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## Permanent Forum on Indigenous Issues

### Twenty-first session

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**Discussion on the six mandated areas of the Permanent Forum (economic and social development, culture, environment, education, health and human rights), with reference to the United Nations Declaration on the Rights of Indigenous Peoples, the outcome document of the World Conference on Indigenous Peoples and the 2030 Agenda for Sustainable Development**

## Collective intellectual property and the appropriation of the ideas and creations of indigenous peoples

### Note by the Secretariat

#### *Summary*

At its twentieth session, the Permanent Forum on Indigenous Issues appointed Irma Pineda Santiago and Simón Freddy Condo Riveros, members of the Forum, to conduct a study on collective intellectual property and the appropriation of the ideas and creations of indigenous peoples, to be submitted to the Forum at its twenty-first session.



## Introduction

1. Recognition of the intellectual property system is a subject that the United Nations has addressed through its specialized agency, the World Intellectual Property Organization (WIPO),<sup>1</sup> which is responsible, inter alia, “for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development”. However, this system focuses on private intellectual property and excludes the system of collective and community ownership advocated by indigenous peoples, which has generated controversy and is a pending matter.

2. This is also a question of political will, since it means believing that it is more important to settle a historically postponed and racist issue that seeks to exclude indigenous peoples or give priority to purely financial and profitable considerations. The knowledge, wisdom, tools and methods used by indigenous peoples to solve their problems have been passed on, and should continue to be passed on, as a legacy, not only to future generations, but to the whole of humankind.

3. The lack of awareness of this situation means that humankind is deprived of the right to have access to the contribution and wisdom of indigenous peoples, who are denied the right to share their knowledge and wisdom. A society that values only private property, to the detriment of the property of humankind, is inconceivable. WIPO and the States Members of the United Nations must therefore provide the necessary legal frameworks for valuing, protecting and safeguarding the permanence of the rights of indigenous peoples over their cultural heritage and their collective intellectual property, which includes traditional knowledge and knowledge of biodiversity. The continuation and repetition of patterns of exclusion of indigenous peoples during the pandemic can be explained in part by the fact that the States of Latin America share a colonial past from which they inherited their systems of law and government, whose common features include presidentialism and the concentration and abuse of power. States have incorporated legal or constitutional mechanisms that authorize the executive to implement exceptional measures to prevent the possibility of direct interference with political power, including in abnormal or emergency situations, such as the pandemic. In relation to indigenous peoples, the colonial legacy of States is evident in policies and practices of reductionism, assimilation and integration.

## I. Background

4. Indigenous peoples are the creators and guardians of a range of knowledge that they have sustained in their collective memory and passed on to subsequent generations. As in any ongoing process, each generation has helped to enrich this knowledge.

5. This knowledge constitutes the intangible cultural heritage of indigenous peoples, which has been defined by the United Nations Educational, Scientific and Cultural Organization (UNESCO) as “traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe or the knowledge and skills to produce traditional crafts”.<sup>2</sup>

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<sup>1</sup> Agreement between the United Nations and the World Intellectual Property Organization. See <https://wipolex.wipo.int/en/text/305623>.

<sup>2</sup> See “What is Intangible Cultural Heritage?”, <https://ich.unesco.org/en/what-is-intangible-heritage-00003>.

6. Therefore, when speaking of the intellectual property of indigenous peoples, traditional knowledge and knowledge of biodiversity should be included, since both their knowledge and their creations, discoveries and innovations constitute their intellectual property, which “includes the information, practices, beliefs and philosophy that are unique to each indigenous culture. Once traditional knowledge is removed from an indigenous community, the community loses control over the way in which that knowledge is used. In most cases, this system of knowledge evolved over many centuries and is unique to the indigenous peoples’ customs, traditions, land and resources. Indigenous peoples have the right to protect their intellectual property, including the right to protect that property against its inappropriate use or exploitation”.<sup>3</sup>

7. The international intellectual property system is composed of three major property rights systems:<sup>4</sup>

(a) Copyright. These rules confer on the creator of a literary, artistic or scientific work the right to publish or reproduce it.

(b) Industrial property. These rules confer the right to exclude others, and of course competitors, from benefiting financially from inventions that have a trade or industry application. Its key characteristics are individuality, tangibility, innovation, novelty, temporality and likelihood of industrial application.

