the ICCPR, individuals may make written submissions claiming violations of their rights. Enforcement and monitoring of the ICESCR, by contrast, relies only a state reporting procedure.

The human rights bodies are also useful for their contribution to the analysis of the human rights impacts of events and trends. For example, the human rights apparatus has responded to the impact of globalization on human rights. In 2001 the Office of the High Commissioner for Human Rights reported to the Sub-commission for the Promotion and Protection of Human Rights on the impact of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPS Agreement) on human rights (UNESCO 2001).

4. The Convention on Biological Diversity (CBD)

While the Convention on Biological Diversity, while being an environmental instrument arising from the UNCED process, gives focus to the commercial value of biological diversity. Within that framework, the Convention recognizes ‘the sovereign rights of States over their natural resources’ and that ‘the authority to determine access to genetic resources rests with the national governments...subject to national legislation’ (Article 15). Thus, the Convention moves away from the principle that biological diversity is the common heritage of humanity, as previously espoused by early versions of instruments of the United Nations Food and Agriculture Organization (FAO (IU) 1983).

While the Convention recognizes State sovereignty only, it does recognize the contribution of Indigenous Peoples to the maintenance and knowledge associated with biological diversity. It requires that State parties to the Convention ‘respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices’ and that they ‘encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices’(article 8(j)). Pritchard and Heindow-Dolman (1998) suggest that the characterization of Indigenous Peoples as ‘holders’ of knowledge links them to the vocabulary of proprietorship for the purpose of intellectual property rights. However, while the Convention has as a goal the equitable sharing of benefits from the utilization of traditional knowledge, access to genetic resources – control over which is a central element of such exclusive rights - is subject not to the prior informed consent of the relevant Indigenous Peoples, but the consent of the State party (article 15.5).

Thus, while the CBD does encourage states to act somewhat benevolently towards Indigenous Peoples, it does not require this and does not, on any reading, establish Indigenous control over genetic resources. Elaboration of the access and benefit sharing provisions in the form of the Bonn Guidelines (as prepared by the Ad Hoc Working Group on Access and Benefit Sharing), confirms this interpretation.

The Seventh Conference of the Parties of the CBD has supported the development of an International Regime on Access and Benefit Sharing following calls for the same at the

World Summit on Sustainable Development and discussion at the Ad hoc working group on Access and Benefit Sharing. There is mixed opinion as to whether the development of an international regime is likely to further or detract from the rights and interests of Indigenous Peoples.

5. United Nations Educational, Scientific and Cultural Organization (UNESCO)

UNESCO, while having, primarily, a policy role in this area, has engaged in some standard setting relevant to Indigenous cultural resources. For example, the UNESCO General Council adopted the Recommendation on the Safeguarding of Traditional Culture and Folklore (adopted by the General Conference at its twenty-fifth session, Paris, 15 November 1989 (UNESCO 1989)). UNESCO also has instruments concerning the restitution of cultural heritage and enacted the World Heritage Convention which contemplates protections for certain cultural heritage.

6. The World Intellectual Property Organization (WIPO)

WIPO's involvement in the debate centres on its role as the international organization that facilitates the making of international law and policy on intellectual property rights. Of relevance to Indigenous traditional knowledge and cultural expressions, it has facilitated discussions of the possible expansion of intellectual property rights or other means of "protection" in a such a way that would enable them to be held by Indigenous Peoples themselves.

WIPO's discussions relevant to traditional knowledge are primarily carried out through The Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. These discussions are supported by the information gathering activities of the WIPO secretariat.

Laws and Processes within other Relevant Organizations

1. The World Trade Organization

The WTO Agreement on Trade Related Impacts of Intellectual Property Rights (TRIPS) sets out minimum intellectual property rights standards that must be implemented in each WTO Member State. The agreement is relevant to the cultural resources of Indigenous Peoples through its provisions concerning patents, copyright and trademarks.

