

Reflections on Intellectual Property, Traditional Knowledge and Cultural Expressions

INDIGENOUS RIGHTS TO TRADITIONAL KNOWLEDGE AND CULTURAL EXPRESSIONS: IMPLEMENTING THE MILLENNIUM DEVELOPMENT GOALS

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As panelists at the 2007 Intellectual Property (IP) Protection for Traditional Knowledge and Cultural Expressions (TCEs) Conference made clear, there is currently a growing list of countries with national laws related to traditional knowledge, cultural expressions and genetic resources.¹ In addition, at least one panelist, Professor Angela Riley, has noted that some indigenous peoples are now codifying their *sui generis* and long-standing systems of laws in an effort to place themselves on the same footing as other citizens

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¹ Shantanu Basu, Panel 1 Materials, *Global Legislative Efforts on Protection for Traditional Knowledge and Cultural Expressions*, (Nov. 9, 2007) (unpublished conference materials, University of Santa Clara School of Law)(on file with author); Gustavo Morais, Panel 1 Materials, *Access to Biodiversity – Brazilian Perspective*, (Nov. 9, 2007) (unpublished conference materials, University of Santa Clara School of Law)(on file with author); Molly Torsen, *Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues*, *infra*, at 199.

who currently enjoy intellectual property rights under national and international law.² Discussion and proposals surrounding their relationship to the TRIPS Agreement and the Convention of Biological Diversity (CBD) are ongoing.³ Lively discussion surrounds the many issues related to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples,⁴ which was adopted by the UN General Assembly only two months before the IP conference in Santa Clara.⁵ This paper centers on the United Nations Millennium Development Goals (MDGs), proposed TCE and genetic resource related amendments to the TRIPS Agreement mentioned by panelist Hannu Wager in Santa Clara, and lingering holes in the recognition of indigenous intellectual property rights.

The UN Millennium Development Goals are eight target goals that the international community has dedicated itself to achieving by the target date of 2015.⁶ They are the guideposts for implementing the Millennium Declaration which the UN General Assembly adopted in 2000.⁷ The eight goals are: (1) eradication of extreme poverty and hunger; (2) achievement of universal primary education; (3) promotion of gender equality and empowerment of women; (4) reduction of child mortality; (5) improvement of maternal health; (6) fighting HIV/AIDS, malaria, and other diseases; (7) ensuring environmental sustainability; and (8) developing a

² Angela R. Riley, "Straight Stealing": *Towards an Indigenous System of Cultural Property Protection*, 80 WASH.L.REV. 69, 131 (2005).

³ Hannu Wager, *Biodiversity, Traditional Knowledge and Folklore: Work on Related IP Matters in the WTO*, *infra*, at 215.

⁴ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

⁵ Indeed, Alberto Saldamundo of International Indian Treaty Council spoke about the implications of the Declaration's passage for recognition of the intellectual property rights of indigenous peoples as well as on implementation of its Article 31. See generally S. James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, JURIST Forum, Oct. 3, 2007, <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>.

⁶ UN Millennium Development Goals, <http://www.un.org/millenniumgoals/>.

⁷ G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 8, 2000).

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global partnership for development.⁸ Specific targets and indicators have also been set for measuring the levels of achievement of the goals.⁹ It is clear from the latter that the eight goals may very well not be met by their target date. I argue that plugging the holes in the recognition of indigenous intellectual property rights will actually serve to advance the timely implementation of the MDGs.

The MDGs are laudable goals that enjoy widespread approbation. Approving parties include indigenous peoples, who are amongst those most likely to benefit from effective implementation of the MDGs, since they remain at the bottom of the indicators contained therein.¹⁰ However, indigenous peoples, the UN Permanent Forum on Indigenous Issues (UNPFII), and Inter-Agency Support Group on Indigenous Issues (ISGII) have stated that it is imperative that indigenous peoples participate fully. Moreover, the entire context in which indigenous peoples are forced to live should be taken into account when implementing the MDGs.¹¹ Without it, national and international efforts to implement the MDGs are likely to concentrate on the mainstream development model, in which the lands and resources of indigenous peoples are appropriated and/or destroyed such that the latter are plunged deeper into poverty.¹² International actors such as the World Bank Group (WBG), World Intellectual Property Organization (WIPO), and the World Trade Organization (WTO) have been precisely the organizations that have

⁸ See *supra* note 5.

⁹ For a complete listing of the targets, goals and indicators for MDGs, see http://devdata.worldbank.org/gmis/mdg/list_of_goals.htm.

¹⁰ “Nevertheless, the information available – both statistics that do exist and experience acquired in the course of our work – indicates that these peoples rank at the bottom of the social indicators in virtually every respect.” Statement of the Inter-agency Support Group on Indigenous Issues Regarding Indigenous Peoples and the Millennium Development Goals 30 September and 1 October 2004, Fourth Session of the Permanent Forum on Indigenous Issues, http://www.hreoc.gov.au/social_Justice/sj_report/sjreport06/chap4.html.

¹¹ See generally Victoria Tauli-Corpuz, *Indigenous Peoples and the Millennium Development Goals*, http://www.tebtebba.org/tebtebba_files/ipr/mdg.html, citing Fourth Session of the UN Permanent Forum on Indigenous Issues, available at http://www.un.org/esa/socdev/unpfii/documents/doc_fourth_4session.htm.

