

## DRAFT STUDY ON THE PARTICIPATION OF OBSERVERS IN THE WORK OF THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE\*

*Document prepared by the Secretariat*

### INTRODUCTION

1. The WIPO General Assembly, at its Fortieth (20<sup>th</sup> Ordinary) Session, held from September 26 to October 5, 2011, agreed on the mandate for the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) for the 2012-2013 biennium.<sup>1</sup> The WIPO General Assembly further invited the IGC to review its procedures with a view to “enhancing the positive contribution of observers” to the IGC process. In order to facilitate this review, the Secretariat of WIPO was requested to prepare a study on the participation of observers in the work of the IGC. According to the decision of the WIPO General Assembly, the study should outline “current practices and potential options” in this regard.<sup>2</sup>

2. In order to assist in the preparation of the study, IGC participants were invited to submit comments to the Secretariat on the subject of the study. In this regard, a “Note on Existing Mechanisms for Participation of Observers in the Work of the WIPO’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore” was prepared, and the IGC participants were invited, through a circular letter dated October 14, 2011, to submit comments before November 30, 2011. Six submissions were received from delegations of Member States,<sup>3</sup> and ten submissions were received from accredited observers, including indigenous peoples’ organizations, non-governmental

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\* The Executive Summary of this study is contained in document [WIPO/GRTKF/IC/20/7](#)

<sup>1</sup> WO/GA/40/19 Prov., para. 180

<sup>2</sup> Full text of the decision is set out in WO/GA/40/7, para. 16.

<sup>3</sup> Colombia; Kazakhstan; Mexico; Pakistan; Russian Federation; United States of America

organizations (NGOs) and United Nations (UN) bodies.<sup>4</sup> One reply was received from a non-accredited NGO.<sup>5</sup>

3. Many of these submissions, from States and observers alike, underscored the vital importance of guaranteeing the participation of observers in the IGC's negotiations, particularly the participation of indigenous peoples and local communities, as the holders of traditional knowledge (TK) and traditional cultural expressions (TCEs). This draft study refers explicitly only to the key issues raised and main proposals made in these submissions. The entire submissions are available on WIPO's TK, TCEs and genetic resources (GRs) website,<sup>6</sup> and the IGC participants are invited to consult them, if they so wish.

4. As mandated by the WIPO General Assembly, this draft study reviews current practices and mechanisms for observer engagement in the work of the IGC and outlines potential options for enhancing the positive contribution of observers based on relevant information received from IGC participants through the submissions referred to, as well as on the Secretariat's own research of good practices pertaining to the participation of observers in other UN and intergovernmental processes.

5. Part I of the document sets out the admission of observers to the IGC process and focuses on their formal role and status as accredited observers. Part II deals with existing and potential means for facilitating the direct and effective participation of accredited observers in sessions of the IGC. Part III deals more broadly with strengthening the capacity of civil society at large to engage with the IGC process. Part IV summarizes potential options for enhancing the participation and positive contribution of observers to the IGC process.

#### PART I. ADMISSION OF OBSERVERS AND THEIR ROLE AND STATUS IN THE IGC PROCESS

6. Since its inception in 1998, WIPO's work on GRs, TK and TCEs has recognized the need to promote an inclusive approach ensuring the direct involvement of the diverse range of stakeholders with particular interests in the issues addressed, especially indigenous and local communities. In 1998 and 1999, two Roundtables on IP and indigenous peoples were convened and, over the same period, a series of nine fact-finding missions (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."<sup>7</sup>

7. Once the IGC was established in 2000, recognition of the need for an inclusive approach continued, and both the WIPO General Assembly and the IGC expressed this need explicitly, with particular attention being paid to improving the participation of indigenous and local communities. For example, at its Twenty-Eighth (13<sup>th</sup> Extraordinary) Session, in September 2002, the WIPO General Assembly decided that "Member States should be encouraged to include representatives of indigenous and local communities on their delegations to the Intergovernmental Committee".<sup>8</sup> At its fifth session, in July 2005, the IGC

<sup>4</sup> United Nations Office of the High Commissioner for Human Rights (OHCHR); *Association des Etudiants et Chercheurs sur la Gouvernance des Etats Insulaires (AECG)*; Foundation for Aboriginal and Islander Research Action (FAIRA); Genetic Resources, Traditional Knowledge and Folklore International (GRTKF Int.); Grand Council of the Crees (*Eeyou Istchee*); Indian Movement "Tupaj Amaru"; Indigenous People (Bethchilokono) of Saint Lucia Governing Council (BGC); Indigenous Peoples Council on Biocolonialism (IPCB); Intangible Cultural Heritage Network (Ichnet); Kanuri Development Association; *Traditions pour Demain*

<sup>5</sup> ADJMOR

<sup>6</sup> [http://www.wipo.int/tk/en/observer\\_participation.html](http://www.wipo.int/tk/en/observer_participation.html)

<sup>7</sup> See Report on the Intellectual Property Needs and Expectations of Traditional Knowledge Holders ("the FFM Report"), 2001.

<sup>8</sup> A/37/14, sub-para. 290(ii)

further considered the participation of indigenous and local communities in its work and decided that “there was a unanimous view that the participation of local and indigenous communities was of great importance for the work of the Committee and that all appropriate measures should be undertaken to facilitate that participation. It was considered that Member States should make every effort to include representatives of these communities in their national delegations”.<sup>9</sup>

8. In practice, however, not many delegations have in the past included representatives of indigenous peoples and local communities. An option, therefore, could be for the IGC to renew calls for delegations to include such representatives, as well as representatives of other observers as appropriate.<sup>10</sup>

### *Accreditation*

9. The IGC has built upon this inclusive approach. Recognizing that many of the stakeholders with a direct interest in the work of the IGC, especially indigenous and local communities, did not enjoy permanent observer status at WIPO, the IGC, already at its first session in April 2001, agreed to allow for the participation in its meetings of certain organizations as *ad hoc* observers,<sup>11</sup> and has ever since continued to do so at each session.

