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DRAWN UP BY : Bastiaan Koster

SUBJECT: WIPO Intergovernmental Committee on  
Intellectual Property and Genetic Resources,  
Traditional Knowledge and Folklore (IGC Meeting)

Eleventh Session  
Geneva, July 3 – July 12, 2007

PURPOSE: For information

TABLED TO: All Attendees



WIPO INTERGOVERNMENTAL COMMITTEE ON  
INTELLECTUAL PROPERTY AND GENETIC RESOURCES,  
TRADITIONAL KNOWLEDGE AND FOLKLORE (IGC)

Eleventh Session  
Geneva, July 3 – July 12, 2007  
Drawn up by Bastiaan Koster

## Introduction

Very little progress was made at the 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> sessions of the IGC.

At the end of the 10<sup>th</sup> session, the IGC reached agreement that it will unfortunately be necessary to take a step "backwards". The meeting agreed on 10 "issues" relating to Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore which were contentious or on which there is disagreement and that these issues will have to be revisited. The issues are:

- 1 Definition of "traditional knowledge" and "traditional cultural expressions"
- 2 Who should benefit from any such protection or who holds the rights to protectable traditional knowledge and traditional cultural expressions?
- 3 What objective is sought to be achieved through affording intellectual property type protection to traditional knowledge and traditional cultural expressions (economic rights, moral rights)?
- 4 What forms of behaviour in relation to the protectable traditional knowledge and traditional cultural expressions should be considered unacceptable/illegal?
- 5 Should there be any exceptions or limitations to rights attaching to protectable traditional knowledge and traditional cultural expressions?
- 6 For how long should protection be afforded?
- 7 To what extent do existing IPRs already afford protection? What gaps need to be filled?
- 8 What sanctions or penalties should apply to behaviour or acts considered to be unacceptable/illegal?
- 9 Which Issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?
- 10 How should foreign rights holders/beneficiaries be treated?

Prior to the 11<sup>th</sup> session, delegations were invited to provide written comments on the 10 issues. It was also agreed that the 10 issues would be discussed in numerical order at the 11<sup>th</sup> session of the IGC, first in relation to traditional knowledge and then in relation to traditional cultural expressions.



**FÉDÉRATION INTERNATIONALE DES CONSEILS EN PROPRIÉTÉ INDUSTRIELLE**  
**Commission d'Étude et de Travail**

It was not believed necessary for FICPI to comment on any of the 10 issues as the issues had been discussed in some detail during earlier sessions of the IGC.

WEDNESDAY, 4 JULY 2007

The first day was dedicated to agenda items 1 – 6. These relate to:

- (a) accreditation of certain organisations;
- (b) participation of indigenous and local communities and;
- (c) opening statements.

Discussions were also held on a voluntary fund which was established to financially support representatives of indigenous and local communities to attend to the IGC. Nominations were asked for representatives of a Board who will manage the fund.

Nothing "new" was said during the opening statements which were made on the first day. Generally countries simply re-stated their respective positions.

Of some concern is language used by indigenous communities and developing countries that traditional knowledge and traditional cultural expressions are "evolutionary in nature" and of "ongoing innovative nature". The use of such language implies that traditional knowledge and traditional cultural expressions are not concepts that date from the past but that new traditional knowledge and traditional cultural expressions are being created on an ongoing basis. This must be seen against the demands by traditional countries and communities that traditional knowledge and traditional cultural expressions must enjoy protection in perpetuity! The IGC has thrived on certain similar phrases like "an international legally binding instrument to protect traditional knowledge, traditional cultural expressions and genetic resources", "the ongoing widespread bio-piracy" and "the misappropriation of traditional knowledge, traditional cultural expressions and genetic resources" to name a few

THURSDAY, 5 JULY 2007

The morning session was devoted to further opening statements. The views were again divided between those countries who now require substantive provisions and an "International Legally Binding Instrument" to protect traditional knowledge, traditional cultural expressions and generic resources and those who believed that further discussions are required.

