

WIPO



WO/GA/26/6

ORIGINAL: English

DATE: August 25, 2000

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

E

WIPO GENERAL ASSEMBLY

**Twenty-Sixth (12th Extraordinary) Session
Geneva, September 25 to October 3, 2000**

MATTERS CONCERNING INTELLECTUAL PROPERTY AND GENETIC RESOURCES,
TRADITIONAL KNOWLEDGE AND FOLKLORE

Document prepared by the Secretariat

1. With the emergence of modern biotechnologies, genetic resources have assumed increasing economic, scientific and commercial value to a wide range of stakeholders. Traditional knowledge associated with those resources has, in consequence, attracted widespread attention from an enlarged audience. Other tradition-based creations, such as expressions of folklore, have at the same time taken on new economic and cultural significance within a globalized information society.
2. Conservation, management, sustainable utilization and benefit sharing in respect of genetic resources and associated traditional knowledge are being addressed within a range of different policy areas, including food and agriculture, biological diversity and the environment, biotechnology innovation and regulation, human rights, cultural policies and trade and economic development. Within all these areas intellectual property issues have arisen and are assuming increasing importance. As the specialized UN agency responsible for the promotion of intellectual property worldwide, WIPO has been requested by its Member States to undertake exploratory groundwork and facilitate discussions for a better understanding of the often inter-related intellectual property issues regarding genetic resources, traditional knowledge and folklore.
3. Section I of the present document reviews previous work and Member State discussions that have taken place at WIPO regarding these subjects. Section II proposes the establishment of a separate body within WIPO to facilitate the continuation of these discussions. Finally,

Section III provides an illustrative list of possible issues that Member States may wish to discuss within such a body.

I. BACKGROUND

4. Since the 1998-99 biennium, issues related to intellectual property and genetic resources have been addressed in regular activities under WIPO's exploratory Subprogram 11.2 on "Biological Diversity and Biotechnology." The activities on intellectual property and genetic resources began with a study on the role of intellectual property rights in the sharing of benefits arising from the use of biological resources and associated traditional knowledge. The study was commissioned jointly with the United Nations Environment Programme (UNEP) and resulted in three case studies, which provide lessons as to how the effective protection of intellectual property rights can support the sharing of benefits arising from the use of genetic resources.

5. Issues related to intellectual property and genetic resources were also discussed by Member States at the third session of the Standing Committee on the Law of Patents (SCP), which took place in Geneva from September 6 to 14, 1999. The SCP requested the International Bureau to include the issue of protection of biological and genetic resources on the agenda of a Working Group on Biotechnological Inventions, to be convened at WIPO in November 1999. The SCP further invited the International Bureau to take steps to convene a separate meeting involving a larger number of Member States early in 2000, to consider that issue (see document SCP/3/11, paragraph 208).

6. The Working Group on Biotechnology, at its meeting on November 8 and 9, 1999, recommended the establishment of nine projects related to the protection of inventions in the field of biotechnology. The Working Group decided to establish a questionnaire for the purpose of gathering information about the protection of biotechnological inventions, including certain aspects regarding intellectual property and genetic resources, in the Member States of WIPO. The Secretariat of WIPO is in the process of compiling the responses to the questionnaire.

7. In response to the invitation issued by the SCP, WIPO organized a Meeting on Intellectual Property and Genetic Resources on April 17 and 18, 2000. The Meeting addressed issues that generally are raised in the context of access to, and *in situ* preservation of, genetic resources in their direct or indirect relationship with intellectual property. The Chairman's Conclusions from the Meeting state that the exchange of views that took place at the Meeting produced a clear consensus that:

"WIPO should facilitate the continuation of consultations among Member States in coordination with the other concerned international organizations, through the conduct of appropriate legal and technical studies, and through the setting up of an appropriate forum within WIPO for future work."

8. At the same meeting, it was agreed that the WIPO Secretariat should prepare and issue an additional questionnaire in the field of intellectual property and genetic resources, which would be based on submissions by Member States. To date, no such submissions have been received.

