

INDIGENOUS PEOPLES COUNCIL ON BIOCOLONIALISM (IPCB)

The following comments were received through a communication from the Indigenous Peoples Council on Biocolonialism (IPCB)

IPCB supports the submission by Call of the Earth LlamadodelaTierra, and makes these additional comments for your consideration.

Policy Objectives

- (i) When referring to the specific intellectual traditions of Indigenous peoples, the term Indigenous knowledge (IK) should be utilized. Therefore, we will refer to IK throughout this submission, rather than TK. IK is holistic in nature, and cannot be separated into distinct categories. IK is intrinsic to specific Indigenous peoples, and is fundamental to sustaining this distinct knowledge for future generations. As such, IK does not exist to “benefit all humanity” but rather the Peoples to whom the knowledge belongs.
- (ii) Systems must be developed that promote respect for IK systems as valid systems of knowledge within their own right, and not for the extraction and use by non-Indigenous societies.
- (iii) This paragraph suggests that Indigenous peoples freely contribute their knowledge for use by others. In fact, the typical paradigm is that IK is misappropriated and misused by others for commercial and other exploitation. What IK holders need is protection from such misuse and misappropriation. This protection should be centered on prohibiting the granting of IPR over IK rather than trying to subsume IK into an IPR framework.
- (iv) IK has inherent value to the communities it serves and cannot be valued based on outside commercial use. IK systems are inherent and inalienable and last in perpetuity as dynamic and evolving knowledge systems as long as the Indigenous people exist. The IP protection provided for intellectual creations and innovations are time limited, individualistic, monopolistic and exist for economic exploitation. Therefore, any attempt to apply IP protection to IK is completely inappropriate because rights to IK must be inalienable, collective and last in perpetuity.
- (v) IK systems belong to the holders of such knowledge, as do the genetic resources originating from their territories. Therefore, it is not necessary to “augment customary custodianship and associated genetic resources.” IK systems can best be protected by insuring the right of self-determination of Indigenous peoples, including the right to territory and permanent sovereignty over natural resources.

- (vi) As stated previously, IK exists to benefit the People to whom the knowledge belongs. There is an inherent conflict of interest if benefits for humanity are prioritised over the rights and interests of Indigenous peoples.
- (vii) Repression, and prohibitions, must also be established over the unauthorized use of IK in non-commercial venues such as in academic and research institutions.
- (viii) Existing international agreements and processes such as WTO/TRIPs, WIPO treaties, and the CBD currently fail to protect the rights of Indigenous peoples. Protections for IK must be based upon and consistent with international human rights law including the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. The Conference of the Parties of the CBD has mandated the Working Group on Access and Benefit Sharing to take these human rights instruments into consideration in the elaboration of an international regime on access and benefit sharing (ABS). Emerging international human rights standards such as contained in the UN Draft Declaration on the Rights of Indigenous Peoples should also be recognized.

As a similar process for developing sui generis protection of IK is underway in the CBD, and nothing should prejudice that body of work. We also recommend consistency with the significant work that has been done under the UN Working Group on Indigenous Populations on the Cultural Heritage of Indigenous Peoples which builds on the earlier report of the Special Rapporteur Erica Irene Daeon Principles and Guidelines on Indigenous Cultural Heritage (E/CN.4/Sub2/2000/26).

- (ix) This objective should focus on strengthening the development of sui generis IK systems for internal use, not external use. Efforts to enhance educational opportunities and the use of culturally appropriate technology, should be considered a human right, and not a requirement to facilitate the extraction of IK for use by outside interests. Considerable work has been achieved in Indigenous classrooms and communities using multi-media and digital technologies as a means of transmitting IK from elders to youth. These kinds of initiatives should be supported when requested by Indigenous peoples.
- (x) Indigenous peoples certainly have a right to fair and equitable terms when they freely consent to the access and use of their IK. By and large, however, Indigenous peoples are not seeking the facilitation or promotion of access to, and wider application of, IK and genetic resources originating in Indigenous territories. Without proper recognition of Indigenous peoples' right of permanent sovereignty over natural resources, any regime to facilitate access to IK and genetic resources originating in Indigenous territories is premature. Currently, Indigenous peoples do not support the international regime on ABS being elaborated and negotiated under the

CBD, therefore it is inappropriate to consider it as a standard for protection of IK, lands or peoples.

We reiterate our comment on Draft Policy Objective (i) and (vi) regarding “benefit for humanity” and apply the same perspective to access to IK and wider application “for the general public interest.”

