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MATTERS CONCERNING THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

Document prepared by the Secretariat

1. At its Thirtieth Session, held from September 22 to October 1, 2003, the WIPO General Assembly discussed the work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, and reached the following decision:

(i) the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) will continue its work for the next budgetary biennium on questions included in its previous mandate,

(ii) its new work will focus, in particular, on a consideration of the international dimension of those questions, without prejudice to the work pursued in other fora, and

(iii) no outcome of its work is excluded, including the possible development of an international instrument or instruments.

2. The General Assembly also urged the IGC to accelerate its work and to present a progress report to the session of the General Assembly in September 2004, and requested the International Bureau to continue to assist the IGC by providing Member States with necessary expertise and documentation (WO/GA/30/8, paragraphs 93 and 94). The 'progress report' that was required in this decision was presented to the General Assembly as document WO/GA/31/5. The discussions of the General Assembly on that progress report are recorded in document WO/GA/31/15 (paragraphs 82 to 96).

3. The IGC has met three times since the General Assembly renewed its mandate for the 2004-2005 biennium, holding its sixth session from in March, 2004, its seventh session in November 2004, and its eighth session in June 2005. The full reports of these three sessions have been circulated as documents WIPO/GRTKF/IC/6/14, WIPO/GRTKF/IC/7/15 and WIPO/GRTKF/IC/8/15 Prov. respectively.

4. Based directly on the previous report to the General Assembly (WO/GA/31/5), the present document provides a factual account of the recent work of the IGC.

Folklore/traditional cultural expressions

5. The IGC discussed the legal protection of expressions of folklore/TCEs, including on the basis of the following documents:

- “Traditional Cultural Expressions/Expressions of Folklore: Legal and Policy Options” (WIPO/GRTKF/IC/6/3);
- “Traditional Knowledge and Traditional Cultural Expressions: The International Dimension” (WIPO/GRTKF/IC/6/6),
- “Submission by the African Group: Objectives, principles and elements of an international instrument, or instruments, on intellectual property in relation to genetic resources and on the protection of traditional knowledge and folklore” (WIPO/GRTKF/IC/6/12),
- “Protection of Traditional Cultural Expressions/Expressions of Folklore: Overview of Policy Objectives and Principles” (WIPO/GRTKF/IC/7/3);
- “Protection of Traditional Cultural Expressions/Expressions of Folklore: Outline and Analysis of Policy Options and Legal Mechanisms” (WIPO/GRTKF/IC/7/4);
- “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles” (WIPO/GRTKF/IC/8/4).

6. At its sixth session, following an extensive review of the basis and forms of protection (paragraphs 26 to 65 of document WIPO/GRTKF/IC/6/14), the IGC requested the Secretariat to prepare two draft materials:

- an overview of policy objectives and core principles for protection of TCEs/expressions of folklore; and
- an outline of the policy options and legal mechanisms for the protection of TCE/ expression of folklore subject matter, based on the full range of approaches already considered by the Committee, together with a brief analysis of the policy and practical implications of each option.

7. The required draft materials were accordingly prepared on the basis of a wide range of positions stated in the IGC, as well as the extensive national experiences and legislative measures advised to the IGC and discussed in that forum (including a specialized panel on *sui generis* folklore/TCE protection). These materials were issued as documents WIPO/GRTKF/IC/7/3 (policy objectives and core principles) and WIPO/GRTKF/IC/7/4 (policy options and legal elements) respectively, for the consideration and review of the IGC at its seventh session.

8. At its seventh session, the Committee considered and discussed these documents, and:

(i) took note of the detailed comments and drafting suggestions made on the draft objectives and core principles as set out in Annex I of document WIPO/GRTKF/IC/7/3; called for further comments on the draft objectives and core principles, including specific suggestions for wording, before February 25, 2005; and requested the Secretariat to produce, on the basis of that Annex and all subsequent inputs and comments from Committee participants, a further draft of objectives and principles for the protection of TCEs/EoF for consideration by the Committee at its eighth session.