(c) Plant breeders’ rights are property rights granted to an individual – or the employer of that individual – who has bred or discovered or developed a new plant variety, giving them exclusive control over the reproduction (or copying) of its protected material.

8. Individuals and companies have been named in connection with the misappropriation of the intellectual property of the knowledge and creations of indigenous peoples. They include the fashion designers Isabel Marant and Carolina Herrera,<sup>5</sup> the companies Nike, Louis Vuitton, Nestlé, Mango, Rapsodia and Pineda-Covalín, the Spanish company Zara, the Mexican company That’s It, the United States company Forever 21, the Indonesian brand Batik Amarillis, the British companies Star Mela and Marks and Spencer, and Hermès.<sup>6</sup> Although these cases have been reported to WIPO, most are still pending, and little can be done to defend the intellectual property rights of indigenous peoples since most Latin American and Caribbean countries have no domestic legal framework that protects these rights, even though several of them have signed international documents that contemplate, from different angles, the protection of the intellectual property rights of indigenous peoples, such as:

(a) The United Nations Declaration on the Rights of Indigenous Peoples, which establishes, inter alia, the obligation of States to provide effective redress “with respect to their cultural, intellectual, religious and spiritual property taken without

<sup>3</sup> See Leaflet No. 12: WIPO and Indigenous Peoples, [www.ohchr.org/Documents/Publications/GuideIPleaflet12en.pdf](http://www.ohchr.org/Documents/Publications/GuideIPleaflet12en.pdf).

<sup>4</sup> Víctor Toledo Llancaqueo, “El nuevo régimen internacional de derechos de propiedad intelectual y los derechos de los pueblos indígenas,” in *Pueblos Indígenas y Derechos Humanos*, M. Berraondo, ed. (University of Deusto, 2006). Available at [www.nacionmulticultural.unam.mx/empresasindigenas/docs/2260.pdf](http://www.nacionmulticultural.unam.mx/empresasindigenas/docs/2260.pdf).

<sup>5</sup> “El plagio de artesanías a indígenas, un lucro millonario que las leyes no logran frenar en México”, *El País*, 9 April 2021. Available at <https://elpais.com/mexico/2021-04-10/el-plagio-de-artesanas-a-indigenas-un-lucro-millonario-que-la-ley-no-logra-frenar-en-mexico.html> (accessed 6 October 2021).

<sup>6</sup> “Plagios a diseños de indígenas van en aumento”, *El Financiero*, 22 October 2018. Available at [www.elfinanciero.com.mx/economia/plagios-a-disenos-de-indigenas-van-en-aumento/](http://www.elfinanciero.com.mx/economia/plagios-a-disenos-de-indigenas-van-en-aumento/) (accessed 11 October 2021).

their free, prior and informed consent or in violation of their laws, traditions and customs”.

(b) The Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization (ILO), which, in addition to advocating free, prior and informed consultation on matters affecting the lives of indigenous peoples, establishes in article 5 that “the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals” and in article 15 states that “the rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources”.

(c) The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage of 2003.

(d) The Convention on Biological Diversity, which urges the States Members of the United Nations to implement the relevant measures to ensure that biological diversity is protected and correctly used.

(e) The Berne Convention for the Protection of Literary and Artistic Works, which seeks to protect the intellectual output covered by the scope of the Convention.

9. In addition, in Latin America, countries such as Brazil and Panama and, more recently, Mexico, have made progress in passing laws on the protection of intellectual property, specifically that of indigenous peoples, as follows:

(a) In Brazil, Act No. 13.123 on access to and sharing of the benefits of genetic resources and the associated traditional knowledge (Intellectual Property Act)<sup>7</sup> entered into force on 17 November 2015. By means of this Act, the legislative branch regulates access to the components of genetic heritage, protection and access to associated traditional knowledge and fair and equitable sharing of benefits for the conservation and sustainable use of Brazilian biodiversity. Article 6 of the Act establishes that policies must be formulated to regulate access “to heritage and related traditional knowledge and the sharing of benefits”, which must be implemented in accordance with the laws in force. In addition, in article 8, paragraph 1, the State “recognizes the right of indigenous peoples, traditional communities and traditional farmers to participate in decision-making at the national level”.

