

Chairman's Summary<sup>1</sup>  
Informal Meeting on Intellectual Property Related to Genetic Resources, Traditional Knowledge and  
Folklore (IGC Retreat)  
5-7 July 2013  
Bangkok, Thailand

The Informal Meeting on Intellectual Property Related to Genetic Resources, Traditional Knowledge and Folklore (IGC Retreat) was organized by the Royal Thai Government on 5-7 July 2013 in Bangkok, Thailand (programme as appears in [Annex 1](#)).

The Retreat was attended by 55 participants from 29 countries and organizations (list of participants as appears in [Annex 2](#)), and chaired by H.E. Mr. Thani Thongphakdi, Ambassador and Permanent Representative of Thailand to the United Nations Office and Other International Organizations in Geneva.

At the opening, H.E. Mr. Sihasak Phuangketkeow, Permanent Secretary of the Ministry of Foreign Affairs of Thailand, welcomed all participants on behalf of the Minister of Foreign Affairs of Thailand. He recognized that while considerable progress has been made in the IGC, there remain many fundamental issues left to be addressed, particularly what, how and for whose benefit should the instrument(s) on genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs) aim to protect. He believed that the Retreat would be an important opportunity for frank and candid discussion with a view to enhancing understanding on substantive matters, building up comfort levels among negotiators and expanding common grounds to move forward the negotiation. He also emphasized the need to discuss procedural aspects of the IGC in order to pave the way towards the timely convening of the diplomatic conference.

H.E. Mr. Wayne McCook, Ambassador and Permanent Representative of Jamaica to the United Nations Office and Other International Organizations in Geneva, in his capacity as the IGC Chair, also delivered a statement thanking the Royal Thai Government for organizing the Retreat and the generous hospitality extended to all participants. He recognized the benefit of inter-sessional meetings in ensuring continued dialogue and emphasized the need to expedite the work of the IGC, while being prudent and maintaining the balance in moving forward. He supported more meetings among technical experts to narrow down options for political decisions. He stressed that the IGC's mandate was not indefinite and that it has to arrive at an outcome which must be substantive, and it was incumbent on all delegations to honour the mandate of the IGC. In seeking solutions, he believed that it was important to think how the IP system could bring added value to the objectives it sought to promote. He further emphasized that the IGC should seek to achieve agreement by consensus and that the time had arrived for delegates to not only talk among those who shared the same position but to also broaden support from all. He pointed out that important pending issues include subject matters of protection, beneficiaries, transparency and how to strike a balance between positive and defensive protection.

As an introduction, a briefing on the background and latest developments of the IGC was provided by Mr. Wend Wendland, Director of Traditional Knowledge Division, WIPO (presentation as appears in [Annex 3](#)).

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<sup>1</sup> This summary reflects the views of the Chairman of the Retreat, and is without prejudice to the positions and views of delegations in the IGC.

Mr. Wendland, on behalf of the WIPO Secretariat, also thanked the Royal Thai Government for having organized the Retreat and for having invited the Secretariat to attend.

The Discussion at the Retreat focused on intellectual property in relation to three key issues, namely genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs) and on the way forward of the IGC, on the basis of the non-papers prepared by moderators of each issue as appear in Annexes 4, 5, 6, 7 respectively.

### **1. GENETIC RESOURCES (GRs)**

The discussion was moderated by Mr. Ian Goss, General Manager, Strategic Programmes, IP Australia.

#### ***Points of Convergence***

1.1 Participants had consensus regarding the high level policy outcomes as follows: "Protection of GRs and associated TK from misappropriation by third parties, whilst providing an effective environment to enable economic benefit to be obtained from the resources, noting a primary pathway for obtaining economic benefit is the patent system."

1.2 There was also consensus that objective 2 in the current text on GRs as developed by IGC 23 was appropriate, noting that there were two options in relation to the objective and that this objective was also relevant to the TK text.

1.3 There was general support for transparency as a policy outcome of a disclosure mechanism, which reflects objective 1 in the current text on GRs as developed by IGC 23, noting that there was no agreement on linking the patent system to the Nagoya Protocol in relation to checkpoints for monitoring compliance with ABS.

1.4 There was an agreement that defensive measures are required to underpin any normative approach. In essence they are not controversial, and are also relevant to the TK text.

1.5 There was general consensus that the subject matter should have a narrow focus, and, as it is not conferring benefits or rights, that significant elements of the text could be refined or removed, and to focus instead on Article 3 as the mechanisms to support the objectives.

#### ***Pending issues***

1.6 The critical issue blocking progress was a lack of consensus in relation to a disclosure mechanism. Key concerns relate to the potential burden on the IP system and business and unintended consequences, which could create uncertainty in the IP system, and limit access to GRs and associated TK, impeding innovation and achievement of economic benefits.

In relation to this key issue, there was however, consensus that these concerns need to be addressed.

#### ***Recommendations***

1.7 To review objective 1 in the current text on GRs as developed by IGC 23 to incorporate key principles that address concerns of non-disclosure proponents. This could perhaps be addressed by incorporating them as principles to be applied when developing the disclosure mechanism. Examples include: maintaining certainty of IP rights, recognizing the role of the IP system in promoting innovation, supporting technology and knowledge.

1.8 To further refine the disclosure proposal so key concerns from users can be better assessed and mitigation proposals considered.

1.9 To request the WIPO secretariat, in coordination with the UPOV secretariat, to provide information on the scope of subject matter, patents or IP rights, in particular does the scope incorporate other rights such as PBR (such as rights in plant varieties that pre-exist the first UPOV Convention).

1.10 Member states should share information on their disclosure regimes to inform the discussions, perhaps this could be by refining the terms of reference for the study proposed by a number of non-disclosure countries, noting that further work was required on the terms of reference to ensure that they were a balanced reflection of the two interests - holders and users. It was suggested that countries having and proposing a disclosure requirement give practical case study examples at the IGC through the organization of a side-event.

1.11 The non-disclosure proponents were requested to review and revisit their position, as the disclosure mechanism is further refined, to see if their current issues could be resolved, noting disclosure proponents had lowered their ambitions significantly taking account of concerns raised in relation to burden and unintended consequences, with consensus on a regime which would be administrative in nature with no obligation on IP offices to verify the disclosures.

## **2. TRADITIONAL KNOWLEDGE (TK)**

The discussion was moderated by Mr. Emmanuel Sackey, Chief Examiner, African Regional Intellectual Property Office (ARIPO).

### ***Points of Convergence***

2.1 Participants agreed to narrow down the policy objectives to only IP specific ones and consider the non IP objectives together with the guiding principles for the development of preambular clauses and statements.

2.2 In the discussion on Article 1 related to the subject matter of protection (all references to articles are references to the draft articles on TK as developed by IGC 24), there was no concern expressed on the definition of TK as such. However, on the criteria of eligibility, the reference to the minimum period to determine the intergenerational character of TK was discussed at length. Many participants expressed the view that it would be impractical or unrealistic to fix a period to determine a social and cultural relationship and to create social identity.

2.3 On Article 3 related to scope of protection, participants considered that the rights- based approach and the measures- based approach could be complementary instead of alternatives. Participants expressed their wish to see such a linkage in future discussions.

### ***Pending Issues***

2.4 Concepts such as "public domain", "misappropriation", "TK widely known" and "diffused TK", "secret TK", as contained in Articles 1 and 3, were vague and should be further clarified for legal certainty and aligned with their usual meanings as appear in relevant international treaties.

2.5 How to address the economic rights of TK holders and how such rights could impact on access to knowledge/information and associated GRs.

2.6 On article 2, related to beneficiaries, with reference to the words “nations” in 2.1 and “national identity” in 2.2, the discussion highlighted that the two terms serve different purposes.

2.7 How to address the overlap of disclosure of origin principles contained in the TK and GRs texts.

### *Recommendations*

2.8 The current TK text contains a large number of bracketed language which should be worked on to enhance clarity and narrow down differences.

2.9 Given the similarity and synergy in the objectives and principles of TK and TCE texts, effort should be made to harmonize the objectives and principles in the two texts and create a single set of objectives for both TK and TCEs.

### **3. TRADITIONAL CULTURAL EXPRESSIONS (TCEs)**

The discussion was moderated by Ms. Kim Connolly-Stone, Chief Advisor, Intellectual Property for New Zealand.

#### *Points of Convergence*

3.1 There was general agreement that the time is right to return to the policy objectives and principles at IGC 25. Participants identified a number of principles or approaches that could help the IGC to rationalize the policy objectives, which included:

- A focus on IP related objectives,
- The protection objective was shared, but there was a need to think further about what is meant by misappropriation,
- Bringing in the principle of balance when reflecting the objectives,
- Taking the objectives that reflect the broader context, or a means to an end, and addressing these in a preamble,
- Testing that a particular objective could be given effect to by the instrument,
- Looking for orphan objectives that do not match up with an article in the text,
- Reconsider whether principles are needed (may have been dealt with in articles, or could be addressed in the preamble).

3.2 On Article 1 (all references to articles are references to the draft articles on TCEs as developed by IGC 22), there seemed to be agreement that the listing of examples could be moved away from in the categories of TCEs. However, there remains a need to consider if a footnote was needed if the list of examples is removed. On the previously debated question of whether “knowledge” should be referred to in the two alternatives in paragraph one, it was thought that both alternatives could be done away with as the definition could stand without them.

