

INTELLECTUAL PROPERTY, GENETIC RESOURCES AND ASSOCIATED
TRADITIONAL KNOWLEDGE: SHARING INDIGENOUS AND LOCAL COMMUNITY
EXPERIENCES

WIPO-IGC 30TH

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SLIDE ONE – TITLE SLIDE - MATAAUTA DECLARATION

Distinguished delegates to the IGC 30th session, it is an honour to be able to present some observations and insights to you on intellectual property, genetic resources and associated traditional knowledge from an indigenous perspective.

Let me begin my saying that I first visited WIPO in 1991. I was part of a small delegation of four representatives from Ngati Awa and Ngati Te Ata (Aotearoa NZ), the National Aboriginal and Islanders Legal Service (Australia) and the National Indian Youth Council (USA) participating in the UN-WGIP that used to meet just across the road in the UN headquarters. We were the core team that focussed specifically on the UN-DRIP articles relating to indigenous cultural and intellectual property issues. As well as pushing for text within the Declaration, and for reports and studies to be conducted on indigenous cultural and intellectual property issues. We also decided to look into how the world's pre-eminent organisation (WIPO) might be able to relieve the deep concern many indigenous communities had about the theft of their knowledge and biocultural heritage through the assertion patents and trademarks.

At that time, we were turned away and told that WIPO only worked with governments. Mind you we were young and a bit naïve and came here fully expecting a meeting with the Director General (without an appointment) but the point is that in 1991 indigenous intellectual property issues was simply not on WIPO's radar. There was no Wend Wendland (Director) or his team (the Traditional Knowledge Division) – no IGC (Intergovernmental Committee Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore). Responding to indigenous issues was simply not a consideration at that time. Within a few years that all changed.

SLIDE TWO – MATAATUA DECLARATION (1993) TEXT

Indigenous peoples looked to the international community because it was evident that the existing intellectual property laws at national level were not providing adequate legal protection to prevent misappropriation of traditional knowledge associated with genetic resources in the granting of patents. There were clear gaps in the laws. It was also evident that the very nature of ip laws, while relevant and in need of adjustment, simply could not deliver all that indigenous peoples were seeking. There was a string of ‘outrageous’ (erroneous) patents being asserted over traditional medicines, foods, and no one seemed to be taking any action.

There was a real sense of alarm as the problem was not just limited to private sector researchers and companies but some governments were also problematic.

In a discussion on the issue of traditional and Indigenous knowledge in the WTO’s Environmental Committee (1996), it was reported that Canada and the US progressed the view that *"From a legal standpoint, traditional and Indigenous knowledge was not an 'intellectual property' and cannot be treated as such"* Both favoured an approach where *"traditional and Indigenous knowledge could be recognised and rewarded through benefit sharing approaches which entail voluntary contractual arrangements on mutually agreed terms. Such private contractual arrangements did not require multilateral disciplines, nor would an international sui generis system be established to protect or grant some right of compensation for this type of subject matter."*ⁱ

I say this only for context acknowledging that these were by no means the only countries expressing this perspective. Indigenous peoples had to look to the international community because there weren’t sufficient responses happening at the national level. While that has changed in some countries it remains a concern in many others.

The 1993 Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoplesⁱⁱ makes the following assertions:

“that Indigenous Peoples are capable of managing their traditional knowledge themselves, but are willing to offer it to all humanity provided their fundamental rights to define and control this knowledge are protected by the international community”;

“that the first beneficiaries of indigenous knowledge (culture and intellectual property rights) must be the direct indigenous descendants of such knowledge”.

The Mataatua Declaration also made the following recommendations to States, national and international agencies,

In the development of policies and practices, States, National and International Agencies must

2.1 Recognise that indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge.

2.2 Recognise that indigenous peoples also have the right to create new knowledge based on cultural traditions.

2.3 Note that existing protection mechanisms are insufficient for the protection of Indigenous Peoples Cultural and Intellectual Property Rights.

2.4 Accept that the cultural and intellectual property rights of indigenous peoples are vested with those who created them.

2.5 Develop in full co-operation with indigenous peoples an additional cultural and intellectual property rights regime incorporating the following:

- collective (as well as individual) ownership and origin
- retroactive coverage of historical as well as contemporary works
- protection against debasement of culturally significant items
- cooperative rather than competitive framework
- first beneficiaries to be the direct descendants of the traditional guardians of that knowledge multi-generational coverage span

These remain the fundamental premises of how many indigenous peoples have engaged in national and international processes.