(ii) noted that all comments on the objectives and principles received within the agreed timeframe would be posted on the WIPO website as received and would also be included in a compilation, to be distributed with the documents for the eighth session.

(iii) also noted the suggested outline of policy options and legal mechanisms for protection set out in Annex I of document WIPO/GRTKF/IC/7/4, and noted the comments made during its current session on that document. It agreed that this material should be updated as appropriate in the light of revisions to the draft objectives and core principles, and in the light of comments received.

9. In line with this decision, the commentary process was established and undertaken, with all the comments received being posted and circulated. On the basis of these comments, the requested 'further draft of objectives and principles' was prepared and circulated as document WIPO/GRTKF/IC/8/4. At its eighth session, the Committee considered this document and reached the following decision concerning this issue and the parallel issue of protection of TK: (i) it agreed that there was broad support for the process and work being undertaken within the IGC on TCEs and TK; and (ii) it discussed documents WIPO/GRTKF/IC/8/4 and WIPO/GRTKF/IC/8/5 and noted the diverse views expressed on these issues.

10. At each of its sessions, the IGC was also briefed on a range of continuing capacity-building and legislative activities relating to the enhanced protection of folklore/TCEs. These included *sui generis* legislation, policy development, training and awareness and the development of new awareness-raising and capacity-building publications.

Traditional knowledge

11. The IGC discussed the legal protection of expressions of folklore/TCEs, including on the basis of the following documents:

- “Traditional Knowledge: Policy and Legal Options” (WIPO/GRTKF/IC/6/4),
- “Traditional Knowledge and Traditional Cultural Expressions: The International Dimension” (WIPO/GRTKF/IC/6/6),
- “Submission by the African Group: Objectives, principles and elements of an international instrument, or instruments, on intellectual property in relation to genetic resources and on the protection of traditional knowledge and folklore” (WIPO/GRTKF/IC/6/12),
- “Protection of Traditional Knowledge: Overview of Policy Objectives and Principles” (WIPO/GRTKF/IC/7/5),
- “Protection of Traditional Knowledge: Outline and Analysis of Policy Options and Legal Mechanisms” (WIPO/GRTKF/IC/7/6), and

- “The Protection of Traditional Knowledge: Revised Objectives and Principles” (WIPO/GRTKF/IC/8/5).

12. At its sixth session, following an extensive review of the basis and forms of protection (paragraphs 67 to 110 of document WIPO/GRTKF/IC/6/14), the IGC requested the Secretariat to prepare two draft materials:

- an overview of policy objectives and core principles for protection of TK; and
- an outline of the policy options and legal mechanisms for the protection of TK subject matter, based on the full range of approaches already considered by the Committee, together with a brief analysis of the policy and practical implications of each option.

13. The required draft materials were accordingly prepared on the basis of a wide range of positions stated in the IGC, as well as the extensive national experiences and legislative measures advised to the IGC and discussed in that forum (including a specialized panel on *sui generis* folklore/TCE protection). These materials were issued as documents WIPO/GRTKF/IC/7/5 (policy objectives and core principles) and WIPO/GRTKF/IC/7/6 (policy options and legal elements) respectively, for the consideration and review of the IGC at its seventh session.

14. At its seventh session, the Committee considered and discussed these documents (paragraphs 104 to 173 of WIPO/GRTKF/IC/7/15), and

(i) took note of the detailed comments and drafting suggestions made on the draft objectives and core principles as set out in Annex I of document WIPO/GRTKF/IC/7/5; called for further comments on the draft objectives and core principles, including specific suggestions for wording, before February 25, 2005; and requested the Secretariat to produce, on the basis of that Annex and all subsequent inputs and comments from Committee participants, a further draft of objectives and principles for the protection of TK for consideration by the Committee at its eighth session.