3.3 On Article 2, on the question of how to deal with the issue of nations in Article 2, it was thought that paragraph 2.2 from the TCE text was a way forward.

3.4 On Article 3, the reluctance of a number of delegations to move beyond option 1 on scope of protection was connected to uncertainty concerning beneficiaries and the definition of TCEs, e.g. How to define beneficiaries? How much subject matter could potentially be protected?

#### *Pending Issues*

3.5 Regarding Article 1 on the use of the terms “artistic and literary” and “creative intellectual activity” - Do these terms appropriately define TCEs, can they accommodate all TCEs that should be covered, and how to provide legal certainty?

3.6 On Article 2, there were still concerns about the lack of clarity concerning beneficiaries, e.g. Does the term “beneficiaries” mean rights of ownership, stewardship or something else? How can the description of beneficiaries be understood objectively?

### *Recommendations*

3.7 Participants were requested to discuss the issue of objectives and principles with their capitals and consider how they could be rationalized ahead of IGC 25. The Friend of the Chair, Mr. Goss, has offered to consider this issue and assist at IGC 25.

3.8 On Article 1, participants were requested to come to IGC 25 prepared to explain why the terms used were important, and to offer alternative language that could address concerns. Those who thought the language was problematic should come prepared to explain how TCEs would be excluded if the language was used, and offer alternative approaches to address the concerns of others regarding legal certainty. Participants should also discuss with their capitals whether the two alternatives in paragraph 1 could be removed. Was the language necessary to provide clarity?

3.9 On Article 2, participants were requested to discuss with capitals 1) what would be useful directions of inquiry to provide certainty with regard to beneficiaries, and 2) whether the approach in 2.2 would be acceptable, and come prepared to address these issues at IGC 25.

3.10 On Article 3, participants were requested to consider whether reservations concerning scope would be addressed if the concerns regarding lack of clarity in articles 1 and 2 were addressed. Alternatively, was there something more fundamental?

## **4. THE WAY FORWARD OF IGC**

The discussion was co-moderated by H.E. Mr. Thani Thongphakdi and H.E. Mr. Wayne McCook.

### *Points of Convergence*

4.1 Given the important moral and economic rights associated with the issues and the significant investment made in the IGC process, all agree that a tangible and meaningful outcome should be achieved.

4.2 As a number of important points still remain to be resolved, political commitment was required, including decisions to be made at the political or policy level to push forward the process.

4.3 Participants agreed that the outcome should be international legal instrument(s) ensuring the effective protection of GRs, TK and TCEs.

4.4 While some participants preferred separate instruments for GRs, TK and TCEs, there was general agreement on flexibility on whether there should be one, two, three separate instruments given the similarities, differences and synergy between them. Although the concept of an early harvest was discussed, it was agreed that all issues should progress at the same rate in a balanced manner, and be concluded at the same time as a single undertaking.

4.5 Participants supported the extension of the IGC mandate with clearly identified issues that required further work and that consideration be given to setting the outer date for the diplomatic conference. It was

proposed for the next year that there be three IGC sessions held to address each issue thematically, with the fourth IGC held prior to the General Assemblies to both discuss cross-cutting issues at a technical level and allow for a meeting at the senior officials level to, among other things, discuss policy issues and provide policy guidance.

4.6 Further studies should be made and side events held to share knowledge and best practices, especially on disclosure requirements.

4.7 There was a need to further engage representatives from indigenous and local communities which would help their understanding of the issues, facilitate their contributions to the process and serve as a confidence-building measure.

#### *Pending Issues*

4.8 Whether the international legal instrument(s) should be measures-based or rights-based in approach.

4.9 Whether the international legal instrument(s) be binding or not.

4.10 How to improve the methods of work (e.g. inter-sessional meeting, friends of the chair, etc.) which needs to be endorsed by the Plenary of IGC.

#### *Recommendations*

4.11 Participants were requested to discuss the above issues with their capitals in preparation for the discussions to be held during the last three days on the IGC which would provide recommendations to the General Assemblies.

4.12 Member states are encouraged to provide additional contributions to the Voluntary Fund to support the participation of stakeholders, as well as consider the proposal made to use the WIPO regular budget to enable the Fund to continue

On 8 July 2013, an excursion to Khung Bang Kachao, Phrapradaeng District, Samut Prakan Province was organized for participants to observe the use of GRs, TK and TCEs in Thailand. Organized with the support of the Biodiversity-based Economy Development Office (BEDO), visits were made to the Klong Lad Po Museum and Wat Par Ked, the House of Aromatic Joss Stick and the Siamese Fighting Fish Gallery.

In the closing session, the Chair thanked all participants for their active and constructive participation in the Retreat, in particular the Chair of the IGC, the moderators of each session, as well as the Director of the Traditional Knowledge Division, WIPO, for their support and cooperation in the organization of the Retreat. The Chair advised that this summary would be sent by the Royal Thai Government to all Missions in Geneva, and that the WIPO Secretariat would be requested to make it available to all observers to the IGC.

On behalf of all participants, the Chair of the IGC thanked the Royal Thai Government and the Ministry of Foreign Affairs for organizing the Retreat.

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Program of IGC Retreat  
5-7 July 2013  
Royal Orchid Sheraton Hotel & Towers  
Bangkok, Thailand

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Friday, 5 July 2013

|             |                                                                                                                                                                                                                                  |
|-------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 10.00-11.00 | Registration ( <i>in front of Grand Ballroom 3</i> )                                                                                                                                                                             |
| 11.00-11.30 | Opening Remarks By<br>- H.E. Mr. Sihasak Phuangketkeow,<br>Permanent Secretary of the Ministry of Foreign Affairs of<br>Thailand (MFA)<br>- H.E. Mr. Wayne McCook,<br>Permanent Representative (PR) of Jamaica, and Chair of IGC |
| 11.30-11.45 | Coffee Break                                                                                                                                                                                                                     |
| 11.45-12.30 | Background and Update of IGC By Mr. Wend Wendland,<br>Director of Traditional Knowledge Division, WIPO                                                                                                                           |
| 12.30-14.00 | Lunch Break ( <i>Feast Restaurant</i> )                                                                                                                                                                                          |
| 14.00-16.00 | Discussion on TCEs<br>Moderated by Ms. Kim Connolly-Stone,<br>Facilitator of TCEs in IGC 22                                                                                                                                      |
| 16.00-16.15 | Coffee Break                                                                                                                                                                                                                     |
| 16.15-18.30 | Discussion on TCEs (Cont.)                                                                                                                                                                                                       |
| 19.30-22.00 | Cocktail Reception hosted by MFA at the Sambal Terrace                                                                                                                                                                           |

Saturday, 6 July 2013

|             |                                                                                                               |
|-------------|---------------------------------------------------------------------------------------------------------------|
| 9.00-12.30  | Discussion on GRs<br>Moderated by Mr. Ian Goss, Facilitator of GRs in IGC 23<br>(Coffee break to be served)   |
| 12.30-14.00 | Lunch ( <i>Feast Restaurant</i> )                                                                             |
| 14.00-17.30 | Discussion on TK Moderated by Mr. Emmanuel Sackey,<br>Facilitator of TK in IGC 24 (Coffee break to be served) |

19.00-21.30

Dinner on Cruise hosted by H.E. Mr. Thani Thongphakdi,  
PR of Thailand (*please meet at hotel's pier at 18.50 hrs.*)

Sunday, 7 July 2013

9.30-12.30

Discussion on the Way Forward  
Co-moderated by H.E. Mr. Wayne McCook,  
PR of Jamaica and Chair of IGC and  
H.E. Mr. Thani Thongphakdi,  
PR of Thailand  
(Coffee break to be served)

12.30-14.00

Lunch (*Riverside Meeting Room 5- TBC*)

14.00-15.30

Discussion on the Way Forward (Cont.)  
(Coffee break to be served)

15.30-16.00

Wrap up session Co-moderated by  
H.E. Mr. Wayne McCook, PR of Jamaica and Chair of IGC,  
and H.E. Mr. Thani Thongphakdi, PR of Thailand

