

WIPO General Assembly

Forty-Seventh (22nd Ordinary) Session
Geneva, October 5 to 14, 2015

**MATTERS CONCERNING THE INTERGOVERNMENTAL COMMITTEE ON
INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL
KNOWLEDGE AND FOLKLORE (IGC): PROPOSAL OF THE UNITED STATES OF
AMERICA TO THE WIPO GENERAL ASSEMBLY**

Document prepared by the Secretariat

1. In a communication dated September 3, 2015, a copy of which is set out in the Annex, the Delegation of the United States of America requested, amongst other, that its submission entitled “Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)” be made available as a working document for discussion at the Forty-Seventh (22nd Ordinary) Session of the WIPO General Assembly.

2. *The WIPO General Assembly is invited to consider the communication in the Annex to this document.*

[Annex follows]

Dr. Francis Gurry
Director General
World Intellectual Property Organization
34, chemin des Colombettes
1211 Geneva 20
Switzerland

September 3, 2015

Dear Dr. Gurry:

In accordance with Rule 5(4) of the General Rules of Procedure of WIPO contained in WIPO Publication 399 (FE) Rev.3, the United States requests that the following proposals (enclosed) be added to the agendas of the Fifty-Fifth Series of Meetings of the Assemblies of the Member States of WIPO (Geneva, October 5 to 14, 2015), as proposals to be considered under the relevant agenda items, or as new agenda items, as appropriate:

- PCT Union Assembly: Matters Concerning the Lisbon Union;
- Madrid Union Assembly: Matters Concerning the Madrid and Lisbon Unions;
- WIPO General Assembly: Matters Concerning the WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT);
- WIPO General Assembly: Matters Concerning the Administration of the Geneva Act of the Lisbon Agreement; and
- WIPO General Assembly: Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).

The United States also requests that the draft agenda (document WO/55/1 Prov. 2) be re-ordered so that the "Global Intellectual Property Services" (agenda items 19-23), upon which WIPO's budget is predominantly dependent, appear before the "Program, Budget and Oversight Matters" (agenda items 10-11).

I would be grateful if you could please provide me with a copy of the revised version of the draft agenda including these items and re-ordered pursuant to this request.

Sincerely,



Deborah Lashley-Johnson
Intellectual Property Attaché
United States Mission to the World Trade Organization

Enclosures

Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)

Proposal of the United States of America to the WIPO General Assembly

Introduction

Since the establishment of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), the United States has been committed to the work of the IGC, and has contributed substantially, working constructively with all Member States with the intent to achieve a mutually acceptable result under the mandate of the IGC. We recognize the Facilitator process to help structure our discussions regarding any mandate of the IGC, in an organized, efficient manner so as to advance this process. The U.S. proposal to replace the IGC with an Ad-Hoc Experts Working Group is provided without prejudice to, and is intended to assist, the Facilitator's discussions. The U.S. proposal is derived from a thoughtful reflection of the IGC's efforts up to and during the 2014/2015 biennium and consultation with other participants in the IGC. The push for accelerated work, and then the ultimate collapse of that work, last year was due to a significant lack of consensus on fundamental issues, such as objectives and principles of the IGC, subject matter of protection, scope of protection, beneficiaries and exceptions. In looking at the heavily bracketed text of the IGC, decisions on those issues remain outstanding for many, if not all, delegations. The U.S. proposal for the holding of seminars, updating and conducting studies, and the establishment of an Ad-Hoc Expert Working Group to address fundamental and cross-cutting concepts for the upcoming biennium seeks to address the shared objective in finding commonality on issues that have been elusive for WIPO Member States for many years.

Discussion and Proposal

The WIPO IGC was established in 2000, to "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."¹ Since 2000, the mandate of the IGC has been regularly renewed to allow a continued conversation. As recognized in the proposal of the Africa Group (WO/GA/47/16), during the intervening 15 years, however, members have been unable to come to an agreement on whether new intellectual property rules should be created for the *sui generis* protection of traditional knowledge (TK) and traditional cultural expressions (TCEs), or to address the intellectual property issues that arise in the context of genetic resources (GR). Despite many years of prolonged discussions in the IGC, there is no shared understanding of any problem to be solved, or the objectives or principles that potentially underlie the linkage between intellectual property and GR, TK and TCEs.

One of the principal reasons that the IGC has failed to make meaningful progress is that there is no shared understanding of what problem the Committee is trying to solve. Some argue that the problem is that knowledge is being used by others without the knowledge holder's permission, and others respond that not all knowledge is or should be proprietary and that there are already international norms for proprietary knowledge. Nor is there a common understanding of whether expansion of

¹ See WO/GA/26/6, paragraph 14

protectable subject matter (and retraction of the public domain) would, on balance, be beneficial. To date, the discussion within the IGC has not been informed by specific examples, drawn from national experience or domestic legislation (other than patent, trademark, trademark, copyright and industrial design legislation), on such basic issues as protectable subject matter and subject matter that is not intended to be protected. Similarly, one of the key unresolved issues is who should be considered a beneficiary person under a *sui generis* approach. The discussions in the IGC have also highlighted the significant differences between the perspectives of some indigenous communities and some WIPO members regarding the ownership and use of TK and TCEs, including the adverse impact that new international norms could have on freedom of expression.

