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**THE PROTECTION OF THE TRADITIONAL CULTURE EXPRESSIONS
AND FOLKLORE: CURRENT TRENDS**

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1. The Intergovernmental Committee

With the advent of new technologies and increased international trade a number of new intellectual property issues have come to the surface. One of them is linked to the interest of the pharmaceutical industry in genetic resources and in traditional healing methods. Another one – which is not particularly new – concerns folklore traditions and their importance for the identity of peoples and nations and also their exploitation by various alien contexts.

A particular problem relates to tradition-based innovations and creations and the complex relations between those and the underlying genetic resources and traditional knowledge. Further interest has been generated when some inventions were revoked because it was found that they were not new, in the sense that they were actually the same or similar as methods and substances which had been known for thousands of years in other parts of the world.

The extremely complex legal and ethical as well as economic and social issues in this context prompted the governing bodies of the World Intellectual Property Organisation to establish, in September 2000, an Intergovernmental Committee to provide a forum for the Member States to discuss these issues.

To date the Committee has met six times. The latest session was held in November 2004.

Generally, about 100 States participate in its meetings and, in addition, a number of intergovernmental organisations and about 50 non-governmental organisations representing a wide variety of interests. Also representatives of indigenous peoples and local communities participate very actively in the sessions of the Committee.

The Committee has one Chairman elected for one year and two Vice-Chairmen.

At its first session the Committee adopted an ambitious work program, which deals partly with the determination of legal standards in certain fields and partly with practical measures to facilitate activities in the fields concerned. The Committee has tried to give equal weight in the discussions to each of the three elements it has to deal with.

The work of the Committee has evoked considerable political interest and the expectations concerning its work are high. The member States of WIPO discussed the activities of the Committee at their assemblies in 2003 and agreed on a new mandate for the Committee. According to that mandate, the Committee should accelerate its work and focus on the international dimension of the issue and report on progress made to the Assemblies in 2004. It was also stated that no outcome of its work was excluded, including designing one or more international legal instruments.

The question is then which aspects of the various elements of the Committee's mandate are dealt with and how this is done. The following part contains a brief summary of the activities to date.

As genetic resources are closely linked to traditional knowledge and traditional knowledge in turn is closely linked to folklore, all the three issues of the mandate of the Committee are described in the future, in order to give a full picture of the work in this important field.

2. Genetic Resources

The work program adopted by the Committee at its First Session contained five elements of which some are of a legal nature and others more aim at the solution of practical problems.

Prior Informed Consent

One activity includes the development of appropriate provisions or guidelines for national patent laws in order to better ensure consistency between the granting of patents and such measures which States have undertaken to control access to genetic resources. This is an issue which flows from the Convention on Biological Diversity (CBD) and concerns the much debated issue of “prior informed consent” as a condition for the granting of patents on the basis of genetic resources. This item is discussed also in the Standing Committee on Patents and the Intergovernmental Committee has not so far dealt more in detail with the issue.

Patentability of Biotechnology Inventions

The second “legal” issue concerns the development of legal standards (in the form of guidelines) concerning the availability and scope of patent protection to structures and compositions derived from, or isolated from, naturally occurring living organisms and also to early stage biotechnology inventions. As regards this issue there has been some hesitation in the Committee and no active work has so far been undertaken on this issue (also because priority has been given to certain other activities mentioned below).

Benefit sharing

The third issue that is on the agenda of the Intergovernmental Committee concerns benefit-sharing from the use of genetic resources as provided for in for instance the CBD and the FAO International Treaty on Plant Genetic Resources for Food and Agriculture. The task of the Committee in this respect is to develop practical and low-cost mechanisms to implement benefit-sharing arrangements under multilateral systems for access to genetic resources and such benefit-sharing. Like the previous items under this headline, the work has not progressed very far in the Committee, partly due to the fact that the FAO Treaty was adopted not long ago.

It is worth noting, however, that the Executive Secretary of the CBD requested the Committee to prepare a technical study on the consistency with WIPO treaties of some issues of particular importance for the implementation of the CBD. Those issues concern whether the disclosure of certain elements could be made a condition for the granting of patent for a genetically-based invention. More specifically those elements concern to what extent it could be required to disclose which genetic resources had been used in the claimed inventions, their country of origin, the source of associated traditional knowledge and, last but not least, evidence of prior informed consent. That study has now been adopted by the Committee and transmitted to the Conference of the Parties of the CBD.

