



**FIRST WIPO INTERREGIONAL MEETING ON SOUTH-SOUTH
COOPERATION ON INTELLECTUAL PROPERTY (IP) GOVERNANCE:
GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE
(GRTKF) AND COPYRIGHT RELATED AND RELATED RIGHTS**



**8-10 August 2012
Brasilia, BRAZIL**



*Traditional Knowledge (TK), Traditional Cultural
Expressions (TCEs) and Genetic Resources (GR):
Current Situation, Progress and Main Issues at the
WIPO Intergovernmental Committee (IGC)*

OUTLINE OF PRESENTATION

1. Introduction
2. Background to IGC-WIPO
3. Intellectual Property Governance
4. Progress but slow progress
5. Increased momentum
6. Current Mandate
7. Progress on the Mandate
8. Challenges and Tactics
9. Way Forward

INTRODUCTION

- The next General Assembly could be at a historical turning point and mark the first major success on GRTKF
- In moving the process forward, developing countries face many challenges ahead
- Developing countries must show leadership in the negotiations and coordinate effectively amongst themselves
- The work of the IGC should in no way hinder, but rather complement, the work currently undertaken in related issues at other multilateral fora
- Disagreement remains on the nature of the future instrument/instruments (legally binding or not), on whether the diplomatic conference should take place, or on what should be negotiated there.

HISTORICAL BACKGROUND OF THE IGC

- Its work started in 1998
- In 1998 and 1999 two roundtables on IP and indigenous peoples convened
- Nine Fact Finding Missions were undertaken to identify and explore the IP needs and expectations of new beneficiaries, including the holders of indigenous knowledge and innovations
- In 2000 the IGC was established

PARTICIPATION IN THE IGC

- From the 1st IGC in April 2001 WIPO's General Rules Procedure, especially Rule 24 allows observers to take part in debates at the invitation of the Chair during IGC sessions on any agenda items for consideration by Member States and be incorporated in the text under negotiation if supported at least one Member State
- Participation in IGC meetings of non governmental and other organisations as ad hoc observers is possible through accreditation process decided upon by Member States
- There is a WIPO Voluntary Fund for accredited indigenous and Local Communities
- Panel of representatives of indigenous and local communities
- WIPO Administrative Support
- By 2011 there were 268 organisations accredited to the IGC

FROM AN EXPLORATORY TO A NEGOTIATING FORUM

- By providing a specialized forum for the structured exchange of information and views within WIPO, the IGC process has succeeded in building up a robust international understanding of the issues.
- The exploratory “forum” has evolved into a true negotiating body, framed by clear and tight schedules and sound working methods
- In 2009, WIPO Member States decided that the IGC should begin formal negotiations with the objective of reaching agreement on one or more international legal instruments that would ensure the effective protection of GRs, TK and TCEs
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DEFINITION OF GOVERNANCE

- Governance in a social system is about Goal setting, law making and regulations to institutionalize patterns of interaction which become fixed rules of the game between different actors in the system
- It is about structuring relations into fixed patterns to reduce complexity and limit contingencies of actions so as to make it possible for mutual expectations to evolve so as to make interaction between different actors predictable and stable and avoid regulative inconsistencies and fragmentation of scope of policy actions
- It is about adaptation, integration and pattern maintenance and exchanges and reinforcement of action in a particular field.