¹² *Id.*

promoted the mainstream development model to the exclusion of indigenous peoples' own economic and development paradigms.¹³

It is widely acknowledged that intellectual property law is pivotal to local as well as global economies. Yet, efforts to amend TRIPS by developing countries and others, discussed by Hannu Wager in this volume, are all geared towards intellectual property law that exclusively supports the mainstream or dominant development model. These efforts have great potential for turning any implementation of MDGs into yet another force that exacerbates the dire situation of indigenous peoples. Scholars, activists, and even WIPO consultants have continually pointed out that indigenous and tribal peoples already have their own customary laws and rules which relate to the protection and sharing of cultural property.¹⁴ Logically, such laws and rules are as tied to indigenous economies as western intellectual property law is tied to the economies of nation-states. Indigenous economies are necessarily undermined when their laws and rules regarding TCEs and genetic resources are simply ignored.

Nevertheless, nation-states are not inclined to actually enforce the rules and laws of indigenous peoples at either the national or international level, because it is far easier for the former to proceed as if the latter did not exist. This tendency leaves indigenous peoples in a double bind, because even if their laws are recognized as being *sui generis* at the international level, the deference of international law to national law, particularly in the area of intellectual property law, may leave them effectively in the same position as they are now.

¹³ *Indigenous Knowledge: Local Pathways to Global Development, Marking Five years of the World Bank Indigenous Knowledge for Development Program*, Knowledge and Learning Group - Africa Division of the World Bank, 2004, <http://siteresources.worldbank.org/EXTINDKNOWLEDGE/Resources/ikcomplete.pdf>.

¹⁴ See Aroha Mead, *Third Party Use of Indigenous Cultural Heritage Inspiration, Innovation, or Appropriation?*, A detailed analysis of the misappropriation of the moko and non-indigenous contempt for Maori law (Nov. 9, 2007) (unpublished conference materials, University of Santa Clara School of Law)(on file with author). See also Torsen, *infra*, at 205.

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Article 31(1) of the UN Declaration on the Rights of Indigenous Peoples states that:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.¹⁵

Nation-states also have a responsibility with respect to the protection of these rights.¹⁶ This includes protecting the right of indigenous peoples to *control* what is theirs. The next Article declares that “Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”¹⁷ Nevertheless, it remains to be seen whether the *modus operandi* at both national and international levels will continue to be one of ignoring the rights of indigenous peoples.

One might think that the current state of affairs reflects the fact that the Declaration is “soft” law. However, there are other Conventions besides the CBD which might lend more force to the Declaration. Particularly pertinent to indigenous TCEs, genetic resources, and economic/development issues is the recently adopted UNESCO Convention on Cultural Diversity (CCD).¹⁸ The

¹⁵ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 4, art. 31(1).

¹⁶ Article 31(2) specifically states that, “In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.”

¹⁷ United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 4, art. 32(1).

¹⁸ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, 45 I.L.M. 269, *available at* http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&

preambular paragraphs of the CCD lend such specific support to the pivotal role that recognition and protection of indigenous intellectual property rights, the nondiscriminatory implementation of the MDGs, and cultural diversity play in thriving indigenous economies that some of them are worth reproducing here:

Being aware that cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development for communities, peoples, and nations . . .

Emphasizing the need to incorporate culture as a strategic element in national and international development policies, as well as in international development cooperation, taking into account also the United Nations Millennium Declaration (2000) with its special emphasis on poverty eradication . . .

Recognizing the need to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where cultural expressions may be threatened by the possibility of extinction or serious impairment . . .

Recognizing that the diversity of cultural expressions, including traditional cultural expressions, is an important factor that allows individuals and peoples to express and to share with others their ideas and values . . .

Taking into account the importance of the vitality of cultures, including for persons belonging to minorities and indigenous peoples, as manifested in their freedom to create, disseminate and distribute their traditional cultural expressions and to have access thereto, so as to benefit them for their own development . . .

Recognizing the importance of intellectual property rights in sustaining those involved in cultural creativity . . .

URL_SECTION=201.html. See also Michael Hahn, *A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law*, 9 J. INT'L ECON. L. 515 (2006).

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Being convinced that cultural activities, goods and services have both an economic and cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value

The preambular paragraphs are more like “soft” law. In addition, although the CCD is a convention, it is noteworthy for its “wobbly” provisions that do not really commit nation-states as firmly as one might initially assume.¹⁹ Furthermore, its history reveals a strong emphasis on the dominant model of development with debate surrounding market-based approaches to cultural expressions that originate primarily from only a few nation-states, such as: film, audio, music, and video recordings of “popular” culture.²⁰ Nevertheless, the CCD is a convention rather than simply a declaration. It obligates nation-states signatories to use good faith efforts to make themselves and the world more culturally diverse (without creating an enforcement mechanism).²¹ The CCD promises to have an important impact on future global debate on cultural diversity as well as on the development of customary international law.²² The unanimously adopted UNESCO Universal Declaration on Cultural Diversity²³ along with the CCD may help to establish cultural diversity as an internationally recognized value.²⁴ This development alone would be pivotal for indigenous peoples and the nondiscriminatory implementation of the Millennium Development Goals.

¹⁹ Michael Hahn, *The Convention on Cultural Diversity and International Economic Law*, 2 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 229, 230-36 (2007) (referring to the CCD as having “rather weak operative provisions”).

²⁰ *Id.* at 230-43.

²¹ *Id.* at 245.

²² *Id.* at 254.

²³ UNESCO Universal Declaration on Cultural Diversity, UNESCO General Conference, 31st Session, CLT.2002/WS/9 (Nov. 2, 2001), <http://unesdoc.unesco.org/images/0012/001271/127160m.pdf>.

²⁴ *See* Hahn, *supra* note 19, at 256.