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Informal Note

International Negotiations on Biodiversity, Genetic Resources and Intellectual Property: Implications of the WIPO Intergovernmental Committee's New Mandate

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The World Intellectual Property Organization's Intergovernmental Committee (IGC) on Genetic Resources, Traditional Knowledge and Folklore recently renewed⁴ its mandate for the continuation of its work. This mandate expands the range of possible outcomes that can be achieved at the international level concerning the relationship between genetic resources and intellectual property and the protection of traditional knowledge within the IGC. Likewise, the new mandate establishes an important challenge for the definition of minimum regulatory principles and a possible defensive and/or positive protection of traditional knowledge. For developing countries and indigenous peoples, opportunities and risks may grow out of this exercise as discussion progress.

Discussion of the WIPO IGC

The IGC is an *Ad hoc* committee created by the WIPO General Assembly as a result of the political impossibility of discussing and promoting topics related to genetic resources and the protection of traditional knowledge in the negotiations of WIPO's Patent Law Treaty in 2000. The IGC's initial mandate was to discuss topics related to (1) access to genetic resources and equitable benefit sharing, (ii) protection of traditional knowledge, and (iii) protection of expressions of folklore. The IGC has constituted an important opportunity for developing countries to present and discuss their concerns about the illegal appropriation of genetic resources, as well as the lack of effective protection of traditional knowledge and folklore.

Five sessions of the IGC have taken place since 2000. During this period some positive but limited achievements have been attained, among which are the following:

- Preparation of extensive documentation, technical studies, case studies and identification of political and protective options related to genetic resources, traditional knowledge and folklore. Most noteworthy among them are a study on disclosure requirements related to the origin of genetic resources and traditional knowledge⁵, a comparative summary of the *sui generis* measures and laws for the protection of traditional knowledge⁶, and a consolidated analysis of the legal protection of traditional cultural expressions⁷.
- Implementation of some defensive measures for the protection of traditional knowledge. These measures include the incorporation of material about traditional knowledge in the minimum documentation for the examination of the state of the art in the Patent Cooperation Treaty (PCT) and the revision of the Strasbourg Agreement Concerning the International Patent Classification in order to include new classification categories related to traditional knowledge.
- Opening of the WIPO IGC to other than corporate actors, such as organizations representing civil society and indigenous peoples.

⁴ See document WO/GA/30/8 of the WIPO General Assembly, October 1, 2003.

http://www.wipo.int/documents/es/document/govbody/wo_gb_ga/doc/wo_ga_30_8.doc

⁵ See document WO/GA/30/5, August 15, 2003.

<http://www.wipo.int/tk/en/igc/documents/index.html>

⁶ See document WIPO/GRTKF/IC/5/INF/4

http://www.wipo.int/documents/en/meetings/2003/igc/doc/grtkf_ic_5_inf_4.doc

⁷ See WIPO/GRTKF/IC/5/3

http://www.wipo.int/documents/es/meetings/2003/igc/doc/grtkf_ic_5_3.doc

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- The debate about genetic resources and traditional knowledge in the IGC has resulted in the search for formulas for the transfer and incorporation of the principles and objectives of the Convention on Biological Diversity (CBD) in some of WIPO's negotiations such as the negotiations of the draft of the Substantive Patent Law Treaty (SPLT) and the reform of the Patent Cooperation Treaty (PCT)⁸.

The Renovation of the Mandate: Frustrated Aspirations?

In July 2003 the IGC tried unsuccessfully to negotiate a new mandate for the IGC. It was not until the WIPO General Assembly met in September 2003 that the large political differences surrounding the topic were reduced and a new mandate was agreed upon. During the discussions prior to the approval of the new mandate there were three basic positions on the part of the WIPO Members with respect to the nature of the mandate. The general position of the industrialized countries was to continue with discussions in the IGC for two more years using the existing mandate. The position of the African and Asian Group considered that it was time for the IGC to work in support of an effective and legally-binding international regulatory framework for the protection of traditional knowledge. In the Latin American and Caribbean group, there were differences of opinion regarding the option of a mandate for a legally-binding international agreement and a mandate that would seek the approval of guidelines and recommendations of a non-legally binding nature. This last position was based on the perception that the World Trade Organization (WTO) is considered a more "appropriate" forum than the WIPO because faster solutions may be obtained through possible commercial trade-offs.

The IGC's new mandate is as follows:

"The WIPO General Assembly has decided:

- 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.*

The General Assembly urged the IGC to accelerate its work and to present a progress report to the Session of the General Assembly in September 2004.