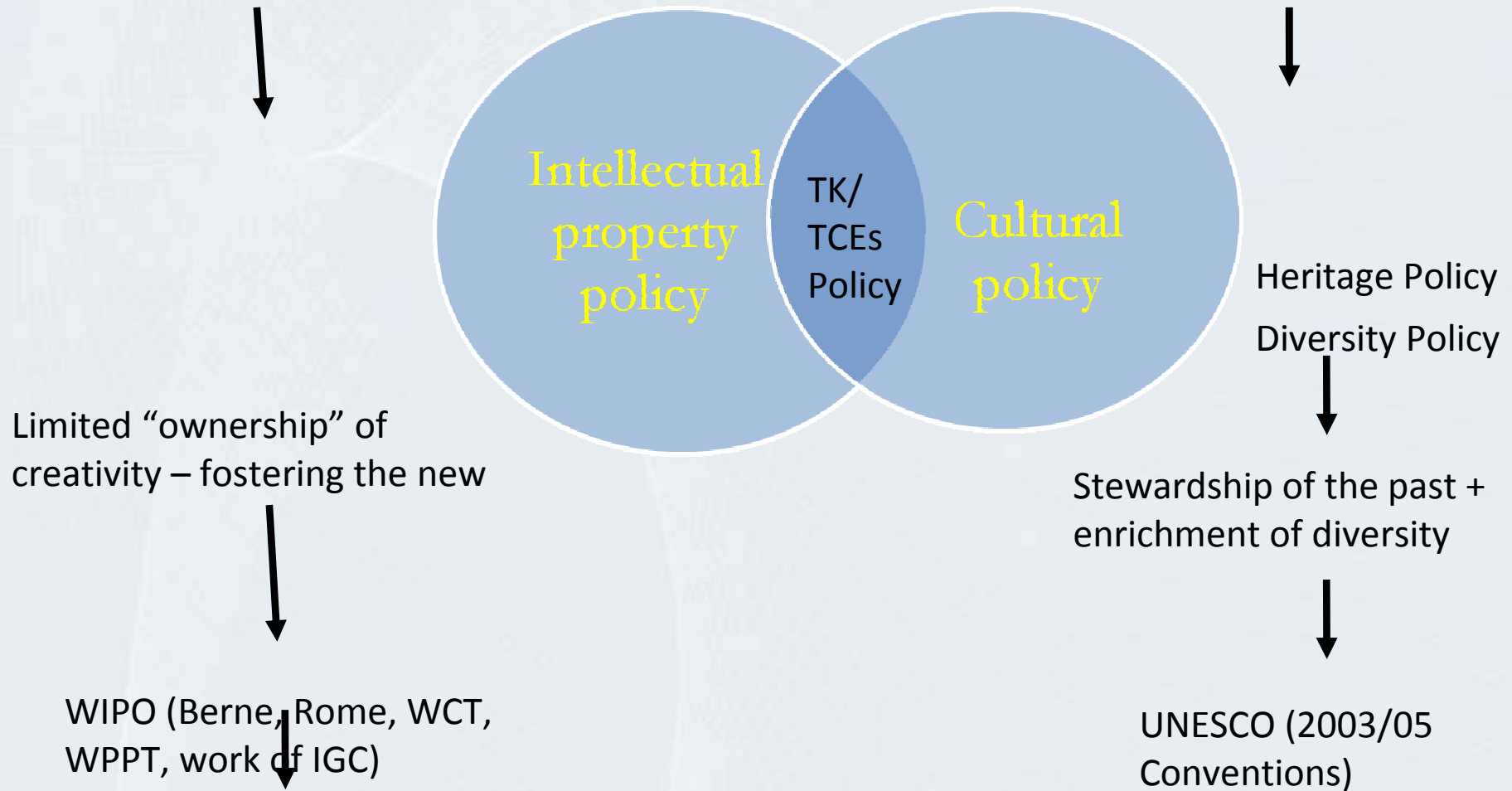
WHAT IS INTELLECTUAL PROPERTY GOVERNANCE?

- IP governance is about Goal setting, law making and regulations to institutionalize patterns of interaction which become fixed rules of the games between different actors in the knowledge generation, exploitation, distribution and dissemination system
- How IP is governed – or how it ought to be governed – is related to how knowledge is created and valued in society. The concept of IP governance hence speaks to establishing oversight over the processes of IP production, exploitation, distribution and access.
- The activities of IP governance should entail the development of policies and strategies for managing system of innovation at different levels. In this case IP governance speaks to politics of IP production, exploitation, distribution and the strategic management of innovation system in an integrated way for sustainable competitive advantage

IP GOVERNANCE OF THE PROTECTION OF TK/TCES

- **Policy** = to set overall goals and directions
- **Law** = to articulate policy through legal principles and rights and duties
- **Practical tools** = to take full advantage of and supplement the law
- **Consultation and capacity-building** = to strengthen policy formulation and enable effective use of law and practical tools

TECHNOLOGICAL, SOCIAL AND POLITICAL TRANSFORMATIONS



NEGOTIATING BLOCKS IN THE IGC

- Developed Countries
- European Union
- Group B
- Central Europe and Baltic States
- Several Professional Groups
- Developing Countries
- African Group
- Asian Group
- Gulac
- China
- Like-Minded Countries
- Development Agenda Group
- Indigenous Peoples and Communities