16.00-16.15

Closing Remarks  
By H.E. Mr. Thani Thongphakdi, PR of Thailand

\*\*\* *Dress code: smart casual/ jacket with no tie*

# List of Delegates

Annex 2

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5 – 7 July 2013, Bangkok, Thailand

| Country/ Name                 | Position                                                 | Organization                               | Contact Information                                                                          | Signature |
|-------------------------------|----------------------------------------------------------|--------------------------------------------|----------------------------------------------------------------------------------------------|-----------|
| <b>Australia</b>              |                                                          |                                            |                                                                                              |           |
| Mr. Ian Goss                  | General Manager, Strategic Programs                      | IP Australia                               | <a href="mailto:ian.goss@ipaustralia.gov.au">ian.goss@ipaustralia.gov.au</a>                 |           |
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| Ms. Cathy Peisley             | Director, Indigenous Participation and Engagement        | Office for the Arts                        | <a href="mailto:cathy.peisley@pmc.gov.au">cathy.peisley@pmc.gov.au</a>                       |           |
| <b>Brazil</b>                 |                                                          |                                            |                                                                                              |           |
| Mr. Jose Mario Ferreira Filho | Minister-Counsellor                                      | Embassy of Brazil in Bangkok               | <a href="mailto:jmariobj@hotmail.com">jmariobj@hotmail.com</a>                               |           |
| <b>Canada</b>                 |                                                          |                                            |                                                                                              |           |
| Mr. Nicolas Lesieur           | Senior Trade Policy Officer                              | Foreign Affairs, Trade and Development     | <a href="mailto:Nicolas.Lesieur@international.gc.ca">Nicolas.Lesieur@international.gc.ca</a> |           |
| <b>China</b>                  |                                                          |                                            |                                                                                              |           |
| Mrs. Yajie Shen               | Section chief, Legal Division, Legal Affairs Department  | National Copyright Administration of China | <a href="mailto:shenyajie@126.com">shenyajie@126.com</a>                                     |           |
| Ms. Binglu Yan                | Project Administrator                                    | State Intellectual Property Office         | <a href="mailto:yanbinglu-1@sipo.gov.cn">yanbinglu-1@sipo.gov.cn</a>                         |           |

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|-----------------------|-----------------------------------------------------------------------------------|--------------------------------------------------------------------------|--------------------------------------------------------------------------|-----------|
| <b>France</b>         |                                                                                   |                                                                          |                                                                          |           |
| Mr. Yann Pradeau      | Deputy Head of Mission                                                            | Embassy of France in Bangkok                                             |                                                                          |           |
| Mr. Fabrice Mattei    | Representative                                                                    | Permanent Mission of France/<br>Rouse & Co., International<br>(Thailand) | <a href="mailto:fmattei@iprights.com">fmattei@iprights.com</a>           |           |
| <b>Holy See</b>       |                                                                                   |                                                                          |                                                                          |           |
| Rev.Fr. Carlo Velardo | Local Attaché                                                                     | Holy See (Apostolic Nunciature)<br>in Bangkok                            | <a href="mailto:Nuntrusth@csloxinfo.com">Nuntrusth@csloxinfo.com</a>     |           |
| <b>India</b>          |                                                                                   |                                                                          |                                                                          |           |
| Dr. Biswajit Dhar     | Director General , Research and<br>Information System for Developing<br>Countries | Ministry of Environment and<br>Forests                                   | <a href="mailto:biswajit@ris.org.in">biswajit@ris.org.in</a>             |           |
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| Prof. K.K. Mishra     | Representative                                                                    | Ministry of Culture                                                      | <a href="mailto:kk.mssin@gmail.com">kk.mssin@gmail.com</a>               |           |
| Smt. Alpana Dubey     | First Secretary (Economic)                                                        | Permanent Mission of India in<br>Geneva                                  | <a href="mailto:Alpana.dubey@ties.itu.in">Alpana.dubey@ties.itu.in</a>   |           |

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|----------------------------|---------------------------------------------------------|---------------------------------|----------------------------------------------------------------------------------|-----------|
| <b>Indonesia</b>           |                                                         |                                 |                                                                                  |           |
| H.E. Mr. Triyono Wibowo    | Ambassador and Permanent Representative                 | Permanent Mission of Indonesia  | <a href="mailto:Ptri.jenewa@ties.itu.int">Ptri.jenewa@ties.itu.int</a>           |           |
| Mr. Arif Suyoko            | Minister Counsellor                                     | Embassy of Indonesia in Bangkok | <a href="mailto:arifsuyoko@yahoo.com">arifsuyoko@yahoo.com</a>                   |           |
| Mr. Bebeb A.K.N Djundjunan | Minister / Deputy Chief                                 | Embassy of Indonesia            | <a href="mailto:Bebeb.djundjunan@ties.itu.int">Bebeb.djundjunan@ties.itu.int</a> |           |
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| <b>Iran</b>                |                                                         |                                 |                                                                                  |           |
| Mr. Alireza Kazemiabadi    | Deputy Minister of Justice                              | Ministry of Justice             | <a href="mailto:alirezakazemi@yahoo.com">alirezakazemi@yahoo.com</a>             |           |
| <b>Jamaica</b>             |                                                         |                                 |                                                                                  |           |
| H.E. Mr. Wayne McCook      | Ambassador and Permanent Representative                 | Permanent Mission of Jamaica    | <a href="mailto:apr@jamaicamission.ch">apr@jamaicamission.ch</a>                 |           |
| <b>Japan</b>               |                                                         |                                 |                                                                                  |           |
| Mr. Hiroki Hori            | Deputy Director, International Affairs Division         | Agency for Cultural Affairs     | <a href="mailto:Hirokihori1010@yahoo.co.jp">Hirokihori1010@yahoo.co.jp</a>       |           |
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|---------------------------|-------------------------------------------------------------------------|---------------------------------------------|----------------------------------------------------------------------------------|-----------|
| Mr. Ryoji Soga            | Deputy Director                                                         | Ministry of Foreign Affairs                 | <a href="mailto:Ryoji.soga@mofa.go.jp">Ryoji.soga@mofa.go.jp</a>                 |           |
| Mr. Satoshi Fukuda        | Director, Multilateral Policy Office,<br>International Affairs Division | Japan Patent Office                         | <a href="mailto:Fukuda-satoshi@jpo.go.jp">Fukuda-satoshi@jpo.go.jp</a>           |           |
| Mr. Yasuo Ohkuma          | Director, Intellectual Property<br>Department                           | JETRO, Bangkok                              | <a href="mailto:Yasuo_ohkuma@jetro.go.jp">Yasuo_ohkuma@jetro.go.jp</a>           |           |
| <b>Mexico</b>             |                                                                         |                                             |                                                                                  |           |
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| <b>Mozambique</b>         |                                                                         |                                             |                                                                                  |           |
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| <b>Norway</b>             |                                                                         |                                             |                                                                                  |           |
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|------------------------------|-----------------------------------------|--------------------------------------------------------------------------------|--------------------------------------------------------------------------------------|-----------|
| Ms. Maja Ostbye              | Trainee                                 | Embassy of Norway in Bangkok                                                   | <a href="mailto:Maja.ostbye@mfa.no">Maja.ostbye@mfa.no</a>                           |           |
| <b>New Zealand</b>           |                                         |                                                                                |                                                                                      |           |
| Ms. Kim Connolly-Stone       | Chief Advisor, Intellectual Property    | Ministry of Business, Innovation and Employment                                | <a href="mailto:Kim-connolly-Stone@mbie.govt.nz">Kim-connolly-Stone@mbie.govt.nz</a> |           |
| <b>Oman</b>                  |                                         |                                                                                |                                                                                      |           |
| Mr. Abdul Wahab Al Mandhari  | Director General for Handicrafts care   | Public Authority for Handicrafts                                               | <a href="mailto:a411l@omantel.net">a411l@omantel.net</a>                             |           |
| <b>Peru</b>                  |                                         |                                                                                |                                                                                      |           |
| Mr. Miguel Fuentes Cervantes | Second Secretary                        | Embassy of Peru in Bangkok                                                     | <a href="mailto:mfuentes@peruthai.or.th">mfuentes@peruthai.or.th</a>                 |           |
| <b>Republic of Korea</b>     |                                         |                                                                                |                                                                                      |           |
| Mr. Taekeun Rhee             | Director General                        | Culture Trade Team, Copyright Bureau , Ministry of Culture, Sports and Tourism |                                                                                      |           |
| Mr. Eom Taemin               | Director, Multilateral Affairs Division | Korean Intellectual Property Office                                            | <a href="mailto:tmeom@kipo.go.kr">tmeom@kipo.go.kr</a>                               |           |
| Mr. Kijoong Song             | Assistant Director                      | Korean Intellectual Property                                                   | <a href="mailto:Kisong111@hotmail.com">Kisong111@hotmail.com</a>                     |           |

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| Country/ Name              | Position                                             | Organization                                                              | Contact Information     | Signature |
|----------------------------|------------------------------------------------------|---------------------------------------------------------------------------|-------------------------|-----------|
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| <b>Thailand</b>            |                                                      |                                                                           |                         |           |
| H.E. Mr. Thani Thongphakdi | Ambassador and Permanent Representative              | Permanent Mission of Thailand                                             |                         |           |
| Mrs. Savitri Suwansathit   | Advisor to the Ministry of Culture                   | Ministry of Culture                                                       | Sa_vitri2000@yahoo.com  |           |

# List of Delegates

Annex 2

Informal Meeting on Intellectual Property related to Genetic Resources, Traditional Knowledge and Folklore (IGC Retreat)

5 – 7 July 2013, Bangkok, Thailand

| Country/ Name                | Position                                                                | Organization                                                        | Contact Information                                                      | Signature |
|------------------------------|-------------------------------------------------------------------------|---------------------------------------------------------------------|--------------------------------------------------------------------------|-----------|
| Mrs. Sansanee Sahussarungsri | Deputy Director-General of Department of International Economic Affairs | Ministry of Foreign Affairs                                         |                                                                          |           |
| Mrs. Eksiri Pintaruchi       | Director, Division of International Economic Policy                     | Ministry of Foreign Affairs                                         |                                                                          |           |
| Dr. Tull Traisorat           | Director, Division of International Law Development                     | Ministry of Foreign Affairs                                         |                                                                          |           |
| Dr. Jaruwan Charlisathian    | Director of Plant Varieties Protection Division                         | Department of Agriculture, Ministry of Agriculture and Cooperatives |                                                                          |           |
| Dr. Tanit Changthavorn       | Assistant to Executive Director                                         | Biodiversity-Based Economy Development Office                       | <a href="mailto:tanit@bedo.or.th">tanit@bedo.or.th</a>                   |           |
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Annex 2

