

## INFORMATION NOTE<sup>1</sup>

### FOR IGC 40 – DISCUSSIONS UNDER AGENDA ITEM 7 – “TAKING STOCK OF PROGRESS AND MAKING A RECOMMENDATION TO THE GENERAL ASSEMBLY”

Prepared by Mr. Ian Goss, the IGC Chair

#### Introduction

1. At the conclusion of the Fortieth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC), the Committee will have completed its work program approved under the current IGC mandate for 2018/2019. In accord with this mandate, the Committee is requested to: *“submit to the 2019 WIPO General Assembly the results of its work in accordance with the objective reflected in paragraph (a)<sup>2</sup>. The General Assembly in 2019 will take stock of progress made, and based on the maturity of the texts, including levels of agreement on objectives, scope and nature of the instrument(s), decide on whether to convene a diplomatic conference and/or continue negotiations.”*
2. Additionally, the mandate states (in the “Work Program” table that follows the narrative part of the mandate) that IGC 40 includes: *“Stocktaking on GRs/TK/TCEs and making a recommendation”*.
3. To assist Member States’ preparations for IGC 40, I have prepared this short information note, which includes:
  - Key questions Member States may wish to consider relating to future work.
  - An overview/status of current negotiations, since text-based negotiations commenced in 2010.
  - A discussion of options for future work.
4. This note is informal and has no status. **I emphasize that any views that may be expressed in this note are mine alone and are without prejudice to any Member States’ positions on the issues discussed.**

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<sup>1</sup> Note from the WIPO Secretariat: The Chair of the IGC, Mr. Ian Goss, has prepared this information note to assist participants in their preparations for IGC 40.

<sup>2</sup> Paragraph (a) of the current mandate states: “The Committee will, during the next budgetary biennium 2018/2019, continue to expedite its work, with the objective of reaching an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs).”

### **Key Questions – Future Work**

5. In considering future work, it may be useful to break deliberations up into specific questions members may wish to consider. These correspond with the decisions to be considered by the General Assembly (GA). I recall that the GA will **take stock of progress made and decide on:**

- *whether to convene a diplomatic conference; and/or*
- *continue negotiations.*

6. Underpinning any deliberation of these questions will be Member States' views regarding the maturity of the individual working documents in terms of: resolution of core issues; form of the instrument(s) and current readiness for political decision-making such as at a diplomatic conference.

7. Additional implied questions which Member States may wish to consider, subject to their views on the above, include:

1. What are the priorities and key deliverables/outcomes for future work?
2. Which enabling activities, if any, should be incorporated within future work, for example, seminars, studies, workshops, working groups, expert groups, or writing teams<sup>3</sup>?
3. Should a defined timeline/road map be established for future work, including a date for a diplomatic conference, should one be agreed or required?
4. Does all subject matter need to be progressed in parallel within similar timeframes?
5. If an incremental approach is taken, how best to safeguard work continuing on all subject matters?
6. Which time frames and governance arrangements should be established for future work, for example:
  - a. Renew the current IGC mandate for a similar length of time (2 years) or for a longer period (3 or 4 years);
  - b. Establish a Standing Committee (SC);
  - c. IGC to continue negotiations followed by the establishment of a SC post successful conclusion of a diplomatic conference to adopt a new instrument(s) on one or more subject matters (there would therefore be an "Assembly" of parties to the new instrument(s) and a SC to continue work on any remaining issues).
7. Is there benefit in holding a workshop(s) or meeting(s) outside Geneva or regional meetings to more actively engage at a political/capital-based level?

### **Lessons from the Current Mandate**

8. In addition to the above questions, Member States may wish to consider the lessons from the work of the Committee under the current mandate. From my perspective, a key positive lesson has been the ability to focus our work over the biennium without the requirement to renegotiate our work program or seek further guidance from the GA on an annual basis. This has contributed to a constructive momentum for our work and ensured we have not been distracted by process debates.

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<sup>3</sup> These would be small, formal groups of drafting experts from several regions tasked with preparing successive versions of the negotiating texts based on the guidance of the IGC.

9. The Committee's work has also been assisted by the *ad hoc* expert groups on each subject matter prior to the IGC sessions, and the use of *ad hoc* small contact groups during the IGC sessions. They have provided a less formal environment to discuss and gain a shared understanding of key issues and have assisted in shaping the focus of the IGC meetings and provided opportunities to develop consensus positions on key issues, which in most instances have been reflected in the consolidated working documents. Whilst concerns have been raised in relation to the transparency and inclusiveness of the contact groups and the informals, I believe their benefit has outweighed the concerns. In addition, appropriate mechanisms have been put in place to ensure that any outcomes of these groups are fully considered within the plenary.