Guide Contractual Practices

The part of its tasks where the most progress has been made concerns a very practical issue, namely the development of what could be called “guide contractual practices” which means guidelines and model intellectual property clauses for contractual arrangements for access to genetic resources and benefit-sharing. This is an essential task as it is practical and will greatly facilitate various types of transfers of genetic resources or access to them. At its Third

Session in June 2002 the Committee gave its support for the structure of a proposed WIPO database containing information in this respect and to the dissemination of a questionnaire to gather information to be put into the database.

It should also be mentioned that the Committee at its Third Session had a demonstration of certain already existing databases in this field, namely the China Traditional Chinese Medicine Patents Database, the Indian Health Heritage Test Database of India, the Indian Traditional Knowledge Digital Library of Ayurveda and the Venezuelan Biozulua database.

In short, this is a practically-oriented part of the Committee's task has progressed well and it has been generally stated that the database which is thus under construction will be of considerable practical value. However, as is mentioned under 7. below there was no agreement in the Committee on the continuation of the work in this area.

Management of Genetic Resources

A fifth task of the Committee concerns possible measures to improve the management of genetic resources, more particularly through the integration into overall plans for effective conservation. This task, however, did not receive much support and has so far not been pursued.

3. Traditional Knowledge

This part of the Committee's task has proved to particularly important for a number of reasons. One such reason is that exploitation of traditional knowledge has become an increasingly important element in a great number of industrial activities. Another reason is that the borderlines between traditional knowledge and folklore is not always very clear, nor is the borderline between such knowledge and genetic resources and their use.

As regards more specifically traditional knowledge, the calls for a better protection concern two distinct elements. One is what could be called "passive protection" mainly how to ensure that patents are not granted for inventions based on previously known traditional knowledge. The second element concerns what could be called "active protection" i.e. the development of a *sui generis* protection system for such knowledge.

On the basis of those two approaches the Committee has decided on four main tasks that it pursues although with a varying degree of speed.

Definition of Traditional Knowledge

One important element is of course to define as precisely as possible what the term traditional knowledge means. The discussions have so far not progressed much in the Committee, but at the Third Session a document on operational definitions of traditional knowledge was discussed. No conclusion was, however, reached at this stage, nor was such a conclusion intended for the time being. On the basis of the discussions, the Secretariat has, however, prepared documents on various elements which could make up a working definition of traditional knowledge.

"Passive" Protection of Traditional Knowledge; its Integration into Searchable Prior Art

As mentioned above, experience has shown that patents have in fact been granted for inventions that were actually not new because they only reflected previously known

traditional knowledge. It has therefore become more and more important to find ways to integrate such documentation into searchable prior art for the purpose of patent examination.

For this purpose the Committee has initiated a number of activities. The first one of those concerns the preparation of an Inventory of traditional knowledge-related periodicals, gazettes and newsletters. Concerning this Inventory a number of activities were suggested or decided, such as the possible integration of that Inventory in the so-called Minimum Documentation List of the PCT (Patent Cooperation Treaty) and also a suggestion that the Inventory be taken into account by the International Patent Classification Task Force on the classification of traditional knowledge. It was also decided that the Inventory should be uploaded on the WIPO Website. Furthermore, the Secretariat has prepared an intellectual property documentation toolkit to facilitate the understanding of the intellectual property implications of the documentation of traditional knowledge.

Another activity in this context deals with the preparation of an Inventory of existing databases on disclosed traditional knowledge. As regards this activity the main decision so far has been that the WIPO Portal of such databases should be maintained but that how it would be used in the future require further examination from, among other, budgetary perspective.

“Active” Protection of Traditional Knowledge

While the passive or defensive protection of traditional knowledge aims at ensuring that patents are not granted for inventions which are in fact based on previously disclosed traditional knowledge, the active protection aims at ensuring that traditional knowledge as such enjoys some kind of intellectual property protection.

In this context two elements are of importance. One concerns to what extent existing intellectual property systems can provide protection for expressions of traditional knowledge. To the extent that this is not the case, the question arises if an additional protection should be established and how it should be designed.

As regards the possibilities to protect traditional knowledge by means of existing intellectual property laws it has become clear that such protection to some extent can be provided through the application of systems for the protection of copyright, trademarks, industrial designs, trade secrets, patents and geographical indications. It is also clear, however, that such protection is not and can not be complete.

The Committee started at its Third Session the exploration of the possible structure of a *sui generis* system for the protection of traditional knowledge. Broadly speaking, certain elements were found to require further study and discussion, namely 1) the policy objective of the protection, 2) the subject matter for protection, 3) the criteria according to which such subject matter should be protected, 4) ownership of the rights, 5) the rights to be granted, 6) the means for acquisition of the rights, 7) the administration of the rights, and, 8) term of protection and expiry of the rights.