(ii) noted that all comments on the objectives and principles received within the agreed timeframe would be posted on the WIPO website as received and would also be included in a compilation, to be distributed with the documents for the eighth session.

(iii) also noted the suggested outline of policy options and legal mechanisms for protection set out in Annex I of document WIPO/GRTKF/IC/7/6, and noted the comments made during its current session on that document. It agreed that this material should be updated as appropriate in the light of revisions to the draft objectives and core principles, and in the light of comments received.

15. In line with this decision, the commentary process was established and undertaken, with all the comments received being posted and circulated. On the basis of these comments, the requested ‘further draft of objectives and principles’ was prepared and circulated as document WIPO/GRTKF/IC/8/5. At its eighth session, the Committee considered this document and reached the decision on TK and TCEs noted in paragraph 9, above.

16. The IGC also considered specific questions relating to the defensive protection of TK. This included the continuation of the existing initiatives, notably the development of technical

standards on the basis of the structure developed by the Asian Group and adopted by the IGC (WIPO/GRTKF/IC/4/14), and the survey of questionnaire on databases and registries related to TK and genetic resources (WIPO/GRTKF/IC/Q.4). An additional initiative was approved concerning the legal and practical aspects of recognition of TK as prior art in the search and examination of patent applications. This resulted from proposals put forward by various Member States and regional groups, and discussions in the IGC, summarized in document WIPO/GRTKF/IC/6/8. Following consideration of this document, the IGC approved future work on this issue, in particular the development of:

- a questionnaire on prior art criteria; and
- draft recommendations to authorities responsible for patent search and examination to take greater account of traditional knowledge systems.

17. The Committee at its subsequent sessions considered a draft outline and a more elaborated draft of the draft recommendations that were presented in the following documents:

- “Recognition of Traditional Knowledge in the Examination of Patent Applications” (WIPO/GRTKF/IC/7/8);
- “Recognition of Traditional Knowledge within the Patent System” (WIPO/GRTKF/IC/8/8).

Continuing work was based in general on Member State responses to the Questionnaire on Recognition of Traditional Knowledge and Genetic Resources in the Patent System (WIPO/GRTKF/IC/Q.5). These responses were collated in document WIPO/GRTKF/IC/8/INF/5.

18. The IGC was also briefed on a range of continuing capacity-building and legislative activities relating to the enhanced protection of TK. These included *sui generis* legislation, policy development, training and awareness and the development of new awareness-raising and capacity-building publications, as well as continuing work on a toolkit intended to equip TK holders with skills and awareness required to ensure that any documentation of their TK promotes their own interests and does not impair their custodianship responsibilities over the TK.

Genetic resources

19. In view of various linkages between TK and genetic resources, the IGC’s work on TK (discussed above) also had bearing on genetic resources. These linkages included the relation between TK protection and rights and interests related to genetic resources, such as approaches to *sui generis* protection of TK within the context of laws governing access to and benefit-sharing from genetic resources (paragraphs 34(b), and 96 to 102, WIPO/GRTKF/IC/6/4 Rev). Defensive protection measures concerning TK also had bearing on the defensive protection of associated genetic resources (WIPO/GRTKF/IC/6/8, WIPO/GRTKF/IC/7/8, WIPO/GRTKF/IC/8/8). A number of as specific documents and proposals were tabled at the eighth session, namely WIPO/GRTKF/IC/8/11, WIPO/GRTKF/IC/8/12, WIPO/GRTKF/IC/8/13 and WIPO/GRTKF/IC/8/14 (these documents also had relevance to discussions on TK). Document WIPO/GRTKF/IC/8/9 provided an historic account of past work of the IGC on genetic resources issues up to the seventh session.

20. The IGC considered these materials at its eighth session, but did not reach agreement on future tasks on genetic resources issues.