9. During the Diplomatic Conference for the Adoption of the Patent Law Treaty from May 11 to June 2, 2000, the Director General conducted consultations concerning formalities in relation to the question of genetic resources. As the outcome of the consultations, a statement was agreed upon among the groups and read out by the Director General, the relevant part of which is as follows:

“Member State discussions concerning genetic resources will continue at WIPO. The format of such discussions will be left to the Director General’s discretion, in consultation with WIPO Member States.”

10. Following the Diplomatic Conference, consultations with Member States took place regarding the format and content of such discussions. As a result of the consultations, it is proposed that a distinct body should be established within WIPO to facilitate such discussions and that, in addition to the issue of genetic resources, the discussions should also include the results of WIPO’s previous work on the related fields of traditional knowledge and expressions of folklore.

11. WIPO began its work on “traditional knowledge, innovations and creativity” (traditional knowledge) in the 1998-99 biennium. Two Roundtables were convened regarding the protection of traditional knowledge and a series of nine fact-finding missions on traditional knowledge, innovations and creativity (FFMs) were undertaken. The objective of the FFMs was “to identify and explore the intellectual property needs and expectations of new beneficiaries, including the holders of indigenous knowledge and innovations.” A draft Report on all the fact-finding missions has been proposed and made available for public comments until October 30, 2000, on the WIPO website (<www.wipo.int/traditionalknowledge/report>). Comments received will be taken into account in producing a final report, which will be published later in 2000.

12. WIPO’s work on “expressions of folklore,” which are a subset of traditional knowledge, began as early as 1978 in cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO). It has thus progressed to a more advanced stage than the work on traditional knowledge in general. A concrete product of this work was the adoption in 1982 of the “Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions” (the Model Provisions). Most recently, WIPO and UNESCO conducted four Regional Consultations on the Protection of Expressions of Folklore, each of which adopted resolutions or recommendations with proposals for future work. Three of the four consultations recommended the establishment within WIPO of a separate committee on folklore and traditional knowledge to facilitate future work in this area (see documents WIPO-UNESCO/FOLK/ASIA/99/1, page 4, paragraph 4; WIPO-UNESCO/FOLK/ARAB /99/1, paragraph II(b)6; WIPO-UNESCO/FOLK/LAC/99/1, page 3). In addition, it is worth noting that the WIPO Performances and Phonograms Treaty (WPPT) already makes explicit reference to expressions of folklore.

II. PROPOSAL FOR THE ESTABLISHMENT OF A WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE¹

13. Following the recommendations of the regional consultations on folklore, the consensus achieved at the Meeting on Intellectual Property and Genetic Resources, the commitment reached in the context of the Diplomatic Conference for the Adoption of the Patent Law Treaty and subsequent consultations with Member States, the Member States might wish to consider the establishment of an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore for the purpose of discussions on these subjects.

14. The Intergovernmental Committee would constitute a forum in which discussions could proceed among Member States on the three primary themes which they identified during the consultations: intellectual property issues that arise in the context of (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not associated with those resources; and (iii) the protection of expressions of folklore.

15. Each one of these themes cuts across the conventional branches of intellectual property law and does therefore not fit into existing WIPO bodies, such as the SCP, the Standing Committee on Copyright and Related Rights (SCCR), the Standing Committee on Trademarks, Industrial Designs and Geographical Indications (SCT), and the Standing Committee on Information Technologies (SCIT). At the same time, the three themes are closely interrelated, and none can be addressed effectively without considering aspects of the others.

16. It is proposed that the Intergovernmental Committee be open to all Member States of WIPO. In conformity with the budgetary allocations available under the Program and Budget and previous WIPO practice, WIPO would facilitate the participation of representatives of developing countries and of certain countries in Europe and Asia. As is usual in WIPO bodies, it is proposed that relevant intergovernmental organizations and accredited international and regional non-governmental organizations be invited to participate in an observer capacity. It is proposed that the Committee would hold its first session in the Spring of 2001 and that the next draft Program and Budget would provide for the Committee to meet twice a year in the 2002-2003 biennium. The Committee would report any recommendations for action that it might formulate to the WIPO General Assembly.