AGENDA ITEM 7: TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE

After some debate on how to proceed, it was pointed out that at the 10<sup>th</sup> session it was agreed that the 10 issues would be discussed in numerical order. Firstly, in respect of traditional cultural expressions/folklore, and then in respect of traditional knowledge. The meeting continued to discuss the 10 issues insofar as they related to traditional cultural expressions and folklore.

ISSUE 1: DEFINITION OF "TRADITIONAL CULTURAL EXPRESSIONS"

A large number of interventions were made. Developing countries were of the view that suggested definitions of "Traditional Cultural Expressions" at earlier meetings were acceptable. On the other hand,



developed countries believed that there are many uncertainties and that the issue of finding a satisfactory universal definition of "Traditional Cultural Expressions" should be further discussed. No endeavour was made to reach any agreement and the comments of the various delegations were simply noted.

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[During the morning session, the Chair allowed a few more opening statements. As in the past, there was a clear divide between those countries now wanting an international legally binding instrument to protect traditional knowledge, traditional cultural expressions and generic resources and those countries who believe that it is premature to discuss substantive issues or the international dimension of the issues under discussion.]

The meeting then continued and Issue 2 was discussed

ISSUE 2: WHO SHOULD BENEFIT FROM ANY SUCH PROTECTION OR WHO HOLDS THE RIGHTS TO PROTECTABLE TRADITIONAL CULTURAL EXPRESSIONS?

Not too much was said about this issue. It would appear that there is general consensus that it must be the traditional communities who should benefit and that it is those communities who hold the rights to protectable traditional knowledge.

ISSUE 3: WHAT OBJECTIVE IS SOUGHT TO BE ACHIEVED THROUGH AFFORDING INTELLECTUAL PROPERTY TYPE PROTECTION TO TRADITIONAL CULTURAL EXPRESSIONS (ECONOMIC RIGHTS, MORAL RIGHTS)?

Portugal, on behalf of the European Union, expressed the view that traditional cultural expressions cannot be protected through an international instrument. Protection must happen on a national level. Developing countries were, however, of the view that an international legally binding instrument is required and the only option for protection of traditional cultural expressions.

ISSUE 4: WHAT FORMS OF BEHAVIOUR IN RELATION TO PROTECTABLE TRADITIONAL CULTURAL EXPRESSIONS SHOULD BE CONSIDERED UNACCEPTABLE/LEGAL?

Various views were expressed. Norway, for example, indicated that the aim should be to avoid unauthorised use for economic gain. However, traditional communities were of the view that use which is morally offensive should also not be allowed.

ISSUE 5: SHOULD THERE BE ANY EXCEPTIONS OR LIMITATIONS TO RIGHTS ATTACHING TO PROTECTABLE TRADITIONAL CULTURAL EXPRESSIONS

Developed countries like Canada and the US were of the view that it is premature to discuss exceptions on this issue at this point in time. Countries like Brazil were of the view that it is a global problem that requires a global response from the existing IP system.

ISSUE 6: FOR HOW LONG SHOULD PROTECTION BE AFFORDED?

Many countries were of the view that it is premature to discuss the length of protection at this point in time. Developing countries and traditional communities were of the view that protection should run into perpetuity.



ISSUE 7: TO WHAT EXTENT DO EXISTING IPRs ALREADY AFFORD PROTECTION? WHAT GAPS NEED TO BE FILLED?

Developing countries were of the view that the current IP system does not provide adequate protection for traditional cultural expressions. It was felt that a new form of IP right has to be created.

ISSUE 8: WHAT SANCTIONS OR PENALTIES SHOULD APPLY TO BEHAVIOUR OR ACTS CONSIDERED TO BE UNACCEPTABLE/ILLEGAL?

Most developed countries believed that it is premature to address this issue. On the other hand, developing countries believe that civil and criminal sanctions should be available on a national and international level. The divide continues.

ISSUE 9: WHICH ISSUES SHOULD BE DEALT WITH INTERNATIONALLY AND WHICH NATIONALLY, OR WHAT DIVISION SHOULD BE MADE BETWEEN INTERNATIONAL REGULATION AND NATIONAL REGULATION?