*The General Assembly further requested that the International Bureau continue to assist the IGC by providing member States with necessary expertise and documentation."*⁹

The new mandate possesses some aspects that must be taken into account by the negotiators and civil society actors interested in the topic. These are as follows:

⁸ See documents produced by the WIPO Permanent Committee on Patent Law.

<http://www.wipo.int/patent/law/en/scp.htm>

⁹ WIPO, 2003.

- The new mandate does not identify clear objectives for discussions/negotiations in the IGC. It is necessary to define what the aims are: to protect, promote, conserve, or create incentives? The initial mandate mentioned the term “protection” of traditional knowledge and folklore, while the current mandate does not.
- The mandate makes reference to the “international dimension” with the aim of obtaining a solution at the international level and not only at the national or regional level. The dimension of development is not mentioned.
- The mandate does not prejudice if the possible outcomes of the discussions/negotiations may be of a regulatory and/or legally-binding nature. Similarly, the mandate allows for a wide variety of solutions ranging from options implying specific reforms to the current system of intellectual property, to novel *sui generis* systems tied to customary law.
- No outcomes from similar work performed in other fora should be excluded. This was included as a result of several countries’ concern that progress should not be hindered in fora such as the CBD, the WTO, the Food and Agriculture Organization of the United Nations (FAO), and the United Nations Conference on Trade and Development (UNCTAD).
- The need for coherence and collaboration with other international fora that are currently carrying out activities on the subject is not explicitly mentioned in the mandate. Nevertheless, several countries recognize the need to seek coherence and cooperation with other fora, especially the CBD and the FAO.
- The IGC must accelerate its work and report on its progress at the next WIPO General Assembly in 2004. Likewise, the WIPO must continue to provide technical support on topics identified by the Members.

The Relationship between the IGC and Recent Decisions of the COP7 of the Convention on Biological Diversity

Although the decisions of the Seventh Conference of the Parties (COP) of the Convention on Biological Diversity do not make explicit reference to the IGC’s work, it is evident that they have direct implications for its work both in the context of Article 8(j) of the Convention related to the role of traditional knowledge about biodiversity and genetic resources, and for the process of negotiating the International Regime on Access and Benefit Sharing (International Regime).

The Decision of the COP7, held from February 9-20, 2004 in Kuala Lumpur, Malaysia, concerning Article 8(j) makes reference to: *“the need for continued collaboration with other relevant organizations working on issues related to the protection of traditional knowledge, innovations and traditional practices of indigenous and local communities (...)”*¹⁰

In addition, the COP7 requests that the Ad Hoc Open-ended Working Group on Article 8(j) *“explore, taking into account the work of the WIPO and the United Nations Permanent Forum on Indigenous Issues, the potential of and conditions under which the use of*

¹⁰ Dct. UNEP/CBD/COP/7/L.19/Rev.1 p. 30

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*existing forms of intellectual property rights can contribute to achieving the objectives of Article 8(j) and related provisions of the Convention;*¹¹.

Finally, the above-mentioned decision invites the WIPO to make available to the Working Group on Article 8(j) and Related Provisions of the Convention, the results of its work, in particular in relation to the protection of traditional knowledge and its recognition as prior art.¹²

With regard to the international regime in the framework of the CBD, after much negotiation during the COP7, the Decision defines the negotiation process by establishing terms of reference for the Ad Hoc Working Group on Access and Benefit Sharing, which must define the nature and scope of the Regime.

Likewise, the same Decision about the International Regime on Access and Benefit Sharing, in its preamble *“invites the FAO, the WTO, the WIPO, and the International Union for the Protection of New Varieties of Plants (UPOV), to cooperate with the Ad Hoc Open-ended Working Group on Access and Benefit Sharing in elaborating the new regime”*¹³.

The section about measures for compliance with prior informed consent of the contracting party providing the genetic resources indicates that *“the ongoing initiatives and processes in relevant international fora such as the WIPO, the TRIPS Council of the WTO, and the FAO Commission on Plant Genetic Resources for Food and Agriculture...”*¹⁴ will be taken into account.

The Decision also makes reference, at the request of the COP, to the WIPO Technical Study on the disclosure requirements related to genetic resources and traditional knowledge. This study was considered useful to clarify some aspects of the user measures related to intellectual property¹⁵. Moreover, the Decision invites *“the Ad Hoc Working Group on Access and Benefit Sharing to identify issues related to the disclosure of origin of genetic resources and associated traditional knowledge in applications for intellectual property rights...”*¹⁶.

