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**Special Rapporteur on the rights of indigenous peoples**

**Twenty-Third Session of the World Intellectual Property Organization**

***Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore***

**Indigenous Panel**

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# INDIGENOUS PEOPLES' RIGHTS TO GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE

**James Anaya, Special Rapporteur on the rights of indigenous peoples**

I am pleased to have the opportunity to speak as part of this panel which opens this session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

State sovereignty and property have been key concepts in the deliberations within the Intergovernmental Committee. In my presentation before the Committee, I will focus on how these concepts relate to indigenous peoples' rights. I will start with a brief historical background, outlining how conventional understandings of sovereignty and property rights were harmful to indigenous peoples. I will subsequently turn to more recent developments within international decision making that have resulted in a new understanding of the right to property and a broader understanding of the rationale behind the principle of state of sovereignty. As I will attempt to demonstrate, these developments that are leading to renditions of these concepts that are more hospitable to the needs and aspirations of indigenous peoples than earlier ones. Finally, I will address what particular relevance these developments have for indigenous peoples' rights to genetic resources and traditional knowledge. In doing so, I will add a couple of comments about the draft instrument on intellectual property rights derived from genetic resources that is presently the subject of negotiations within this body.

## 1. Historic background

The principle of state sovereignty and the right to property were fundamental building blocks of the international legal system during the classical era. As we are all aware, the process of European colonization placed indigenous peoples' territories and resources under the hegemony and control of the European colonizers. International law of this period essentially served to legitimize the colonial patterns, and the principle of sovereignty and the right to property were imbued with meanings towards this end.

The concept of sovereignty came to be designed so to only apply to polities sufficiently similar to the European state model. Consequently, indigenous peoples' societies were deemed not to be states, or other polities, with sovereign rights.

Likewise property rights theories of the era professed that only land used in ways sufficiently similar to European style agriculture could result in property rights to land and resources. It was thus held that indigenous peoples' cultures had not improved on the land in a manner required to acquire property rights thereto.

This aspect of classical international law, which held that indigenous peoples can neither hold sovereign or property rights to resources, is part of the doctrine of *terra nullius*, under which land occupied only by indigenous peoples was regarded as vacant.

At the time, not much attention was paid to traditional knowledge generated by indigenous societies, or to genetic resources situated in their territories. Still, it is worth noting that the first intellectual property and similar regimes originate from colonial and earlier-post colonial era, introducing the concept of the public domain.

From an indigenous peoples' rights perspective, it is interesting to compare the notion of the public domain with the *terra nullius* doctrine. The latter doctrine suggests that indigenous peoples hold no rights to resources due to the fact that their collective land use does not sufficiently improve on the land. For its part, the notion of the public domain implies that indigenous peoples' collective way of gradually generating knowledge often does not result in rights thereto, as the knowledge is deemed to not sufficiently add to the existing, already publically available, bulk of knowledge. In both instances, it is hence the way in which indigenous peoples' cultures differ from those of non-indigenous peoples that disqualify them from rights to resources and traditional knowledge, respectively.

## 2. Generally on contemporary international law and policy concerning indigenous peoples

The legacy of classical international law, with its inhospitable view of both the political and civil rights of indigenous peoples, prevailed into the early 1980s. Only at this time did the United Nations and its member states commence addressing the situation of indigenous peoples in earnest. But since then, the developments international law and policy has been rapid. The last three decades have brought a paradigm shift in the international system's position on indigenous peoples' rights. This is manifested first and foremost by the United Nations General Assembly's adoption of the Declaration on the Rights of Indigenous Peoples in 2007.

The Declaration must not, however, be viewed in isolation. In doing so, one risks being distracted by discussions on the formal legal status of the Declaration. It is critical to recognize that the Declaration is not only important in itself, but is also significant because it reflects – in broad terms – a general global consensus on indigenous peoples' rights that is in significant part incorporated into contemporary international law. These rights, which the Declaration affirms, have been recognized through state practice, through the adoption of instruments such as the International Labor Organization's Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, through treaty body jurisprudence, and through rulings by international and domestic courts, among other developments. The paradigm shift in international law has perhaps been particularly visible within the two areas that I mentioned in the outset of this presentation; that is, within the spheres of sovereignty and property rights.

