

TO: Members of Call of the Earth Circle

FROM: Rodrigo de la Cruz and Alejandro Argumedo

SUBJECT: WIPO-IGC, 7th Session: Genetic Resources and Intellectual Property, Traditional Knowledge and Folklore

DATE: 1 – 5 November 2004

VENUE: Geneva, Switzerland

I. Background

1. The meeting of the World Intellectual Property Organization's (WIPO) Intergovernmental Committee (IGC), 7th session was held from 1-5 November 2004 in Geneva, Switzerland.
2. Call of the Earth (COE) sent a small delegation to the meeting which included:
 - (a) Alejandro Argumedo (Co-Chair);
 - (b) Rodrigo de la Cruz (Steering Committee Member); and
 - (c) Rahera Smith (Director).
3. At the meeting, COE actively took part in the discussions regarding the protection of indigenous peoples' rights relating to Genetic Resources and Intellectual Property, Traditional Knowledge and Folklore. A summary of the relevant COE statements/interventions are set out below in Part III.

II. Agenda

4. The WIPO-IGC, 7th Session included discussion on the following relevant agenda items:
 - 4.1 Participation of indigenous and local communities.
 - 4.2 Traditional cultural expressions/folklore:
 - Protection of folklore/traditional cultural expressions: overview of policy aims and core principles. See WIPO/GRTKF/IC/7/3.
 - Protection of folklore/traditional cultural expressions: outline of policy options and legal mechanisms. See WIPO/GRTKF/IC/4.
 - Protection of folklore/traditional cultural expressions: the international dimension
 - Update on legal-technical assistance and capability-building activities WIPO/GRTKF/IC/7/11

4.3 Traditional Knowledge.

- Protection of traditional knowledge: overview of policy objectives and core principles. See WIPO/GRTKF/IC/7/5.
- Protection of traditional knowledge: outline of policy options and legal mechanisms. See WIPO/GRTKF/IC/7/6.
- Protection of traditional knowledge: the international dimension. See documents 7/5 and 7/6.
- Update on technical standards and issues concerning recorded or registered traditional knowledge. See WIPO/GRTKF/IC/7/7.
- Recognition of traditional knowledge within the patent system. See WIPO/GRTKF/IC/7/8.

4.4 Genetic Resources:

- Genetic resources: draft intellectual property guidelines for access and equitable benefit-sharing. See WIPO/GRTKF/IC7/9.
- Patent disclosure requirements relating to genetic resources and traditional knowledge: available alternatives at national and international levels. See WIPO/IGRTKF/IC/7/10.

III. Call of the Earth Statements

Participation of Indigenous and Local Communities

5. First Intervention - “Call of the Earth supports the request by the previous indigenous group to discuss the proposals tabled in greater detail. However, we would like to point out that there are several indigenous groups present, and that an open and transparent discussion is necessary to take into account all points of view. We would also like to state that the Committee has not seriously discussed the participation of indigenous peoples at this meeting. Furthermore we are deeply concerned about the lack of real support and how we lack decision-making authority in an area which is integral to the cultural heritage of indigenous peoples. Our experience at the Convention on Biological Diversity (CBD) must be taken into account in this process.”
6. Second Intervention - We have taken careful note of the fact that different governmental delegations have stressed the need to consolidate participation of indigenous peoples, as it has in the past Committee’s session, however we feel that we have reached a point where no further steps can be taken to ensure effective participation.
7. With regards to the possible establishment of a voluntary fund, we wish to inform you that in practice, indigenous peoples are already participating through voluntary contributions of different donors. In so far as this Committee has been in operation, WIPO has not provided any direct support. For this reason we consider that WIPO is indebted to indigenous peoples for the direct participation in the Committee’s discussions.