10. In accordance with the agreed procedure, decisions on accreditation are made by the Member States at the beginning of each session of the IGC based on documentation containing biographical details of organizations requesting representation in the sessions of the IGC. Currently there are 268 organizations accredited to the IGC as *ad hoc* observers representing a wide diversity of stakeholders, such as indigenous peoples’ organizations, NGOs, the private sector and academic institutions. However, not all of them regularly attend IGC sessions.

11. The IGC’s “fast-track” accreditation procedure for *ad hoc* observers complements initiatives of other UN bodies towards establishing a meaningful dialogue with various stakeholders. For example, organizations in consultative status with the UN Economic and Social Council (ECOSOC) may participate, present written contributions and make statements to various UN bodies, such as the Human Rights Council. However, as indicated in the submission by the UN Office of the High Commissioner for Human Rights (OHCHR), the Human Rights Council has even facilitated the participation in some of its subsidiary mechanisms of non-state actors not in consultative status with ECOSOC. Similarly, the participation of organizations of indigenous peoples not in consultative status with ECOSOC was authorized for the Open-ended Intersessional Working Group on the Draft Declaration on the Rights of Indigenous Peoples (1995-2006)<sup>12</sup> in recognition that they had “special knowledge and understanding of the current situation of the world’s indigenous people and their human rights needs”<sup>13</sup>. In that case, decisions on authorization to participate were made by ECOSOC based on the recommendations of a Committee on Non-Governmental Organizations that was requested to meet as necessary to examine applications from indigenous peoples’ organizations interested in participating in the Working Group. This arrangement is widely referred to as a good example of an inclusive and participatory UN process that contributed to the legitimacy of its outcome.<sup>14</sup>

<sup>9</sup> WIPO/GRTKF/IC/5/15, para. 206

<sup>10</sup> See submission by Mexico.

<sup>11</sup> WIPO/GRTKF/IC/1/2, para. 8 and WIPO/GRTKF/IC/1/13, para. 18

<sup>12</sup> ECOSOC resolution 1995/32 of July 25, 1995

<sup>13</sup> Commission on Human Rights resolution 1995/32 of March 3, 1995

<sup>14</sup> See submissions by OHCHR, Grand Council of the Crees (*Eeyou Istchee*), Indian Movement “*Tupaj Amaru*”.

12. The participatory status of indigenous peoples is being increasingly discussed within UN processes, particularly in relation to the traditional forms of self-organization of indigenous peoples. As recognized in a report of the UN Secretary-General of 1996,<sup>15</sup> "... traditionally, indigenous people do not organize themselves in non-governmental structures which is a precondition for achieving consultative status [with ECOSOC]."

13. Most recently, at its eighteenth session in September 2011, the Human Rights Council, recognizing that some indigenous peoples' representatives "are not always organized as non-governmental organizations" and have their own governance bodies and institutions, requested the UN Secretary-General to prepare a document on "ways and means of promoting participation at the United Nations of recognized indigenous peoples' representatives on issues affecting them . . .". This report would be presented to the Council at its twenty-first session in September 2012.<sup>16</sup>

14. As highlighted in the report to the Human Rights Council by the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) on its fourth session, held in July 2011, an enhanced participatory status of indigenous peoples' governance bodies and institutions in UN processes would be in line with Article 18 of the UN Declaration on the Rights of Indigenous Peoples, 2007, which affirms that "indigenous peoples have the right to participate in decision-making in matters affecting their rights, through representatives chosen by them in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions".<sup>17</sup>

15. Such developments elsewhere in the UN could further inform the IGC's relationship with various categories of accredited observers, and, particularly, help establish appropriate consultative arrangements with the key non-governmental stakeholders in the process, *i.e.* indigenous peoples and local communities. In this regard, it is important to note that a distinction is frequently drawn between organizations representative of and accountable to indigenous peoples and local communities, on the one hand, and NGOs working with or for indigenous peoples and local communities, on the other. With regard to the former, the abovementioned EMRIP report makes references to "indigenous peoples' governance bodies and institutions, including traditional indigenous Governments, indigenous parliaments, assemblies and councils".<sup>18</sup>

16. Taking these developments into account, respecting the rights of various interest groups to self-organization and self-identification, and in line with some of the submissions made to the WIPO Secretariat for preparation of this study,<sup>19</sup> an option for the IGC to consider could be to establish some transparent procedure through which indigenous peoples' and local communities' organizations (as opposed to NGOs working with and for them) can be more easily identified. This step could be useful for a number of reasons, notably enhancing the legitimacy and representativity of other processes for indigenous and local communities' participation: for example, it would be easier to identify relevant and credible beneficiaries of the WIPO Voluntary Fund for Accredited Indigenous and Local Communities (the WIPO Voluntary Fund), community representatives to be invited to present on the WIPO Panel of Indigenous and Local Communities (see further below), indigenous and local community persons who could form part of State delegations, and experts to be

<sup>15</sup> A/51/493 ("Review of the existing mechanisms, procedures and programmes within the United Nations concerning indigenous people")

<sup>16</sup> A/HRC/RES/18/8, para. 13. See also submission by OHCHR for further detail.

<sup>17</sup> A/HRC/18/43, proposal 3 ("Strengthening indigenous peoples' participatory rights at the United Nations"). For other relevant articles of the UN Declaration on the Rights of Indigenous Peoples, see submissions by OHCHR and Grand Council of the Crees (*Eeyou Istchee*).

<sup>18</sup> *Ibid.*, proposal 3(c)

<sup>19</sup> See submissions by Mexico and FAIRA. See also, on a related point, submission by the United States of America.

invited to indigenous and local community expert meetings and consultations (see further below). Further the IGC may wish at some stage to enter into special consultative arrangements with organizations representative of and accountable to indigenous peoples and local communities.