With regard to sovereignty, indigenous peoples have of course not been recognized as sovereigns in the way states are. But authoritative international instruments and decisions have come to acknowledge indigenous peoples as distinct communities with political attributes, enjoying a right to self-determination to be exercised through autonomous and self-governing arrangements within existing states. The sovereign right attaching to states and indigenous peoples' right to self-determination are certainly different rights. Still, the two sets of rights can be said to be rooted in the same rationale: that peoples should be allowed to be in control of their own affairs under conditions of equality. International law's recognition that indigenous peoples are peoples with the right to self-determination implies that indigenous peoples have regained a substantial part of the political rights they were deprived of during the colonial era.

Indigenous peoples' right to autonomy and self-government are reflected throughout the UN Declaration on the Rights of Indigenous Peoples, but chiefly in Articles 3 and 4. These provisions

affirm that "*[i]ndigenous peoples have the right to self-determination ... in exercising [this] right [indigenous peoples] have the right to autonomy and self-government in matters relating to their internal land local affairs*". I emphasize that the Declaration affirms rather than establishes indigenous peoples as beneficiaries of the right to self-determination. This can be seen, for instance, in that the two UN bodies that oversee the implementation of international law's principal sources on the right to self-determination – the common Article 1 of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights – have repeatedly confirmed that the right attaches to indigenous peoples, among other peoples. I have myself reached the same conclusion in my capacity as Special Rapporteur. But the main evidence of the right to self-determination applying to indigenous peoples is found in a rich state practice. In addition to offering its overwhelming support to the UN Declaration on the Rights of Indigenous Peoples – including its Articles 3 and 4 – states are increasingly introducing autonomy or self-government arrangements for indigenous peoples in their respective countries. These arrangements vary in scope and content depending on the domestic circumstances. Still, together they reflect a general norm stipulating that indigenous peoples are entitled to self-governance in their own affairs.

As regards indigenous peoples' property rights to lands and natural resources, today a rich jurisprudence from regional and domestic courts, as well as from UN treaty bodies, affirms that indigenous peoples' traditional use of lands and resources results in property rights thereto with the same legal status as state granted title. For instance, the UN Committee on the Elimination of Racial Discrimination has confirmed that the right to property enshrined in the Convention on the Elimination of All Forms of Racial Discrimination extends to indigenous peoples' traditional territories and resources. The UN Committee on Economic, Social and Cultural Rights has concurred with this conclusion. The Inter-American Court and Commission on Human Rights have in a number of cases confirmed that indigenous peoples hold property rights to lands and resources traditionally used, a position shared by the African Commission on Peoples and Human Rights in the *Enderois Case*. It is worth noting that the Inter-American Commission has concluded that indigenous peoples' property rights are not only enshrined in the American regional human rights instruments. Additionally, the Commission has affirmed that the obligation to respect indigenous property rights on the basis of their customary land tenure is grounded in general principles of international law, as well as being a norm of customary international law.

Consequently, when the UN Declaration on the Rights of Indigenous Peoples proclaims in article 26 that "*[i]ndigenous peoples have the right to own ... and control the lands, territories and resources that they possess by reason of traditional ... occupation or use...*", it is reflecting, rather than establishing, an international norm. The evolved understanding of the right to property has resulted in specific protections for indigenous peoples rights over lands they still possess, as well as in their regaining rights to resources lost during the classical era.

### 3. Specifically on indigenous peoples' rights to GR and TK

In my view, this property right embraces all forms of natural resources customarily used by indigenous peoples. Thus, indigenous peoples' property rights should also be understood to extend over the genetic that they have traditionally used according to well defined patterns. In this regard, the legal sources just mentioned do not distinguish explicitly between genetic resources and other natural resources. Further, the UN Declaration on the Rights of Indigenous Peoples provides in article 31 that "*[i]ndigenous peoples have the right to maintain, control ... and develop their cultural heritage ... including genetic resources...*".