10. Member States may wish to consider whether it is time to review and rationalize the negotiation texts, which incorporate a large number of options and alternative positions. In some areas, significant duplication and language may no longer reflect the direction of the discussions. These issues, from my perspective, prejudice the ability of the Committee to narrow gaps. Shorter, simpler text(s) with reduced alternate positions would facilitate the Committee's negotiations. This work could be undertaken by an intersessional working group of experts, a writing team of cross regional experts<sup>4</sup> or a Chair's text(s) could be developed, such as that recently developed for genetic resources (GRs) and associated traditional knowledge (TK). Clearly, any rationalized text(s) that may be developed would need to be reviewed and endorsed by the Plenary.

11. Member States may also consider whether the 2018/2019 mandate itself is sufficiently clear in relation to the purpose and the priority/focus of the Committee's work and working methods. In particular, Member States may consider whether a clearer road map is needed. As reflected above in terms of the development of draft texts, Member States may also consider whether more robust working methods are required, noting that smaller technical working groups and/or contact groups are helpful to develop consensus position on key issues. Member States may wish to reconsider whether combining discussions on TK and traditional cultural expressions (TCEs) has been useful.

12. Members may also wish to consider the utility of Chair's Notes which have been produced prior to each meeting to assist Member States with their preparations and also articulate the focus of the meeting.

## **Overview/Status of Current Negotiations**

### ***Genetic Resources***

13. The first consolidated text on GRs was produced at IGC 20 in February 2012. This text attempted to summarize proposals and positions within IGC working documents and Member States' proposals. This initial document has since been significantly refined to incorporate two broad proposals to address the policy objectives detailed in the text, noting these are not agreed and include enhancing efficacy, transparency and the quality of the IP/patent system relating to GRs and associated TK, facilitating mutual supportiveness with agreements relating to GRs and associated TK and ensuring patent offices have the appropriate information to prevent the granting of erroneous IP/patent rights.

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<sup>4</sup> See footnote 3 above.

14. The two broad approaches incorporated within the working document are:

a. **Disclosure requirement.** Inclusion of a disclosure requirement within IP/patent legislation relating to the disclosure of information (for example, information about the country of origin or source of GRs and associated TK) in applications, where the subject matter/claimed invention is materially or directly based on GRs and associated TK. Within this approach, defensive measures (below) are considered complementary to a disclosure requirement not as an alternative approach to addressing the policy objectives.

b. **Defensive measures.** This approach incorporates defensive measures such as databases, voluntary codes and guidelines for IP/patent offices, third party dispute mechanisms and due diligence regimes within patent offices under national laws to ensure compliance with relevant access and benefit-sharing (ABS) regimes.

15. In relation to a disclosure requirement, the approach has been significantly refined with the inclusion of an administrative mechanism option focused on ensuring transparency within the IP/patent system rather than solely a regime based around a substantive patentability requirement.

16. In addition to the consolidated working document, four additional documents have been presented by Member States for consideration by the Committee.<sup>5</sup> Whilst two of the documents expand on defensive measures detailed within the consolidated document, they may be considered as stand-alone recommendations for the Committee to consider. The third proposal recommends a study to assist Member States with their deliberations with a focus on learning from national experiences. A fourth information paper has been submitted by a Member State: *"The Economic Impact of Patent Delays and Uncertainty: U.S. Concerns about Proposals for New Patent Disclosure Requirements"*. In addition to these documents, at IGC 20, the EU re-tabled its disclosure proposal which had first been distributed at IGC 8.<sup>6</sup>

17. In relation to the status of these negotiations, I believe that the Committee is nearing a point at which it needs to decide on the final form of the instrument. In order to facilitate this decision-making, I have, on my own authority, prepared a Chair's text on GRs and associated TK, in an attempt to move the negotiations on this subject matter forward. This text is an attempt to balance the interests and rights of the providers and users of GRs and associated TK, without which, in my view, a mutually beneficial agreement will not be achieved. It, in particular, reflects a considered view that continuing to work on the basis of the current consolidated working document is no longer productive. Rather a more pragmatic approach would be to provide a text which incorporates the two primary mechanisms proposed by Member States to achieve the IGC's mandate relating to GRs: a disclosure regime and initiatives relating to information systems. Other related defensive measures incorporated within the two Joint Recommendations and reflected in the consolidated working document, I believe could be considered separately by a technical working group(s) and progressed in parallel with the normative negotiations relating to disclosure.