The IGC's progress was impaired when it took on a normative role without adhering to the Development Agenda recommendations for norm setting activities, which suggest taking into consideration a balance between costs and benefits, to invite the participation of all stakeholders, and to consider the preservation of the public domain. Despite these recommendations, the IGC has not considered the public domain, and has instead surprisingly questioned whether it exists. The IGC has heard from potential rights holders, but has, in general, not included the participation of musicians, artists and others who would be adversely impacted by reducing the public domain.

In addition, the expectation of the demandeurs for a mandatory treaty with new patent eligibility obligations fails to take into account the various approaches Member States have established to regulate the use of GR, TK and TCEs, and has missed opportunities demonstrated by other approaches. Detailed national laws outside the patent system to regulate conduct may be the most effective means of managing access to genetic material and associated TK without creating legal uncertainty in the patent system. Further, addressing the means to improve patent examination through the role of databases to prevent the erroneous granting of patents is a targeted response to erroneous patent grant concerns.

Finally, the IGC's progress has also been slow because the work that needs to be done has a complicated human rights dimension, which may not be able to be objectively evaluated. For example, one cost of the proposal to grant certain people or groups intellectual property rights due to who they are may be to weaken the tenets of international law enshrined in the Universal Declaration of Human Rights (UDHR) to avoid any discrimination of any kind. How can all equally participate in the life of a community, if the community partitions specific cultural traditions according to subgroups of the community? The answer to this question is not black and white, and the IGC has not been able to agree upon who should be the beneficiary of the proposed international agreement. An Ad-Hoc Experts Working Group setting may allow a thorough analysis of the issue.

Any result on these issues should be a framework that improves efficiency and is agreed to by all Member States. In order to make real progress in the work related to the important topics assigned to the IGC in 2000, we believe that it is necessary to significantly change the manner of work rather than simply renewing the mandate of the IGC. As we have stated with respect to governance in general, better mechanisms than regularly-scheduled Committee meetings exist to allow the development of a shared understanding of these complex issues, and to allow a genuine discussion. If Committee meetings are not facilitating progress, then other mechanisms need to be considered.

With seminars and studies addressing specific topics, and a cross-regional group of experts meeting to discuss lessons learned from those seminars and studies (i.e., the Ad-Hoc Experts Working Group), we believe that progress can be made. The Secretariat could hold an ongoing series of seminars on the intellectual property aspects of genetic resources, and the protection of traditional knowledge and

traditional cultural expressions, the impact of such protection upon the cultural life of communities, as well as the circumstances under which genetic resources, traditional knowledge and traditional cultural expressions are in the public domain, and provide a brief report of such seminars.

In the 2016/17 biennium, the cross-regional group of experts could consider the results of the seminars and the work of the IGC, have an exchange of views on any problems regarding the intellectual property aspects of genetic resources, the protection of traditional knowledge and the protection of traditional cultural expressions, as well as what traditional knowledge and traditional cultural expressions should be entitled to protection and which should be entitled to be used by all peoples. The Ad-Hoc Experts Working Group will meet in person for four days, and will work to develop a shared understanding of what, if any, problems exist regarding the intellectual property aspects of genetic resources, the protection of traditional knowledge, and the protection of traditional cultural expressions and will produce a range of examples of such agreed problems. In addition, the Ad-Hoc Experts Working Group could aim to find a mutually acceptable response to the following questions which have been discussed throughout the IGC without resolution:

- (i) What does “traditional knowledge” or “traditional cultural expressions” mean?
- (ii) Is publicly available and/or widely diffused “traditional knowledge” and “traditional cultural expressions” in the public domain? When are genetic resources in the public domain?
- (iii) What does “misappropriation” and “misuse” mean?

In addition, the Ad Hoc Experts Working Group could:

- (iv) explore what can be derived from national experiences;
- (v) consider national and regional legal instruments. Have any of them proven useful to reach the intended aims? In what respect? Who is the beneficiary in national systems? Does the approach work? Are there any negative consequences of these approaches?
- (vi) evaluate experiences with the implementation of the Nagoya Protocol.

The Secretariat would be encouraged to provide technical assistance to the Ad-Hoc Experts Working Group, as requested.

The General Assembly is invited to decide:

- (i) Not to renew the mandate of the IGC for the 2016/2017 biennium,*
- (ii) That Program 4 should continue to provide seminars and to conduct studies; and*
- (iii) That an ad-hoc, cross regional group of experts (an Ad-Hoc Experts Working Group) shall be established, to determine what, if any problems exist and*

what, if anything, can be done at the international level to address any such problems and to address the questions and matters referenced above.

[End of Annex and of document]