The contents of the Decision are not very detailed in terms of the concrete responsibilities of the WIPO and the CBD because the preeminence of the agreements and decisions in both fora is not clear. Although the CBD Working Group must *“identify”* aspects of the disclosure of origin in applications for intellectual property rights and transmit the results to the WIPO, the mechanisms for doing so and the compliance criteria for this task are not mentioned.

¹¹ Dct. UNEP/CBD/COP/7/L.19/Rev.1 p. 31. It is worthwhile to remember that Article 8(j) calls on the States to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities and seeks to promote the broadest application of the TK, with the approval and participation of the holders of said knowledge, and to foment the equitable sharing of the benefits derived from its utilization.

¹² Dct. UNEP/CBD/COP/7/L.19/Rev.1 p. 31

¹³ Dct. UNEP/CBD/COP/7/L.28/P. 5.

¹⁴ Dct. UNEP/CBD/COP/7/L.28 P. 10

¹⁵ Dct. UNEP/CBD/COP/7/L.28 P. 11

¹⁶ Dct. UNEP/CBD/COP/7/L.28 P. 12

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On the other hand, the Decision “invites the WIPO to examine, and where appropriate, address, taking into account the need to ensure that this work is supportive of and does not run counter to the objectives of the Convention on Biological Diversity, issues regarding the interrelation of access to genetic resources and disclosure requirements in intellectual property rights applications.”¹⁷.

The reference to the need for WIPO’s work not to run counter to the objectives of the Convention arises out of a long debate between the GRULAC, the African group and the European Union about the importance of existing intellectual property systems, or such systems under development, not constituting obstacles for the conservation and sustainable use of biodiversity, and above all, of the benefit-sharing schemes being fair and equitable under mutually agreed terms.

In summary, we see that there is a clear link between the IGC’s new mandate and the process of negotiating the international regime in the framework of the CBD.

Similarly, the indigenous peoples position on the role of the WIPO was to take note of the work recently performed by the IGC, insisting on the leadership role of the Working Group on Article 8(j) and the CBD on these topics.

Although the need for collaboration between the two instances is mentioned, there appears to be no clarity about the roles, defined responsibilities, or mechanisms for operation and decision making between the CBD and the WIPO’s work in the framework of the CBD. What is certain is that the issues about the role of traditional knowledge and intellectual property must be key pieces in the design of the future international regime.

Unfortunately, most of the key issues could not be resolved by the COP and will have to be discussed by the Working Group on Access and Benefit Sharing during the intersessional period until 2006. Among the unresolved issues, the following can be cited.

- Whether the international regime will be legally binding or not;
- Whether it will take the form of a protocol or another regulatory instrument;
- How will the international regime be articulated with respect to other instruments and processes, such as the IGC’s or the FAO Treaty?;
- What will be the scope of the international regime’s application, for example, concerning the inclusion or not of derivatives of genetic resources?;
- What will be the relationship between the regime’s new regulations and existing or future intellectual property regulations?;
- Whether or not a distinction will be made between countries of origin and countries that are suppliers.

Beyond the formal decisions, the discussion was relatively polarized between countries that advocated the need to facilitate access to genetic resources, such as the European Union, and those, such as megadiverse countries, that insisted on the need to ensure equitable benefit sharing through a legally binding instrument.

¹⁷ Dec. UNEP/CBD/COP/7/L.28 P. 12

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Nevertheless, the prolonged negotiations omitted fundamental topics such as the purpose of the international regime and its connection to the CBD's objectives related to the conservation and sustainable use of biodiversity, as well as to the fair and equitable distribution of benefits derived from its use; the relationships of the international regime to the fulfillment of the goal adopted at the World Summit on Sustainable Development for the significant reduction in biodiversity loss by the year 2010, and other international commitments such as the Millennium Development Goals. The complexity of the task of negotiating an international regime and the lack of agreement and clarity on central aspects leads us to foresee a long and difficult process in which the IGC will play a key role as a provider of technical input and information.

Likewise, while the international regime is being negotiated, it is urgent and necessary for countries, both countries of origin and providers and users, to adopt temporary measures based on their experiences applying the Bonn Guidelines, for example, and on existing regulatory judicial frameworks.