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<sup>5</sup> Documents WIPO/GRTKF/IC/40/11, WIPO/GRTKF/IC/40/15, WIPO/GRTKF/IC/40/16 and WIPO/GRTKF/IC/40/17.

<sup>6</sup> Document WIPO/GRTKF/IC/8/11 (Disclosure of Origin or Source of Genetic Resources and Associated Traditional Knowledge in Patent Applications).

### ***Traditional Knowledge and Traditional Cultural Expressions***

18. Whilst negotiations on TK and TCEs are still ongoing and will be further informed by IGC 40, it is worth considering the background and status of current negotiations in the context of future work. Both texts originated from draft “objectives and principles” documents published by the IGC Secretariat in 2005 to support discussions within the Committee, which were subsequently revised at intersessional working groups conducted in 2010 and 2011. These texts formed the bases for the current working documents, which capture the views and positions of Member States since text-based negotiations commenced in 2010.

19. Throughout this time, TK and TCEs discussions have primarily focused on: policy objectives; subject matter, including eligibility criteria; beneficiaries; scope of protection; exceptions and limitations; sanctions and remedies; relationship with the public domain; and use of terms, in particular definitions of TK and TCEs. This reflects that there are significant common policy issues across both subject matters, in particular, policy objectives, beneficiaries and scope and nature of protection. However, it should also be noted that there are clear differences in relation to the nature of the subject matter and resulting relationship with the extant IP systems and international agreements relating to intangible cultural heritage. This reflects that whilst TK discussions in the multilateral environment are relatively new, TCEs (or “expressions of folklore”) discussions have been ongoing for over 60 years in a number of different fora.

20. The current working documents include a number of different positions on key issues, reflecting the different policy interests of Member States. In particular, between:

- a. protecting the interests of beneficiaries;
- b. protecting the interests of users of TK and TCEs; and
- c. balancing the interests of the beneficiaries with the protection of the public domain and artistic freedom.

21. In addition to the working documents, in recent years, seven documents have been presented for consideration by the Committee relating to TK and TCEs discussions.<sup>7</sup> Four of them were also submitted to support GRs discussions. The EU submitted two proposals recommending the conduct of studies to assist the work of the Committee particularly relating to obtaining lessons from national experiences.

### ***Key Changes within TK and TCEs Working Documents***

22. Notwithstanding divergent positions within the TK/TCE working documents, in my view, significant progress has been made within the texts over the biennium, in particular:

- a. Preambles for both TK and TCEs have been rationalized with a single proposal, though some brackets remain.
- b. Policy *objectives*, whilst still not agreed, have been further refined with a possible compromise position focusing on:
  - (1) protecting TK/TCEs against unauthorized and/or uncompensated uses; and

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<sup>7</sup> Documents WIPO/GRTKF/IC/40/11, WIPO/GRTKF/IC/40/12, WIPO/GRTKF/IC/40/13, WIPO/GRTKF/IC/40/14, WIPO/GRTKF/IC/40/15, WIPO/GRTKF/IC/40/16 and WIPO/GRTKF/IC/40/17.

- (2) preventing the granting of erroneous IP rights over TK/TCEs.
- c. Subject matter articles have been significantly refined, though still not agreed. In particular, general definitions for TK and TCEs have been developed, and are nearing a point of consensus. In addition, eligibility criteria for protection have been rationalized and are nearing consensus with the exception of issues relating to the inclusion of a temporal criteria. However, a possible comprise position is developing in this area.
- d. Scope of protection articles continue to be refined aided by the further development of the tiered approach which will be a focus of IGC 40.
- e. There has been a continued shift towards framework documents which establish a set of standards (minimum/maximum) or mechanisms which provide flexibility for implementation at the domestic level.
- f. A clearer single framework is now emerging which links the subject matter, objectives, eligibility requirements for protection and scope of protection. Such a framework should enable the consolidated working documents to be further rationalized and alternative positions within the text reduced.

