

Draft
INTELLECTUAL PROPERTY
AND PROTECTION OF GENETIC RESOURCES, TRADITIONAL KNOWLEDGE
AND FOLKLORE

**Development of an International Instrument For Protection of Traditional Knowledge,
Folklore & IP Aspects of Genetic Resources.**

Possible *Principles And Elements* For Protection
Of
Folklore/Traditional Cultural Expressions

WIPO African Group Contribution

WIPO Round Table on Policy and Legal Options for Protection of Genetic Resources,
Traditional Knowledge and Expressions of Folklore

Kampala, October 13 & 14 2003

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October 2003**

Introduction

1. As the WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (IGC) focuses on developing international protection in these areas, the substantive contribution of the principal stakeholders becomes increasingly fundamental. Moreover, Africa is often blamed for making strong proposals, such as calling for international instruments, without supporting such proposals with concrete ideas for their implementation. The African Group in WIPO, consequently, welcomes regional events such as this as an opportunity to discuss and move the way forward for the IGC particularly with its new mandate established at the last Assemblies of Members States between September 22 and 1 October 2003. I discussed the decision of the Assemblies yesterday. As a follow up, in this presentation, I suggest and put forth, on behalf of the African Group in Geneva, principles, elements and wording that could be a part of eventual international instruments. That is, I expand on ways the IGC could proceed toward implementing that decision. These are just some initial thoughts and I hope to develop and polish these ideas with your valuable input.

2. This draft paper focuses on folklore. While all three issues of the IGC are important to African countries, folklore is particularly important and therefore draws great amount of experience. OAPI has a regional system for folklore protection and countries such as have enacted national laws for the protection of folklore. The time has come, therefore, in light of these experiences and the need to accelerate the work of the IGC, to make headway on the folklore issue as African countries have been calling for several decades. Progress with folklore might 'break the ice' and lead the way for progress on traditional knowledge and genetic resources since the three issues remain essentially inter-linked and progress in any of these areas should take into account and support the work taking place in the others.

Norm-building and norm-setting

3. It is normal for legislative drafting (whether at national, regional or international levels) to be preceded by policy discussions, aimed at setting overall policy directions, establishing the main principles and objectives and narrowing down the options. This is the 'norm-building' which necessarily precedes the 'norm-setting'. Discussions at the IGC have contributed to clarifying key legal and policy questions.

4. The IGC has considered information on a number of different existing *sui generis* systems for the protection of folklore. One of them is from our own continent, the Bangui Agreement of OAPI, and many African States have followed the WIPO-UNESCO Model Provisions of 1982 and the Tunis Model Law of 1976 in their national laws.

5. Other examples include the legislation of New Zealand and the USA of defensive measures on the use by third parties of traditional symbols and signs as trademarks and the South Pacific Regional Framework of 2002 that requires, for example, disclosure of the source of folklore used to obtain intellectual property rights, as well as the equitable sharing in any benefits and the prohibition of making derogatory, libelous, defamatory or fallacious uses of folklore under any circumstances. Another idea, inspired by the Law of Panama, 2000, would create a register for sacred expressions of folklore where communities could register expressions to prevent any and particularly offensive uses of them.

6. I don't want to, at this point, suggest one of these particular approaches should take precedence over the other, but rather to emphasize the breadth of these experiences and the need to draw from them elements for national and international norms for the protection of folklore. The purpose then of this paper is, therefore, to discuss some of the principles and elements that could be part of a system for the protection of expressions of folklore/TCEs. It is thus another step to bring countries towards the norm-setting required for an effective protection of our resources.

3. In consequence and on the basis of the discussion of these draft principles and elements at this meeting of experts in Kampala, I suggest that we hold a further meeting of experts to further refine and narrow down the options and start to develop some legislative language. This work should, as always, be based on the active and extensive consultation with all stakeholders, especially the owners and custodians of folklore. The results of this second meeting could then be widely discussed among African countries and then submitted, in the name of the African Group, to the next session of the IGC, taking place in March 2004.

4. Once norm setting begins in earnest, I suggest we focus initial attention on one or two main provisions of the instrument. For example, the rights that would apply to expressions of folklore/TCEs and the exceptions to them.

Possible principles for discussion

5. The protection of folklore/TCEs is one element of an overall policy framework that could take into account principles such as:

- (a) Protection of TCEs should primarily be undertaken for the benefit of communities. But this does not, however, exclude the possibility of providing that rights in folklore vest in a State-appointed authority or that benefits from folklore protection be shared with everyone, through, for example, a cultural fund. This is the route taken by many African countries which have already got laws for folklore protection.
- (b) We should also not forget that individuals can and should be encouraged to hold rights in their contemporary adaptations or interpretations of folklore. This is important as a stimulus for creativity and economic development.
- (c) Folklore comprises different forms – for example, literary and artistic works, signs and symbols, handicrafts, etc. Some are sacred and or secret, others not or less so. They may each therefore be protected under varying systems, whether rooted in branches of the conventional IP systems (e.g., copyright, trademarks, unfair competition etc) or specifically developed. Different approaches ensure respect for the will of the custodians of folklore while stimulating and facilitating tradition-based creativity.
- (d) Systems and mechanisms for TCE protection should as far as possible be developed with the full and effective participation of the relevant communities and recognize and incorporate indigenous and customary laws and protocols. .

- (e) Protection of TCEs by IP should not be confused with the ‘preservation’ of cultural heritage.
- (f) As the African Group has stated several times, folklore (and TK) protection is linked closely to economic development and income generation. A key objective of folklore protection should be, I suggest, to harness culture and heritage for poverty reduction, job creation, skills training, tourism and foreign exchange earning etc. I understand of course that at the same time, this must be balanced against the need to maintain traditional ways of life where necessary.
- (g) Existing IP systems may be useful, as the IGC’s work has shown, and we should make use of or build upon existing measures where possible. Where they prove to be inadequate, however, they should be complemented by *sui generis* measures or replaced by *sui generis* stand-alone systems.
- (h) Whether we use existing rights or new ones, or both, capacity-building is going to be crucial. There is no point in establish legal systems if they cannot be fairly easily used or are not known about. Capacity-building activities should be increased particularly that directed towards the custodians of folklore and should focus both on increasing practical capacity to protect folklore and to engage actively in policy debate and to put forward community-based proposals.
- (i) Folklore can be distinguished from technical traditional knowledge in the narrower sense, but any linkages between them should be respected as far as possible in the design and implementation of new legal mechanisms.

Conclusions

6. These are just some ideas for discussion and comments are very welcome.

7. Based on the discussion of these draft ideas, as I have said, I suggest we discuss specific provisions at another meeting before the March 2004 IGC session.

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