PROGRESS MADE SINCE 2003

- General Assembly 2003 IGC Mandate for 2004/2005
 - 2005 Draft Principles and Objectives for TK and TCEs at IGC 7th Session
- General Assembly of Sept 2005 Renewed Mandate for 2006/2007
 - This biennium introduced the instrument like proposals at the request of the members
 - Little progress was made
- General Assembly in Sept 2007 Renewed Mandate for 2008/2009
 - Focus on objectives and reluctance to engage in substantive discussions on article like provisions
 - List of issues and Gap Analysis
 - African Group Durban Meeting and strategy for text based negotiations
 - July 2009 IGC Session 14 as a turning point on mandate
 - African Group and Allies' Proposal on text basis as the only way forward for mandate
- General Assembly Sept 2009 Renewal of 2010/2011 mandate
- 2009 Text based negotiations
- Intersessional Working Groups
 - July 2010 -Gap Analysis
 - February 2011 -List of Key issues
 - March 2011 -GRs (Many submissions)
 - 2011 Four outstanding issues for Clarification
- IGC 19th Session in 2011 as a crucial turning point towards text based negotiations on a text(s) of international legal instruments
- General Assembly Sept 2011 Renewal of Mandate for 2012/2013

PROGRESSION OF ISSUES

12th IGC SESSION IN February 2008

List of Issues on TK and TCEs

1. Definitions of Tk and TECs that should be protected
2. Who should benefit from any such protection or who hold the right to protectable TK and TCEs?
3. What objective is sought to be achieved through according intellectual property rights protection (economic and moral rights)?
4. What sort of behaviour should be considered unacceptable/illegal?
5. Should there be any exceptions or limitations to the rights?
6. For how long should protection be accorded?
7. To what extent do existing IPRs already afford protection?
8. What sanctions or penalties should apply to behaviour or acts considered to be unacceptable or illegal?
9. Which issues should be dealt with at the international and national levels?
What divisions should be made between the national and international?
10. How should foreign rights holders/beneficiaries be treated?

PROGRESSION OF ISSUES

- GAP ANALYSIS WIPO/GRTKF/IC/13/5 OCT 2008
- The working definitions or other bases upon which analysis is conducted
- Obligations, provisions and possibilities already existing at the international level
- Gaps existing at the international level, illustrating those gaps, to the extent possible, with specific examples
- Consideration relevant to determine whether those gaps need to be addressed
- What options exist or might be developed to address any identified gaps, including legal and other options, whether at the international, regional or national level
- For easy of accessing information a matrix was provided.

CURRENT MANDATE FOR 2012-13

40TH GENERAL ASSEMBLY, 26 Sept – 5 October 2011

- (a) The committee will, during the next biennium (2012/13), and without prejudice to the work pursued in other fora, expedite its work on text based negotiations with the object of reaching agreement on a text(s) of international legal instruments which will ensure the effective protection of GRs, TK and TCEs.
- (b) The Committee will follow a clearly defined work programme based on sound working methods for the 2012/2013 biennium: Initially 4 Sessions; 3 thematic with a provision for the General Assembly to consider the need for additional meetings
- (c) WIPO documents including WIPO/GRTKF/1C/19/4, WIPO/GRTKF/1C/19/5, WIPO/GRTKF/1C/19/6 and WIPO/GRTKF/1C/19/7 as basis for text based negotiations as well as any other text contributions by Members

2012/2013 BIENNIUM WORK SCHEDULE

Date	Activity
February 2012	IGC 20 (GRs). To Undertake text based negotiations with a focus on considering options for a draft legal text as detailed in WIPO/GRTKF/1C/19/7 (8 days)
April/May 2012	IGC 21 (TK). Focus on 4 key articles <i>viz</i> subject Matter of protection, Beneficiaries, Scope of Protection and Limitations and Exceptions
July 2012	IGC 22 (TCEs). Focus on 4 key articles <i>viz</i> subject Matter of protection, Beneficiaries, Scope of Protection and Limitations and Exceptions
September 2012	General Assembly
2013	IGC 23. Consider decision of General Assembly and take stock of further work required to finalise text/s.

