

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

Twentieth Session
Geneva, February 14 to 22, 2012

**REPORT FROM HIS EXCELLENCY AMBASSADOR PHILIP RICHARD OWADE ON
KEY ISSUES PENDING FROM THE 2010-2011 BIENNIUM**

Document submitted by His Excellency Ambassador Philip Richard Owade

1. At the Nineteenth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the IGC”), held from July 18 to 22, 2011, the IGC Chair for the 2010-2011 biennium, His Excellency Ambassador Philip Owade indicated that he may prepare a summary of some of the key issues that he believed needed to be taken forward to the next round of negotiations.
2. Ambassador Owade has prepared such a report and provided it to the Secretariat.
3. The Annex to this document contains the part of the said report dealing with genetic resources.

4. *The IGC is invited to take note of this document and the Annex to it.*

[Annex follows]

INTRODUCTION

1. I had the honor of chairing the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the IGC”) in 2010 and 2011. During this session the Committee was able to make considerable progress in developing texts for traditional cultural expressions (TCEs), traditional knowledge (TK) and genetic resources (GRs). However, certain policy issues still remain unresolved, and, as the IGC enters a new mandate and new phase in its work, under a new Chair, I thought it might be useful if I were to try to summarize the key issues as I see them on each of the IGC’s themes, namely TCEs, TK and GRs.
2. I have therefore prepared notes on the 3 themes and given them to the Secretariat. I have instructed the Secretariat to make the GRs section available to the present session. The TK section will be made available at the Twenty-First Session of the IGC which is taking place from April 16 to 20, 2012, and the TCEs section at the Twenty-Second Session of the IGC, which is taking place from July 9 to 13, 2012.
3. These notes are merely an attempt to capture the policy issues that seem to me to be the most important in the negotiations of the IGC and to identify some of the main views on them. The notes may help to frame and focus the IGC’s continuing discussions. Of course, the IGC and its new Chair are not bound to follow or use these notes but I hope they may be helpful.
4. In preparing these notes, I have referred to the more recent main documents and reports prepared for the IGC, as well as the various notes I made while I was the Chair.

NOTES ON KEY ISSUES: GENETIC RESOURCES

5. The relationship between IP and GRs is perhaps less clear than that between IP and TK/TCEs. GRs are subject to access and benefit-sharing regulations, in particular within the international frameworks defined by the Convention on Biological Diversity (CBD) and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol), as well as by the International Treaty on Genetic Resources for Food and Agriculture (ITPGRFA) of the United Nations Food and Agriculture Organization. Furthermore, GRs as encountered in nature are not IP. They are not creations of the human mind and thus they cannot be directly protected as IP.
6. Therefore, WIPO is not the relevant forum for regulating access to GRs or their direct (positive) ‘protection’ as such. However, as the IGC has identified, there are certain IP issues associated with GRs.
7. The IP issues associated with GRs seem to be:
 - The ‘defensive protection’ of GRs: this refers to preventing patents being granted over inventions based on or developed using GRs (and associated TK) which do not fulfill the existing requirements of novelty and inventiveness. In this context, to help patent examiners find relevant prior art and avoid the granting of erroneous patents, certain options have been discussed by the IGC: these are the options A.1, A.2 and A.3 in the so-called Cluster A, as well as option B.4, in the IGC’s “Options for Future Work on Intellectual Property and Genetic Resources” (document WIPO/GRTKF/IC/20/5). As can be seen, implementation of these options may not necessarily require new international norms, as they could be implemented, if agreed upon, through practical measures, such as databases and guidelines. In fact, I believe some of them have already been implemented in practice and WIPO has improved its own search tools and patent classification systems. In regard to the ‘defensive’ protection of GRs, there are also some Member State proposals before the IGC, notably the Japanese

proposals related to databases (these are in documents WIPO/GRTKF/IC/20/INF/9 and WIPO/GRTKF/IC/20/INF/11). Also relevant here are the cross-cutting proposals from the African Group (WIPO/GRTKF/IC/20/INF/12) and the Like-Minded Countries' Contribution (WIPO/GRTKF/IC/20/6). The other, perhaps more controversial, aspect of this issue concerns the possible disqualification of patent applications that do not comply with obligations related to prior informed consent (PIC), mutually agreed terms, fair and equitable benefit-sharing, and disclosure of origin.