SLIDE THREE – UN-WORKING GROUP ON INDIGENOUS POPULATIONS (WGIP) REPORTS

Across the street at the UN-WGIP, discussions were advancing not only in terms of draft text for Articles within the UN Declaration on the Rights of Indigenous Peoples (UN-DRIP) but also in requiring more in-depth analysis of

the issues. Six reportsⁱⁱⁱ were requested by indigenous delegates and were duly conducted. As far as I'm aware, this amount of attention did not occur to the same level for any other issues within the DRIP with the possible exception of the UN Study on Treaties and Other Constructive Arrangements.

Notable is the sequence of these studies – starting with the protection of indigenous cultural property – followed by indigenous intellectual property – followed by a combined cultural and intellectual property report and then a more holistic approach of looking at the broader issue of heritage of indigenous peoples. This was not accidental. The order of the reports shows the development in understanding that was occurring. That in order to look at the protection of cultural property it would inevitably lead to investigating the role of intellectual property which would then lead to examining the inter-relationship of cultural and intellectual property and ultimately take the research to the inevitable space of studying indigenous heritage. This had been the contention of indigenous peoples since the first time the issue of intellectual property was raised within the UN-DRIP negotiations. In other words, that one could not extract the consideration of intellectual property issues from the broader context of indigenous heritage and world views.

E/CN.4/Sub.2/1991/34 3 July 1991 Working Paper on the question of the Ownership and Control of the Cultural Property of Indigenous Peoples;

E/CN.4/Sub.2/1992/30, 6 July 1992 Intellectual property of Indigenous Peoples: Concise Report of the Secretary General,

E/CN.4/Sub.2/1993/28 28 July 1993, Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples;

E/CN.4/Sub.2/1994/31 8 July 1994, Preliminary Report: Protection of the Heritage of Indigenous Peoples;

E/CN.4/Sub.2/1995/26, 15 June 1995 Final Report on the Protection of the Heritage of Indigenous Peoples; and

E/CN.4/Sub.2/1996/22, 24 June 1996 Supplementary Report: Protection of the Heritage of Indigenous Peoples

By way of background to the partnering of cultural and intellectual property, the following might be helpful. In resolution 1990/25 of 31 August, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities entrusted Professor Daes to prepare a working paper on the question of the ownership and control of cultural property of Indigenous peoples for submission to the ninth session of the WGIP. A number of Indigenous peoples and organisations^{iv}, submitted that the western legal

distinction between cultural property and intellectual property was superficial in that Indigenous cultures did not separate culture from intellect or intellect from culture. The Indigenous group asked that any further research into this area be progressed as a duality. In 1992, the Sub-Commission at its forty fourth session expressed the conviction in its resolution 1992/35 of 27 August 1992, that

"there is' a relationship, in the laws or philosophies of Indigenous peoples, between cultural property and intellectual property, and that the protection of both is essential to the Indigenous peoples' cultural and economic survival and development."

Accordingly, the Sub-Commission recommended that the title of the study Professor Daes was to undertake should be revised to "Protection of the cultural and intellectual - property of Indigenous peoples." All subsequent reports by Professor Daes reflect this inter-relationship.^v

SLIDE FOUR – WIPO FIRST ROUNDTABLE (1998)

My second visit to WIPO was as an invited panellist on the 1st ever WIPO roundtable. (By then I was working in government, had organised the WIPO-NZ Fact Finding Mission and was leading a whole of government review of Maori cultural heritage policies and legislation known as the Taonga Maori review.)

In the introductory remarks of the then WIPO Director General and Deputy DG it was said: *"the international intellectual property system must be democratic - if it is to survive **the system's benefits must be available to all....** we may begin to see a path forward towards ensuring that the benefits of all human creativity, wherever and however generated and maintained, may be protected, respected and shared according to commonly-recognized and -respected principles."*^{vi}

This was seen as an acknowledgement that the international community was indeed going to fix a gap in intellectual policy and law and thereby afford greater protection of indigenous knowledge, cultural and genetic resources. The formation of this very IGC in 2002 was considered a high point and created an optimism and anticipation that this process would be inclusive (as the UN-WGIP sessions had been) and bring constructive results.