17. The IGC is and will remain an intergovernmental process in which decisions are taken by the Member States of WIPO. This may not, however, preclude it from establishing some means of identifying, from among the broad range of observers present in the process, those organizations which are representative of and accountable to indigenous peoples and local communities.

18. This would entail some adjustments to the current “fast-track” accreditation process used by the IGC. As is known, decisions on accreditation are taken by the IGC plenary at the commencement of IGC sessions. Because of the IGC’s full, substantive agenda, the IGC has seldom had the time to consider the applications in detail. As already noted, 268 organizations have already been accredited, many of which do not actually attend the sessions, although this could be for a variety of reasons, including lack of funding.

19. More particularly, in order to maximize the efficiency of identifying the nature and legitimacy of representativity, two changes could be made to the current procedure for accreditation. First, applicants for accreditation could be requested to indicate, with supporting documentation, whether or not they are an indigenous or local community organization or governance body, and already accredited observers could be requested to clarify their status in this respect, in a way similar to the presentation of credentials by Member States.<sup>20</sup> Such documentation could comprise copies of by-laws and written evidence of support, letters or documents including names, signatures and contact details of representative bodies and structures of indigenous peoples and communities. Such documentation should evidence the indigenous or local community constituency that the organization represents and is accountable to.

20. Second, in addition, with a view to strengthening the transparency and credibility of the accreditation process, an option could be for the IGC to establish a standing accreditation advisory mechanism. This mechanism could, for example, comprise members from both delegations of Member States and accredited observers serving in their individual capacities. Building further on the experience of the WIPO Voluntary Fund’s Advisory Board, this mechanism could comprise eight members, five from States and three from accredited observers representing indigenous and local communities. It could be chaired by one of the IGC’s Vice-Chairs. This mechanism would be tasked with reviewing all applications for accreditation, including information provided in support of organizations asserting that they are an indigenous or local community organization or governance body, and making recommendations on accreditation to the IGC. Final decisions on accreditation would still be taken by the IGC plenary. It would be most efficient if this mechanism could work intersessionally, so that it may report its recommendations to the following session of the IGC. Such a standing accreditation advisory mechanism would not need to meet physically but could work electronically (for example, via email and videoconferencing) thus saving time and costs. Such a mechanism would be able to examine applications for accreditation thoroughly and its members would, over the length of their biennial mandate, build up some knowledge and expertise, thus further enhancing the legitimacy, quality and consistency of the process.

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<sup>20</sup> WIPO General Rules of Procedure, Rule 8 (see Publication No. 399 Rev.3 at [http://www.wipo.int/freepublications/en/general/399/wipo\\_pub\\_399.html](http://www.wipo.int/freepublications/en/general/399/wipo_pub_399.html)). Also see submission by the United States of America.

### *Constituencies of observers*

21. For the purposes of participation in UN bodies, observers sometimes organize themselves into constituencies, or caucuses, representing various interest groups and stakeholders, and further coordinate their input to processes through representation mechanisms.<sup>21</sup> Such arrangements may constitute good practices in fostering effective interaction with the UN system, as, for example, “the role played by the global indigenous peoples’ caucus in the negotiation and adoption of the Declaration on the Rights of Indigenous Peoples”.<sup>22</sup> In the IGC context, on several occasions indigenous peoples and local communities have jointly presented, following internal consultations, their concerns to the plenary, although they also have been able to intervene individually.

22. In some international normative processes the participation of constituencies has been formalized. Among them, Agenda 21, providing a comprehensive action program to attain the implementation of policies for sustainable development, designates nine major groups that work closely with the UN Commission on Sustainable Development (CSD): (i) business and industry, (ii) children and youth, (iii) farmers, (iv) indigenous peoples, (v) local authorities, (vi) NGOs, (vii) scientific and technological community, (viii) women, and (ix) workers and trade unions. This is to ensure that policies, definitions and rules affecting access to and participation by NGOs apply equally to all major groups.<sup>23</sup> The same distinctions among nine constituencies are followed in processes taking place under the auspices of the UN Framework Convention on Climate Change (UNFCCC),<sup>24</sup> and the 2009 reform of the Committee on World Food Security (CFS) of the UN Food and Agriculture Organization (FAO) introduces a similar approach.<sup>25</sup> Another example is the International Indigenous Forum on Biodiversity (IIFB) which comprises representatives of indigenous governments, indigenous non-governmental organizations and indigenous scholars and activists.<sup>26</sup>

23. While designation of constituencies may be useful in enhancing observers’ internal coordination, interaction with the Member States, the Secretariat and others observers, and participation in an intergovernmental process in general, it is regarded as important that such broader networks would only be legitimate if initiated by the constituencies themselves. As emphasized in the report of the UN Secretary-General of 2004, “...the main constituencies of NGOs should themselves take steps to form groups or broad networks for participation in United Nations activities”.<sup>27</sup>

### *Participatory capacity*

24. Almost since the inception of the IGC, the Chair has generally allowed observers to intervene during IGC sessions on any issue on the agenda and to make drafting proposals on negotiating texts and other working documents for consideration by Member States. The practice has been, for some time, that such drafting proposals are incorporated in the text under discussion if supported by at least one Member State; they are nonetheless reflected in the reports of the sessions in cases where reports of sessions do record drafting proposals. Representatives of observers and some of the Member States have on various occasions expressed their appreciation for the opportunity for observers to intervene during discussions and to make drafting submissions.

<sup>21</sup> See submissions by Ichnet and BGC/GRTKF Int.