8. The ILO's Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries calls for the need for participation of and consultation with indigenous peoples regarding all issues concerning them, be it the adoption of administrative, policy or regulatory measures or the establishment of development plans and programs (Article 6). The convention is a particularly important instrument for organizations within the United Nations System, for [them to] serious take into account indigenous peoples' participation. In this sense, WIPO should seriously consider the establishment of a voluntary fund. WIPO itself should provide the initial capital investment as a practical measure to attract donors at the commencement of the International Decade of Indigenous Peoples.
9. On the other hand, we are grateful for the proposal by New Zealand's delegation and the support received in this forum given that it leads to the practical implementation and effective participation of indigenous peoples. However, we have two main concerns that:
 - (a) the discussion regarding indigenous participation should be focused on practical and effective steps and establishing funds required to secure indigenous representation from geographical regions around the world. If countries do not provide their practical support, all proposals put forward by this Committee will be immaterial; and
 - (b) we do not think it is necessary to have [an indigenous] Co-Chair conduct the activities of this Committee. We believe that indigenous representation should be independent, at least for the time being, until it is consolidated. [Our] independence must be safeguarded for a close relationship with WIPO may affect indigenous peoples' rights to self-determination especially when we are dealing with issues of the utmost importance to our lives, like the intangible heritage of traditional knowledge to which principles of inalienability and imprescriptibility apply.
10. As a practical way of identifying financial sources for this fund, we ask that WIPO levy a bio-piracy tax on all patents connected with traditional knowledge and managed by WIPO. This could support a fund for the participation of indigenous peoples and local communities.
11. Finally we agree with the statements made by the distinguished delegate from Papua New Guinea in calling for greater sensitivity in this Committee insofar as the decisions adopted here will directly affect indigenous peoples.

Traditional Cultural Expressions/ Folklore - Protection of Folklore/Traditional Cultural Expressions: Overview of Objectives and Core Principles

12. First Intervention - "Again we congratulate the Secretariat for the excellent quality of the documents submitted for our reading. However, we would also like to draw your attention again to the treatment of the issues set out in these documents and discussions of this Committee.

13. We believe that to treat cultural expressions in an isolated manner separate from traditional knowledge highlights the conceptual differences regarding protection that indigenous communities have regarding systems of intellectual property rights. This isolated treatment by in large does not assist to secure its protection.
14. Our dances or songs are not separate from our costumes, nor from the traditional knowledge associated with the woven textiles and dyeing techniques, musical instruments, sculptures or craftsmanship regarding these materials and processes etc.... For us, this separation is artificial and is an attempt to undermine the holistic and integral nature of cultural expression and creativity of indigenous peoples, to whom traditional knowledge is a fundamental part of cultural expression. This separation not only attempts to undermine future innovation, but also encourages the misuse and misappropriation further isolating traditional knowledge which is a right conferred by the indigenous artists and communities who produce these expressions. At the same time they are left without the protection of other basic elements of cultural expressions.
15. We ask this Committee to consider integral models that resemble local management models of cultural innovation. Our organization will be putting forward its comments on the proposal by the suggested date of the Chair. In this sense, we ask that an expert group be set up and included in the Permanent Forum and indigenous representatives are taken into account in regional representation.
16. Finally, we would like to draw your attention to the Treaty mentioned by the UNESCO representative in this session before the break. According to the distinguished delegate, we get the impression that this Treaty might be linked to various areas of this Committee work. In this sense, we suggest that the Secretariat prepare an informative report identifying the synergies and differences between the Treaty referred to and to this Committee's work."

Traditional Knowledge - Protection of Traditional Knowledge: Overview of Policy Objectives and Core Principles

17. First Intervention - "With regards to the objectives and principles for the protection of traditional knowledge, we note that we are not looking at the value of the principle of traditional knowledge *per se*, though it seems that this may be related to the recognition of the specific characteristics of traditional knowledge, as stated in A9 of the document referred to, whereby its value, *per se*, should be included in the principle.
18. As stated by the distinguished delegate from Papua New Guinea, traditional knowledge forms part of indigenous peoples' culture. It is the only thing [we] have left and as such, it is inherent to [our] survival. In this sense, for indigenous people, acknowledging the nature of traditional knowledge *per se* also means:
- recognizing collective ownership;
 - recognizing custody of traditional knowledge; and
 - increasing the facilitation of the free exchange and transmission of this knowledge among indigenous peoples.
- These must be core principles of any future international protection scheme.