Broadly speaking the protection of traditional knowledge could be set up according to two different tracks, namely the “folklore track” (stressing the cultural contexts in which traditional knowledge operates) or the “biodiversity track” (concentrating on biodiversity-associated traditional knowledge). Also the issue of the interaction between a possible *sui generis* system and existing intellectual property protection systems needs to be explored.

As regards the final outcome there are various possibilities. One would consist of a binding international instrument while another approach would consist, at least as a start, of a “soft law,” that is, a recommendation or a similar arrangement. An issue that has also come into focus concerns the indirect protection that may be given through the protection of non-original databases (which is actually presently under discussion in the WIPO Standing Committee on Copyright).

As these are very complex and sensitive matters, the Committee decided that member States and other interested parties would submit comments and observations to the Secretariat by September 15, 2002. An amended version of the basic document was then prepared, taking into account the two possible tracks to follow, an analysis of national *sui generis* systems that have been implemented and the problems of interface between a *sui generis* system and existing intellectual property systems. The findings were included in the documents prepared for and discussed at the 6th session of the Committee in March 2004.

4. Folklore/Traditional Cultural Expressions

The third pillar in the work of the Committee concerns folklore, that is, in a way, artistic traditional knowledge. The notion of folklore covers a number of artistic expressions in the form of song, music, dance and handicraft developed over the centuries but at the same time a living and ever changing phenomenon.

Folklore and its proper protection has been on the agenda of the intergovernmental organizations for a number of years. Thus in 1982 the WIPO/UNESCO Model Provisions on the protection of expressions of folklore were adopted. Efforts at that time to establish an international convention on the issue failed and were not taken up again.

The issue is now on the agenda of the Intergovernmental Committee. At the outset three tasks were proposed in this context, namely the updating of the Model Provisions, improving of the protection of handicrafts and other tangible expressions of folklore and a revival of the efforts to establish an international protection system.

As a basis for the discussions in the Committee, the Secretariat prepared a Report on the National Experiences with the Legal Protection of Folklore. As a follow-up of that Report the Secretariat proposed four activities. One of those include increased legal-technical assistance to countries principally for a better protection of folklore for instance through the development of preservation and conservation.

Another activity involves an updating of the Model Provisions, and the next one the initiation of a study on a possible international protection of expressions of folklore in the form of a *sui generis* system. The fourth activity includes studying the relationship between customary laws and protocols in the folklore field and the formal intellectual property system.

Of the proposed activities, the first and the last ones received wide support in the Committee, while there was for the time being no consensus as to the updating of the model provisions and as to the activity concerning a *sui generis* international protection system, mainly because some Delegations considered them to be premature. In this situation the Chair of the Committee suggested that the Secretariat should prepare an analytical and systematic document on national experiences of protection of folklore either by means of traditional intellectual property or by means of *sui generis* legislation and the implementation of such legal frameworks. That document should include the role of customary law and the interaction of national protection systems with legal systems in other countries. It was so decided by the Committee and the issue was then further discussed at the following sessions of the

Committee. It forms part of the work carried out and the discussions held at the 6th session of the Committee in March 2004 and also at the 7th session (see below).

5. The Assembly meeting in 2003

The General Assembly of the member States of WIPO discussed the Intergovernmental Committee and its work at their sessions in 2003 and agreed on a new mandate for the Committee. According to the mandate, the Committee will continue its work for the next budgetary biennium on questions included in its previous mandate. Then the mandate went on stating that

*“ii) its new work will focus, in particular, on a consideration of the international dimension of those questions, without prejudice to the work pursued in other for a, and
iii) no outcome of its work is excluded, including the possible development of an international instrument or instruments.”*

The Assembly furthermore urged the Committee to accelerate its work and present a progress report to the session of the Assembly in September 2004. Furthermore, the Assembly requested the International Bureau to assist the Committee by providing Member States with necessary expertise and documentation.

6. The 6th and 7th Sessions of the Committee

Mindful of the new mandate, the Committee started, at its 6th Session in March 2004 its deliberations on several key issues in its work. Those were mainly

- Policy and legal issues and legal options for protection of a) traditional knowledge and, b) folklore, and
- The international dimension, including the various options as regards international protection (binding or non-binding instrument, public law instrument or instrument granting exclusive rights, etc.).

On the basis of the discussions the Secretariat elaborated extensive working documents on all the key issues. Those were then discussed in the 7th session that took place in November 2004

At the 7th session some progress was made but the work also suffered some drawbacks.