Therefore, genetic resources do not differ from other natural resources as far as indigenous peoples' customary or traditional property rights are concerned. Another matter is that genetic

resources may deviate from other resources when it comes to how to *effectively recognize and secure* the underlying rights. Unlike many other natural resources, genetic resources are often not unique to one particular territory. It is my understanding that it is common to find a particular genetic resource in more than one indigenous people's territory (as well as in more than one state). This cross-boundary nature of genetic resources does not diminish indigenous peoples' underlying rights to such resources. But it may call for creative solutions in order that indigenous peoples' rights to genetic resources be effectively secured genetic resources and to avoid problems such as a regulatory "race to the bottom". To find such solutions is precisely the precise role of this body, I believe.

As mentioned, international law's interest in traditional knowledge is more recent, compared with its interest in land and tangible natural resources. But as you are aware, the questions of what rights indigenous peoples possess over traditional knowledge has lately been subject to intense debates in various forums, including in human rights bodies. In my opinion, it is evident that these deliberations have resulted in a consensus that indigenous peoples are the rightful holders of traditional knowledge generated by them. The reasons for this conclusion can largely be found in the legal principles and developments in international law and policy that I have already discussed.

Recall the comparison I made earlier between the notion of the public domain and the *terra nullius* doctrine. As I stated, generally speaking, these two concepts often resulted in lack of recognition of rights of indigenous peoples, because indigenous land use and ways to generate knowledge are culturally different compared to the practices of those that created the law. But as I have noted, contemporary international law prohibits discrimination against indigenous peoples' because of the particularities of their cultures. Thus, the *terra nullius* and similar doctrines have been rejected as inherently discriminatory. The right to non-discrimination provides that indigenous peoples must have the same possibility, not only formally but also in fact, to establish, like others can, property rights to lands and natural resources. The general principles that have resulted in reformation of property rights law pertaining to indigenous peoples' lands and resources are not less relevant in the context of traditional knowledge. The same basic arguments that have resulted in the rejection of the *terra nullius* doctrine also speak for a reformation of the public domain, as it applies to indigenous knowledge.

It is of course a fundamental underlying principle in intellectual property law and theory that rights to human creativity in the outset vest with the creator of that knowledge. This principle – combined with the requirement that property rights law does not discriminate against the particularities of indigenous peoples' cultures – suggests that legal protection be extended so to also effectively protect knowledge generated in indigenous peoples' cultures. In this connection, the fact that indigenous peoples tend to generate knowledge by gradually building on prior knowledge, tend to generate knowledge collectively, and tend to perceive the knowledge to vest in the collective, must not result in a lack of recognition of rights. This is also reflected in article 31 of the UN Declaration on the Rights of Indigenous Peoples, which emphasizes that "*[i]ndigenous peoples have the right to maintain, control ... and develop their cultural heritage, traditional knowledge*". Worth mentioning in this context are also articles 5.5 and 7 of the Nagoya Protocol. These provisions at least indirectly affirm that indigenous peoples are the relevant right-holders with regard to traditional knowledge generated by them.

In a presentation delivered to a body involved in negotiations under the auspices of the World Intellectual Property Organization, it is appropriate to focus on property rights. Please allow me, however, to return briefly to the right to self-determination. As mentioned, indigenous peoples' have rights to autonomy and self-governance over matters that are relevant to them, to be exercised within the borders of existing states. Genetic resources and traditional knowledge

constitute integral elements of indigenous peoples' societies and cultures and, consequently, indigenous peoples' rights to autonomy and self-governance embrace such knowledge and resources. It follows that, in addition to their proprietary interests, indigenous peoples have a right to manage their own genetic resources and traditional knowledge. Further, they have a right to be genuinely involved in state decision-making processes pertaining to such resources and knowledge, including in legislative processes. Indigenous peoples' right to be involved in decision-making also applies at the international level. Indigenous peoples must be adequately represented in deliberations such as those taking place within the WIPO Intergovernmental Committee. Adequate representation is not only about relevant numbers. The Committee sessions should be organized so that indigenous peoples' concerns are genuinely taken on board.