Informal Meeting on Intellectual Property related to Genetic Resources, Traditional Knowledge and Folklore (IGC Retreat)

5 – 7 July 2013, Bangkok, Thailand

| Country/ Name                                          | Position                                 | Organization                              | Contact Information                                                                                      | Signature |
|--------------------------------------------------------|------------------------------------------|-------------------------------------------|----------------------------------------------------------------------------------------------------------|-----------|
| <b>USA</b>                                             |                                          |                                           |                                                                                                          |           |
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| <b>World Intellectual Property Organization (WIPO)</b> |                                          |                                           |                                                                                                          |           |
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List of Delegates

Annex 2

Informal Meeting on Intellectual Property related to Genetic Resources, Traditional Knowledge and Folklore (IGC Retreat)

5 – 7 July 2013, Bangkok, Thailand

*As of 8 July 2013 (10.00 hrs.)*



# Background and Update on the IGC

Wend Wendland, Director, Traditional  
Knowledge Division, WIPO

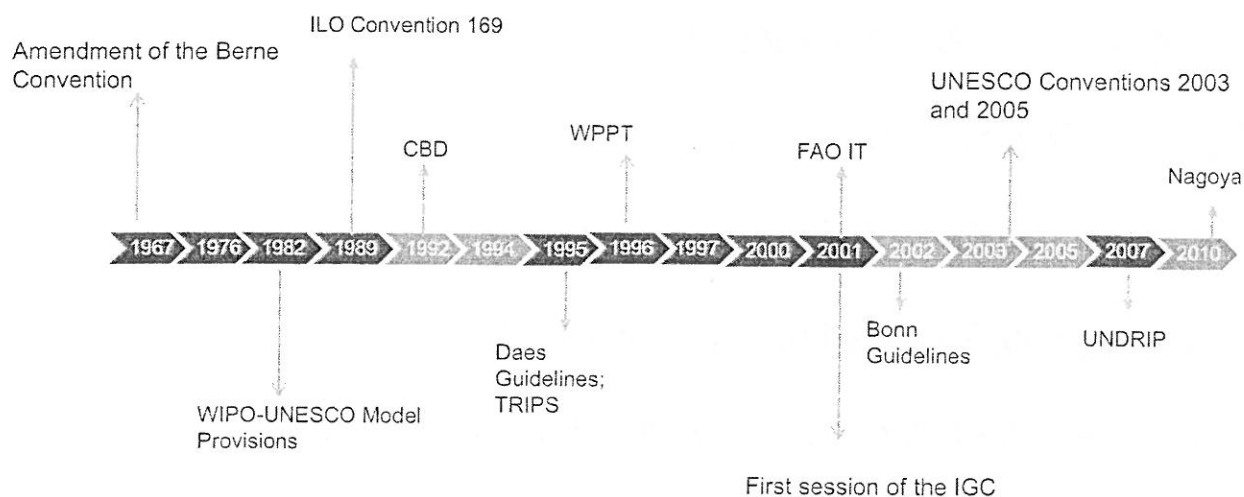
- The protection of GRs, TK and TCEs: origins and context
- The establishment of the IGC
- What does “protection” mean in the IGC?
- Objectives: setting overall directions
- The IGC: challenges and opportunities
- The texts: a short history
- The current state of play
- Closing: a few key issues

## The protection of GRs, TK and TCEs: origins and context

- Culture (from 1950s)
  - cultural property, cultural heritage, cultural diversity
- The Indigenous movement (from 1980s)
- Environmentalism (from late 1980s)
- Health (from 1970s)
- Food and agriculture (from 1980s)
- Intellectual property (from 1960s)



## Milestones: GRs, TK and TCEs



## The establishment of the IGC

- Colombia and WIPO's Patent Law Treaty, 2000
- Why GRs, TK and TCEs together?
  - beyond “common heritage of humanity”
  - challenge logic of the human individual innovation
  - balance and equity - new players in IP policy-making
  - cut across all branches of the IP system
  - closely inter-related

What does “ protection” mean in the IGC?

Protecting TK/TCEs through a special system or mechanisms (*sui generis*) based on the kinds of **measures, principles and trade-offs** that underlie intellectual property systems

# balance

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## *Article 6*

### *Exhaustion*

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

## *Article 7*

### *Objectives*

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

## *Article 8*

### *Principles*

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance

“positive”

“defensive”

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# The great **PROTECTION** racket

**Imposing IPRs on traditional knowledge**



13

GRAIN



ver the past three years, the World the Convention on Biological diversity (CBD), the

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## ■ The “international dimension”

### ■ three principles

■ national treatment

■ reciprocity

■ mutual recognition

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Objectives: setting overall directions

■ High-level

- Fostering cultural diversity
- Safeguarding intangible cultural heritage
- Conserving biodiversity
- Promoting sustainable development
- Ensuring food security
- Encouraging human creativity
- Respecting human rights, including rights and interests of indigenous peoples and local communities
- Fostering access to knowledge and a robust "public domain"
- .....

■ IP-specific

- Prevent misappropriation and misuse
- Promote innovation and creativity
- Preclude the grant of improper IP rights to unauthorized parties
- Promote access to knowledge and safeguard the public domain
- Ensure benefit-sharing

## The IGC: challenges and opportunities

- Diverse actors, diverse objectives, proxy for other issues
- Top-down norm-setting, with relatively little experience at the national level
- Representation and participation, especially indigenous peoples
- Fragmentation: interface with other instruments and fora, CBD/Nagoya, FAO, WTO, UNESCO, Permanent Forum, WHO, UNCTAD

- Historical opportunity: first developing country-initiated normative process in IP
- Cutting edge: fresh uses for age-old IP values and principles
- International comity: mutual supportiveness of IP towards other policy objectives

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The TK and TCE texts: a short history

Elements of *sui generis* protection of TK (3/8), 2002

Questionnaire (2/7) and final report on national experiences with TCE protection (3/10), 2002

Policy and legal options (6/3 and 6/4), 2004

Elements of an international instrument (African Group, 6/12), 2004

**First Draft Policy Objectives and Core Principles (7/3 and 7/5), 2004**

First commentary process – comments incorporated

Second Draft Policy Objectives and Core Principles (8/4 and 8/5, June 2005)

Second commentary process, 2006 – comments not incorporated but circulated

**“Lists of Issues”, 2006**

**Gap analyses, 2008**

“Text-based negotiations” begin in 2010

**Intersessional working groups (IWGs) meet 2010 and 2011**

IGCs 16 to 24 review successive drafts, 2010 to 2013

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The current state of play

# IGC mandate 2012-2013



- . . . expedited text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs . . .

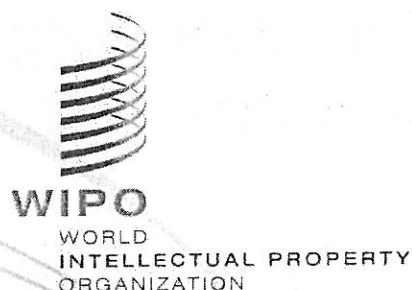
## IGC's Work Program for 2013 as agreed in October 2012



- . . . agree to continue negotiations and engagement in good faith, with appropriate representation . . .
- . . . submit texts to the GA in 2013 . . . GA to decide on convening a diplomatic conference . . .
- Three thematic sessions . . .
  - IGC 23 (GRs): February 4 to 8, 2013
  - IGC 24 (TK): April 22 to 26, 2013
  - IGC 25 (TCEs plus 3 days): July 15 to 24, 2013

(d) The work of the IGC shall follow the program set out below:

| Provisional Date | Activity                                                                                                                                                                                                                                                                                                                                                                                                           |
|------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| February 2013    | IGG 23 - Genetic Resources (5 days)                                                                                                                                                                                                                                                                                                                                                                                |
| April/May 2013   | IGC 24 – Traditional Knowledge. With a focus on, but not limited to, 4 key Articles viz Subject Matter of Protection, Beneficiaries, Scope of Protection and Limitations and Exceptions (5 days)                                                                                                                                                                                                                   |
| July 2013        | IGC 25 – Traditional cultural expressions. With a focus on, but not limited to, 4 key Articles viz Subject Matter of Protection, Beneficiaries, Scope of Protection and Limitations and Exceptions (5 days)<br><br>Review and take stock of the text(s) of the International legal instrument(s) ensuring the effective protection of TCEs, TK, and GRs and make a recommendation to the General Assembly (3 days) |
| October 2013     | WIPO General Assembly<br><br>Decide on convening a diplomatic conference                                                                                                                                                                                                                                                                                                                                           |



Closing: a few key issues

- Objectives
- Concepts and terms
- “International” legal instrument(s)
  - legal certainty vs. flexibility
  - restrictive vs. inclusive
  - international vs. national

## Sign up for the TK e-Newsletter and Updates

[grtkf@wipo.int](mailto:grtkf@wipo.int)  
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WITHOUT PREJUDICE

IGC RETREAT:  
GENETIC RESOURCES AND ASSOCIATED  
TRADITIONAL KNOWLEDGE

WITHOUT PREJUDICE

# DISCUSSION PAPER INTELLECTUAL PROPERTY AND PROTECTION OF GENETIC RESOURCES AND ASSOCIATED TRADITIONAL KNOWLEDGE

## INTRODUCTION

1. This paper is provided without prejudice and its purpose is to identify the status of current WIPO IGC negotiations relating to Genetic Resources (GR) including background, areas of convergence, key policy issues requiring resolution and possible future direction.