(b) In Mexico, the Federal Act on the Protection of the Cultural Heritage of Indigenous and Afro-Mexican Peoples and Communities<sup>8</sup> was approved by the Congress of the Union on 1 December 2021. Its purpose is to protect the knowledge, culture and identity of indigenous and Afro-Mexican peoples and communities from unauthorized use. The aim is to address a legal loophole that allows outsiders to appropriate these communities’ knowledge and cultural expressions without sharing with them the benefits arising from the use and exploitation of those goods.

(c) In Panama, the law of June 2000<sup>9</sup> establishes a special system for the collective intellectual property rights of indigenous peoples, to protect and defend their cultural identity in the form of traditional knowledge. It establishes, inter alia,

<sup>7</sup> Act No. 13.123 of 20 May 2015 on access to and sharing of the benefits of genetic resources and related traditional knowledge. [www.wipo.int/news/es/wipolex/2015/article\\_0014.html#:~:text=The%20Law%20regulates%20access%20to%20the%20biodiversity%20of%20Brazil.](http://www.wipo.int/news/es/wipolex/2015/article_0014.html#:~:text=The%20Law%20regulates%20access%20to%20the%20biodiversity%20of%20Brazil.)

<sup>8</sup> See [www.diputados.gob.mx/LeyesBiblio/pdf/262\\_210618.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/262_210618.pdf).

<sup>9</sup> See [https://cerlalc.org/laws\\_rules/ley-20-de-2000-del-regimen-especial-de-propiedad-intelectual-sobre-los-derechos-colectivos-de-los-pueblos-indigenas-para-la-proteccion-y-defensa-de-su-identidad-cultural-y-de-sus-conocimientos-tradic/](https://cerlalc.org/laws_rules/ley-20-de-2000-del-regimen-especial-de-propiedad-intelectual-sobre-los-derechos-colectivos-de-los-pueblos-indigenas-para-la-proteccion-y-defensa-de-su-identidad-cultural-y-de-sus-conocimientos-tradic/).

that use and marketing must be governed by the rules of each community. The Panamanian system provides that cultural heritage may not be the subject of “exclusive rights of any kind on the part of third parties that have not been authorized via the intellectual property system”. However, there has so far been some distrust among indigenous communities regarding joining a system for registering elements of their intellectual property and cultural heritage.

## II. Rules that protect indigenous rights

10. The rights of indigenous peoples are identified in a number of important international instruments, although implementation depends in practice on the political will of the signatory Governments. These instruments include:

(a) The United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007, which recognizes self-determination, equality, non-discrimination and the right to self-government and autonomy and to free, prior and informed consent.

(b) The Indigenous and Tribal Peoples Convention, 1989 (No. 169) of ILO, adopted on 27 June 1989, recognizes two categories of indigenous peoples: indigenous peoples and tribal peoples. The Convention recognizes the administration of justice and customary law of indigenous peoples; the right to be consulted and to participate; the right to land, territory and natural resources; social and labour rights; bilingual education; and cross-border cooperation.

(c) The International Covenant on Civil and Political Rights, adopted by the General Assembly on 16 December 1966. The Human Rights Committee, which is responsible for monitoring compliance with the Covenant, has applied several of its provisions in the specific context of indigenous peoples, including the right to self-determination (art. 1) and the rights of national, ethnic and linguistic minorities (art. 27).

(d) The International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly on 16 December 1966. The Committee on Economic, Social and Cultural Rights, which is responsible for monitoring the implementation of the Covenant, has also applied some of its provisions in the specific context of indigenous peoples, including the right to housing; the right to food; the right to education; the right to health; the right to water; and intellectual property rights.

(e) The International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly on 21 December 1965. The Committee on the Elimination of Racial Discrimination, which is responsible for monitoring implementation of the Convention, has paid special attention to the situation of indigenous peoples through its various procedures.

(f) The Convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly on 18 December 1979. The Committee on the Elimination of Discrimination against Women has paid special attention to the situation of indigenous women as particularly vulnerable and disadvantaged groups. See, for example, General Recommendation No. 24 on women and health. In the resolution establishing the mandate of the Special Rapporteur on the rights of indigenous peoples, the Human Rights Council requested the Special Rapporteur to pay special attention to the situation of indigenous women and to take into account a gender perspective in the performance of the mandate.

(g) The Convention on the Rights of the Child, adopted by the General Assembly on 20 November 1989. Article 30 of the Convention explicitly refers to the situation of indigenous children. On the basis of this provision, the Committee on the Rights of the Child has paid special attention to the situation of indigenous children (see the Committee's recommendations). In the resolution establishing the mandate of the Special Rapporteur on the rights of indigenous peoples, the Human Rights Council requested the Special Rapporteur to pay special attention to the situation of indigenous children.