- How could the IP system support the implementation of access and benefit-sharing obligations? / Consistency and synergy between the IP system and the CBD: a number of countries have enacted domestic legislation putting into effect the CBD obligations that access to a country's GRs should depend on securing that country's PIC and agreeing to fair and equitable benefit-sharing. The IP issue seems to be whether, and to what extent, the IP system should be used to support and implement these obligations. One of the options in this regard (which is Option B.1 in document WIPO/GRTKF/IC/20/5) is to develop mandatory disclosure requirements, in other words, to make it mandatory for patent applications to show the source or origin of GRs, as well as evidence of PIC and a benefit-sharing agreement. Other related options are B.2 and B.3. Member States have tabled several proposals and other information on this issue, namely the European Union (WIPO/GRTKF/IC/20/INF/8), Japan (WIPO/GRTKF/IC/20/INF/9), Switzerland (WIPO/GRTKF/IC/20/INF/10), the African Group (WIPO/GRTKF/IC/20/INF/12) and the Like-Minded Countries (WIPO/GRTKF/IC/20/6). Regarding a proposed disclosure requirement, the following could be considered as the key issues that need to be discussed:
 - Subject matter;
 - Nature of disclosure (mandatory or voluntary);
 - Information to be disclosed;
 - Trigger for disclosure; and
 - Consequence of noncompliance.

8. In summary then, the issues and their related documents may be identified as follows:

Issue	Options (from WIPO/GRTKF/IC/20/5)	Relevant document
The 'defensive protection' of GRs	Information systems: options A.1, A.2 and A.3, as well as B.4	Documents WIPO/GRTKF/IC/20/6 (Like-Minded), WIPO/GRTKF/IC/20/INF/9 (Japan), WIPO/GRTKF/IC/20/INF/11 (Japan) and WIPO/GRTKF/IC/20/INF/12 (African Group)
Consistency and synergy between the IP system and the CBD	Disclosure : options B.1, B.2, B.3	Documents WIPO/GRTKF/IC/20/6 (Like-Minded), WIPO/GRTKF/IC/20/INF/8 (EU), WIPO/GRTKF/IC/20/INF/9 (Japan), WIPO/GRTKF/IC/20/INF/10 (Swiss), WIPO/GRTKF/IC/20/INF/12 (African Group)

9. Member States have also sought to identify certain more general “objectives and principles” related to the relationship between IP and GRs, and the latest draft of these can be found in document WIPO/GRTKF/IC/20/4. In my view, this document is useful in that it enables an important discussion, regarding IP issues associated with GRs, of what are the objectives that the IGC wishes to be achieved? From earlier discussions, for example, is it:

- To prevent patents/IPRs involving the access and utilization of GRs that do not fulfill the existing requirements of novelty and inventiveness from being granted?
- To prevent patents from being granted where there is no PIC, mutually agreed terms and fair and equitable benefit-sharing / and disclosure of origin?
- To ensure that IP offices have appropriate information on GRs and TK to make proper and informed decisions in granting IPRs?

10. The IGC has also, in the past, discussed the role of IP in mutually-agreed terms for fair and equitable benefit-sharing: a primary means of giving effect to the equitable sharing of benefits arising from the use of GRs is through mutually-agreed terms, which are to be developed between provider and user of the resource for the granting of access to the resource, according to the CBD. The CBD thus foresees, in Article 15, that “[a]ccess, where granted, shall be on mutually agreed terms,” which are mostly contained in contracts or permit systems. IP potentially plays a role in mutually agreed terms for the sharing of monetary as well as non-monetary benefits. WIPO, as discussed by the IGC, has been engaged in the development of model IP clauses which may be considered for inclusion in contractual agreements when mutually agreed terms are under negotiation. A database of existing access and benefit-sharing agreements was created under the IGC’s oversight as a capacity-building tool, a questionnaire on such agreements was prepared and circulated, and initial drafts of guidelines have been prepared. The latest draft – ‘Genetic Resources: Draft Intellectual Property Guidelines for Access and Equitable Benefit-Sharing: Updated version’¹ – was circulated for consideration at the Committee’s seventeenth session. These were included in what was known as “Cluster C” in earlier versions of document WIPO/GRTKF/IC/20/5. As the IGC has itself recognized, these are non-normative, practical tools which were developed some time ago and are already being updated and improved upon. At its 19th session, the IGC requested that the Secretariat finalize and update these activities and provide information thereon to the IGC: this the Secretariat has done in document WIPO/GRTKF/IC/20/INF/14. Some discussions have also been held on licensing practices in the field of GRs which extend the concepts of distributive innovation or open source from the copyright field: this was however not extensively discussed when I was the Chair and, in my view, should the IGC wish it to be undertaken, it should give further direction on such an activity.

11. In conclusion, as can be seen, there are numerous proposals and options before the IGC on IP and GRs. It would be helpful, in my view, to try to consolidate the various proposals that Member States have tabled into a single text that could form the basis for the IGC’s “text-based negotiations”. Without such a single text, consolidating all current proposals, it is difficult to imagine how “text-based negotiations” could take place effectively.

[End of Annex and of document]

¹

See WIPO/GRTKF/IC/17/INF/12.