19. With reference to the principle of consistency with existing legal systems in A6 paragraph 2, whereby the protection of traditional knowledge should be consistent with and supportive of existing Intellectual Property systems, once again indigenous people are concerned that Intellectual Property Rights (IPR) should be part of a system protective of traditional knowledge. That is a system which takes into account the intergenerational nature of traditional knowledge, that collective ownership lives on in time and is subject to a permanent process of innovation related to the culture, has value *per se*, and is closely linked to the land etc...
20. Furthermore, to the best of our knowledge, IPR's are completely counterproductive, especially the patent system which protects a private individual or corporate right with commercial objectives. However other industrial property options like Appellations of Origin, Trademarks and Copyrights could be less damaging to the integrity of traditional knowledge as they incorporate *sui generis* characteristics and in particular common law characteristics, as well as indigenous peoples' own cultural practices.
21. I¹ would like to emphasize [something] not as a private and individual indigenous person, but rather as a member of the indigenous peoples from which I come from – the Quechua people – from Ecuador. Also due to my position, I have close links with 9 national indigenous organizations from the Amazon and the Andean Community from Venezuela, Colombia, Ecuador, Peru and Bolivia, where I am in charge of the development of a project on the elements for the *sui generis* protection of traditional knowledge from an indigenous perspective.
22. Here is what I would like to emphasize: *if in this Committee, which is highly regarded as such, and for the expertise of governmental delegates and observers present, it decides that the protection of traditional knowledge must be consistent with the patent system, the decision will be a great international strategy to disintegrate the indigenous peoples who are still preserving the most sacred heritage we have: the social cohesion on the basis of our identity as people.* This will simply lead to unfair competition for the private appropriation of traditional knowledge with commercial objectives.
23. On the other hand, we would also like to refer to the policy objectives, and in particular roman point x (10), which mentions that one of the aims is to “*promote intellectual and technological exchange*” and which uses the terminology “*accessing*” traditional knowledge and disseminating it in greater measures and under fair and equitable conditions. On this matter, again like the indigenous peoples' delegation, we draw the distinguished governmental delegates' attention to the fact that what is being discussed here is heritage and it is not part of their culture. Nor is it in the public domain but rather a fundamental element of indigenous peoples' culture. Therefore, when talking about access to traditional knowledge, indigenous people do not understand how a different culture can delve into the intrinsic nature of traditional knowledge, given that it is at the deepest root of the indigenous peoples' cultural practices and views of the world.

¹ Individual statement by Rodrigo de la Cruz as a member of an indigenous peoples group

24. If what we are talking about here is promoting intercultural relationships for the respect of intercultural practices, I think that it would be better, and in this sense, would rather employ the term ‘*use*’ of traditional knowledge instead of ‘*access*’, under the principle of prior informed consent of indigenous peoples’ themselves as lawful holders and guardians of this knowledge.
25. There are other aspects that we would like to comment on regarding policy objectives and principles, however we reserve our views [at this point in time] and would like to submit them in detail prior to [the Committee’s deadline of] 25 February 2005. In this sense, we urge that an expert group be established to discuss that this proposal include indigenous representatives from the different geographical regions of the world and the Permanent Forum, as independent experts.
26. Finally, Call of the Earth echoes the statements from the delegations of Brazil, Venezuela, Ecuador, the African Union, Mexico and others, especially regarding a call for intellectual property systems to be subject to a *sui generis* nature of protection of traditional knowledge. In particular we would like to express our opposition to all patents on forms of life, for this would prevent the misappropriation of our traditional knowledge, bio-piracy being one instance of this misappropriation.”

Genetic Resources - Draft Intellectual Property Guidelines for Access and Equitable Benefit-Sharing

27. Shared statement by indigenous delegates, but not made explicit to the Committee – “According to a study conducted by RAFI commissioned by UNDP in 1994, it was determined that at a global level:
- almost 100% of biodiversity ‘shelters’ are located in areas maintained or bordered by indigenous and/or agricultural communities in the South;
 - 90% of land and water mass with the greatest biological diversity is not protected by governments and are exclusively maintained by rural communities;
 - 99% of all the experts with experience in biodiversity belong to indigenous and other rural communities;
 - 80% of the world population’s health depends on medicinal plants;
 - 90% of the experts in flora and other agricultural researchers live in rural communities.
28. If we look at reality nowadays, this data has not changed. In contrast, 95% of intellectual property rights, especially patents, belong to large corporations or government institutions mainly in the industrialized countries in the North. That is to say that the raw material for genetic resources lies in the South [of America], whereas the technology lies in the North [of America].

