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NOTE

From: Presidency

To: Delegations

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Subject: 32nd Session of WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) (Geneva, 28 November - 2 December 2016)
- Final EU statements

Delegations will find attached, for information, the statements delivered on behalf of the EU and its Member States at the above mentioned WIPO meeting.

**Opening statement
IGC 32**

Chair,

The European Union and its Member States are looking forward to the second session on Traditional Knowledge under the IGC 2016/2017 mandate. We would like to thank you for the work you have undertaken in preparing this meeting and the Secretariat for all the support it has provided.

In relation to the Indicative List of outstanding issues, we would like to stress the importance of the objectives. Without a common understanding on the objectives it is not realistic to achieve progress.

These objectives should be in line with WIPOs mandate, and we should not duplicate matters that have been dealt with in other instruments, such as the CBD and the Nagoya protocol. Further, there are important IP concepts, such as the public domain and the effect on all stakeholders, which should play a key role in the discussions.

We would also like to stress again the usefulness of the different possibilities for the enhanced protection of Traditional Knowledge that have already been placed before this IGC such as awareness raising, encouraging use of existing legal frameworks, including the trademark, design, trade secret, geographical indications, and copyright systems, and improving access to those frameworks.

The EU and its MS attach importance to respecting the 2016/2017 mandate given by the 55th General Assembly. Therefore we look forward to a substantive debate that furthers mutual understanding of the facts rather than one geared towards reaching any particular type of outcome. First and foremost we need to find agreement in relation to these basic issues.

We continue to advocate solid and evidence based discussion that considers real world implications and feasibility in social, economic and legal terms, including enforcement. To this end the EU and its Member States support a Study on national experiences and how these may inform our discussions.

The EU and its MS have re- submitted a working document which requests the WIPO secretariat to undertake a study of national experiences and domestic legislation and initiatives recently adopted in relation to the protection of Traditional Knowledge. The re-submitted document has been slightly modified, to take into account concerns expressed at IGC 31. To inform discussion at the IGC, the study should:

- Analyse domestic legislation and concrete examples of protectable subject matter and subject matter that is not intended to be protected.
- Take into account the variety of measures that can be taken, some of which could be measures based, whilst others could be rights-based.

Thank you.

Statement on TK (32/4)

Chair,

Objectives

- On behalf of the EU and Member States, I would like to stress the importance of the link with IP, and not duplicating matters.
- We therefore find Alt 2 the better one in the policy objectives.
- Further, the EU and its Member States support a reference to “innovation”, as innovation and the protection of innovation are WIPO's core mandate. This covers all sorts of creation and innovation, and it is not tied to a specific category. It is unclear what “tradition-based creation and innovation” covers.

Beneficiaries

- The EU and its Member States support ILC as the beneficiary.
- We believe that a competent authority, as appropriate, should solely act as a custodian, with the consent of the beneficiaries, and should not have any rights itself. Taking into account the eligibility criteria supported by the EU and its Member States, for instance that the TK is directly linked with the ILC, it would be difficult to envisage rights for a competent authority.
- As a preliminary comment in relation to article 5, I would like to mention that we believe it should cover 'administration of interests'.

Subject matter

- The criteria eligibility should be included in article 1, not in the definition. We therefore support Alt 2.
- This is an interesting discussion, which raises fundamental questions. Do the proponents believe that every community/every culture in the world possesses a form of TK? And if so where do we draw the line between what is TK and what constitutes the public domain, in order to preserve the public domain, the common platform from which all future knowledge and inventions have historically been derived from?

Thank you.

Comments on REV1

Chair,

The EU and its Member States would like to thank the facilitators for their hard work in preparing REV1.

We appreciate the attempt by the facilitators to reduce existing gaps. Thanks to the flexibility shown by a number of delegations, some obstacles to progress seem to have been removed. At the same time we note that significant gaps still remain and that the basic differences have not been resolved. We have to be realistic, and recognize that we do not have a common policy objective at the moment. We therefore should continue to focus our discussions on the core issues as identified in the mandate.

In relation to REV 1, we will focus our comments on the core issues. We would like to reserve our position in relation to the articles which were only briefly discussed at yesterday's informal.

Policy

- The EU and its Member States support Alt 2, however, as requested before, [tradition-based] should be deleted.
- The EU supports a reference to “innovation”, which covers all sorts of creation and innovation, and is not tied to a specific category. It is unclear what “tradition-based creation and innovation” covers, and we look forward to further explanations.
- Alt 4 contains many concepts we support, such as the reference to the public domain, the concept of the protection of innovation and the transfer and dissemination of knowledge, and, in general, the prevention of the erroneous grant of patents.
- Alt 1: the fair and equitable sharing of benefits is already covered by the Nagoya protocol.
- Alt 3: we will need more time to consider this at greater length. That being said, we would confirm our preference for Alt 2 as stated earlier.

Subject Matter

- The EU and its Member States continue to support Alt 2, and to have the eligibility criteria in the article.

Beneficiaries

- The EU and its Member States are in favour of Alt 1, which states clearly that the beneficiaries are the ILCs, being the creators and holders of TK.

Scope and conditions of protection

- The EU and its Member States support Alt 1 as a stand alone option.
- In relation to the principle of attribution, we would like to note that such a provision should not diminish legal certainty and society at large. We also have some questions in relation to attribution, for instance, it is unclear at what level attribution would have to be decided, and when and where it would apply. We therefore welcome practical examples in the informal tomorrow.