(h) The Convention on Biological Diversity, adopted in Rio de Janeiro on 5 June 1992. In article 8(j), the Convention recognizes the right of "indigenous and local communities" to "knowledge, innovations and practices...embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity" and to participate in their wider application and the benefits arising therefrom. The Conference of the Parties to the Convention has adopted a number of relevant decisions on these matters and has developed voluntary guidelines on conducting assessments of the cultural, environmental and social impact on indigenous communities. (See Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments regarding Developments Proposed to Take Place on, or which are Likely to Impact On, Sacred Sites and On Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities).

(i) The United Nations Framework Convention on Climate Change, adopted in 1992. This Convention aims to stabilize greenhouse gas concentrations at a level that would prevent dangerous human-induced interference with the climate system, based on a two-pronged strategy of mitigation and adaptation measures. In 2016, the States Parties committed to strengthening their global response in the historic Paris Agreement, which is the first agreement in which the human rights and the rights of indigenous peoples are explicitly recognized. The preamble acknowledges that climate change is a common concern of humankind and that Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health and the rights of indigenous peoples. These references represent an important milestone and commitment, since, when implementing the Agreement, the Parties must ensure that the rights of indigenous peoples are respected in their action on climate change.

(j) The Paris Agreement recognizes the need to strengthen the knowledge, technologies, practices and efforts of local communities and indigenous peoples in addressing and responding to climate change and recognizes that adaptation action should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions. The Escazú Agreement is a regional agreement on access to information, participation and justice in environmental matters in Latin America and the Caribbean. It was opened for signature at United Nations Headquarters in September 2018 and calls on Parties to assist indigenous peoples in preparing their requests for environmental information and obtaining a response (art. 5.4). It requires Parties to ensure compliance with their domestic legislation and international obligations in relation to the rights of indigenous peoples (art. 7). It also establishes that Parties must ensure a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threats, restrictions and insecurity (art. 9).

11. However, this international recognition of indigenous peoples' rights remains inadequate, as it is more akin to charity. All of their full rights as indigenous peoples or nations are not recognized, or their intellectual property, creations, innovations and

technologies. The cultural heritage of many indigenous peoples is in danger because the underlying problem, recognition of collective rights, is not being addressed. In addition, many of the world's peoples are unable to enjoy their human rights and fundamental freedoms.

12. The cultural and intellectual heritage of indigenous peoples consists of traditional practices, knowledge and ways of life, but it also constitutes the very life of indigenous communities and peoples and transcends the limits to become a legacy to humankind. In some cases, lives have been lost defending their knowledge and plants that have social, cultural, political and medicinal value.

13. An example is the coca leaf, which has existed for thousands of years and has a ritual and special use in the worldview of indigenous peoples. It has been transformed in the laboratories of western universities through the extraction of a component that is used in medicines such as lidocaine, a powerful local anaesthetic used by dentists and by doctors during surgery. The derivative known as cocaine has become a curse that poisons young people and is used by Governments to incite their armies to commit crimes against humanity.

### **III. Surrendering rights with nothing in return**

14. Some institutions, such as WIPO, have suggested to indigenous peoples that, in order to obtain recognition of their property rights in respect of medicines, they should agree to collaborate with or sign agreements with pharmaceutical companies, which will process the patent. Similarly, in the case of textiles, which have been plagiarized by various well-known firms and brands, Governments have proposed to indigenous artisans or creators that they should establish collaboration agreements with those firms, which continues to place indigenous peoples and communities at a clear disadvantage.

15. In other words, indigenous peoples should give up or hand over their knowledge to these pharmaceutical and textile firms and textile factories, which then become the owners and exploiters of that knowledge and other elements of collective intellectual property, while indigenous peoples become the suppliers of the raw materials and the wisdom, on the grounds that this will provide them with a secure market.

16. The major challenge in most Latin American and Caribbean countries continues to be that indigenous peoples and communities lack recognition as subjects of law, which prevents them from having full access to the jurisdiction of their States and limits their ability to assert their rights before any instance of Government or the court.