The TRIPS Agreement is particularly relevant for its facilitation of the grant of private rights over subject matter deriving from or being identified through traditional biological knowledge. Article 27.3(b) of the Agreement requires that patents be made available for micro-organisms and biological processes for the production of plants or animals, other than non-biological and microbiological processes. Although it excludes from patentability plants and animals, it does require a sui generis mechanism for the protection of plant varieties (article 27.3(b)). Some member states, mainly in the developed world, also allow the patenting of plants and animals. The impact of this provision on Indigenous Peoples is that it - in interaction with other factors in one sense facilitates, and in other fails to prevent, the grant of patent rights to outsiders in relation to the traditional knowledge of Indigenous Peoples.

Compliance with WTO Agreements is enforced through the WTO's dispute settlement procedure, a tribunal type arrangement where which one member is able to complain of

another's failure to comply. If a state fails to abide by the decision of the dispute settlement body, they are vulnerable to the imposition of trade sanctions from other members in relation to any trade area. The unequal economic strengths of the different WTO Member States mean that the failure to abide by dispute settlement decisions may have greater consequence for some than it does for others, the direction and extent of the advantage depending on the relative economic strength of the parties in dispute.

As the ramifications of failing to comply with WTO Agreements can be great, there is concern that Member States may implement the WTO Agreement rather than Human Rights and Multilateral Environmental Agreements (MEAs) in the case of any direct or tangential incompatibility. The extent of any incompatibility with human rights and environmental instruments or implementation measures, particularly the Convention on Biological Diversity and instruments concerned with the right to health and development, have been widely discussed (United Nations 2001).

2. The International Union for the Protection of New Varieties of Plants (UPOV)

UPOV is an intergovernmental organization that has set standards in relation to appropriate protection for plant varieties through the UPOV Convention. A number of countries have systems of protection for plant varieties consistent with the UPOV Convention. The UPOV system is relevant to the WTO's TRIPS Agreement. Although the TRIPS Agreement requires member states to provide a sui generis system for the protection of plant varieties, the TRIPS agreement of the WTO does not define thus far what is an appropriate sui generis system. It is clear that UPOV is considered to be an appropriate system. However, NGOs have expressed concern that there is pressure within the WTO for UPOV to become the only appropriate sui generis system. This would remove flexibility from member states to devise sui generis systems responsive to the needs of indigenous and other marginalized peoples.

National

Current national policies and laws in the area of indigenous traditional knowledge for food, agriculture and medicine, cultural expressions and human genetic resources ("cultural resources") vary between jurisdictions. A wide range of government departments and types of laws may be relevant, including intellectual property law, heritage law, racial vilification laws, native title, indigenous customary law, and environmental resource related law. Often these laws have been developed for other purposes, their relationship to indigenous cultural resources being tangential to the main focus of the policy or law.

Notes

Hunter, D, Salzman, J & Zaelke, D. *International Environmental Law and Policy*, 1998 Foundation Press

International Labor Organization, *Convention on Indigenous and Tribal Peoples*, 1989 [No. 169]

International Work Group for Indigenous Affairs 2002, *The Indigenous World 2000-2001*, IWGIA, Copenhagen.

Our Culture, Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights, Frankel & Co, Sydney.

Pritchard, S & Heindow-Dolman, C 1998, 'Indigenous Peoples and international law: a critical overview', Australian Indigenous Law Reporter, Sydney.

UNEP, Convention on Biological Diversity June 5, 1992, 31 I.L.M. 818 (1992) entered into force December 29, 1993

United Nations, Draft Declaration on the Rights of Indigenous Peoples E/CN.4/SUB.2/1994/2/Add.1 1994

UNESCO 1989 Recommendation on the safeguarding of Traditional Culture & Folklore (adopted by the General Conference at its twenty fifth session Paris 15 November 1989 UNESCO 1989 Recommendation on the safeguarding of Traditional Culture & Folklore (adopted by the General Conference at its twenty fifth session Paris 15 November 1989

United Nations Economic and Social Council, Commission on Human Rights Fifty-seventh session, Report of the working group established in accordance with commission on human rights resolution 1995/32 Chairperson-Rapporteur Mr Luis-Enrique Chavez E/CN.4/2001/85 6 February 2001

United Nations Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities Forty-fourth session Item 15 of the agenda E/CN.4/Sub.2/1992/32 25 August 1992 Economic and Social Council

United Nations Human Rights Commission Resolution 2001/57

WTO 1995, Agreement on Trade Related Aspects of Intellectual Property Rights