SLIDE FIVE - UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2007)

Articles 1-5, 11, 12, 24-27, 31, 34

It took 25 years to finalise the UN Declaration because of the fears of a number of countries, four in particular (Canada, Australia, New Zealand and the USA). Interestingly, after the UN General Assembly adopted the Declaration in 2007, the fears that had delayed negotiations for the 13 years after the Declaration left the UN-WGIP and moved into the inter-governmental process were never realised. There wasn't a flood of submissions to the UN Decolonisation Committee, the social fabric of countries didn't turn into chaos and the world's economic system didn't collapse. (Well, it is collapsing but that has little to do with the recognition of indigenous peoples rights.) Life carried on as it always had.

There seem to be similarities with this IGC process – the reluctance of some countries to commit to move forward and finalise the IGC's work. Again concerns are being expressed, (lack of certainty for patent applicants, increased compliance costs, dis-incentivising innovation) but not all of these come from a place of evidence or feasibility.

Certainty - From an indigenous perspective, this IGC was established to try and provide certainty to traditional knowledge holders and indigenous communities that there would be a legal framework to protect the misappropriation of their knowledge and genetic resources.

Increased compliance costs - As with any revision of application procedures, new procedures would take a little time to adjust to but then the system would adjust and carry on.

Dis-incentivising innovation – there is no compelling evidence to suggest this would occur. It is purely speculative.

Professor James Anaya in his technical review of the IGC's work observed that there was an *“overall problem of being able to get any sense of whether the current draft texts can be useful or not”* because the text is ambiguous on the issue of indigenous rights and, because it includes bracketed language. Anaya goes on to observe that the current draft instrument does not go so far as *“to provide or require affirmative recognition of or specific measures of protection*

for indigenous peoples' rights in genetic resources or associated traditional knowledge".^{vii}

I'm stating the obvious here that the text of the draft IGC instruments matter to indigenous peoples as much as to governments. I've already highlighted through the Mataatua Declaration some of the expectations indigenous peoples have of what should be covered in any instrument that is dealing with genetic resources and associated traditional knowledge – we can add to that list:

- Clear unambiguous text on the requirement to demonstrate the free prior, informed consent of traditional knowledge holders was obtained;
- Consistency with the articles of the Declaration on the Rights of Indigenous Peoples;
- Putting the burden of proof on patent applicants to fully disclose whether their invention has used TK (and if so how) rather than on indigenous communities to have to catalogue in databases all of their TK as the main means of establishing prior art;
- Achieving certainty that the nature of indigenous interests in genetic resources and associated TK is not limited to moral rights but also includes economic rights;
- Including measures to ensure indigenous knowledge isn't declared public domain by default without evidence that there was an intention to place it there even if this requires including retroactive provisions. The concept of the public domain poses an unresolved problem for many indigenous peoples.

These are some of the issues you'll be discussing in the coming days. It was heartening to listen to the opening comments of the IGC Chair and statements of the regional coordinators to commit to narrowing gaps and to move forward. My hope for this IGC 30th session is that this happens.

SLIDE SIX – ART INSTALLATION BY MAORI ARTISTS TRACEY TAWHIO AND GEORGE NUKU

There is a saying that if you're not invited to the table, chances are you are on the menu. In the case of the WIPO-IGC meetings, indigenous peoples are invited to the table but are no longer accepting the invitation. This year there are only seven indigenous representatives here – and when the three indigenous panellists leave tomorrow (as we were only funded until then),

there will be just four indigenous representatives participating in IGC-30. That is the same number who came in 1991 when WIPO had no traditional work programme. By comparison there were well over 50 indigenous representatives at the first 1998 WIPO Roundtable on Intellectual Property and Indigenous Peoples.

Four indigenous representatives surely presents a low point in this IGC process, a warning signal that the IGC may have lost credibility with many indigenous peoples because of the impasse and blockage that has occurred here and the lack of certainty over the recognition of indigenous peoples as rights holders.

The inability of the Voluntary fund to fund indigenous representatives since 2014 is also a contributing factor. (Although over 600,000 CHF was contributed up until 2013 – no new contributions have come in since then and the current balance is under \$700 CHF).^{viii} Lack of available funding to support indigenous participation in IGC sessions sends a strong signal that indigenous voices are not an integral part of these negotiations.

For our part, the indigenous caucus recognises that we also need to be more proactive in encouraging greater participation from knowledge holders, indigenous scientists and lawyers and other indigenous representatives who would be able to contribute technical as well as policy guidance. We have committed to increase both the numbers of indigenous representatives as well as broaden the types of expertise they would cover.