<sup>22</sup> A/HRC/18/42, para. 72

<sup>23</sup> Agenda 21, Chapter 23 (“Strengthening the role of major groups”). Full text of Agenda 21 is available at <http://www.un.org/esa/sustdev/documents/agenda21/english/Agenda21.pdf>

<sup>24</sup> FCCC/SBI/2010/8, para. 35

<sup>25</sup> CFS:2009/2 Rev.2, para. 11(ii)

<sup>26</sup> <http://www.iifb.net/>

<sup>27</sup> A/59/354, para. 8 (“Report of the Secretary-General in response to the report of the Panel of Eminent Persons on United Nations – Civil Society Relations”)

25. It is within the Chair's discretion to limit interventions of observers in view of timing or relevance to the issues addressed, as appropriate.<sup>28</sup> Certain submissions underscored that the Chair of the IGC should exercise this discretion more robustly to curb interventions that were too long or not directly relevant, as these tended to detract from more pertinent statements made by other observers.<sup>29</sup>

26. Certain other arrangements practiced by some UN bodies could serve as a useful reference for further consideration by the IGC. For example, the practice of co-chairing of certain meetings was adopted by the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity (CBD). That Working Group agreed, at its first meeting in March 2000, that each of its sub-working groups would be "co-chaired by a representative proposed by the indigenous and local community organizations present at the meeting". It was also agreed that "a Group of Friends of the Bureau should be established with a balanced regional membership of representatives of indigenous and local community organizations and that those organizations should be invited to join in any contact drafting groups that might be established, on the understanding that the final decisions rested with the Parties to the Convention".<sup>30</sup>

27. In the context of the IGC, such an approach was followed during the second Intersessional Working Group (IWG2), in March 2011, when two experts from accredited observers served as rapporteurs for two of the drafting groups.<sup>31</sup>

## PART II. FACILITATING DIRECT PARTICIPATION AND EFFECTIVE CONTRIBUTION OF OBSERVERS TO THE WORK OF THE IGC

### *Financial support for participation of observers*

28. In 2005, the WIPO General Assembly established the WIPO Voluntary Fund in order to enhance the participation in sessions of the IGC of representatives of indigenous peoples and local communities which are already accredited to the IGC.<sup>32</sup> The rules of the Fund were amended by the September 2010 WIPO General Assembly to include meetings of the IWGs in its scope.<sup>33</sup> The establishment of the Fund was noted with appreciation and donor contributions were encouraged by UN Permanent Forum on Indigenous Issues (UNPFII), at its fifth session in 2006.<sup>34</sup>

29. Decisions on funding are made by the WIPO Director General based on recommendations of the Advisory Board which selects candidates to receive funding. The members of the Advisory Board are elected by the IGC plenary on the proposal of its Chair. They meet during the IGC session in which they are participating and are required to conclude their deliberations before the end of the session, when their mandate expires. The Advisory Board comprises nine members, including: (i) the Chair or one of the Vice-Chairs of the IGC appointed *ex officio*; (ii) five members from the delegations of WIPO Member States taking part in the IGC sessions, reflecting appropriate geographical balance; and (iii)

<sup>28</sup> See Rules 13(3) and 15(5) of the WIPO General Rules of Procedure.

<sup>29</sup> See submissions by the United States of America and FAIRA.

<sup>30</sup> UNEP/CBD/COP/5/5, paras. 14-17

<sup>31</sup> WIPO/GRTKF/IWG/2/3

<sup>32</sup> The decision of the WIPO General Assembly establishing the Fund is contained in document WIPO/GRTKF/IC/9/3.

<sup>33</sup> See amended text of the Member States' decision establishing the Fund at

<sup>34</sup> [http://www.wipo.int/export/sites/www/tk/en/ngoparticipation/voluntary\\_fund/amended\\_rules.doc](http://www.wipo.int/export/sites/www/tk/en/ngoparticipation/voluntary_fund/amended_rules.doc)

E/C.19/2006/11, para. 171

three members from accredited observers representing indigenous or local communities. The members of the Advisory Board serve in an individual capacity.

30. Since the establishment of the WIPO Voluntary Fund, practical adjustments have been made to its operating procedures, for example, through introducing certain amendments to the required documented requests for funding in order to facilitate the assessment by the Advisory Board of applicants' eligibility. In addition, based on the suggestions formulated by the Advisory Board at the sixteenth session of the IGC, the Director General decided to "invite all funded participants in the future to submit a brief and structured report about their own participation in the meeting for which they have been funded". Should previously funded applicants decide to reapply for funding, their reports would be annexed to their application for due consideration by the Advisory Board.<sup>35</sup>

31. According to the rules, the extent of support that the WIPO Voluntary Fund can provide depends exclusively on the voluntary contributions made by donors. Especially in the early years of the Fund, several donors<sup>36</sup> made significant contributions of the Fund, which operated successfully. South Africa contributed, for the second time, in early 2011. By mid 2011, however, the Fund had effectively run out of money. On October 20, 2011, the Government of Australia made a contribution to the Fund of 89,500 Swiss francs that should allow the Fund to continue to operate in view of the 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> sessions of the IGC planned for 2012. Considering the crucial need to ensure adequate participation of indigenous and local communities in the negotiations, continuous efforts are required to encourage other Member States and public or private entities to contribute to the Fund to ensure its operation beyond the 22<sup>nd</sup> session of the IGC.<sup>37</sup>

32. The rules of the WIPO Voluntary Fund in relation to decision-making could be informed by similar funding mechanisms elsewhere in the UN system. For example, indigenous and local community representatives funded for CBD meetings are selected, in accordance with certain selection criteria, by the Executive Secretary of the CBD who consults "through electronic means and long-distance communication, with an Advisory Selection Committee consisting of seven representatives of indigenous and local communities nominated by indigenous and local communities from the seven socio-cultural regions recognized by the UNPFII, as well as with the Bureau of the Conference of the Parties".<sup>38</sup> This Advisory Selection Committee is a standing entity and does not meet physically.

