

No. 8

Alternative Dispute Resolution for Disputes Related to Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources*

Alternative dispute resolution (ADR) offers an alternative to formal court-based systems for tackling intellectual property (IP) disputes that may arise in relation to traditional knowledge (TK), traditional cultural expressions (TCEs) and genetic resources (GRs). These disputes are often sensitive and involve parties that can be very diverse from a cultural and economic perspective. With ADR, the parties themselves assume responsibility for solving the conflict and can take into account issues other than legal norms. This is particularly important given the complex legal, social, political, cultural and historical dimensions of disputes over TK, TCEs and GRs.

Indigenous peoples and traditional and local communities have unique needs and expectations in relation to IP. Issues related to TK, TCEs and GRs are often intricately interwoven with cultural values about knowledge, its circulation and use. Many disagreements involve questions of culturally appropriate usage, sharing of knowledge and proper attribution. Court-based processes may not be able to resolve issues of this nature, which often have no recognized legal basis. Indeed, such processes can generally only address questions of law. Litigation may further disadvantage indigenous peoples and traditional and local communities who may face difficulties in accessing the legal system, either financially or materially and in making a legal case for their claim. Further, the adversarial nature of the judicial process can be a barrier to constructive dialogue.

For these reasons, ADR is an important element of the range of options available to indigenous peoples, traditional and local communities, and third-party users for resolving disputes. It also complements current efforts aimed at developing an international legal instrument for the protection of TK and TCEs and for regulating the interface between IP and access and benefit-sharing of GRs. This brief summarizes the key issues related to the use of ADR in the context of disputes relating to IP and TK, TCEs and GRs.

What is Alternative Dispute Resolution?

ADR seeks to resolve disputes in non-adversarial ways in order to reach outcomes of mutual benefit for all parties. ADR can be sensitive to the unique issues that underpin each dispute, and can therefore establish appropriate processes to address them.

ADR is an *alternative* to litigation. It is available as a means to resolve conflicts between a range of parties with varying levels of access to legal advice. ADR is characterized by having both formal and informal procedures, offering options beyond those of litigation, and granting parties more control in determining the parameters of the dispute and the most appropriate way to reach resolution.

* This background brief was prepared for WIPO by Dr. Jane E. Anderson, Assistant Professor, Centre for Heritage and Society, Department of Anthropology, University of Massachusetts and Adjunct Professor of Law, New York University School of Law.

ADR's four key methods are negotiation, mediation, arbitration and collaborative law (mediation and arbitration are examined in more detail below). While there are differences between these methods, all four provide flexible processes that aim to enhance the parties' understanding of the issues involved in a dispute, such as history and politics. This can help to identify the key elements at the center of the dispute, and thereby contribute to their resolution in sensitive ways.

Parties to ADR can include individuals, communities, collectivities, organizations, businesses and/or states. Because it is not necessarily linked to any specific national court system, ADR is particularly appropriate if the dispute involves parties from different countries and in multiple legal jurisdictions. ADR can also be a useful strategy for disputes between indigenous, traditional and local communities themselves.

For example, ADR could have been an option for the 2013 dispute around the auction of seventy Hopi and Zuni masks in Paris, France. These masks, made in the late nineteenth and early twentieth century in North America, are extremely sought after by collectors. From an indigenous perspective, they are sacred objects and contain cultural and spiritual elements that remain active and meaningful within contemporary Zuni and Hopi cultural practice. The dispute was around who the legitimate owners of these masks should be. It raised legal and non-legal questions about the conditions of initial acquisition and therefore the right to resale, authenticity, ongoing private property rights as well as underlying IP rights regarding reproduction of images of the masks and access and control of cultural knowledge embodied within them. With multiple areas of law, and differing cultural positions, ADR could have enabled the non-legal components, particularly the cultural significance of the works, to be included for consideration.

Mediation

Mediation is a non-binding procedure with few formalities where parties voluntarily submit a dispute for resolution. A neutral intermediary, the mediator, helps the parties reach a mutually satisfactory, interest-based settlement. In contrast to court-based processes, mediation enables the parties themselves to determine the structure and conditions for a settlement. The mediator works with the parties to determine the best framework for the mediation to take place and how it will be conducted, including identifying the important issues that need to be discussed. Mediation is a confidential process, unless the parties agree otherwise, and parties can withdraw from the procedure at any point. Mediation can also address non-legal issues. It encourages the parties to engage in a dialogue about what each understands the dispute to be about, and to work together to develop a resolution that takes into account each party's issues. There is no third party that imposes resolution or remedy. Mediation is non-binding and a party to mediation cannot be forced to accept an outcome that it does not like.