One such drawback was that it was not possible to find any agreement on the finalisation of the Committee's work on genetic resources (mainly draft IP guidelines for contracts on the use of genetic resources). That part of the work was therefore left unfinished.

The positive aspects were that there was agreement on future work on traditional knowledge and folklore, with a view to establishing an international document on draft objectives and core principles for the protection and also an outline of policy options and legal mechanisms for the protection in those areas.

These latter expressions (policy options policy and legal mechanisms) in fact include fairly specific elements for the possible future protection in those areas.

There are numerous details of interest in this context and it is not possible to describe all of them here. As regards *policy options* in the field of traditional cultural expressions/folklore, the choice is essentially between

- proprietary and non-proprietary options (exclusive rights, equitable remuneration schemes or only moral rights protection) or
- unfair competition approach (actions against misleading or unfair trade practices), or
- penal sanctions approach

As then regards the *legal mechanisms* available to implement those policy options, a number of questions have to be solved. Those are primarily the following.

- The subject matter of protection (what is “traditional cultural expressions”)
- The criteria for protection (products of creative activity + characteristic of a community’s distinctive cultural identity, or any other criteria)
- Who should be the beneficiaries of the protection and how should they be determined
- How should the management of the rights be organised (direct management by the community or management through an authority in consultation with the community concerned)
- The scope of protection (which rights should be provided for)
- Which exceptions and limitations should be provided for (when could a traditional cultural expression be used without consent)
- The term of protection (time-limited or continuous; links to the community)
- Should formalities be a condition for protection
- Which should be the sanctions and remedies be for infringements
- Application in time
- Relationship with intellectual property protection
- The mechanisms for protection at the international or regional level (folklore is often regional in character).

A very constructive discussion took place at the 7th session and it was agreed that the material prepared by the Secretariat should be updated and submitted to the 8th session of the Committee. That will take place in June 2005 and the results at that session will be determining for the final result of the work of the Committee. That result will then be assessed by the Assembly in early autumn 2005. After that Assembly session we will know if the Committee will continue its work during the next WIPO budget cycle in 2006-2007.

6. Participation of indigenous and local communities

A particularly sensitive and at the same extraordinarily important item is how and to what extent indigenous and local communities should be admitted to take part in the discussions of the Committee. After all it is the interests of those communities that are at stake and which will be the ones primarily affected by the result of its deliberations. At the same time, the issue is sensitive.

It would seem that the Committee is generally positive towards an increased involvement of those communities in the work of the Committee. The problem is the financing of such participation. It has turned out that for practical and political reasons it is not possible to finance such participation from the regular budget of WIPO. Instead, the participation will have to be financed in a voluntary way, possibly through the creation of a Voluntary Fund. From a structural point of view, the participation will probably be based on an informal consultative forum in advance of the sessions of the Committee and then participation in the sessions of the Committee.

7. Some Conclusions

The establishment of the Intergovernmental Committee and its work has not been without practical and political problems. This is in a way quite natural because the Committee enters uncharted waters where there are a number of conflicting interests. It provides, however, an appropriate forum for discussions about the intellectual property aspects of a number of issues that are anyway on the international agenda in various other fora such as the World Trade Organization, the Convention on Biodiversity, the Food and Agriculture Organization and also in a number of regional contexts. Through the Intergovernmental Committee WIPO has organised the discussion in a constructive way; *inter alia* because not only governments and intergovernmental and non-governmental organisations participate actively in the debates but also because indigenous peoples and local communities have a possibility to make their voice heard.

To some extent a work on the same issues are undertaken in the TRIPS Council within the World Trade Organization (mainly in the context of the review of Article 27.3.b) of the Agreement (the biotechnology exception). The Doha Ministerial Conference also instructed that traditional knowledge and folklore should form part of the next round (the "Development Round). In the TRIPS Council there are differing views on how the work should proceed. Some developing countries would prefer the work on traditional knowledge and folklore to be conducted in that Council, while most other countries would prefer the work of the WIPO Intergovernmental Committee to be concluded first.

The work of the Committee has necessarily to proceed step by step with some caution. So far the work has already yielded some practical results and as it progresses over this and the year 2005 will see which further practical results will come out of its work. So far this has been rather promising and the debates must be considered as very constructive.

At the same time it has to be admitted that the work is politically sensitive and difficult, also because it appears on the agenda also of other Organizations, such as the WTO, FAO and CBD. There is thus a lot of pressure on the WIPO Intergovernmental Committee.

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