The international dimension

21. Reflecting the explicit reference to the international dimension of its work in its mandate for the biennium 2004-2005, the IGC considered this issue at its sixth session under agenda item 8 ('International Dimension'). Discussion focussed in particular on documents WIPO/GRTKF/IC/6/6 and WIPO/GRTKF/IC/6/12 ('Submission by the African Group: Objectives, principles and elements of an international instrument, or instruments, on intellectual property in relation to genetic resources and on the protection of traditional knowledge and folklore').

22. The Chair concluded the item by stating that "the discussion had shown a positive approach to the issue; that there had been a broad support for the contents of document WIPO/GRTKF/IC/6/6; and there had been a constructive debate on the issue of the international aspects, including the elements included in the African proposal (document WIPO/GRTKF/IC/6/12)". He indicated that the "some Delegations said that they needed more time to consider it and others said, for instance, that it was a valuable framework that needed to be more elaborated on". On the Chair's proposal, the Committee took note of document WIPO/GRTKF/IC/6/6 and of the proposal by the African Group in document WIPO/GRTKF/IC/6/12 as well as of the interventions made and, on that basis, agreed to draw on considerations concerning the international dimension in its work on substantive issues.

23. It was then clarified that the international dimension would be integrated under each of the substantive topics. In line with this approach, the international dimension is, for example, dealt with under documents WIPO/GRTKF/IC/7/3 (policy objectives and core principles on TCE protection), WIPO/GRTKF/IC/7/4 (policy options and legal elements for TCE protection), WIPO/GRTKF/IC/7/5 (policy objectives and core principles on TK protection), WIPO/GRTKF/IC/7/6 (policy options and legal elements for TK protection), WIPO/GRTKF/IC/8/4 (revision of WIPO/GRTKF/IC/7/3) and WIPO/GRTKF/IC/8/5 (revision of WIPO/GRTKF/IC/7/5). Document WIPO/GRTKF/IC/8/6 was provided to the IGC at its eighth session as an additional background information resource on the international dimension.

Participation of indigenous and local communities

24. Consistent with the priority that both the General Assembly (A/37/14, paragraphs 245, and 263 to 290) and the IGC itself have in the past given to enhanced participation in the IGC by indigenous and local communities, the IGC continued its work on proposals to enhance this participation. Discussion was focussed on documents WIPO/GRTKF/IC/6/10, WIPO/GRTKF/IC/7/12, WIPO/GRTKF/IC/7/14, and WIPO/GRTKF/IC/8/3. Building on existing consultation and communication mechanisms, specific steps included:

- the convening of an indigenous consultative forum prior to each session of the IGC;
- establishment of a website to communicate the views and positions of IGC observers;
- circulation to the IGC of information on views and positions posted by observers

- the convening of a panel chaired by an indigenous or local community representative prior to the commencement of each session of the IGC; and
- support for informal consultative processes and voluntary funding initiatives that contribute to the enhanced involvement of indigenous and local communities in the work of the IGC.

Additional *ad hoc* observers were accredited to the IGC, most representing indigenous or local communities or the interests of holders and custodians of TCEs or TK. This brought to over 110 the total number of *ad hoc* observers specifically accredited to the IGC. All requests for accreditation made to the IGC were approved by the Committee at the first opportunity.

25. The IGC discussed the question of funding the participation of indigenous and local communities, including on proposed elements for a voluntary fund. At its sixth session, the IGC agreed “to encourage voluntary donors to support the immediate participation of representatives of accredited observers in [the] consultative forum and in the IGC’s sessions; and on the basis of an updated proposal, to continue its consideration and elaboration of possible establishment of formal structures for a Voluntary Fund”.

26. The requested ‘updated proposal’ was prepared as document WIPO/GRTKF/IC/7/12. The IGC considered this at its seventh session, and decided that, on the basis of this proposal and the comments made upon it, “a formal proposal for a Voluntary Fund be prepared for its consideration at its eighth session”. It also encouraged continuing voluntary funding of representatives of indigenous and local communities, and other forms of enhancing their participation in the Committee and other WIPO activities.