17. At its first session, it is proposed that the Committee determine, within its sphere of competence, and in accordance with the Program and Budget, the agenda of items on which work should proceed. It would also determine the priority accorded to these various items. It is proposed that the draft agenda for the first session of the Committee include the items set out in the Annex to this document. It is also suggested that Member States be invited to

¹ The title given to the proposed body in this document is provisional and subject to approval by the Member States. The title suggested in this document reflects the three primary themes identified by Member States during recent consultations on the subject (see paragraph 14, below). Accordingly, the substantive issues listed in Section III of the present document are organized under these three themes.

submit proposals for issues to be considered at the first session of the Committee and documents to be prepared by the WIPO Secretariat for that first session. Section III, below, identifies issues that Member States may consider appropriate and which may form the basis for proposals for issues to be considered at the first session of the Committee.

18. It is proposed not to establish separate rules of procedure for the Intergovernmental Committee, but rather that the general rules of procedure adopted for WIPO bodies, namely the WIPO General Rules of Procedure (publication No. 399 Rev.3) should apply, subject to any special rules of procedure that the Intergovernmental Committee may wish to adopt.²

19. The WIPO General Assembly is invited to approve the establishment of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore proposed in paragraph 13 and the administrative matters proposed in paragraphs 16 to 18, above.

III. ISSUES FOR CONSIDERATION BY THE PROPOSED INTERGOVERNMENTAL COMMITTEE

20. In the course of the informal consultations described in paragraphs 9 and 10, above, the Member States identified three primary themes which require further discussion. These themes consist of intellectual property issues that arise in the context of: (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, innovations and creativity, whether or not associated with those resources; and (iii) the protection of expressions of folklore, including handicrafts. This Section provides a list of issues for each theme which the Member States identified for discussion. The present document merely catalogs these issues in a non-exhaustive list, without elaborating on them substantively.

A. Access to Genetic Resources and Benefit-Sharing

21. Intellectual property questions related to access to genetic resources and benefit-sharing arise in four main contexts. These contexts rely upon a shared understanding of the meaning of certain terms, such as “genetic resources,” which should accordingly be the subject of definitions to which attention should be given at the outset. The four main contexts concern the role of intellectual property rights in:

(i) *Contractual agreements for access to genetic resources.* Access agreements for genetic resources, such as material transfer agreements (MTAs), raise questions on the role of intellectual property rights (IPRs) in respect of: ensuring control over *ex-situ* use of genetic resources; technology transfer and joint research and development; the exploration of the possibility of joint ownership of IPRs; ensuring continued customary use

² The SCCR, SCT and SCIT have adopted a special Rule of procedure extending membership (without the right to vote) to the European Communities (see documents SCCR/1/2, paragraphs 8 to 10; SCT/1/6, paragraph 16; and SCIT/1/7, paragraph 11 and Annex III, Appendix 1, respectively).

of genetic resources, etc. Member States may wish to consider the development of “best contractual practices,” guidelines and model intellectual property clauses for MTAs and other access agreements.

(ii) *Legislative, administrative and policy measures to regulate access to genetic resources and benefit-sharing.* Issues arising in the development of national and regional access legislation include the role of intellectual property rights regarding: prior informed consent procedures; ensuring the recording of ownership interests in inventions that arise from access to or use of genetic resources; transfer of and access to technology in the context of benefit-sharing; and joint research and development as a form of non-monetary benefit-sharing.

(iii) *Multilateral systems for facilitated access to genetic resources and benefit-sharing.* Multilateral systems, such as the system currently being developed for plant genetic resources for food and agriculture, raise numerous intellectual property issues, including: possible intellectual property-based benefits-sharing mechanisms; acquisition of intellectual property rights over genetic resources placed in the multilateral system; access under the multilateral system to genetic resources covered by intellectual property rights; transfer of and access to technology under the multilateral system; and the rights of holders of traditional knowledge associated with genetic resources placed in the multilateral system.