Arbitration

Arbitration is a more formal process than mediation. While it shares some principles with mediation, it differs in several ways. By agreement of the parties, a dispute is submitted to one or more arbitrators who make a final and binding decision. Arbitration functions like a tribunal and parties cannot unilaterally withdraw from the process once they have submitted to it. Unlike a court-based process, however, arbitration allows the parties to choose an appropriate arbitrator, and for the process to be confidential. A tribunal or panel of arbitrators renders the final judgment, called "award". Arbitration also focuses on the parties' legal positions and makes decisions based on the applicable substantial law. Any final decision is binding on the parties and is internationally enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

Advantages of Mediation and Arbitration for Disputes Involving TK, TCEs and GRs

ADR, especially mediation and arbitration, has many advantages for disputes involving TK, TCEs and GRs. Such processes can explore grievances in ways that recognize the different cultural value systems of the parties. They are also more likely to address direct needs and foster new relationships between the parties. A further advantage is that they can provide a single neutral procedure that can deal with multiple jurisdictions. Hence parties are able to develop solutions beyond those allowed by court-based processes. Importantly, ADR also encourages the choice of neutral mediators or arbitrators with direct experience and expertise in the issues at hand, drawn from indigenous communities or with knowledge of indigenous legal issues. Another advantage of ADR includes enabling a dispute to be completed within a reasonable timeframe. The following paragraphs highlight specific advantages for indigenous peoples and traditional and local communities, as well as third-party users.

Advantages for indigenous peoples and traditional and local communities

For indigenous peoples and traditional and local communities, ADR provides a context for resolving disputes that recognizes the cultural, ethical and historical concerns that exist in relation to IP and the use of TK, TCEs and GRs by third parties.

ADR offers an opportunity to:

- Recognize different value systems;
- Enable the incorporation of customary law processes;
- Recognize the legal and non-legal components of a dispute;
- Provide remedies that are culturally appropriate.

A further advantage is that communities themselves can be a party and indigenous peoples and traditional communities can represent themselves and do not have to rely on expensive or inaccessible legal counsel. Proceedings may even be conducted in the language of their choice.

Advantages for third-party users

For third-party users, including museums, archives, libraries, research institutes, universities, individuals and industry, ADR provides a means to recognize and resolve the inter-related social, cultural and political dimensions of the claim.

ADR offers an opportunity to:

- Establish relationships between communities and institutions;
- Reduce animosity and misunderstandings;
- Explain motivations and intentions in a less formal and less confrontational way;
- Engage in dialogue and create conditions for understanding cultural differences;
- Add value to potential products derived from TK, TCEs and GRs.

Indigenous peoples have the right to access and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

United Nations Declaration on the Rights of Indigenous Peoples, Article 40

Potential Challenges of ADR

ADR processes can help unravel misunderstandings about the complicated elements of IP law, and the ways in which it is interpreted, understood and realized in commercial and non-commercial settings. However, ADR is not an alternative to the legal protection of TK, TCEs and GRs and should be understood as a complementary strategy or additional resource for dispute settlement. Any ADR process that addresses TK, TCEs and GRs should be attuned to the possibility of inter-cultural differences from its inception, enabling customary law processes and protocols to be incorporated when needed.

Conclusion

ADR offers an alternative to litigation for resolving conflicts involving IP and TK, TCEs and GRs. This is because the issues that arise do not only involve the resolution of competing legal claims, but also a complex layering of interests and responsibilities, developed through historical and contemporary engagements with indigenous peoples and that exist within traditional and local communities. ADR can therefore allow for a fuller and more comprehensive understanding of what is at stake and for whom.

ADR is thus an important element of the range of options available to indigenous peoples, traditional and local communities and third-party users. It does not replace current efforts to develop an international legal instrument. Rather, it is a complementary tool, which could enhance the applicability and effectiveness of any future international instruments.

WIPO Services in Arbitration and Mediation

The WIPO Arbitration and Mediation Center was established in 1994 to offer ADR options for the resolution of international commercial disputes between private parties. Developed by leading experts in cross-border dispute settlement, the mediation, arbitration and expert determination procedures offered by the Center are widely recognized as appropriate for intellectual property disputes.

As part of the WIPO ADR Services for Specific Sectors, the Center provides dispute resolution, advice and case administration services to help parties resolve disputes arising in the area of art and cultural heritage. WIPO ADR procedures in this area have involved various parties, including artists, art galleries, museums and indigenous and local communities. For example, the Center has carried out its “good offices” in a matter between a museum and an indigenous community concerning the restitution of a cultural object, as well as related IP issues. In addition, the Center, in conjunction with the International Council of Museums, now also offers mediation for art and cultural heritage disputes.

In the area of biodiversity, the Center has provided technical assistance to the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) Secretariat in developing the Rules for Mediation of a Dispute in relation to a Standard Material Transfer Agreement.

More information about the Center can be found at: www.wipo.int/amc/en/; about its dispute resolution services in the area of art and cultural heritage at: www.wipo.int/amc/en/center/specific-sectors/art/, and about its dispute resolution services in the area of biodiversity at: www.wipo.int/amc/en/center/specific-sectors/biodiversity/.

Further Information

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