## BACKGROUND

### STATUS OF CURRENT NEGOTIATIONS

2. The IGC made good progress at its 23rd session (4 to 8 February 2013). The substantive policy and technical discussions and text-based negotiation led to significant progress in development of the GR text. Members propose two different, though not mutually exclusive, objectives for protection of genetic resources. While they disagree on the relative priority of these objectives and mechanisms for achieving them, these two objectives could be complementary.

**Objective 1:** Applicants for patents, or intellectual property more generally, comply with access and benefit sharing regulations. The proposed mechanism for achieving this objective is to compel applicants to disclose where and how genetic resources used in their application were accessed.

**Objective 2:** Patent offices, or intellectual property offices more generally, have the required information to make correct decisions when assessing applications. The two options for mechanisms to achieve this objective are

(a) increasing access to information specifically for assessing the internationally recognised criteria for patentability of novelty, inventiveness and industrial applicability; or

(b) increasing access to information for any criteria relevant to assessing applications, include national disclosure requirements of the type described in objective 1.

3. While there was no consensus in relation to Objective 1, which addresses disclosure requirements, proponents of such requirements from across regional groupings began to develop a common approach. Rather than a criterion for patentability, the text reflects an administrative disclosure regime with no obligation on IP offices to verify the disclosure.

4. Most Member States endorsed Objective 2 that patent offices should have sufficient information on genetic resources on traditional knowledge to perform their function, but propose different mechanisms to achieve this. Member States who oppose the disclosure requirements in Objective 1 have tabled specific, separate non-normative proposals addressing Objective 2.

5. The text includes both permissive and directive language. Some Members consider the instrument should apply to IP rights more broadly, while others focus on patents. They also debate linkages with the Nagoya Protocol of the Convention on Biological Diversity.

6. It should be noted that the non-normative measures tabled in separate proposals and substantially replicated under Defensive Protection within the text, will be required to achieve both objectives and underpin any disclosure regime, should one be agreed.

## **IP AND GENETIC RESOURCES-DISCLOSURE AND PATENTABILITY**

7. A number of Member States from across regional areas have proposed a range of mechanisms for patent applicants to disclose both the source and conditions of access for genetic resources upon which their invention is based. These proposals are a response to concerns that genetic resources are being used to develop commercially successful products without benefits being shared with the countries from which these genetic resources were accessed. Some Member States oppose such proposals, questioning the extent of failures to share benefits and disputing the proportionality of measures that could impede innovation.

8. In response to concerns such as innovations previously known to traditional medicine being patented, Member States have in the IGC also considered IP issues relevant to the protection of traditional knowledge associated with genetic resources. A key topic in this discussion, also reflected in the text on genetic resources, is patent offices' referral to traditional knowledge associated with genetic resources when testing a claimed invention against the patentability criteria of novelty and inventiveness.

9. From the commencement of the IGC in 2001 Member states have submitted numerous proposals on both disclosure and patentability. Under its more recent negotiating mandate, commencing 2009, the IGC has developed a single text capturing these proposals. More recently, Member States have engaged constructively to streamline this negotiating document and negotiate their way through their policy differences.

## **KEY POLICY ISSUES REQUIRING RESOLUTION**

10. The central policy divide in relation to the negotiations relates to member states views on what the primary objective of the negotiations are; prevent the granting of erroneous patents relating to GR and associated TK or prevent misappropriation of GR and associated TK and what is the appropriate role of the patent system, in particular, in relation to these objectives.

11. Proponents of a disclosure requirement argue that such requirements would contribute to both these objectives by enhancing transparency and accountability in relation to the use of GR and associated TK in patents and other IP. Proponents of disclosure requirements include Member states across regional groupings. It is noted that recent IGC negotiations have recognised the need for a balanced approach in this area and there is potential for consensus amongst disclosure proponents.

12. A different group of Member States, including countries from which a significant proportion of patenting activity emanates, argue against a disclosure regime. They

call for further information on the operation and effectiveness of the numerous national disclosure laws already in place. These national measures are not uniform suggesting that a minimum international standard has some merit.

13. Instead of a disclosure requirement they recommend non-normative measures such as databases of genetic resources and associated traditional knowledge and guidelines for examining patent applications relating to genetic resources. This position reflects a policy focus on the first option in Objective 2. These proposals have been included in separate documents as well as the single negotiating text. These measures are not controversial from a policy and technical perspective and subject to further operational level technical analysis should be able to be supported by all member states.

14. A second key policy issue is the nature and scope of proposed disclosure requirements. In this context the following key policy issues remain to be agreed:

a) Should the IGC text link patent disclosure requirements and the provisions on checkpoints for use of genetic resources in the Nagoya Protocol to the Convention on Biological Diversity? A patent disclosure requirement does not address all the IP policy issues arising from access and benefit sharing of genetic resources and traditional knowledge. Commercialisation takes time and patent applications, if any, lag many years after the time of accessing the genetic resources.

b) Should this mechanism apply to patents only or to intellectual property rights more generally? Pharmaceutical patents are the most commercially significant type of intellectual property that is relevant here. Plant variety protection is not within the scope of WIPO discussions.

c) Should this mechanism apply to 'derivatives'? That term is not clearly understood in intellectual property discussions or international access and benefit sharing instruments.

d) Should the text describe the threshold of the requirement to disclose in general terms, such as 'an invention that involves genetic resources' or in more specific terms? General terms give room for national flexibility, while a clear threshold provides certainty and is more likely to support innovation.

e) Should the text mandate sanctions in general terms, specify minimum sanctions, or preclude sanctions that effect the validity of granted patents. Revocation of a patent is a dissuasive penalty for a business whose main assets are intellectual property. However, revocation of a patent would prevent a beneficiary obtaining economic benefit from patents incorporating their GRs and associated TK as once a patent is revoked the information relating to that patent is available for all to utilise.

## **NEXT STEPS/FUTURE DIRECTION**

15. Negotiations have reached a critical stage, with clarity, though not consensus in relation to Member States negotiating objectives. The key mechanisms to achieve these objectives have been identified.

16. The mechanisms for assessing the Objective concerning the patentability criteria of novelty and inventiveness are not controversial, and address traditional knowledge rather than genetic resources. These could be progressed in discussions on traditional knowledge, in parallel with ongoing negotiations on genetic resources.

17. Another avenue for progress is for proponents of a disclosure requirement to develop common views on the key policy issues identified in this paper. There is a growing recognition of the need for any disclosure regime to not place undue burdens on the patent system or business which would undermine economic benefits from use of genetic resources.

18. WIPO Member States will be unable to reach consensus on disclosure requirements while some Member States remain concerned about the practicality and effectiveness of disclosure requirements, potential high transaction costs, impact on certainty within the patent system, and potential barriers to access genetic resources. An avenue for progress is for increased sharing of information on national experiences and obtaining greater clarity regarding the nature of the proposed disclosure regime.

19. If agreement could be reached on the substantive issue of disclosure requirements, significant progress could be made in finalising a text. The question, of whether or not a patent applicant should be compelled to disclose how and where they accessed a genetic resource, could not be resolved by WIPO Member States in the Standing Committee on the Law of Patents when raised in 1999. It was one of the key issues that prompted the formation of the IGC in 2000. It is matter that should be resolved within WIPO.

20. The current approach of plenary discussions, smaller expert working groups and facilitated drafting is an effective process for making such progress. However, if this process is to work effectively, it is important that representatives at IGC negotiations have the appropriate technical, legal and policy knowledge to contribute effectively to negotiations. In addition, it is important that Member States between IGC meetings continue to reach out to each other to discuss their differences in order to gain a shared understanding of their different positions, without which these negotiations will not be brought to a successful conclusion. A conclusion which addresses the interests of all Member States.

WITHOUT PREJUDICE

IGC RETREAT:  
TRADITIONAL KNOWLEDGE

WITHOUT PREJUDICE

PREPARATORY MEETING QGC RETREAT IN BANGKOK, THAILAND- JULY 5-7, 2013) FOR THE TWENTY-FIFTH SESSION OF THE IGC SCHEDULED TO TAKE PLACE AT THE WIPO HEADQUARTERS, GENEVA, SWITZERLAND FROM JULY 15-24, 2013

I. Back round

As you would recall, the IGC has, since its inception carried out extensive studies, reviews and exchanged experiences gained at the national, regional and international levels with the view to establishing international framework for the protection of traditional knowledge, traditional cultural expressions (folklore) and genetic resources. In 2009, the General Assembly of WIPO specifically mandated the IGC to undertake text-based negotiations and submit to the 2011 General Assembly the text (or texts) of an international legal instrument (or instruments) which will ensure the effective protection of the resources. In view of the fact that not much agreement could be reached, the General Assembly renewed the IGC mandate for 2012/2013 biennium and requested the Committee to accelerate its work based on clearly defined work programme and sound working methods. The Committee was requested to submit to the 2012 General Assembly the work output to enable the Assembly to take stock of the progress made and decide on convening a Diplomatic Conference. It is within this context that the IGC, at its Twenty-fourth Session held from April 22 to 26, 2013 focused its work on the draft articles for the protection of traditional knowledge with the view to addressing the key substantive articles.