I would like to end by connecting the points made in this presentation to the negotiations in which those present are now involved. Before doing so, however, please allow me to add a few words on the relationship between the rights to property and self-determination, on one hand, and the concept of free, prior and informed consent, on the other. Too often, discussions on indigenous peoples' rights – including over genetic resources and traditional knowledge are being clouded by a misunderstanding that prior informed consent is a right in itself. This may in turn lead some to infer that no right of indigenous peoples to consent exists, as there are not sufficient legal sources to support such a claim. Prior informed consent is, however, not a free-standing right. Rather, the ability to consent or not consent to the use of their genetic resources and traditional knowledge flows from indigenous peoples' rights to property and self-determination. That a right to consent exists is thus, in my opinion, sufficiently established by the international legal sources and arguments outlined in this presentation. There is no need to involve the concept free, prior and informed consent as a separate issue. For a more elaborated outline of the relationship between indigenous peoples' rights and the concept of free, prior and informed consent, I invite interested delegates to consult my recent report to the UN Human Rights Council; Document A/HRC/21/47, in particular paragraphs 47-53.

## 4. The Relationship between human rights and the WIPO IGC negotiations

In this presentation, I have aspired to explain how indigenous peoples hold underlying rights to genetic resources and traditional knowledge in a way that I hope is helpful to your deliberations. How to formulate these underlying rights in an intellectual property or similar framework is beyond my expertise. I leave that task to able negotiators and experts such as those present. Still, I have studied the Annex to document WIPO/GRTKF/IC/23/4, titled "Intellectual Property and the Protection of Genetic Resources [their Derivatives] and Associated Traditional Knowledge", which I understand is the principal conference document, containing an embryo for a potential legally binding instrument on "intellectual property rights derived from genetic resources". It is clear that the draft instrument is a work in progress, and that difficult negotiations remain. I wish you all the best of luck in these deliberations. It is important, not only for indigenous peoples but for all peoples, that these negotiations are brought to a successful conclusion, one that allows those that legitimately hold rights to genetic resources and traditional knowledge to determine the use of such resources and knowledge, and ensuring a fair distribution of wealth generated by the commercial use of genetic resources and traditional knowledge. Given that the draft instrument is a work in progress, and given my limited knowledge in international intellectual property law, I shall refrain from comment on the instrument in detail. I would like, however, to offer a few comments on two core issues included in the draft instrument, against the background of indigenous peoples' underlying rights to genetic resources and traditional knowledge.

The draft instrument contains a number of provisions that declare that states hold sovereign rights over genetic resources. These provisions are not problematic in themselves. It is a fundamental principle in international law that states' sovereignty extends over natural resources, including

over genetic resources, found within their borders. As a general rule, a provider state is thus entitled to determine on what terms, if at all, *other states and foreign third parties* can access genetic resources. Importantly however, from the fact that the principle of state sovereignty provides states the right to determine to what extent *external subject*s can access genetic resources situated within the state's border; it does not follow that states can invoke this principle vis-à-vis legal subjects *within the state*. In other words, states' sovereign rights do not preclude the possibility that indigenous peoples have established rights to genetic resources that they have traditionally used. When finalized, the instrument should be clear on this distinction. The instrument need not disrupt the principle of state sovereignty over natural resources. But it should at the same time respect and affirm that indigenous peoples' hold rights to genetic resources traditionally used by them.

The draft instrument in addition contains a number of provisions suggesting that rights to traditional knowledge are subject to national legislation. My observation here is similar to that made with regard to genetic resources. Certainly, states are entitled to, and indeed should, enact legislation regulating under what circumstances traditional knowledge held within the state can be accessed and to what extent holders of traditional knowledge are entitled to benefit-sharing. But this does not imply that no restrictions apply to national law-making. National legislation must at the same time recognize indigenous peoples' right to traditional knowledge generated in accordance with international standards. It is noteworthy that the instrument, "Intellectual Property and the Protection of Genetic Resources [their Derivatives] and Associated Traditional Knowledge", contains provisions addressing how the norms contained in the instrument can or should be reflected in national legislation, including provisions stating that national law should address the circumstances under which traditional knowledge can be accessed. But these provisions should also affirm that such national legislation must be respectful of indigenous peoples' rights to traditional knowledge generated by them, consistent with international human rights law.

Again, I am thankful for the opportunity to participate in this panel and address this body. I wish you all the best for a successful session.

Thank you all for your kind attention.