17. In any patent litigation settled by the courts, the case is not won by the party who is right, but by the party who hires the most prestigious lawyers, who are not necessarily the most honest, but those who use the most dishonest means or tactics to win. In those circumstances, the indigenous people will lose, because they have barely enough resources to meet their basic needs.

### **IV. A legacy or destroyed by the market**

18. Indigenous peoples protect life, in the holistic sense. Indigenous peoples consider that life comes before the individual or nature. Life cannot exist in isolation, it is in a permanent state of reciprocity. Statistics show that 80 per cent of the planet's conserved biodiversity is found in indigenous territories, which makes it clear that those who have been best able to conserve nature are indigenous peoples, precisely because they view human beings and the environment as one.

19. Conversely, in the current market-based capitalist system, competition and the extraction of natural resources, knowledge and all the creations of indigenous peoples lead to the destruction of forests, pollute rivers and lakes, plunder nature by extracting minerals and oil and loot the daily life and survival of peoples. In other words, they destroy them so that a minority may benefit. The market cannot determine the right to life for some and death for others.

20. In this regard, individual or corporate intellectual property cannot be placed above human rights. This should be the fundamental discussion: individual rights alone cannot be recognized, to the detriment of collective rights. Similarly, the United Nations should be consistent with its own Declaration on the Rights of Indigenous Peoples.

## **V. Collective intellectual property and individual property**

21. Why defend collective ownership and not individual ownership? This question was posed to various members of indigenous communities during the preparation of the present report. Among the many responses received, the one shared by Alberto Morales Luquisani, an elderly man from the Muñecas province in the department of La Paz, Plurinational State of Bolivia, stands out:

“What do we see in the cities? Private property, this is mine, that is yours and nothing belongs to the people. Even the streets and avenues belong to the municipality, so no one cares how their neighbour lives, whether the street is clean or whether there is a person lying on the ground. They have forgotten about reciprocity, solidarity and complementarity. Functioning in isolation like this, a few will own everything and the rest are destined to be poor”.

22. If the knowledge and wisdom of indigenous peoples becomes private property, only those who claim ownership will have the right to enjoy it, while everyone else will be merely employees. That is the difference and the essence of a collective right and of community or collective ownership.

23. Protecting collective property ensures that no one can appropriate a medicine, a piece of knowledge, a design, a people or a territory, because it belongs to the community. If it is collectively owned, the spiritual essence of the signs printed in the designs cannot be distorted. Collective ownership ensures that the symbolism of the communities is maintained in everything they make, create or discover, together with their rituals for making use of natural resources and sacred spaces and territories. There is therefore no exploitation of any element of biodiversity or the creations that have come from the minds of the members of the communities and everything that is collectively owned benefits the entire community.

24. That is the difference between collective property and private property. Living well is guaranteed for all, rather than the few. One cannot live well if others live badly. It is a right that makes self-determination possible and allows a people to define the kind of society and law it wants.

## **VI. Recommendations**

25. In view of the current challenges in the field of intellectual property, the Permanent Forum recommends that:

(a) Member States recognize the full right of indigenous peoples and communities to ownership and control of their heritage and intellectual property, which includes traditional knowledge and their knowledge of biodiversity.

(b) Member States take measures to safeguard the right to intellectual property of indigenous peoples and communities by generating laws and public policies to that effect, which recognize that indigenous communities have the full right and control over their creations, knowledge, discoveries, works and other elements that have originated in their minds, imagination and creativity.

(c) The United Nations, through WIPO, carry out the relevant and necessary studies and research to adapt its criteria with the aim of protecting the intellectual property rights of indigenous peoples in respect of their creations, discoveries, traditional knowledge and knowledge of biodiversity, the meaning of which is in essence collective and not individual, regarding the above-mentioned rights.

## **VII. Conclusions**

26. The misappropriation of the intellectual property of indigenous peoples affects them considerably, both spiritually and materially, since in addition to the extraction of their creations and knowledge, which are sold while the members of these peoples receive absolutely no benefit, it constitutes a serious violation of their human rights.

27. Human rights cannot be relinquished to the market, just as the knowledge and wisdom of indigenous peoples cannot be relinquished to the voracity of transnational corporations or pharmaceutical, food, fashion, or any other companies. Indigenous peoples believe that life is priceless and that it cannot be governed by a patent, but rather by a human right that prioritizes life over the market. Recognizing and upholding the full rights of indigenous peoples over their collective intellectual property will ensure harmony and equity for these peoples and communities to live well.

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