Risks and Opportunities for Developing Countries

WIPO's new mandate poses some opportunities and some risks for developing countries. With respect to the opportunities, it is important to mention that, in order to be able to solve the problems of illicit access to resources or unlawful appropriation of genetic resources or traditional knowledge (biopiracy), it is necessary to reform existing intellectual property regulations at the international level in order to establish a minimum package of defensive measures. The defensive measures proposed by some developing countries include, among others, disclosure of origin, the certification of origin of biological resources and the presentation of evidence of licit access to genetic resources. It is unlikely that patent or copyright regulations would change due to reforms in Multilateral Environmental Agreements (e.g., the IGC), especially in the case of countries that haven't even ratified those agreements. The IGC could be a vehicle for recommending that negotiations of the PCT or the draft of the SPLT, currently carried out in the WIPO, be definitively incorporated into a package of defensive measures. Likewise, if the IGC Members agree, the IGC could include these defensive measures in an independent international agreement in the future. With regard to traditional knowledge, the IGC could develop some principles or regulations, whether legally-binding or not, that permit the "protection" of some commercial aspects linked to traditional knowledge. Perhaps the IGC could also help to "protect" some moral aspects of knowledge by prohibiting the establishment of intellectual property or *sui generis* laws on moral or religious aspects of traditional knowledge. Additionally, the IGC could contribute key information and technical orientations to the process of negotiating the IR.

There may also be risks in the IGC, related to undertaking exercises that are unsuccessful or inadequate to prevent illegal access and unlawful appropriation of genetic resources and traditional knowledge. The excessive orientation towards the protection of intellectual property as a solution to all problems related to traditional knowledge can weaken the exercise of a "protection" that is adequate for its true holders: the indigenous peoples and other local communities. This can be corroborated in the IGC Members' impossibility to establish clear objectives. Likewise, the WIPO is seen by some countries, civil society groups, indigenous peoples and other communities as a forum where it is unlikely that their interests will be taken into account.

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Thus, for example, the recent Decision adopted by the COP7 about Article 8(j) of the Convention places special emphasis on *sui generis* forms of protection of traditional knowledge based on non-intellectual property¹⁸.

Recently there has been a tendency in the doctrine, in the opinions of several developing countries, and in some civil society actors to consider that international level work should be assigned in the following manner:

- The WTO should study the reform of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) with a view to incorporating effective defensive measures for the fulfillment of the CBD's principles and objectives.
- The IGC and the Ad Hoc Open-ended Working Group on Article 8(j) should seek practical solutions for the protection of traditional knowledge, taking into account the holders' interests and common law.
- After the Decisions of the recent Conferences of Parties, the CBD must define the terms and establish the content for the negotiation of an international regime for the distribution of benefits, taking into consideration related processes and agreements such as the FAO Treaty and the WIPO.
- The FAO should wait for the ratification by the minimum number of necessary countries to put the International Agreement on Plant Genetic Resources into effect and subsequently assist the countries with its effective implementation.

Although this labor distribution would not solve all the problems, it could avoid duplication of work and perhaps promote mutually supportive solutions.

Indigenous Participation and Vision in the IGC

In the opinion of some indigenous organizations, the participation of indigenous peoples in the IGC has been insufficient¹⁹. Given the diversity and great number of indigenous peoples, it has not been possible to ensure a sufficiently representative participation. On numerous occasions the indigenous peoples have expressed interest in obtaining financial support to ensure their participation in the IGC. Some of the main points in declarations by indigenous organizations in the IGC have indicated the following: i) intellectual property as reflected in international agreements is having a negative effect on the indigenous peoples' rights to their knowledge; ii) the indigenous people alone should decide about access, use and the most appropriate protection system for their knowledge; iii) the principles of indigenous customary law must be the basis for any discussion in the IGC; iv) it is necessary to create mechanisms for interaction between the WIPO Members and the Permanent Forum on Indigenous Issues²⁰.

Some Conclusions

Although the IGC offers some opportunities to make progress toward the achievement of the developing countries' objectives concerning genetic resources, the indigenous agenda

¹⁸ UNEP/CBD/COP/7/L19/Rev.1, P. 31.

¹⁹ See Declaration of the "Call of the Earth" group in the Fifth Session of the IGC in July 2003.
<http://www.earthcall.org/>

²⁰ See <http://www.un.org/esa/socdev/pfi/>

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and that of other communities regarding traditional knowledge, the outcomes will not be easy to obtain or at the level that they may expect. Although the IGC renewed its mandate and broadened the range of possible outcomes by WIPO Members, it has not been capable of establishing clear objectives to guide their work. During the IGC's work, the exploration of regional and national solutions must be promoted to enable a bottom-up approach and political opportunities must be maintained in order to find *sui generis* solutions aimed at a broader and more multidisciplinary protection. It will also be necessary to establish roles, responsibilities and clear mechanisms for interaction and cooperation with related processes such as the CBD and, in particular, the Working Groups on Access to Genetic Resources and Benefit Sharing and on Article 8(j). Finally, the participation of indigenous peoples and other local communities will have a determining effect in achieving real legitimacy for the IGC's outcomes.