DRAFT STUDY ON PARTICIPATION OF OBSERVERS OF IGC-GRTKF

The 40th session of the GA in 2011 invited the IGC to review its procedures with a view to enhancing the positive contribution of observers to the IGC process:

1. Clarifying relationship with diverse categories of observers
2. Cooperating in the spirit of partnership
3. Substantiating policy debates through enhanced engagement
4. Facilitating coordinated expert advice and input
5. Enhancing national and regional dialogues and awareness-raising
6. Fortifying Financial and other means of support for direct participation
7. Expanding interaction through information exchange
8. Awareness-raising and communications tools
9. Strengthening cooperation with other United Nations bodies, programmes and agencies

WHY HAS THE IGC NOT FULLY REFLECTED THE VIEWS OF INDIGENOUS AND OTHER LOCAL COMMUNITIES?

- There are several reasons that explain why the IGC has not succeeded in fully reflecting the demands of indigenous and other local communities:
- Its Member State driven committee, Member State interests dominate.
- Indigenous peoples Groups failure to lobby progressive members states for support
- Divisions in their ranks regarding their demands

2012/2013 BIENNIUM WORK SCHEDULE

Date	Activity
<p>February 2012 IGC 20 (GRs). To Undertake text based negotiations with a focus on considering options for a draft legal text as detailed in WIPO/GRTKF/1C/19/7 (8 days)</p>	<ul style="list-style-type: none"> •Development of a single text was a great achievement •Mandatory Disclosure was the intractable issue that divided the member states •Counter Proposal from Japan on database as an alternative
<p>April/May 2012 IGC 21 (TK). Focus on 4 key articles <i>viz</i> subject Matter of protection, Beneficiaries, Scope of Protection and Limitations and Exceptions</p>	<ul style="list-style-type: none"> •No agreement on definition; scope and limitations and exceptions. •Differences on inclusion of nations, individuals, families and states •Discussions went beyond the four issues and added complications in text
<p>July 2012 IGC 22 (TCEs). Focus on 4 key articles <i>viz</i> subject Matter of protection, Beneficiaries, Scope of Protection and Limitations and Exceptions</p>	<ul style="list-style-type: none"> •No agreement on definition; scope and limitations and exceptions. •Possible solution to inclusion of nations, individuals, families and states as beneficiaries •Discussions went beyond the four issues and added complications in text

GENETIC RESOURCES AND ASSOCIATED TRADITIONAL KNOWLEDGE

- Succeeded for the first time to produce a single document on Genetic Resources and its associated TK
- The section on Policy objectives still has options
- The thrust of the options is that the developing countries are driving does binding language while the developed countries would like it to be more open.
- Developing countries ensuring that the burden of providing information and other requirements is not placed on indigenous and local communities
- **Substantive Matters**
- A tendance to separate GR from the associated TK
- A move to exclude derivatives
- Developing countries attempting to have a disclosure requirement close to the CBD Mandatory Requirement
- A possibility of accepting a voluntary disclosure requirement as per proposals from Norway and Switzerland
- The turning attention to the PCT and PLT- the African proposal
- The attention to the databases-
- Guidelines or recommendations on defensive protection
- A lot of diferences on the sanctions, remedies and exercise of the rights

TRADITIONAL KNOWLEDGE

- The aim of the session was to provide
- The section on Objectives and Principles still contain too many divergent views.
- The definition proffered in the document has a complex combination of stuff that needs to be cleaned out. Indigenous peoples and member states from developing countries to sort out the mess
- It will help if the blocks could be allowed to focus with the option that represents their interests.
- On the beneficiaries this is better provision.
- The article on Scope of protection the options are clear. Article 3 BIS is placed there as a detractor.
- The options can easily be separated into two reflecting the divergent views.
- The text has become more complicated as somewhat new options have been introduced or added on to the 19/4 document. i.e Article 5
- On Exceptions and Limitations too many alternatives
- The purpose of the articles is to have an instrument that is enforceable but the negotiating partners from the North always suggest ways to weak the effectiveness of any of the articles (may/should/shall); (Member States/contracting parties); and (holders /owners)
- The way forward is that the text is mature and contain all the information to result into a legal instrument and should proceed towards a diplomatic conference for agreement on legally binding instrument.
- The facilitators comments and the text be the only documents for further negotiations to avoid introduction of new materials

TRADITIONAL CULTURAL EXPRESSIONS

- Did not have time to discuss Objectives and Principles
- Substantive Articles
- Clearer approach to definition and eligibility criteria in article 1
- Very clear definition of beneficiaries
- Scope of Protection has options but they are clear
- Administration of rights is an area where indigenous peoples and member states from developing countries can work together to streamline differences
- Exeptions and limitations provides a much cleaner text than the TK.
- The facilitators notes provide an explanatory not on the approach taken.

