

Report on the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 13th Session, Geneva, 13-17 October 2008

Dr. Silke von Lewinski

In the framework of the traditional panel of representatives of indigenous peoples from different parts of the world, which preceded the proper meeting of the Intergovernmental Committee (IGC), it became clear again that among the major threats for folklore and traditional knowledge are threats coming from the governments of the countries where indigenous peoples live, for example, where deforestation (even if legal under the national laws) also causes the loss of the knowledge and folklore related to the forests.

Another threat is the influence of western culture which more and more replaces the traditional cultural expressions. Sometimes, only the old members of an indigenous community still know these expressions; at the same time, due to the customary law, they often cannot teach them without restriction. Modern schools do not teach traditional knowledge in the broad sense. Therefore, individual projects have been started, for example, in Kenya, in order to preserve and make the people appreciate their folklore and traditional knowledge, such as at a cultural festival which would bring awareness to the young people in particular. A representative of the Massai reported about a pilot project financed by WIPO in order to train the local communities to record and document their own existing folklore in order to preserve it for future generations. A representative from the Karakol Valley complained about the "invasion" of tourism which would destroy traditional habitats and ways of life, due to Russian law, which allows enterprises to use indigenous lands as they wish.

At the IGC meeting itself, another nine new non-governmental organisations were accredited as ad hoc-observers (see document WIPO/GRTKF/IC/13/2). For the information on contributions and applications for support by the voluntary fund for accredited indigenous and local communities, which continues to work well and to enable a number of representatives of indigenous peoples to participate in the IGC meetings, see document WIPO/GRTKF/IC/13/INF/4.

At the beginning of the IGC meeting, the new Director General Francis Gurry, who had already been responsible for the IGC beforehand, strongly appealed to the participants to try to make serious progress, given the long time during which the IGC has already worked on these matters. He made it clear that he would seek for any viable procedure in order to reach this goal. In particular, he pointed at the intersessional working process which had already taken place in the African group, and suggested to unpackage the different issues in order to find common ground, while sticking to the holistic approach.

Indeed, different avenues have already been tried in the past and led to the following, three different documents and approaches: First, a list of draft articles for a sui generis-protection of folklore, which is the most advanced and detailed document; secondly, a list of ten issues to be dealt with in any potential legislative norm on the protection of folklore; and, thirdly, – a new document submitted for this 13th Session – a draft gap analyses on the protection of folklore (WIPO/GRTKF/IC/13/4(b)). The latter document was prepared upon a decision taken at the preceding session of the IGC and aims at describing the protection existing under the current international intellectual property law available for folklore, as well as the gaps of protection and considerations on whether these gaps must be addressed, and if so, in which way (including legal and other options, whether at international, regional or national level).

In addition, the African group has submitted a proposal on the protection of folklore (as well as of traditional knowledge and genetic resources) for consideration of the IGC (document WIPO/GRTKF/IC/13/9). The African group thereby aims at streamlining the process. On the basis of the above mentioned ten issues and the reactions to them by member states as summarised in the so-called “factual extractions” by the WIPO Secretariat, this document adds comments and recommendations thereon by making observations on the points of convergences and divergences by member states on these issues and indicating a possible way forward.

Throughout the general statements, the different groups of member countries basically reiterated their positions known from previous meetings and considered the

gap analyses of WIPO as interesting or useful. All of them were in favour of making progress in the deliberations. Yet, Group B continuously considered more study to be necessary in relation to the issues at stake and, while being ready to participate constructively in the discussions, called for an in-depth discussion. The group of Latin-American and Caribbean countries admitted that a lot of work still needs to be done and confirmed that any result of the deliberations should be open and should include the possibility of a treaty. The latter view was also separately expressed by the Asian group, which also pointed at the need to address gaps in the law, gaps in the interpretation of existing legal instruments, and gaps in the implementation thereof in reality. The new group of Least Developed Countries considered the protection of folklore (as well as traditional knowledge and genetic resources) important for the development of small and medium enterprises in their countries and claimed more assistance of WIPO, for example, regarding the publication of catalogues of folklore, so that the countries would know what resources they have so as to take these as a basis for economic development.

The African Group addressed again the need for an international treaty but acknowledged that a sufficient political will would be necessary to achieve this goal. It reported about the intersessional regional meetings on a strategy for a protection of folklore among the African countries. The European Community assured the members again of its constructive cooperation but claimed that the fundamental concepts and definitions still must be more deeply analysed, and restated that in the end, all the more since a uniform solution would be difficult to be found, the result of the IGC should only be the adoption of non-binding guidelines. Similarly, the USA again claimed a rich, robust and balanced discussion which would be necessary to advance the work. In contrast, Nigeria was of the opinion that after all these years of discussion, more discussions would hardly help, and that less rhetorics and more concrete outcomes with a view to a binding instrument were necessary now.

More concretely on the issue of folklore, the B-Group considered that the gap analysis showed that existing intellectual property may address many of the issues at stake and that, at the same time, many needs should be dealt with by cultural heritage rather than by intellectual property laws. It considered the agreement on a working definition of folklore as very important, as well as capacity building. Also the

Central and Eastern European and Baltic Countries called for a definition which would bring about legal certainty and pointed at the need to also reach a definite understanding of terms such as “owners of protection”. Canada even put into doubt whether the existing gaps required to be filled; it proposed to have more discussions on public domain and access to the knowledge. The EC pointed at the fact that currently, there are only very few systems of protection working under national law, so that the international discussions would be premature. The USA claimed for a consensus on fundamental issues in the first place and considered the identification of options in the gap analysis as most useful; at the same time, one should carefully consider what is a “gap” and in which cases there may be, instead, a deliberate decision for the public domain. New Zealand observed that the gap analysis did not correspond to a holistic approach, but that such approach starting from the ground or from the needs of indigenous peoples should be the basis of work in this field. Similarly, Brazil stated that intellectual property was not fit and not aimed at protecting folklore, and that it clearly left gaps of protection. Nigeria agreed with detailed reasoning to this statement and spoke again in favour a sui generis-protection. Regarding definitions, it pointed out that it would be unlikely to ever get an agreement on any definition; in addition, such definition would not be necessary.

On procedure, the IGC had agreed already at the previous session to consider intersessional meetings in order to accelerate the process. At this session, proposals from the chair and the African group concerned issues such as timing, composition of the groups for intersessional meetings, and the length of the meetings. Yet, after a whole day of discussion, no consensus on the procedure was possible. Accordingly, the IGC will resume next March for its subsequent meeting, at which the possibility of intersessional meetings may again be explored.

-----End of report-----