Under the able Chairmanship of Ambassador McCook, Permanent Representative of Jamaica to the United Nations in Geneva, much progress has been made, particularly in relation to the four questions that had been raised by the text namely, the subject matter of protection, the beneficiaries, the scope of protection and exceptions and limitations during the Twenty-fourth Session. It is to be pointed out that at the Session, changes to the policy objectives and guiding principles were also made by the Member States and Observers present. Consistent with the Chairman's working methodology, a number of informal experts meetings and facilitators' text as well as informal sessions have been incorporated into the Committee's work towards the desired outcome. Furthermore, the Chairman encouraged Member States to hold preparatory meetings ahead of the IGC Sessions for the meeting of the minds and narrowing down of differences including possible compromises that can be reached. It is against this backdrop that the Bangkok Retreat has been organized to discuss outstanding issues related to the GR, TK and TCE draft articles in a frank and transparent manner towards consensus building and reaching convergence on the texts.

As we are all aware, the Twenty-fifth Session of the IGC will discuss the substantive articles on TCEs and allot time for the review of the GR and the TK texts. In order to achieve this, the following key policy and substantive issues which could not be agreed upon during the Twenty-fourth Session and the other Articles which were commented upon during the Twenty-first Session of the IGC have been raised for discussion during the retreat with the view to establishing common grounds on those issues in order to accelerate the work of the Committee towards the conclusion of international legal instrument(s) for the effective protection of GRs, TK and TCEs.

## II. Unresolved issues under the four key articles as well as policy objectives and guiding principles of the draft text on the protection of traditional knowledge

### Article 1 Subject Matter of Protection

Member States have not agreed on which of the following operative terms [refers to] [includes] [means] should be retained in the definition of TK. There has been a lot of discussion on the definition of TK since the Third IGC as to whether the policy choice should aim to define TK in an operational (open-ended) or exhaustive forms. It has been argued that certain types of TK may be distinctively associated with certain indigenous peoples and local communities and therefore a one-size-fit-all definition will not create flexibility in national law.

There is need to create a glossary or list of terms to take care of Article 1.2 (definition of traditional knowledge associated with genetic resources), 1.5 (databases) and the definition of [Use][Utilization] under Option 1 Of Article 3. This proposal is aimed at providing clarity and avoid clogging the text.

Should protection extend only to traditional knowledge that is ONLY to traditional knowledge that is distinctively associated with cultural and social identity? Member States need to determine whether this provision is not restrictive.

Should the inter-generational nature of traditional knowledge be linked to 50 years minimum? Are there any practical experiences that can be learnt? The proponents of this provision have not provided justification for the 50 years cut off point.

### Article 2 Beneficiaries

The following additional beneficiaries proposed by Member States should further be examined for clarity and legal certainty: [state or states] [nations] and [national entities].

### Article 3 Scope of Protection

Clarification is needed regarding what is meant by inalienable, indivisible and imperceptible nature of moral rights of TK.

Are the following terms synonymous [traditional context] [customary use] and [customary context].

A number of delegations have indicated their view that option 1 relating to exclusive/collective/positive rights and option 2 dealing with measures- based/regulatory approach are complementary and may not be mutually exclusive and that such linkage is consistent with the existing intellectual property Treaties and Conventions.

It would be critical for the following terminologies used in several articles to be defined for clarity [Protected TK] [Secret TK] [Sacred TK] [Spiritual TK] [TK widely known] [TK not widely known] [TK used outside the community] [Publicly available TK] [TK in the public domain]. It is proposed that subject to Member States agreement, "traditional knowledge" can be used to replace all those terminologies since it is clearly defined in Article 1.

## Article 6 Exceptions and Limitations

Several Member States have called for the simplification and restructuring of the Article as well as the delineation of conceptual differences regarding how sanctions should be applied. Clarity is needed with respect to the interface between customary laws and national laws, balance between public interest and the appropriate protection and clear distinction between utilization of TK within and beyond traditional and cultural context.

### Policy Objectives

Member States have called for the need to focus on IP-related objectives and avoid duplicative objectives. It has been proposed that four or five key IP-related objectives could be constructed to serve the purpose. Proposals have been put forth by some delegations that the objectives of the three texts should be harmonized since they are inter-related.

### Guiding Principles

It has been proposed by a regional group that guiding principles should be expunged from the text since such principles form the basis for decision making and in this particular case for developing the substantive provisions [draft articles]. Since the draft articles have already been elaborated, it appears the guiding principles may not be relevant except for the drafting of preambular clauses.

### III. Other critical Articles not commented upon during the Twenty-fourth Session of the IGC but may need to be resolved during the Twenty-fifth Session

## Article 4 Sanctions, Remedies and Exercise of Rights

This is one provision that Member States are struggling to define the policy intent. Choices to be made include developing provisions that enable for Member States discretion (flexibility) or are prescriptive in the instrument in the application of sanctions. The use of contract law versus IP law underpins some of the divergent views expressed by Member States. Since this article was not discussed during the Twenty-fourth Session, consensus could be reached by developing countries on which of the options should be defended or merged taking into account all the essential elements required for the exercise of rights conferred by the instrument.

### Article 4bis Disclosure Requirements

Article 4bis could be considered as a substantive article. The practicality of this provision is based on whether the PCT and PLT should be amended to harmonize the patent prosecution process. The proposal for the study by the WIPO Secretariat on measures related to the avoidance of the erroneous granting of patent and compliance with existing access and benefit sharing system submitted by USA, Japan, Canada and Korea seeks to assess the administrative and transaction costs as well as the burden that might be placed on stakeholders regarding disclosure requirement in patent procedure. Many developing countries, who believe that the solution lies in the amendment of the

PCT did not support the proposed study. It is to be pointed out that the genetic resources text also contains substantive articles on disclosure requirements. Harmonization of the disclosure requirements provisions in the GR and TK texts could be considered by Member States for consistency.

#### Article 5 Administration of Rights/Article 5bis

It has been proposed that Article 5 and 5bis should be merged. The current Article 5bis should be merged with 5.1 since the underlying principles are the same and there is convergence in the elements.

#### Article 9 Transitional Measures

The following could be further discussed:

The question of certainty of rights and the fact that there should be no retroactivity upon entry into force of the instrument have been raised by some Member States with respect to this Article. Some issues to consider in the provisions include;

- i. Rights already acquired without Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT).
- ii. Continuing acts that commenced prior to the entry into force of the instrument.
- iii. TK legally acquired prior to the entry into force of the instruments for those who have commenced using the TK and those who have made substantial preparation to utilize the TK.

#### Article 11 National Treatment and Other Means of Recognizing Foreign Rights and Interests

Some Member States have raised concern that national treatment and reciprocity principles of conventional intellectual property rights may be difficult to conceive within the context of traditional knowledge protection owing to its intrinsic links to cultures and heritage of indigenous peoples and local communities. Member States guidance will be needed.

#### IV. There Appear to be Broad Consensus on the Remaining Articles 7.8.10 and 12

The facilitators could be requested to simplify, merge where possible and clean the provisions of the articles.

#### V. Structure of discussions during the IGC Retreat in Bangkok, Thailand

In order to address the critical legal and technical policy questions arising from the current draft articles on the protection of traditional knowledge (Rev 2, April 26, 2013), the following could be discussed at the retreat in a frank and transparent manner;

- i. Whether the right-based approach (positive rights) proposed by developing countries could be linked to the measures-based approach (defensive protection) in a complementary and mutually inclusive manner. This approach will narrow down the divergent views and create a certain degree of convergence in the text.
- ii. Whether beneficiaries should include states, nations or national entities.
- iii. Should the provisions of Article 4 relating to sanctions, remedies and exercise of rights be drafted in a flexible manner to enable for Member States discussions in their application of sanctions or be prescriptive as has been proposed by some developing Countries. What will be the policy intent in each case.
- iv. To what extent will disclosure requirements in patents and plant variety protection procedures inhibit innovation and creativity, place additional burdens on the patent examination process and increase administrative and transaction costs in the grant of patents for both the applicants and the Patent Offices. What challenges would be paused by the amendment of the PCT and PLT to include disclosure requirements.
- v. The application of the principles of national treatment and reciprocity within the context of traditional knowledge protection given that traditional knowledge in most cases is intrinsically and deeply rooted in indigenous peoples' and local communities' cultures and heritage.
- vi. To provide glossary or list of terms for definitions provided in the texts and other terms which have not been clearly defined such as different adjectives qualifying TK, misappropriation, misuse, inalienable, indivisible and imperceptible.