Such a low number of indigenous representatives should not happen in a UN process that focuses on indigenous issues. Let's hope this was a one-off situation that will not be repeated. New contributions to the voluntary fund is essential.

SLIDE SEVEN – KUA TAE MAI TE WAI ME TURAKI NGA TAEPA

In terms of providing a quick update on Maori cultural and intellectual property issues, I can report that these remain unresolved in New Zealand. Government has yet to respond to the Waitangi Tribunal's 2011 report on the WAI262 Indigenous Flora and Fauna Claim.^{ix}

The WAI 262 claim is known as the flora and fauna claim and sought recognition of Maori interests and rights around indigenous flora and fauna and other 'taonga'. In this context, 'taonga' includes traditional knowledge and intellectual property rights over cultural ideas, design, language, native flora

and fauna, genetic resources and much more. Claimants of Wai-262 contended that the Crown had breached the Treaty of Waitangi by failing to protect *tinorangatanga* (sovereignty) and *kaitiakitanga* (guardianship) over flora, fauna and other *taonga*.

Past sessions of the IGC have had presentations on this claim in previous indigenous panels by Justice Joe Williams (presiding Judge on the WAI-262 Claim)^x and Ms. Hema Wihongi (daughter of Del Wihongi one of the claimants).^{xi}

In terms of concluding remarks, for those familiar with the Maori culture, and the performance of a *haka* (war dance) and a *powhiri* (traditional welcome) – where a warrior is sent out to a group to issue a *wero* (challenge) to see if they come with good intentions, I leave a *wero* here at this IGC-30th

Kua tae mai te wa me turaki nga taepa

The time has come when the fences can and should be pulled down (in the spirit of good faith and constructiveness).

I wish you well in your deliberations over the next week and sincerely hope that you make good progress during this IGC-30th session that will result in a strong message being sent to the world's indigenous and local communities that the IGC is ready to move forward in developing a legally binding international instrument (or instruments) to safeguard genetic resources and associated traditional knowledge and traditional knowledge and cultural expressions. A strong message should include an unambiguous commitment to recognise the rights of knowledge holders and to ensure greater indigenous participation through new contributions to the Voluntary Fund.

No reira, tena koutou, tena koutou, tena koutou katoa.

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ⁱ WTO Trade & Environment Committee Report, PRESS@010, 8 July 1996

ⁱⁱ For the full text of the Mataatua Declaration refer: <http://www.ngatiawa.iwi.nz/cms/view/mataatua-declaration.aspx>

^{iv} These organisations were: Ngati Awa, Ngati Te Ata (Maori from Aotearoa NZ), the National Aboriginal and Islanders' Legal Service (Australia) and the National Indian Youth Council (USA)

^v Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific, Aroha Te Pareake Mead, in Cultural and Intellectual Property rights: Volume 2 – Economics, Politics and Colonisation, IRI, Auckland 1997 http://www.kaupapamaori.com/assets/iri/cultural_intellectual_property.pdf

^{vi} WIPO Roundtable on Intellectual Property and Indigenous Peoples WIPO/INDIP/RT/98/1

^{vii} WIPO/GRTKF/IC/30/INF/10 – Technical review of key intellectual property-related issues of the WIPO draft instruments on genetic resources, traditional knowledge and traditional cultural expressions, By Professor James Anaya - *Information document submitted by the Secretariat of the United Nations Permanent Forum on Indigenous Issues* - March 3 2016.

^{viii} WIPO IGC-30 'Participation of Indigenous and Local Communities Voluntary Fund' WIPO/GRTKF/IGC/30/3

^{ix} For a copy of the Waitangi Tribunal Report on the WAI 262 Indigenous Flora and Fauna claim as well as facts and figures about the scope and objectives of the claim refer: <http://www.justice.govt.nz/tribunals/waitangi-tribunal/news/wai-262-ko-aotearoa-tenei-report-on-the-wai-262-claim-released>

^x Presentation of Justice Joe Williams to WIPO/IPTK/G E/15 'When Two Worlds Meet: Indigeneity and Intellectual Property' http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=300261

^{xi} Presentation of Ms Hema Broad to WIPO/GRTKF/IC/26 'INTELLECTUAL PROPERTY AND GENETIC RESOURCES: WHAT IS AT STAKE FOR INDIGENOUS PEOPLES?' http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=262997