Defensive measures

- The EU and its Member States are interested in the discussions on databases, and we support in general measures such as the use of databases. We look forward to continuing these discussions.

Sanctions

- As the Canadian delegation, the EU and its Member States reserve the right to comment on these and other new proposals.

Administration

- Alt 2: ‘with the free, prior and informed consent’ should be included.
- Alt 2: how would more authorities work together? How would legal certainty be guaranteed?
- A competent authority, as appropriate, should solely act as a custodian, with the consent of the beneficiaries, and should not have any rights itself.

Thank you.

Study Proposal (WIPO/GRTKF/IC/32/9)

Chair,

As we have often said before and will continue to insist, the EU and its Member States firmly believe that our work must be guided by solid evidence on the implications and feasibility in social, economic and legal terms. Therefore we support studies in general as an appropriate tool for our work.

We would like to thank you for giving us the opportunity to introduce our revised proposal to request the Secretariat to undertake a study of national experiences and domestic legislation and initiatives in relation to protection of TK. The study should in particular cover the period of the last 5 – 10 years. The study should help to inform our discussions on TK, following the evidence based approach in compliance with para (d) of the IGC mandate.

The study should build on existing material and other studies already conducted by the Secretariat in relation to TK. We would like to note that the gap analysis conducted in 2008 sought to identify gaps, whereas our aim is to provide an overview of recently adopted regimes designed to protect TK and therefore complement the work of the gap analysis, with a view to anchor our work in an evidence based approach.

The main focus of the study should be to analyse existing domestic/national legislation and initiatives on TK applied in the Member States of WIPO or regional areas; some of which could be measures based, whilst others could be rights-based. The study should also include concrete examples of protected subject matter.

On one hand, the study should review recently adopted national and regional IPR regimes such as IP laws, regulations, measures and procedures, by which the TK can be protected. Here it would be useful to know what the role of trademark, design, copyright, trade secrets or GI legislation in connection with TK is.

On the other hand, other alternative recently adopted IPR or other regimes should be considered. It would be interesting to know how key definitions such as TK, 'traditional', 'misappropriation', scope and beneficiaries have been defined; whether these alternative regimes are sufficient to ensure adequate protection for TK and proved to be useful in protection of TK. The question of legal certainty for all stakeholders under these regimes should be examined.

The study should address the issue of existing databases, such as those created for the purpose of keeping TK for other generations. The shared experience with the databases provided in the study could shed some light also on their practical impact on patent procedures.

Last but not least, the EU has listened with interest to the many examples provided in informal discussions by indigenous representatives of national measures from which they benefit. We would therefore like the study to also examine on a systematic basis the impact of national measures and practices on indigenous and local communities.

Thank you.

US paper TK examples (WIPO/GRTKF/32/10)

Chair,

The EU and its Member States would like to thank the delegation of the US for their document which compiles some examples of widely diffused Traditional Knowledge, in order to stimulate a discussion of what should be protectable subject matter and what is not intended to be protected. The EU very much welcomes a debate anchored in concrete examples.

In relation to one of the examples given, football, we are somewhat surprised that the paper has omitted any reference to European involvement in the development of the worlds most successful sport. Success it is said has many fathers and we in the European Union are proud to claim our shared paternity rights on this one.

Thank you.

Comments on REV 2

Chair,

On behalf of the EU and its Member States I would like to thank the facilitators for the second revision of the document.

The facilitators have continued their best endeavour efforts to capture the various positions expressed. The discussions this week made clear that significant gaps still remain and that differences on core issues have not been resolved.

The EU and its Member States have proposed a study which would have helped to shed light on existing national and regional legislation in relation to the protection of TK, and we look to all delegations in the IGC for their support for organizing such a study.

At the outset we would like to mention that brackets around newly introduced text are missing, and that those brackets should be introduced for consistency reasons in: article 6 alt 1, article 6, para 6.7, article 7 alt 1 and alt 2 and article 9 alt 1. Further, the word ‘peoples’ should be bracketed in article 13.

In relation to REV 2, we will focus our comments on the core issues which we considered as a matter of priority in line with the 2016/2017 IGC mandate. We would like to reserve our position in relation to the other articles.

On the policy objectives, we support the Alt 2 approach. During this session two new proposals have been introduced as Alt 3 and 4, both of which require further detailed consideration.

In relation to subject matter, we continue to support the inclusion of eligibility criteria in the article.

In relation to beneficiaries, we support Indigenous and Local Communities as beneficiaries, and therefore the language contained in Alt 1. We are not in a position to support Alt 2, which includes a reference to nations and states as potential beneficiaries.

On the scope and conditions of positive protection, the EU and its Member States support alt 1 as a stand alone option.

We note the insertion of a new art 5 BIS on defensive protection. This approach could constitute a realistic common objective for our work. We look forward to having detailed discussions on possible modalities.

On administration, we support alt 1 as a basis for future discussions.

We would like to reserve our position in relation to other changes and newly introduced text, for instance those changes introduced in the articles on sanctions, disclosure requirement, exceptions / limitations, and the relationship with other international agreements.

Let me reiterate, that in our assessment we do not have a common understanding yet of the objectives, and therefore our focus should remain on the core issues. Lastly, it is important to note that in line with the mandate we should not prejudge the nature of the instrument.

Thank you.