29. Indigenous peoples consider ourselves as millenary holders and guardians of traditional knowledge associated with genetic resources and we can not find any rationale for its separation. When reference is made to associated traditional knowledge, all access to genetic resources implies that the use of traditional knowledge must respect the basic principle of Free and Prior Informed Consent by indigenous peoples'. [Furthermore it must respect] the principle of Equitable Benefit-Sharing, both monetary and non-monetary [aspects], which must also be decided by indigenous peoples'.
30. Another fundamental principle for access to genetic resources is the disclosure of their sources and other sources associated with traditional knowledge. [Its] scope should cover products derived from genetic resources, especially those related to the application of intellectual property systems [currently] under discussion at this Committee.
31. Finally, in accordance with the decisions adopted at the last World Summit on Sustainable Development, and as we have expressed in other relevant forums, indigenous peoples from all regions express that this Committees work should not duplicate the efforts carried out by the Convention on Biological Diversity (CBD) for the establishment of International Guidelines for Access and International *Sui Generis* Scheme for the Protection of Traditional Knowledge. Rather it should concentrate on the issues strictly relevant to its mandate and at CBD's request.

Final Statement

32. Call of the Earth put forward a joint declaration to reiterate some of the main points submitted by other indigenous delegates, namely those from Latin America and dealt with in the Committees session. Expert Rodrigo de la Cruz presented this declaration.
33. First Intervention – “As a representative of the Indigenous Peoples delegation from Mid and South America who take part in this 7th session of the IGC, we have welcomed the interventions from different governmental delegations calling for the need to consolidate indigenous peoples participation.
34. Article 6 of ILO's Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries deals with the rights of participation and consultation with indigenous peoples regarding all issues affecting us, be it the adoption of administrative, policy or regulatory measures. This is a binding instrument of special importance for organizations within the United Nations System, so that our participation can seriously be accepted. In this sense, a way of making this effective is through the creation of a Voluntary Fund with the initial capital investment provided by WIPO itself. [This would be] a display of its practical actions to appeal to donors' sensitivity at the commencement of the International Decade of Indigenous Peoples, declared such by the United Nations itself.

35. Therefore, we recommend that the focus of discussions at the next Committee's session be on concrete and effective steps for the establishment of this fund. [This fund] could ensure the presence of indigenous representatives from all geographical regions around the world, especially from developing countries, and complementarily, through the participation of indigenous members as independent experts at the Permanent Forum. [Furthermore] allowing governments to include indigenous delegates in their delegations which are recognized by the organizations indigenous representative. If WIPO and Northern countries in particular which use genetic resources and traditional knowledge, do not offer concrete funding, all points proposed in this Committee will lack any major relevance concerning traditional knowledge.
36. With regards to the other points on the agenda canvassed throughout this session, we have taken due note of them and in a timely fashion prior to [the deadline of] 25 February 2005, we will present our respective comments having previously consulted with the indigenous peoples of the region for consideration in the report for the Committee's 8th session."

IV. Decisions adopted at the WIPO Intergovernmental Committee, 7th Session

37. The most relevant decisions adopted at the WIPO Committee's Session were as follows:

Participation of indigenous and local communities

38. The Committee requested that, on the basis of document WIPO/GRTKF/IC/7/8 and comments made, that a formal proposal for a Voluntary Fund be prepared for its consideration at its eighth session and encouraged continuing voluntary funding of representatives of indigenous and local communities, and other forms of enhancing their participation in the Committee and other WIPO activities.

Folklore and traditional cultural expressions

39. The Committee:
- took note of the detailed comments and drafting suggestions made on the draft objectives and core principles set out in Annex I of document WIPO/GRTKF/IC/7/3;
 - called for further comments on the draft objectives and core principles before 25 February 2005; and
 - requested that the Secretariat produce, on the basis of the Annex and all subsequent comments/ input from Committee participants, a further draft of objectives and principles for consideration by the Committee at its eighth session.