33. As another example, the UN Voluntary Fund for Indigenous Populations was established by the UN General Assembly to assist indigenous representatives to participate in sessions of the UNPFII, the EMRIP, the Human Rights Council and the UN Treaty Bodies.<sup>39</sup> This Fund is administered by the Secretary-General of the UN with the advice of a Board of Trustees composed of five persons with relevant experience in indigenous peoples' issues. They are appointed by the Secretary-General for a three-year renewable term, and at least one member must be a representative of a widely-recognized organization of indigenous peoples.<sup>40</sup> According to a 2010 report of the UN High Commissioner for Human Rights, "in practice, indigenous persons have been regularly appointed as members of the Board".<sup>41</sup> The Board holds annual sessions in Geneva to review the financial status of the

<sup>35</sup> WIPO/GRTKF/IC/16/INF/6, para. 4. See also submission by Kanuri Development Association.

<sup>36</sup> Since its creation in 2005, the Fund has benefited from contributions from the Swedish International Biodiversity Programme (SwedBio/CBM), France, the Christensen Fund, the Swiss Federal Institute of Intellectual Property (on two occasions), South Africa (on two occasions), Norway, Australia, including contributions from an anonymous contributor, totaling 604,489.53 Swiss francs.

<sup>37</sup> See submissions by Pakistan, FAIRA, Grand Council of the Crees (*Eeyou Istchee*), IPCB.

<sup>38</sup> UNEP/CBD/COP/DEC/VIII/5, section D Annex "Criteria for the Operation of the Voluntary Funding Mechanism"

<sup>39</sup> A/RES/56/140, A/RES/63/161, A/RES/65/198

<sup>40</sup> A/RES/40/131

<sup>41</sup> A/HRC/15/38

Voluntary Fund, examine applications for funding and meet with present and potential donors to ensure that sufficient funds are available for execution of the Fund's mandate. The Board is also allowed to operate intersessionally via electronic mail and videoconferencing. As emphasized by the High Commissioner in the above-mentioned report, "intersessional decision-making has proven important especially in situations where the mandate of the Fund has been extended by the General Assembly between sessions. In such cases all Board members are contacted to provide intersessional advice and make recommendations".<sup>42</sup>

34. The current modalities of the WIPO Voluntary Fund Advisory Board mechanism pose certain challenges for intersessional decision-making should the need arise (the need did arise when, in 2009, the WIPO General Assembly established the IWGs which were not covered by Fund's operations: as a result, no funding could be provided from the Fund for the first IWG in July 2010. With the agreement of Member States, WIPO's regular budget was used and a rudimentary selection process was put in place in this exceptional case). Furthermore, the current procedure is rather cumbersome. At present, a Board is constituted at each and every IGC session, and the Board meets in the margins of each session, thus imposing a considerable burden on IGC participants who are members of the Board. The current practice also provides for very short time within which the new members of the Advisory Board at each session have to familiarize themselves with the rules of the WIPO Voluntary Fund and evaluate the applications.

35. Building on the examples from other UN processes outlined above, an option for the IGC to consider would be for Advisory Board to be appointed for the length of the IGC's mandate and to work intersessionally. This would enhance continuity and consistency in decision-making which would increase the credibility of the Fund. If the Board could work intersessionally, it would significantly reduce the pressure and burden currently experienced during IGC sessions. Such a standing Board would not need to meet physically, but could work electronically (for example, via email and videoconferencing). Working intersessionally, the Board could also be more involved in awareness-raising and soliciting funds. It may be recalled that earlier in this document an option to create a standing mechanism to advise on accreditation applications has been identified. In time, it could be considered to simplify and streamline procedures by having the same standing mechanism review accreditation applications and funding applications.

36. While a change to the accreditation procedure could be agreed by the IGC and implemented relatively quickly, a change to the operations of the Fund would require changes to the Rules of the Fund by the WIPO General Assembly. An option, therefore, for the IGC to consider would be to request the necessary rule changes to be submitted to the next session of the WIPO General Assembly for its consideration.

#### *Thematic advice and information exchange during IGC sessions*

37. In November 2004, at the seventh session of the IGC, the Delegation of New Zealand proposed that the IGC consider some practical changes to the meeting procedure to enable the more effective participation of indigenous and local community observers. The proposed arrangements included, *inter alia*, the incorporation of panel presentations by members of indigenous and local communities as part of the IGC plenary.<sup>43</sup> Pursuant to this proposal, the IGC decided at the session that future sessions of the IGC should be preceded by panel presentations chaired by a representative of an indigenous people or local community, and this has occurred at each subsequent session.<sup>44</sup> The panelists comprise participants from

<sup>42</sup> *Ibid.*

<sup>43</sup> Full text of the proposal by the Delegation of New Zealand is contained in document WIPO/GRTKF/IC/7/14.

<sup>44</sup> WIPO/GRTKF/IC/7/15, subpara 63(iv)

indigenous and local communities from different socio-cultural regions. The panels do not form a formal part of the IGC sessions. However, summary records of their proceedings are included in the reports of the IGC sessions. Presentations by panel participants are also made available on the WIPO TK, TCEs and GRs website.<sup>45</sup>

38. While the panels serve as a rich source of information on the experiences, concerns and aspirations of indigenous and local communities in relation to the protection, promotion and preservation of TK, TCEs and GRs, some submissions pointed out that their impact could be enhanced if the panel discussions were to serve as a platform for more interactive engagement between indigenous and local community experts, Member States and accredited observers through a thematic dialogue that could substantively inform the IGC's negotiations.<sup>46</sup> An option therefore is that the indigenous and local community panels could constitute part of the formal proceedings of the IGC. Such interactive dialogues could be convened by the Secretariat and provide the IGC with information and advice on a specific theme identified, at a previous session, by the IGC.