DEVELOPMENT AGENDA REPORTS

- Brazil speaking on behalf of DAG was concerned about the pace despite the progress made and urged to strengthen efforts towards concluding the negotiations and fulfill the General Assembly mandate. Explained relevance of a binding legal instrument to development
- South Africa on behalf of the African Group noted the progress made and looked forward to the General Assembly making a landmark decision towards a Diplomatic conference and called for apolitical will from Member states
- The European Union noted that the work of their biennial was without prejudice to the outcome. It noted that further substantive work was required to fulfil the Mandate of the General assembly

DEVELOPMENT AGENDA REPORTS

- Delegation of Italy on behalf of Group B acknowledge progress made but indicated that further work remained to be done in order to fulfil the mandate of the Committee. Called for the preservation of a robust, rich and accessible public domain and the obligations of flexibilities in international IP agreements as they may be relevant.
- Delegation of Iran on behalf of the Asian Group noted the role of the IGC in norm setting in relation to internationally binding rules for the protection of TK, TCEs and GR to benefit developing countries. Urged member States for a constructive engagement to solve divergences with a view to holding a Diplomatic Conference.
- The USA in support of Italy supported a non binding international instrument pursuant to the current WIPO General Assembly mandate and called for preservation of policy space and flexibilities.
- Argentina, India, Algeria
- Gulac did not make a statement and what does that reflect?

POSSIBLE SCENARIOS AT THE GA

- The mandate of the committee leaves no outcome excluded
- To many developed countries the outcome of the IGC should not prescribe any particular outcome
- The word protection is understood to include legal and non legal measures
- Possible Outcomes:
 - Legal instrument(s) Governance- norm setting
 - Declaration } **Policy**
 - Guidelines } **Issues**

APPROACHES TO NEGOTIATIONS AT THE IGC

- There has always been a plea for definitional clarity of TK, TCEs
- There are question of immature texts: TK; TCEs and GR
- Request for more studies
- Quest for more national examples to lead up into international norm setting
- The conventional norms of IP as the norm for TK,TCEs and GRs
- More work needs to be done on objectives and principles
- Attempts to weaken the texts and make them as confusing as possible by introduction of detractors or detracting texts
- Lobbying countries before major session as collection of intelligence
- Presentation of partisan views dressed up as scientific and tested
- Non-engagement on substantive issues to undermine progress
- Presentation of new proposals all the time

DEVELOPING COUNTRIES TACTICS

- Set the terms of the negotiations by making written submissions
- Use group coherence as pressure and consensus setting
- Adequate preparations of substantive and tactical issues
- Interregional collaboration on consensus building
- Create critical points of engagement for decision making such as the 14th and 19th Sessions
- Focus on substantive issues rather than the principles and objectives but ignore them at your peril
- Provision of technical information on issues seeking clarity
- No linkages with negotiations in other foras

CHALLENGES IN NEGOTIATING STRATEGIES OF DEVELOPING COUNTRIES

- Shared long term objectives
- Cohesion and lack of it in Regional Groups
- Impact of Emergent groups such as the Like-minded group, Development Agenda Group
- Strong national interests
- Capacity of negotiating Groups
- Change of negotiating teams
- Mobility of Experienced negotiators
- Developing countries that are influenced by big powers
- Individuals sacrificing national for self- interests
- Timing of consultation with capital officials

OUTSTANDING ISSUES FOR NEGOTIATIONS

- Three separate texts or weld them into one
- Is there any more work on definitions?
- Is the scope of protection adequate for GRTKF?
- Are the beneficiaries well defined?
- Are the limitations and expectations properly delineated to avoid over exposure?
- On genetic resources, mandatory requirements or new legal instrument?
- Are the three document sufficiently matured for a diplomatic conference?
- What are the conditions for the Diplomatic Conference?

WAY FORWARD AT THE GENERAL ASSEMBLY

- What do we expect at the General Assembly
- The adequacy/readiness of the Three separate Texts for a diplomatic conference
- Conditionalities for the renewal of the mandate
- What are the preferred scenarios
- Developed countries approach
- Developing countries approach
- Outcomes of the General Assembly
- Beyond the General Assembly
- Is there a possibility of Reconstituting a new south – south negotiating platform
- Commonalities between the texts can be an opportunity

**THANK YOU
FOR YOUR ATTENTION
OBLIGADO**