Developing countries and traditional communities argued for protection on an international basis, whereas developed countries were of the view that although there may be an international aspect, that there has to be a focus on the national level first.

ISSUE 10: HOW SHOULD FOREIGN RIGHT HOLDERS/BENEFICIARIES BE TREATED?

Developed countries were of the view that further work is required before this issue can be decided. On the other hand, developing countries are of the view that foreign rights holders should be treated in the same manner as nationals.

The meeting finished its discussions on the ten issues on traditional cultural expressions during the afternoon of Friday 6 July 2007.

The formal decision of the IGC on Agenda Item 7 is as follows:

**"The Committee took note of documents WIPO/GRTKF/IC/11/4(a), WIPO/GRTKF/IC/11/4(a) Add., WIPO/GRTKF/IC/11/4(a) Add 2., WIPO/GRTKF/IC/11/4(b), WIPO/GRTKF/IC/11/4(c) and WIPO/GRTKF/IC/11/6. The composite decision taken by the Committee on future work on agenda items 7 and 8 is reported under agenda item 10."**

AGENDA ITEM 8: TRADITIONAL KNOWLEDGE

The meeting then continued to discuss the very same issues, but this time insofar as they relate to traditional knowledge. In many ways, this has been a waste of time as the meeting painfully went through the ten issues and, in most cases, made the same statements which were made in respect of traditional cultural expressions. The meeting concluded its discussions on the ten issues in respect of traditional knowledge at 12h00 on Tuesday 10 July. This resulted in the meeting falling very far behind on the agenda.

The formal decision of the IGC on Agenda Item 8 reads as follows;

**"The Committee took note of documents WIPO/GRTKF/IC/11/5(a),**



**WIPO/GRTKF/IC/11/5(a) Add., WIPO/GRTKF/IC/11/5(a) Add 2., WIPO/GRTKF/IC/11/5(b), WIPO/GRTKF/IC/11/5(b) Add., WIPO/GRTKF/IC/11/5(c), WIPO/GRTKF/IC/11/6 and WIPO/GRTKF/IC/11/7. The composite decision taken by the Committee on future work on agenda items 7 and 8 is reported under agenda item 10."**

#### AGENDA ITEM 9: GENERIC RESOURCES

Generic resources were discussed from lunchtime on Tuesday 10 July.

The floor was opened to other NGO's like the Convention of Biodiversity to report on progress made in their organisations in respect of generic resources. The floor was then opened for general comments.

The discussions at the meeting mainly focused on the disclosure of generic resources and related traditional knowledge and patent applications. Developing countries want mandatory disclosure requirements including an amendment to the Trips Agreement to make it mandatory for member countries to have disclosure requirements in their patent legislation. Norway, for example, also supports the amendment of the Trips Agreement to make disclosure in patent applications mandatory. The European Union supports disclosure requirements but not an amendment of the Trips Agreement. The US and a few other countries are opposed to disclosure requirements. Generally, there is a move that some form of responsible disclosure requirement of generic resources and related traditional knowledge is acceptable. There is also the Swiss proposal on disclosure which was made at an earlier IGC meeting. No agreement was reached on the issue but there is general support (barring the US and only a few other countries) that some form of disclosure requirement should follow. At this point in time, the main issue is whether the disclosure requirement should be formalised in the Trips Agreement. In the meantime, it would appear that many countries have changed their national laws to require some form of disclosure. The disclosure issue is also looked at in other forums.