- (xi) We note that existing regimes, such as the CBD’s voluntary Bonn Guidelines on ABS, have found little support among Indigenous peoples, especially as regards its promotion of national authorities as competent bodies to control access to IK associated with genetic resources (Article 26) and its limitation to “established legal rights” of Indigenous peoples, subject to domestic law (Article 31). As stated above, the current discussions on an international regime for ABS under the CBD are proceeding without Indigenous support because there has been no commitment for the regime to achieve consistency with human rights law.

It is difficult to see how benefit sharing agreements that allow for the monopolization and alienation of traditional knowledge and genetic resources under the veil of intellectual property protection can be of any meaningful benefit to Indigenous peoples. Certainly, there will be a promise of some potential income, an income that could make a difference in the lives of those terribly lacking in resources. In the end, however, the benefits that come to Indigenous peoples are likely to be quite insignificant compared to those reaped by the pharmaceutical, agricultural or chemical companies and academic institutions with which they are dealing.

- (xii) IPR protections are not consistent with sustainable development, rather they promote short-term gain and alienate knowledge and resources from Indigenous peoples. Community development models should be based on sustainable development practices and consistent with Indigenous peoples’ right of self-determination, including their right to freely pursue economic development.
- (xiii) Rather than curtailing the grant or exercise of invalid IPRs, this objective should focus on prohibiting the grant of IPRs over IK and promote strict enforcement of such prohibition. Ensuring that IPRs are not granted over existing IK and biological resources should be a priority objective in recognition of the principle within IPLaw itself that IPRs should be limited to true innovations and not extend to natural processes. This objective should also promote mechanisms for redress, including repatriation, restitution, damages and sanctions.
- (xiv) Principles of transparency must include evidence of strict adherence to ethical codes of conduct, free prior informed consent, and procedures for redress and liability.
- (xv) No comment.

Core Principles

A.2 This principle should also include the recognition of Indigenous peoples' right of permanent sovereignty over natural resources.

A.4.1 The only appropriate authorities to determine the appropriate means for use of IK should be Indigenous peoples' authorities. National authorities should be required to uphold international human rights law. As long as Indigenous peoples' rights are subject to national legislation, the right of self-determination will not be appropriately protected. History clearly shows that states' interests directly conflict with Indigenous peoples' rights.

A.4.2 True protection for IK cannot be based on IPRs in their existing or adapted form (i.e., community copyright or community marks). New sui generis protections should be based on Indigenous peoples' customary laws, which are the true sui generis protections for IK.

A.5.1 Protection of Indigenous peoples' rights over their knowledge should be a priority, not trying to balance interests of users of IK at the expense of compromising the rights of IK holders.

A.6.1 States' sovereignty is not absolute and does not amount to absolute political or legal freedom. Sovereignty of states is limited by the Charter of the United Nations and by other principles of international law, such as human rights treaties. We recommend inclusion of the analysis and findings of the report of the Human Rights Special Rapporteur, Erica Irene Daes in her *Final Report on Indigenous Peoples' Permanent Sovereignty Over Natural Resources*¹ as a fundamental principle for WIPO's work.

A.6.2 Until existing IPR conventions, agreements, and national laws are adapted to recognize Indigenous peoples as rightsholders over their own knowledge and resources, consistent with international human rights law, true protection of IK will never be achieved.

A.7.1 Given the conflict of interest that WIPO has to promote IPRs and the inability of IPRs to adequately protect IK, WIPO is an inappropriate body to establish any kind of international standards for the protection of IK. This work, in the interests of Indigenous peoples, is best carried out in the human rights arena.

A.8 We reiterate our comment in A.4.1 regarding subjecting Indigenous peoples' rights to national law.

Specific Substantive Principles

B3.2 This definition of traditional knowledge is narrow and limiting and therefore, fails to reflect the evolving and dynamic nature of IK in relation to specific peoples

¹E/CN.4/Sub.2/2004/30 Special Rapporteur, Erica Irene Daes, *Final Report on Indigenous Peoples' Permanent Sovereignty Over Natural Resources*

overtime and their territory. Furthermore, it is inappropriate for WIPO to define TK or IK.

B.8.2 This principle assumes that Indigenous knowledge already publicly released is within the "public domain." Indigenous peoples have asserted that with respect to Indigenous knowledge that is already documented in registers or databases, this knowledge is NOT in the public domain, and Indigenous peoples retain all rights over the ownership and use of this knowledge. Similarly, any Indigenous knowledge acquired without prior and informed consent is not in the public domain, and all rights remain with the affected Indigenous peoples. Mechanisms are necessary for the repatriation of Indigenous knowledge and genetic resources that have been illegally appropriated. Indigenous knowledge and genetic resources should be classified as inalienable cultural heritage, which is not subject to the laws relevant to public domain.

B9 IK in all forms must be protected in perpetuity.