### **Options for Future Work**

23. Considering the status of the negotiations, and noting that the TK/TCEs discussions are still ongoing, broad options Member States may wish to consider in relation to future work are detailed below. **It is emphasized that the options are not necessarily exhaustive and they are presented as suggestions only. They are without prejudice to any Member States' positions.** As indicated earlier in reviewing these options, Member States will need to consider the status of the current negotiations, including:

- a. Maturity of the individual working documents in terms of:
  - (1) resolution of key issues;
  - (2) level of agreement; and
  - (3) number of outstanding issues still requiring resolution.
- b. Nature of the instrument(s).
- c. Current readiness for political decision-making, such as at a diplomatic conference.

24. These suggestions assume that all Member States wish to continue the work of the Committee based on the Committee's objective reflected in sub paragraph (a) of the current mandate, an objective which the Committee reaffirmed at the 2018 GA.

### ***General Options***

25. Options relating to how to progress the overarching objective of the work of the IGC relating to GRs, TK and TCEs could include:

- a. **Option A.** Consider taking an incremental approach rather than attempt to progress all the work as a single package. An initial focus could be on progressing subject matter where the negotiations are more mature or at a stage for political decision-making, for example, protection in relation to TK and

TCEs that are distinctively associated with and under the exclusive control of beneficiaries, and on an administrative disclosure requirement related to GRs, reflected in the Chair's text. Such an approach would need to have in-built safeguards to ensure that all Member States' interests are protected across the subject matters. One approach to providing appropriate safeguards could possibly be to develop a framework instrument on GRs, TK and TCEs which establishes a set of objectives, principles and norms to guide WIPO's work on GRs, TK and TCEs. The instrument would have an in-built mechanism for continued work among the parties on outstanding issues. Progress made on these issues could be captured, over time, in protocols to the instrument. Such an approach would enable work to be progressed incrementally in manageable packages based on opportunities for reaching consensus. In addition, parallel work could be undertaken in relation to the defensive measures proposed by Member States.

- b. **Option B.** An alternative approach could be to continue to progress work on each subject matter and as each reaches a conclusion it could be held over, pending the completion of negotiations of all three subject matters, and then progressed as a single package. Whilst this option ensures each subject matter is treated equally it may create delays in addressing the immediate concerns of the beneficiaries such as misappropriation and misuse of their GRs, TK and TCEs, and a delay in benefit-sharing.

### ***Options Specific to the Three Subject Matters***

#### **Genetic Resources**

- 26. Options could include:
  - a. Accept the Chair's text as the basis for future negotiation, which could be concluded under a new mandate and/or at a diplomatic conference.
  - b. Accept the Chair's text as the basis for future negotiation (option a. above), and, in parallel and initially in technical working groups<sup>8</sup>, consider and progress defensive measures reflected in the Joint Recommendations and within the consolidated working document.
  - c. Continue as before, using the Chair's text and all existing documents, and focus on agreeing amongst the different proponents clear positions which would require a subsequent political decision amongst Member States.

#### **Traditional Knowledge/Traditional Cultural Expressions**

- 27. Options could include, noting discussions are still ongoing:
  - a. Continue negotiations on the existing TK and TCEs working texts with the aim of reaching a consensus on core issues during the next biennium. This option could be supported by:

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<sup>8</sup> The Secretariat (Program 4) could also be tasked with making initial, technical proposals, subject to the provision of additional resources as needed.

- (1) Revision of the working texts by intersessional working groups of experts<sup>9</sup>, a small, formal cross-regional writing team of experts working during IGC sessions<sup>10</sup> or through the development of Chair's texts.
  - (2) A timeline for key decisions to ensure negotiations are not open-ended.
  - (3) Establishment of small, informal *ad hoc* working groups to present proposals on core issues to support consensus building, noting the clear intent of this work would be to advance and not to delay negotiations.
- b. Consider taking an incremental approach to the negotiations with an initial focus on gaining consensus on perhaps the less contentious issues such as moral rights relating to recognition and attribution whilst negotiations continue on the scope of any economic rights. In parallel, work could also be undertaken on progressing complementary or defensive measures such as databases.
- c. Continue as before, and focus on agreeing amongst the different proponents clear positions which would require a subsequent political decision amongst Member States such as at a diplomatic conference, subject to the nature of the instrument.
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<sup>9</sup> Members are invited to consider the number of intersessional working groups and/or *ad hoc* expert groups meetings, if so decided on, in relation to the number of IGC sessions. In recent biennia, the IGC has met six times per biennium and there were three meetings of *ad hoc* groups of experts in 2018/2019. Presumably, for example, that number of IGC sessions could not be maintained if intersessional working groups and/or *ad hoc* expert groups were also decided upon.

<sup>10</sup> See footnote 3 above.