## **VI. Conclusion**

It is hoped that the preparatory meeting will afford Member States the opportunity to discuss the outstanding key issues in an open and frank manner to enable for the meeting of the minds to ensure expeditious progress and agreement on the text.

WITHOUT PREJUDICE

IGC RETREAT:  
TRADITIONAL CULTURAL EXPRESSIONS

WITHOUT PREJUDICE

19 June 2013

## **WIPO IGC Retreat, Bangkok, 5-7 July: Traditional Cultural Expressions Non-Paper**

### **Introduction**

1. This non-paper has been prepared to assist the discussion of traditional cultural expressions (TCEs) at the World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) retreat in Bangkok, 5-7 July 2013. It sets out some background to the development of the draft TCE text, and reminds delegates of the outstanding policy and drafting issues when the TCE text was last considered at the IGC's 22<sup>nd</sup> session.
2. The paper outlines the key outstanding issues article by article, but does not discuss all the drafting issues (a fuller account of outstanding drafting issues is provided in the facilitator's notes to the TCE text in Annex to WIPO/GRTKF/IC/25/4). It invites the delegations who had concerns about particular issues or drafting approaches at IGC 22 to reconsider these issues in advance of the retreat and the July IGC. While the retreat will not be a drafting session, it would be useful for the proponents of different approaches to come prepared to talk about the issues underlying their drafting preferences on key issues, and think about compromises that could bridge the differences. This discussion can pave the way for progress at the July IGC. Given time constraints at the Bangkok meeting we may wish to limit our discussion to Articles 1, 2 and 3.
3. In some areas the policy differences between IGC members are significant, and are not just questions of drafting. An overarching difference is whether to take a prescriptive or flexible approach to an international legal instrument on TCEs. It is suggested that delegates discuss these more high level issues at the Bangkok meeting, and consider the following interrelated questions:
  - a. Whether the TCE text in its current form will result in an outcome on TCEs: is there scope to reach agreement working on the current text (which will require significant compromises in some articles) or do we need to consider something different?
  - b. What sort of international legal instrument is likely to garner widespread support among IGC member states and ensure an outcome?
  - c. Can the IGC produce one document that covers both TCEs and traditional knowledge (TK), given the interconnection between TK and TCEs and the significant overlap in the two existing texts?

### **Background**

4. The most recent TCE text is contained in the Annex to WIPO/GRTKF/IC/25/4. This version of the text was developed at IGC 22 by the TCE facilitator, to reduce the number of options and simplify the text. It is a work in progress.
5. At IGC 22 the facilitator produced a first revision of the text based on suggestions from the first run through by the plenary. Articles 1, 2 and 5 were further amended as a result of deliberations by the expert group. A second revision was then discussed by the plenary. Because there was not time during IGC 22 for the facilitator to prepare a further revision of Articles 4, 8, 9, 10, 11

and 12, these articles are in brackets to reflect that some delegations either raised concerns about what the facilitator had proposed for some of these articles or wished to reflect further.

6. The text from IGC 22 was submitted to the 2012 General Assembly. The General Assembly decided that the IGC should continue its work, including by building on the existing texts.

#### **Article 1 – subject matter of protection**

7. The outstanding policy and drafting issues on Article 1 are discussed in detail in the facilitator's commentary in the Annex to WIPO/GRTKF/IC/25/4. The key issues are summarised here:
  - a. **Are TCEs artistic or literary?** Some delegations wish to describe TCEs as artistic or literary, in order to distinguish TCEs from purely functional forms. There is opposition to this by delegations (and holders of TCEs) who point out that TCEs are not necessarily artistic and say this term is subjective and limits the definition. It is suggested that delegates to the retreat consider the issue of functional forms further. Are there other ways to address the concerns about the inclusion of functional forms? Is it necessary to try and explicitly exclude functional forms in this part of the definition, when there are a number of qualifiers on eligibility for protection? Delegates may also wish to consider that WIPO is moving into new territory with an instrument on TCEs and that it does not necessarily need to bind itself with conventional terminology and concepts. There is scope to innovate.
  - b. **TCEs as the outward manifestation of TK.** The two options under the definition of TCEs both refer to TK. This is because TCEs are essentially the outward manifestation of TK. TK and TCEs are integrally connected and for many indigenous peoples it does not make sense to distinguish between two categories. However, some delegations are concerned that if we refer to TK in the definition of TCEs then this could result in duplicating the protection afforded to TK. The challenge is to address this concern about the potential for duplication while retaining the reference to TK in the definition of TCEs. The expert group at TGC 22 considered the use of a footnote. It is suggested that we discuss this idea further.
  - c. **Is there an objection to "generation to generation"?** The concept of TCEs being passed from generation to generation or between generations has been discussed extensively at previous IGC sessions and is fairly well understood. One delegation bracketed this text during IGC 22. The facilitator notes that this language is not bracketed in the subsequent TK text that came out of IGC 24 which may mean that this delegation would no longer object to its inclusion in the TCE text. It is suggested that the delegation concerned compare its position on TK and TCEs in advance of the July IGC.
  - d. **To list or not to list.** In the definition of TCEs the basic categories of TCEs are fairly well settled, but we disagree on whether to include examples. The proponents of including examples note that lists are only illustrative and provide greater certainty that particular subject matter is protected. Others do not think the lists are necessary, or are concerned that including examples could result in interpretive problems in respect of the TCEs that are not included in the lists. It is suggested that delegates at the retreat consider different ways that the illustrative purpose could be met. The expert group at

IGC 22 considered the possibility of using a clarifying footnote. Another possibility is to include illustrations in a preamble or other explanatory material.

- e. **Should "creative intellectual activity" be a criterion for eligibility?** There is disagreement on whether "creative intellectual activity" in paragraph 2(a) should be a criterion. The proponents of the concept took it from the WIPO Convention, adding "creative" to intellectual activity. They could not conceive of situations where a TCE would not result from some intellectual activity. There were concerns from others that not all instances of TCEs would qualify as intellectual activity (e.g., rituals), and questions about how one would prove this criterion. Is there another way to reflect this concept that would address the concerns of those who oppose it? It is suggested that the proponents and opponents of this concept come prepared to discuss this issue in relation to specific TCEs.

#### **Article 2: beneficiaries of protection**

- 8. The outstanding policy issue in Article 2 is the scope of the beneficiaries of protection. Most of the IGC is comfortable with protecting the TCEs of indigenous peoples and local communities, although a few delegations have concerns about the use of the word "peoples" and this still needs to be worked through. The key policy divergence is whether to also include nations as beneficiaries to, in effect, act as trustee when TCEs cannot be attributed to a particular people or community.
- 9. At IGC 22 the expert group tried to address the question of nations. The solution was to include the phrase "or as determined by national law", which would enable a country to be a beneficiary if TCEs are held by the nation as a whole. If this solution remains unacceptable for some delegations (who thought it was too vague), the approach taken in paragraph 2.2 of Article 2 of the TK text could provide a way forward. Paragraph 2.2 spells out that a national entity could be the beneficiary only if TK was not attributable or confined to an indigenous people or local community and it is not possible to identify the people who generated it.
- 10. The term "local communities" is currently bracketed in Article 2 of the TCE text because some delegations thought it was not appropriately defined. However, this term is not bracketed in the more recent TK version of Article 2 which may mean that brackets can be removed from Article 2 of the TCE text at the July IGC. It is suggested that the delegation concerned compare its position on the TK and TCEs text.

#### **Article 3: scope of protection**

- 11. The key issue in Article 3 is the level of prescriptiveness that is required in setting out how TCEs should be protected. What is common to both options at the moment is that TCEs should be protected in some way. The question is whether the instrument should tell States which sorts of misappropriation should be prevented, and how this should be done.
- 12. Article 3 contains two options. Option one provides flexibility for States to determine how TCEs are protected. Option two is more prescriptive, and has options within it. It starts by listing the types of misappropriation that should be prevented. Paragraphs (a) to (c) are similar to the moral rights we are familiar with under copyright law, and paragraph (d) has its genesis in the laws of unfair competition and trade practices. In paragraphs (a) to (d) there is flexibility for

States to decide which legal and policy means to use to regulate these types of misappropriation. We call this the "regulate approach".

13. Paragraph (e) deals with the issue of commercial exploitation and has two alternatives. Alternative 1 continues the regulation approach by leaving it to each State to determine how or when to regulate commercial uses of TCEs. It also provides flexibility to determine the extent to which the beneficiaries are able to authorise or not authorise commercial exploitation by others. Alternative 2 is more prescriptive and says that States must regulate commercial exploitation through the creation of an exclusive rights system that is similar to copyright.
14. To date IGC delegations have been polarised in their preferences. Some want total flexibility while others want a system of exclusive rights. It is suggested that delegates at the Bangkok meeting consider whether it is possible to find a middle ground in the regulate approach. This would mean having some prescription about the types of misappropriation that need to be regulated, but leaving it to each State to decide which legal or policy approaches to use. This would allow States to implement a system of exclusive rights if they wished to. The approach suggested would also enable WIPO Member States to gain greater experience in the development and implementation of domestic systems for the protection of TCEs. Further harmonisation could be considered at a later date.