39. Similar consultative arrangements in the form of expert panels are in place in various UN bodies. The Human Rights Council's proceedings include panel debates, seminars and round tables. These are utilized on a case-by-case basis and complement the Council's intergovernmental nature.<sup>47</sup> The Conference of the Parties to the CBD have also instituted in-depth dialogues on thematic areas and other cross-cutting issues at sessions of the Working Group on Article 8(j) and Related Provisions of the CBD.<sup>48</sup>

#### *International expert consultations*

40. Prior to the twelfth session of the IGC, in February 2008, the Swiss Federal Institute of Intellectual Property and the International Centre for Trade and Sustainable Development (ICTSD) held a two-day workshop entitled "Facilitating the Participation in the Intellectual Property and Traditional Knowledge Debate in WIPO's IGC". The workshop was attended by indigenous representatives funded by the WIPO Voluntary Fund to participate in IGC 12 and representatives from national governments and from relevant international organizations, such as the CBD Secretariat, FAO, World Trade Organization (WTO) and WIPO.

41. The workshop aimed at assisting indigenous representatives to be more directly involved in the discussions of the IGC by introducing them to the topics addressed by the IGC and other international fora, collecting their needs, interests and expectations, clarifying relevant terminology, discussing and analysing possible approaches and proposals to resolve the issues discussed, and by allowing for new or improved contacts among the workshop participants. Besides presentations on various topics, ample time was foreseen for plenary and small group discussions that allowed for specific capacity-building, as well as free and informal exchange of views among the participants.<sup>49</sup>

42. Such consultative arrangements contribute effectively to strengthening the capacity of the IGC observers, particularly indigenous peoples and local communities, to ensure their meaningful, substantive and consistent participation in the work of the IGC. Building upon this good example, an option could be for an international expert meeting for indigenous peoples and local communities to be organized prior to an upcoming IGC session, with the participation of recognized experts from among indigenous and local community organizations accredited to the IGC.<sup>50</sup>

<sup>45</sup> See [http://www.wipo.int/tk/en/ngoparticipation/ind\\_loc\\_com/index.html](http://www.wipo.int/tk/en/ngoparticipation/ind_loc_com/index.html)

<sup>46</sup> See submission by the United States of America and AECG.

<sup>47</sup> A/HRC/5/21, para. 115. See also submission by the OHCHR.

<sup>48</sup> UNEP/CBD/COP/DEC/X/43, paras. 12-13

<sup>49</sup> Information provided by the Swiss Federal Institute of Intellectual Property.

<sup>50</sup> See submissions by Pakistan, United States of America, *Traditions pour Demain*.

43. An expert meeting could be instrumental in strengthening the capacity of indigenous and local community experts to participate in and make a stronger substantive input to the IGC negotiations, as well as in providing a space for experts' internal debate to identify and formulate feasible ways of addressing the key issues in the negotiations. It could also provide an opportunity for the IGC to request specific thematic advice.

44. Such a meeting could be organized in cooperation with the UNPFII. The UNPFII has a specific mandate to provide expert advice and recommendations to UN programs and agencies on indigenous peoples' rights and issues, and one of its members focuses specifically on the matters of indigenous peoples' TK. At its tenth session, in May 2011, the UNPFII specifically addressed the issue of indigenous participation in the work of the IGC and welcomed WIPO "facilitating a process, in accordance with the Declaration [on the Rights of Indigenous Peoples] to engage with indigenous peoples on matters including intellectual property, genetic resources, traditional knowledge and folklore".<sup>51</sup> For instance, such a meeting could take place, over two days, in Geneva, prior to an IGC session. Two expert participants, identified with the assistance of the PFII, could be invited from each of the seven socio-cultural regions recognized by the PFII.

#### *Briefings and exchanges of information*

45. Specific briefings and consultations for representatives of observers are or have been undertaken within the framework of meetings of the IGC. For example, in the earlier years of the IGC, the Secretariat provided a briefing for observers during the lunch-break on the first day of each session. As attendance at such briefings waned, perhaps because observers became more familiar with the IGC process, these briefings were discontinued in 2009. They could be re-instated.<sup>52</sup>

46. Furthermore, each IGC session is preceded by a meeting of the Indigenous Peoples and Local Communities Consultative Forum, where representatives of indigenous peoples and local communities, who chair the Forum's meeting, can prepare and meet among themselves. The Consultative Forum takes place at WIPO's premises on the day before an IGC session. The IGC has decided that meetings of the Forum are related to the IGC, so funding from the Voluntary Fund extends to Forum meetings. The WIPO Secretariat is on hand to provide input on substantive and organizational issues, if so invited, during the meeting. On some occasions, the Forum has invited Member State delegates and the Chair of the IGC to participate. During IGC sessions themselves, observers participating in the Forum have invited the Chair and the Secretariat to meet with them, and that has been done so on several occasions.

#### *Administrative support*

47. During IGC sessions, WIPO finances the logistical, secretarial and interpretation/translation support that is provided by the Indigenous Peoples' Center for Documentation, Research and Information (DoCip)<sup>53</sup> for the meetings of the indigenous and local communities' representatives. Such support, although requiring modest financial provisions, significantly facilitates developing information and communication capacity of participating representatives and is highly appreciated by observers.

<sup>51</sup> E/2011/43-E/C.19/2011/14, para. 28

<sup>52</sup> See submission by *Traditions pour Demain*.

<sup>53</sup> DoCip is a non-profit service organization that provides documentation and information assistance to indigenous participants in United Nations meetings on indigenous issues.

### PART III. STRENGTHENING CAPACITY OF CIVIL SOCIETY AT LARGE TO BE INVOLVED IN THE IGC PROCESS

48. Upon invitation or on its own initiative, the Secretariat provides briefings on the work of the IGC to representatives of NGOs and civil society in the margins of meetings of UNPFII, EMRIP, FAO, CBD bodies and the UN Educational, Scientific and Cultural Organization (UNESCO). In addition, WIPO's capacity-building program on IP and TK, GRs and TCEs provides useful opportunities to communicate with the civil society. For example, upon request, the WIPO Secretariat provides training programs for indigenous and local communities, co-organizes national, regional and inter-regional meetings in which representatives of observers, including indigenous and local communities, participate, and supports national and regional legislative development, again in which indigenous and local communities often participate.