(iv) *The protection of biotechnological inventions, including certain related administrative and procedural issues.* Intellectual property issues in the field of biotechnology include: licensing and other issues related to the use of rights in biotechnological inventions; administrative and procedural issues related to the examination of patent applications directed at biotechnological inventions; the relationship between patents and other forms of intellectual property protection for biotechnological inventions; and certain aspects, related to ethical and environmental issues, animal and human health.

22. In each of these four contexts intellectual property issues arise regarding the protection of traditional knowledge related to genetic resources. These issues are dealt with separately under the next heading.

B. Protection of Traditional Knowledge

23. Based on WIPO’s previous work, intellectual property issues regarding the protection of traditional knowledge related to genetic resources, and traditional knowledge, innovations and creativity in general, can be grouped in four categories:

(i) *Terminological and conceptual issues.* Issues to be discussed in this category include: the selection of appropriate terms to describe the subject matter for which protection is sought; a clear definition or description of what is meant (and not meant) for intellectual property purposes by the selected terms; study of customary laws and regulatory systems that apply to traditional knowledge in local and traditional communities; examination of certain conceptual issues, such as collectivity of creation, innovation and ownership and cultural understandings of property rights.

(ii) *Standards concerning the availability, scope and use of intellectual property rights in traditional knowledge.* Issues include: in the short term, facilitating access

to the intellectual property system to enable traditional knowledge holders to acquire and use intellectual property rights where available under current standards; in the longer term, the possible development of new standards to protect traditional knowledge not protected by existing intellectual property tools, the elaboration of an international framework for traditional knowledge protection, and the development of a system of “community” or “collective” rights to protect traditional knowledge.

(iii) *Certain criteria for the application of technical elements of standards, namely legal criteria for the definition of prior art and administrative and procedural issues related to the examination of patent applications.* Issues in this category include: the integration of traditional knowledge into the procedures of IP offices for filing, examination, publication and granting of industrial property titles through the documentation and publication of traditional knowledge as searchable prior art, where so desired by the relevant traditional knowledge holders; an analysis of how prior art is established for purposes of patent examinations in the context of traditional knowledge; and the provision of legal assistance with traditional knowledge documentation.

(iv) *The enforcement of rights in traditional knowledge.* This involves facilitating access to the intellectual property system, to enable traditional knowledge holders to use and enforce rights under the intellectual property system.

C. Protection of Expressions of Folklore

24. The four regional consultations on the protection of folklore, mentioned in paragraph 12, above, recommended that WIPO should increase and intensify its work in the field of folklore protection. Recommendations for the legal protection of folklore focused on the development of a *sui generis* form of legal protection at the international level (Asia/Pacific, Arab, LAC Recommendations). Three of four consultation meetings considered the UNESCO-WIPO Model Provisions (1982) to be an adequate starting point and relevant groundwork for future work in this direction. One consultation recommended “to develop, in the shortest possible time, a broad consensus among States in favor of an international regime” (African Recommendation). Such a consensus among States seems to require detailed Member State discussions on issues such as those referred to in paragraph 23, above, insofar as they are relevant also to folklore, which might be facilitated by the establishment of a distinct body for this purpose, as referred to in Section II. Furthermore, discussions at the Thirty-Fourth Series of Meetings of the Assemblies of the Member States of WIPO, held from September 20 to 29, 1999, specified that special attention in this context should be given to the protection of handicrafts (see document A/34/16, paragraphs 29, 113 and 142).

25. *The WIPO General Assembly is invited to note the foregoing enumeration of issues for further discussion regarding intellectual property in relation to genetic resources, traditional knowledge and folklore.*

[Annex follows]

ANNEX

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

First Session

Geneva, Spring 2001

DRAFT AGENDA

prepared by the Director General

1. Opening of the session
2. Election of a Chair and two Vice-Chairs
3. Adoption of the Agenda
4. Issues to be considered by the Intergovernmental Committee
 - 4.1 Access to Genetic Resources and Benefit-Sharing
 - 4.2 Protection of Traditional Knowledge
 - 4.3 Protection of Expressions of Folklore
5. Future work
6. Adoption of the Report
7. Closing of the session

[End of Annex and of document]