#### **Article four-administration of rights/interests**

15. The outstanding policy issues for Article 4 include:
  - a. Whether, and to what extent, an instrument on TCEs should provide a role for governments in the administration of the rights or interests of indigenous peoples or local communities in their TCEs.
  - b. If we do provide for competent authorities, what functions should they have? Should the functions be directed to the internal business of the TCE holders, such as negotiating mutually agreed terms and granting licenses, or be related to the more administrative or judicial functions that would be carried out by government authorities, such as supervising benefit sharing or determining if certain acts are an infringement.
  - c. If competent authorities are optional, what do we gain from having an article on the administration of rights? Is it, for example, still useful to clarify at the international level that any collective management must be authorised by the beneficiaries?
16. Page 21 of the Annex to WIPO/GRTKF/IC/25/4 explains the approach undertaken by the facilitator in the redrafting of Article 4 and identifies a number of drafting questions. It also asks if option 2, the short option, is a useful way of bridging differences under the longer option 1.

#### **Article 5-exceptions and limitations**

17. The outstanding policy issues in Article 5 include:
  - a. The test in paragraph 3 for developing domestic exceptions and limitations. There seems to be more support for alternative 2. Another option is to run the alternatives together.

- b. Whether the mandatory exception concerning the use of TCEs in archives and libraries etc. should only be utilised if there is consent from the holders of the TCEs (paragraph 4(a)).
- c. Whether there should be a mandatory exception for the creation of works inspired by or borrowed from TCEs (paragraph 4(b)).
- d. Whether paragraph five, which limits the scope of protection afforded to TCEs, by enabling uses of TCEs permitted under copyright or trade mark law, should be addressed in Article 3 on scope of protection. The policy issue is whether this is an acceptable limitation on scope, and should it be a mandatory or optional one.

#### **Article six – term of protection**

- 18. The outstanding policy issue in Article 6 is whether or not protection for TCEs should be time limited.

#### **Article seven- formalities**

- 19. There are no outstanding policy issues. It is generally agreed that the protection of TCEs should not be subject to formalities.

#### **Article 8 – sanctions, remedies and exercise of rights/interests**

- 20. The outstanding policy issue in Article 8 is whether we should be prescriptive about sanctions or provide domestic flexibility. Option 1 of paragraph 1 provides more flexibility by referring to "appropriate measures", which may be legal, policy or administrative in nature. Option 2 of paragraph 1 is more prescriptive as it requires particular remedies.
- 21. Another outstanding issue is whether to require alternative dispute resolution.

#### **Article 9 – transitional measures**

- 22. The outstanding policy issues for Article 9 include:
  - a. Whether or not protections for TCEs would apply to on-going uses of TCEs that began before such protections for TCEs come into force.
  - b. Whether or not IP rights over TCE subject matter previously obtained by third parties should be preserved.
- 23. In thinking about these issues delegates may wish to consider if it would be easier to bring existing uses into conformity with the moral rights style protections from article three, than it would be for commercial use. For example, while it may not be reasonable or possible to prevent on-going use, it may be reasonable to require that on-going use not be offensive and that the TCE holders are acknowledged. Similarly, while it may not be reasonable to curtail an existing IP right over a TCE, it may be reasonable to do so if the user of the TCE had not obtained the IP right in good faith.

#### **Article 10 – consistency with the general legal framework**

- 24. The facilitator's wild card merger, at IGC 22, of the previous two options for this article was an attempt to simplify what had become a very unwieldy and unnecessarily complex article, and bring together the two different concepts being proposed. The two concepts are:

- a. Consistency with international IP instruments; and
- b. Consistency with other (non-IP) international instruments, which are relevant to the protection of TCEs.

25. The facilitator's notes, on page 25 of the Annex to WIPO/GRTKF/IC/25/4, identify some drafting issues that need to be considered.

#### **Article 11 - national treatment**

26. The IGC has not had a great deal of discussion on the issue of international enforceability. It has not yet been determined whether national treatment or a different approach, such as material reciprocity, would be appropriate for TCEs. The issue of international enforceability is also dependent on the form of international legal instrument that is decided upon.

#### **Article 12 - trans-boundary cooperation**

27. This article was inserted by the facilitator at IGC 22, to create consistency with the TK text. There has yet to be a discussion about its inclusion.

28. The policy issue at stake is whether to address the issue that TCEs may be shared by indigenous people or local communities who reside in different countries. The approach suggested here is to require cooperation between the countries concerned. The nature of that cooperation is not spelt out and would be left to the countries concerned to work through.

Kim Connally-Stone  
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WITHOUT PREJUDICE

**IGC RETREAT: THE  
WAY FORWARD**

WITHOUT PREJUDICE

## *Discussion Paper*

### *The Way Forward*

#### Background

In 2009, WIPO members decided that the IGC should begin formal negotiations with the objective of reaching agreement on one or more international legal instruments that would ensure effective protection of GRs, TK and TCEs.

Under the mandate of the IGC for the 2012-2013 biennium, the 50th General Assemblies of WIPO decided that the last three days of IGC 25 in July 2013 will "review and take stock of the text(s) of the international legal instrument(s) ensuring the effective protection of TCEs, TK and GRs and make a recommendation to the General Assembly"; and that the 51st General Assemblies will "take stock of and consider the text(s), progress made and decide on convening a diplomatic conference".

The IGC decided that the texts on GRs and TK, as at the close of IGC 23 and 24 respectively, be transmitted to the General Assembly taking place in September 2013.

#### Issues for discussion

The purpose of this session on the "way forward of the IGC" is to prepare for discussion during the last three days of the upcoming IGC 25 and the 51st Assemblies. In this regard, participants are invited to consider and discuss the following issues:

1. Nature of the outcome document(s) – A common understanding on the nature of outcome document(s) that the IGC should aim to achieve is an essential basis for further discussion on the way forward. What is clear now are (1) the current mandate of the IGC is to reach an agreement on "international legal instrument(s)", and (2) so far, there are three texts on GRs, TK and TCEs. While the most important question is "What do you think the outcome document(s) should look like?", participants are invited to consider two main aspects of the issue which are:

- 1.1 What should be the nature or approach of the international legal instrument(s)?
  - a. How much detail should the "international legal instrument(s)" on GRs, TK, TCEs cover, e.g. taking into account the need to strike a balance between detailed prescription/legal certainty and flexibility for national legislation?
  - b. Regulate versus right-based approach-The current draft texts reflect different approaches in different articles. Which one is the preferred approach for which issue? Is there a need to ensure consistency of approach throughout the instrument(s)?

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  - b. Regulate versus right-based approach- The current draft texts reflect different approaches in different articles. Which one is the preferred approach for which issue? Is there a need to ensure consistency of approach throughout the instrument(s)?

- c. Bearing in mind various formats of "international legal instrument(s)", e.g. a formal treaty binding upon signatory States or a declaration, when and by whom should the decision on the format of the final outcome document(s) be made?
- 1.2 How many legal instrument(s) do we want? Options and relevant questions may include:
- a. One instrument, encompassing all three issues – If so, when and how should we start merging the current texts? Who should propose the merged text to provide the basis for further negotiation?
  - b. Three separate instruments, separate tracks (the first instrument finished can be open to signature without waiting for all three instruments to be completed) – If so, how can we ensure consistency of similar provisions in different instruments? Who should be responsible for this?
  - c. Three separate instruments, single undertaking – If so, the questions from 1.2 (b.) also apply. In addition, should there be a single set of preambles and final provisions?

*In answering questions 1.1 and 1.2, participants are invited to go beyond their known positions to also elaborate their views on the pros and cons of different options.*

**2. Extension of the IGC mandate-** In view of the need to fulfill its mandate, it is important that the 51st Assemblies decide to extend the IGC's mandate. Relevant questions may include:

- 2.1 For how long should the mandate be extended? – Biennium 2014-2015?
- 2.2 Should the 51st Assemblies determine specific dates for a diplomatic conference? When can we realistically expect the diplomatic conference to take place? What should be the indicators signalling that the text(s) are ready for a diplomatic conference?

### **3. Program and Method of Work of IGC**

- 3.1 How many more IGC meetings do we need? How long should each meeting last?
- 3.2 How should those meetings be organised? Given the different levels of maturing of each text on GRs, TK and TCEs, should equal time be given for each topic? Should we address one topic per meeting or combined?
- 3.3 Methods of Work – Is there anything we can do to improve the methods of work of the IGC to ensure more expeditious progress while maintaining inclusiveness and transparency?
  - a. Informal consultations during the IGC session – Most delegates would agree that informal consultations are very useful because it allows for more in-depth, right

to the point and expeditious negotiation, and that the current practice that it be broadcasted to a spill-over room helps to promote transparency. Should this practice continue or is there any other better option-e.g. to convene more informals during inter-sessional periods and have less/shorter formal meetings?

- b. Should the IGC Chair be mandated to do more during the inter-sessional period?
- c. Other possible options?-e.g. enhancing roles of facilitators and/or vice chairs, establishing friends of the chair, convening experts drafting group

#### 4. Inclusiveness of the IGC Process

4.1 So far, observers, especially representatives of indigenous and local communities, have played unique and significant roles and provided valuable inputs and contribution to the IGC process. Given the Voluntary Fund to support their participation in the IGC is running low, how can we enhance the effectiveness of Observers' participation and ensure the inclusiveness of the IGC process?

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