27. At the Committee’s eighth session, the Chair took note of the comments made on the draft proposal and observed that broad general support for the proposal had been expressed in the Committee. The Chair proposed, and the Committee agreed, that:

(i) a revised draft of document WIPO/GRTKF/IC/8/3, taking account of the comments made within the Committee, would be prepared by the Secretariat and published by June 17, 2005;

(ii) Committee participants would be invited to provide comments on that revised draft to the Secretariat by July 15, 2005; and

(iii) a third version of the proposal would be prepared and published by the end of July for consideration by the General Assembly at its next session.

The revised proposal for the establishment of a voluntary fund is to be submitted to the General Assembly in a parallel document, WO/GA/32/13.

Consultation and coordination

28. Both in the IGC and in the General Assembly, many Member States have stressed the need for the work of the IGC to be undertaken in consultation and coordination with a wide range of stakeholders, including respecting and supporting the mandates and processes of other international organizations, and ensuring concrete involvement and engagement with representatives of indigenous and local communities. Beyond the active participation of many intergovernmental organizations (IGOs) and observers in the IGC itself, the Secretariat has consulted with many intergovernmental, regional and non-governmental organizations.

29. The intergovernmental organizations (including regional organizations) consulted and coordinated with during the current phase of the IGC's work included (but were not limited to): the African Regional Intellectual Property Organization (ARIPO), the Association of South-East Asian Nations (ASEAN), the Asian-African Legal Consultative Organisation, Consultative Group on International Agricultural Research (CGIAR), Food and Agricultural Organization (FAO), International Centre for Genetic Engineering and Biotechnology (ICBEG), International Centre of Insect Physiology and Ecology (ICIPE), International Labour Organization (ILO), the International Plant Genetic Resources Institute (IPGRI), the Office of the High Commissioner for Human Rights, *l'Organisation Africaine de la Propriété Intellectuelle* (OAPI), the Organization of American States, the Pacific Community, the Pacific Islands Forum, the Secretariat of the Convention on Biological Diversity, the South Asian Association for Regional Cooperation (SAARC), the Southern African Development Community (SADC), the South Centre, the United Nations Conference on Trade and Development (UNCTAD), the United Nations Development Program (UNDP), the United Nations Environment Programme (UNEP), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Permanent Forum on Indigenous Issues, the United Nations University Institute of Advanced Studies (UNU-IAS), the International Union for the Protection of New Varieties of Plants (UPOV), the World Conservation Union (IUCN), the World Food Program, the World Health Organization, and the World Trade Organization.

30. More than one hundred NGOs were consulted or coordinated with in various formal and informal settings, including many of the accredited IGC observers and many representatives of indigenous and local communities. For reasons of space, a full list is not given here. The NGOs consulted represent a wide range of sectors, interests and geographical regions, including organizations representing Indigenous and local communities, and organizations variously concerned with environmental and biodiversity issues, agricultural and genetic resources issues, sustainable development, folklore and cultural issues.

Intersessional consultations

31. In addition to a wide range of intersessional consultations on IGC issues, both within Geneva and through various regional and national meetings held at the request of WIPO Member States, open informal information sessions were held in Geneva to assist delegations in their preparations for the seventh or eighth sessions of the Committee.

Future work

32. At its eighth session, the Committee considered the question of its future work and adopted the following decision:

The Committee noted the broad support from Committee participants on the future work of the Committee and agreed to recommend to the General Assembly that the mandate of the Committee be extended to the next budgetary biennium to continue its work on traditional knowledge, traditional cultural expressions/folklore and genetic resources.

33. The General Assembly is invited: (i) to take note of the contents of this document; (ii) to consider the recommendation of the Intergovernmental Committee that its mandate be extended to the next budgetary biennium to continue its work on traditional knowledge, traditional culture expressions/folklore and genetic resources; and (iii) to provide its directions in this regard.

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