The formal decision on Agenda Item 9 reads as follows;

**"The Committee took note of documents WIPO/GRTKF/IC/11/8 (a), WIPO/GRTKF/IC/11/8/(b), WIPO/GRTKF/IC/11/10, WIPO/GRTKF/IC/11/11, and WIPO/GRTKF/IC/13. The composite decision taken by the Committee on future work on agenda item 9 is reported under agenda item 10."**

#### AGENDA ITEM 10: FUTURE WORK

The current mandate of the IGC comes to an end in September 2007. Given the unsatisfactory outcome of the recent meetings, including the discussions at the 11<sup>th</sup> session, the agreement on future work promised to very difficult. The Chairman suggested at the morning session on Wednesday 11 July that the meeting should adjourn and that informal consultations be held between the various country groups with a view of reaching some form of consensus and direction regarding future work. The proposal was for the meeting to continue at 15h00 that afternoon. The "informal consultations" continued until 18h00 when the chair announced that no agreement could be reached on the Future Work of the IGC as yet. The Chair indicated that the informal consultations would continue during the morning session the next day in an attempt to reach consensus on the future work of the IGC and that the meeting would reconvene the next day at 15h00. By 15h00 the next day there was still no agreement. The IGC eventually agreed, at 19h30 that evening, on the Future Work of the IGC. The agreed proposal of the Future Work will now be put forward to the General Assembly and reads as follows:



**DECISION ON ITEM 10: FUTURE WORK**

- 8. The Intergovernmental Committee reviewed the progress made on its substantive agenda items at the current and previous sessions of its current mandate, and**
- (i) Agreed that progress had been made on its substantive work to date;**
  - (ii) Agreed that its work had greatly benefited from the enhanced participation of representatives of indigenous and local communities made possible by various initiatives including the successful launch of the WIPO Voluntary Fund, and also from the participation of intergovernmental organizations;**
  - (iii) Agreed to recommend to the WIPO General Assembly that the current mandate of the Committee be renewed as set out in document WO/GA/30/8, paragraphs 93 to 95, namely that:**
    - the Committee “will continue its work for the next budgetary biennium on questions included in its previous mandate”;**
    - “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**
    - “no outcome of its work is excluded, including the possible development of an international instrument or instruments”;**
    - the IGC would be urged “to accelerate its work and to present a progress report to the session of the General Assembly” in September 2008.**
    - The General Assembly would further request “the International Bureau to continue to assist the IGC by providing Member States with necessary expertise and documentation.”**
  - (iv) With respect to the content of paragraph (iii), the Committee agreed to work towards further convergence of views on the questions included in its previous mandates, in particular, within the areas of TCEs and TK, on the Lists of Issues agreed at its Tenth Session, with a view to making appropriate recommendations to the General Assembly.**
  - (v) Agreed concerning its substantive working document on item 7 (TCEs/EoF) that:**
    - the Secretariat should prepare a factual extraction, with attribution, consolidating the view points and questions of Members and Observers on the List of Issues considered during the Eleventh Session including their comments submitted in writing for the Eleventh Session, subject to review of Member States and observers and without prejudice to any position taken on these issues, and**
      - As agreed at the Tenth session, document WIPO/GRTKF/IC/11/4 (c) remains on the table in its existing form and comments made in relation to it are noted.**



- (vi) **Agreed concerning its substantive working document on item 8 (TK) that:**
- **the Secretariat should prepare a factual extraction, with attribution, consolidating the view points and questions of Members and Observers on the List of Issues considered during the Eleventh Session including their comments submitted in writing for the Eleventh Session, subject to review of Member States and observers and without prejudice to any position taken on these issues, and**
  - **As agreed at the Tenth session, document WIPO/GRTKF/IC/11/5 (c) remains on the table in its existing form and comments made in relation to it are noted.**
- (vii) **Agreed concerning its substantive working documents on item 9 (genetic resources) that:**
- **the Secretariat should prepare a further update of international developments based on document 11/8(b) which would include omissions identified in the current session, more recent developments, and any other relevant developments reported to the Committee, and document WIPO/GRTKF/IC/11/8 (a) remains on the table in its existing form and comments made in relation to it are noted."**

It would appear that the discussions of the IGC will go round in circles for at least another one or two meetings. Consideration should be given to Group 8 only monitoring the outcome of the meetings in the future without actually sending anybody to the meetings. This was discussed informally with members of the WIPO Secretariat and they agree that it may take a few more meetings before substantive issues will be discussed. FICPI's input and presence at the IGC meetings will become relevant when substantive issues in respect of the protection of traditional knowledge, traditional cultural expressions and generic resources are discussed.

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