#### *Regional consultations*

49. Additional efforts could be undertaken to reach out to observers, especially indigenous and local communities, in various regions of the world many of whom do not participate in IGC sessions or related meetings and are not sufficiently aware of the IGC process. For example, an option could be for there to be organized national and regional workshops with the broad participation of indigenous and local communities. Such consultations would serve as a platform for increasing communities' awareness and understanding of the issues being negotiated by the IGC and, provided the workshops report in to the IGC, would enrich the IGC's discussions with communities' views, concerns and experiences.

50. Such national or regional workshops could also serve as an effective mechanism for facilitating remote participation and input of stakeholders beyond the IGC's formal plenary sessions.<sup>54</sup> They could also support relevant policy and legislative initiatives at national and regional levels.<sup>55</sup> Such workshops are not, however, provided for in WIPO's budget for 2102 and 2013, and would need to be organized and funded by interested Member States. If so requested, WIPO could provide technical support for such workshops.

#### *Information and communication mechanisms*

51. The IGC, at its first session, approved a proposal to establish an electronic forum "to exchange information and facilitate discussions between Member States and observers on the themes falling within the Committee's sphere of competence".<sup>56</sup> The proposal further suggested the forum "could be used by Member States and observers to exchange national experiences, including relevant legislation, technical papers prepared by experts in the field and proposals, and as a forum for discussion and analysis of such national experiences, papers and proposals".

52. The WIPO TK, TCEs and GRs website has since then fulfilled the functions of such an electronic forum by making publicly available all current drafts, drafting proposals, working documents, comments, papers, studies, databases, questionnaires, and other materials prepared for consideration by the IGC, as well as comprehensive reports of its sessions in Arabic, Chinese, English, French, Russian and Spanish.<sup>57</sup> Electronic updates and newsletters concerning relevant developments and events are regularly communicated through e-mail notifications.

<sup>54</sup> See submission by Colombia, Mexico, United States of America, FAIRA, IPCB, and *ADJMOR*.

<sup>55</sup> See submission by Kazakhstan.

<sup>56</sup> WIPO/GRTKF/IC/1/2, paras. 13-15 and WIPO/GRTKF/IC/1/13, para. 18

<sup>57</sup> See <http://www.wipo.int/tk/en/>

53. Among recent additions, the website now links to “Background Briefs on Selected Topics”, a “Snapshot”, which provides a concise and factual overview of the latest developments in the IGC, and a forthcoming “Frequently asked Questions (FAQ)” page. A distinct website is devoted to proposals, submissions and papers of observers.<sup>58</sup> The Secretariat undertakes continuous efforts to ensure that the website effectively responds to information and awareness needs of the Member States and observers.

54. Written guidance on the procedures of the IGC and on how to participate in IGC discussions are made available at sessions and on WIPO’s TK, GRs and TCEs website.<sup>59</sup> These could be supplemented and consolidated into a single, short guidebook for IGC observers.

55. However, the extensive resources on IP and GRs, TK and TCEs available on the website may not be easily accessible to observers who are not sufficiently familiar with the work of the IGC. Additional efforts could be taken to produce explanatory guides aimed at wider audience interested in engaging with the IGC process, as well as regularly up-dated information documents comprising executive summaries of resources made available on the website, such as policy, legislative and awareness-raising materials.<sup>60</sup>

56. Consideration could also be given to communicating the IGC plenary sessions online. Yet, while webcasts considerably enhance access to information and passive participation in the sessions, they do not substitute for actual participation. It should also be noted that many indigenous and local communities do not have adequate access to information and communication technologies, and appropriate attention should be devoted to continued development of conventional paper-based communication tools, in as many languages as possible, particularly for training and capacity-building.

#### PART IV. SUMMARY OF POTENTIAL OPTIONS FOR ENHANCING PARTICIPATION AND POSITIVE CONTRIBUTION OF OBSERVERS TO THE IGC PROCESS

57. The following part draws from the discussion above and identifies in brief terms the main, concrete options that arise from it. The options are described in broad terms, and, should the IGC so wish, the Secretariat could be tasked with developing the necessary administrative arrangements necessary for their implementation in the most pragmatic, efficient and cost-effective manner possible. None of the proposals below would entail any additional funding from WIPO beyond that already provided for in the Program and Budget for 2012-2013 (Program 4). The options identified are not necessarily alternatives, but could be seen as a ‘package’ of complementary steps.

##### *Proposal 1: Clarifying relationship with diverse categories of observers*

58. The work of the IGC has, since its inception, involved the valuable participation of various categories of observers, including UN bodies and programs, non-governmental and civil society organizations, the private sector, and, arguably the key stakeholders in the process, indigenous peoples and local communities and their organizations. While respecting the rights of civil society to self-organization and self-identification, at this critical stage of the IGC’s deliberations it might be practically useful to recognize the heterogeneous

<sup>58</sup> See <http://www.wipo.int/tk/en/igc/ngo/ngopapers.html>

<sup>59</sup> See *Practical Information for Delegates* at [http://www.wipo.int/export/sites/www/tk/en/igc/documentation/info\\_delegates.pdf](http://www.wipo.int/export/sites/www/tk/en/igc/documentation/info_delegates.pdf), *Facilities for Accredited Organizations Representing Indigenous and Local Communities* at [http://www.wipo.int/tk/en/igc/documentation/info\\_ngos.pdf](http://www.wipo.int/tk/en/igc/documentation/info_ngos.pdf) and *Making Your Intervention* at <http://www.wipo.int/tk/en/igc/documentation/intervention.pdf>

<sup>60</sup> See submissions by Russian Federation, United States of America.

nature of participating observers, and, in so doing, clarify the IGC's relationship with diverse categories of observers towards establishing a meaningful dialogue.

59. The distinction, drawn and explained above, between organizations representative of and accountable to indigenous peoples and local communities, on the one hand, and NGOs working with or for indigenous peoples, on the other, could be taken into account in this regard. This could be useful for enhancing the credibility and legitimacy of mechanisms, existing or proposed, for indigenous and local participation.