40. All comments received within the agreed timeframe will be posted on WIPO's website.

Traditional Knowledge

41. Likewise, The Committee took note of the detailed comments and drafting suggestions made on the draft objectives and core principles as set out in Annex I of document WIPO/GRTKF/IC/7/5; called for further comments on the draft objectives and core principles, before 25February 2005; and requested the Secretariat produce, on the basis of the Annex and all subsequent comments/ input from Committee participants, a further draft of objectives and principles for consideration by the Committee at its eighth session.
42. All comments received within the agreed timeframe will be posted on WIPO's website.
43. The Committee also noted the suggested outline of policy options and legal protection mechanisms set out in Annex I of document WIPO/GRTKF/IC/7/6 and noted the comments made during its current session on that document. It agreed that this material should be updated as appropriate in the light of revisions to the draft objectives and core principles, and in the light of comments received.

Genetic Resources

44. The Chair noted that, among other things:
- i. a number of comments were made on the contents of document WIPO/GRTKF/IC/7/9, which were all duly noted by the Secretariat and will be included in the Report;
 - ii. A number of Delegations expressed support for the future work as proposed in paragraph 43 of the document;
 - iii. A number of delegations expressed strong opposition to, among other things, the usefulness of the contractual approach and have declared that the said activity should detract from other work of the Committee under no circumstances; and
 - iv. The Chair concluded that there was no consensus on the future work of the Committee in this area and suggested that no decision should be taken at this session but that it should be kept on the agenda for the eighth session of the Committee.
45. The Committee decided in accordance with the suggestion by the Chair.

V. Recommendations

46. Call of the Earth as an entity, made up of indigenous professionals from different geographical regions around the world in their capacity as independent experts, should consolidate its involvement in discussions on intellectual property rights and traditional knowledge. In this sense, COE should strengthen its proactive follow-up in relevant forums that deal with these issues including WIPO and CBD, with a view to join efforts for the defense and protection of collective and integral rights on the ancestral knowledge of indigenous peoples.
47. COE should conduct studies and publish its *in situ* experiences of protecting indigenous peoples' ancestral knowledge, to support its technical, legal and political position in relevant world forums on the basis of practical evidence.
48. The development of capacity and information systems on intellectual property and traditional knowledge is a critical and urgent issue. Therefore COE should design projects that allow sustainable training like support the definitions of policies, strategies and regulations at national and regional levels, in cooperation with respective indigenous peoples' organizations.
49. A COE technical committee should be established to conduct a thorough study of the official documents issued at the 7th session of the WIPO Intergovernmental Committee, for the presentation of contributions at the WIPO Secretariat, before February 25, as stated in the already adopted decisions.
50. Information relating to the 7th session of the WIPO Intergovernmental Committee **should be obtained** from their website at www.wipo.org . A detailed analysis of the documents is as follows:
- Participation of indigenous and local communities: WIPO/GRTKF/IC/7/12, WIPO/GRTKF/IC/7/13 and WIPO/GRTKF/IC/7/INF/2.
 - Traditional cultural expressions/folklore: IPO/GRTKF/IC/7/3, WIPO/GRTKF/IC/7/4, WIPO/GRTKF/IC/6/6, WIPO/GRTKF/IC/7/11 and WIPO/GRTKF/IC/7/INF/4.
 - Traditional knowledge: WIPO/GRTKF/IC/7/5, WIPO/GRTKF/IC/7/6, WIPO/GRTKF/IC/6/6, WIPO/GRTKF/IC/7/7, WIPO/GRTKF/IC/7/8 and WIPO/GRTKF/IC/7/8 Add.
 - Genetic resources: WIPO/GRTKF/IC/7/9, WIPO/GRTKF/IC/7/10, WIPO/GRTKF/IC/7/INF/5.
51. This report is submitted for consideration by members of Call of the Earth and other international organizations for indigenous peoples, to contribute to the strengthening of indigenous peoples' position and our proactive participation in the debates and decisions on the WIPO Committee's mandate.

November 2004

Rodrigo de la Cruz, Member of the Steering Committee
Alejandro Argumedo, Co-Chair