60. This would require some mechanism or procedure whereby such organizations could be identified by the Member States in the IGC. Such identification could be facilitated through introducing more specific questions to the applications forms for *ad hoc* accreditation concerning the objectives and activities of applying organizations, and requesting further supporting documentation from already accredited observers wishing to delegate representatives to attend future sessions of the IGC, as described above. To improve transparency, credibility and consistency of such a procedure, and a more detailed examination of accreditation applications, the IGC may consider establishing a standing advisory mechanism that would work intersessionally and by electronic means to review applications and make recommendations for consideration by the IGC (see further paragraphs 9 to 20 above).

*Proposal 2: Cooperating in a spirit of partnership*

61. The IGC may wish to consider further strengthening its partnership with observers, particularly those representing indigenous peoples and local communities, through, for example, the IGC inviting observers to nominate a representative to form part of any "Friends of the Chair" groups that may be formed from time to time. The IGC could also, subject to compliance with the Rule of Procedure, nominate a representative of observers to co-chair or co-facilitate some sub-working groups, such as drafting groups, as was previously done at IWG 2 (see further paragraphs 24 to 27 above).

*Proposal 3: Substantiating policy debate through enhanced engagement*

62. The IGC may wish to consider reviewing some of the current modalities of the indigenous and local community panel presentations towards enhancing mutual engagement and true dialogue. The interactive dialogues could be convened, by the Secretariat, as part of formal proceedings of the IGC and panels could be requested to provide substantive information and advice on specific themes or issues identified by the IGC at a preceding session. The revised arrangements would allow for a debate among panelists, Member States and observers that would be reflected in the sessions' reports (see further paragraphs 37 to 39 above).

*Proposal 4: Facilitating coordinated expert advice and input*

63. Indigenous peoples and local communities participating in the work of the IGC are in a position to valuably contribute to the process with their substantive expert advice. One of the challenges, however, is that they lack opportunities to consult with each other and coordinate before IGC sessions. The IGC may wish to consider authorizing a two day indigenous and local communities expert meeting to be convened by the Secretariat, prior to a next session of the IGC, with the funded participation of two recognized experts, representing an accredited community organization, from each of the seven socio-cultural regions recognized by the PFII. Representatives of Member States and other accredited observers would be

invited to participate in the meeting as observers. Costs for such an expert consultation are foreseen in the WIPO Program and Budget for the 2012/13 biennium.<sup>61</sup>

64. Such meeting could be a major contribution to enhancing indigenous peoples' and local communities' expert input into the IGC's negotiations, and provide an opportunity for the IGC to request communities' expert advice on certain issues or themes identified beforehand by the IGC. The UNPFII could be invited to cooperate on and provide substantive support to such an expert meeting. The Secretariat could be tasked with working out the administrative arrangements for the implementation of this option in the most pragmatic, efficient and cost-effective manner possible (see further paragraphs 40 to 44 above).

*Proposal 5: Enhancing national and regional dialogue and awareness-raising*

65. Despite a relatively high number of accredited observers, most indigenous and local communities in various regions of the world are still not sufficiently aware of the IGC process, and those actually participating in the IGC sessions rarely have the capacity to prepare for negotiations by holding national and/or regional preparatory meetings. The IGC may wish to invite Member States to organize national and/or regional consultations for and with accredited observers, especially representatives of indigenous and local communities. The Secretariat could provide technical support to such consultations (see further paragraphs 49 to 50 above).

*Proposal 6: Fortifying financial and other means of support for direct participation*

66. Regarding the WIPO Voluntary Fund, the IGC may wish to consider proposing amendments to the rules of the WIPO Voluntary Fund for the next session of the WIPO General Assembly so that the Board would be established once for each mandate of the IGC and work intersessionally, through electronic means. This would improve the efficiency of the operation of the Fund and consistent implementation of its rules, as well as enable the Board to assist with awareness-raising and soliciting funds (see further paragraphs 28 to 36 above). The standing mechanism for accreditation applications (option identified above) and such a standing Board could eventually be merged.

67. In addition, the IGC may consider repeating its invitation to Member States to increase the participation of indigenous and local communities' representatives, as well as other observers as appropriate, in official delegations (see further paragraphs 7 to 8 above).

*Proposal 7: Expanding interaction through information exchange*

68. The IGC may wish to consider inviting the Secretariat to re-launch lunch-time briefings for participating observers on the first day of a session of the IGC to better inform all interested observers of relevant substantive and procedural matters, as well as to take note of concerns and issues raised by observers and benefit from their advice (see further paragraph 45 above).

*Proposal 8: Awareness-raising and communications tools*

69. For future sessions of the IGC, the Secretariat could produce an information document briefly describing the resources available on the WIPO TK, TCEs and GRs website. Such an information document could assist IGC participants, particularly newcomers, to make better use of already available materials (see further paragraph 55 above).

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<sup>61</sup> The text of the WIPO Program and Budget for the 2012/13 biennium is available at [http://www.wipo.int/export/sites/www/about-wipo/en/budget/pdf/budget\\_2012\\_2013.pdf](http://www.wipo.int/export/sites/www/about-wipo/en/budget/pdf/budget_2012_2013.pdf)

70. The Secretariat may also be invited by the IGC to develop, based on and replacing various resources already available separately, a short and practical guide for observers representing or working with indigenous and local communities on the IGC's substantive agenda as well as on its procedures (see further paragraphs 51 to 56 above).

*Proposal 9: Strengthening cooperation with other United Nations bodies, programs and agencies*

71. The Secretariat is following closely the related activities of other UN bodies, programs and agencies, such as the UNPFII, the OHCHR, the International Labor Organization (ILO), UNESCO, FAO, the CBD, and others. The IGC could consider welcoming further coordination and interaction with such UN bodies on the matters of mutual concern at the international, regional and country levels, including in relation to awareness-raising, capacity-building and training activities with and for indigenous and local communities.

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