



The WIPO Negotiations on IP, Genetic Resources and Traditional Knowledge: Can It Deliver?

By Viviana Muñoz Tellez

Introduction

There has been much expectation on what the Intellectual Property Organization (WIPO) can deliver on intellectual property aspects of the protection of genetic resources (GRs), traditional knowledge (TK) and related traditional cultural expressions (TCEs). Results from fourteen years of extensive study, analysis and discussion have been distilled into three negotiating texts. But in July 2014, negotiations suffered a reversal. When the WIPO General Assembly meets in October 2015, it will decide on the way forward, testing to the political will and commitment of Member states. In particular, Member states must decide on the future of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).

This brief analyses the current state of play in the negotiations at WIPO on the intellectual property (IP) aspects of the protection of GRs, TK and TCEs and offers a perspective on the way forward.

1. Misappropriation and Misuse

The 188 Member states of WIPO have agreed to do their part -as it concerns the international IP system- to ensure the effective protection of genetic resources

(GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs). This is an important understanding, embodied in the current mandate for the negotiations. But fifteen years later, there is much frustration that WIPO has not delivered results.

Different equity, ethical, moral and cultural values and concerns, as well as commercial interests, continue to drive the debate. Various international organizations are working on various aspects of the protection of GRs and TK. In the context of the Convention of Biological Diversity (CBD), protection of GRs and TK linked to the preservation, conservation and sustainable use of GRs and associated TK.¹ Efforts within the IP system should be complementary to these goals.

The work in WIPO should be focused to tackling the misappropriation and misuse of GRs and TK including TCEs through the IP system, known commonly as biopiracy. This includes the unauthorized taking and utilization of GRs and TK, failure to ask permission or acknowledge the origin or source of the invention or creativity, failure to share benefits, culturally offensive use, and grant of patents or other forms of IP rights in error.² Given the international dimension of bioprospecting and patenting activities, national legislation is insufficient to address misappropriation and misuse of GRs and TK. Moreover, no

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single solution is likely to respond to the variety of concerns. International agreement on various complementary legal measures appears necessary.

Disregard for ABS rules by the IP system

There are several aspects to the problem of misappropriation and misuse of GRs and TK. One is the operation of the international IP legal regime in disregard for Access and Benefit Sharing (ABS) rules, though parties to the CBD recognize the influence of IP on its implementation and agreed to cooperate to ensure that IP rights are supportive of and do not run counter to its objectives.³ ABS rules are meant to prevent unauthorized access and utilization of GRs and TK, by requiring that prior informed consent (PIC) is obtained prior to access and that the benefits derived from utilization are equitably shared. Requiring permission prior to access or use of TK associated to GRs is an important means to empower indigenous and local communities. PIC for access to GRs is also an important recognition of the sovereign right of countries to regulate access to their biological resources. Emphasis on monetary benefit sharing reflects the perceived economic value of GRs and TK.

Over the past twenty years, binding international legal regimes on IP, on the one hand, and ABS, on the other hand, continue to develop in parallel. This has led to friction in their implementation. More so as there is ample scope for interpretation and choice in national law on the manner of implementing obligations in both regimes. Improving coherence is imperative in light of the global reach of IP rights and the obligations that most countries have acquired under both international regimes. Even countries that decide not to regulate access to the GRs or associated TK within their territory still have obligations to put in place measures to monitor and ensure compliance by users of GRs and associated TK with national ABS laws of third countries.⁴ Moreover, there is broad agreement on the principles of prior informed consent (PIC) and benefit sharing as set out in the Convention on Biological Diversity (CBD) of 1992, including among non-member countries.⁵ International ABS rules have been further elaborated in the Nagoya Protocol to the CBD which came into force in October 2014. To date, of the 196 parties to the CBD, 62 have ratified the Nagoya Protocol. The international ABS regime specifies that countries must put in place rules for users and providers of GRs and associated TK. Most notably, prior informed consent (PIC) must be obtained prior to access to GRs and associated TK, from a government agency or a specific custodian group (i.e. indigenous peoples or local community). In addition, benefits

arising from the utilization of GRs and associated TK - referring to any research and development activity, including subsequent applications and commercialization- are to be shared in a fair and equitable way as negotiated and agreed upon among the user and provider party. The ABS regime is still under development, with many countries still in the process of establishing or reforming ABS national legislation to be compatible with the CBD and Nagoya Protocol obligations.⁶ This remains an indispensable task.

One of the causes for tension is that international IP rules, e.g. the World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) do not accommodate ABS while they facilitate the private appropriation of inventions and creations based on GRs and TK. For example, patents for GR/TK based inventions may be granted irrespective of whether or not the GRs/TK were accessed and utilized in accordance to the national ABS legislation of the country of origin or source of the GR/TK. Complete and quality disclosure in patent applications is an inherent requirement of the patent system. However, there is no requirement to specifically disclose the source or geographical origin from which the materials were acquired. Through national legislation and regulations, countries can request such disclosure in patent applications, which would facilitate checking that PIC was obtained and benefit sharing, as a coherent implementation of the IP and ABS legal regimes. For example, India requires that permission be obtained from the National Biodiversity Authority (NBA) prior to applying for a patent for an invention using biological material or TK from India. In this way, the NBA uses the patent application stage as a checkpoint for compliance with Indian ABS regulation. However, given the principle of territoriality of IP rights, such domestic measures cannot affect IP right claims in third countries, when in fact many patents based on GRs/TK are applied for and granted in third countries, which may not regulate ABS. Hence, WIPO has a role to play in developing the obligation on disclosure of the source and origin of GRs/TK into an international standard, requiring implementation by all national IP offices.

Grant of erroneous patents and other IP rights

Another form of misappropriation of GRs and TK is the erroneous grant of patents or other forms of IP rights. There are numerous cases whereby patent offices around the world, such as the European Patent Office and the United States Patent and Trademark Office, have granted patents for GRs, TK associated to GRs, or to TK-based inventions that fail to meet the requirements of novelty and inventiveness. Cases include the Maca, Ayahuasca and Camu Camu plants.⁷

In particular, the patent examination process can fail to identify previously-known TK as prior art. Seeking to revoke patents through legal challenge after these have been granted can be a highly costly, lengthy and complex process. Indigenous peoples and local communities, unfamiliar with the IP system, cannot be expected to seek redress over bad patents. Thus, in WIPO it is crucial to find agreement on standards for all patent offices to improve the patent examination process to avoid bad patents in relation to GRs and TK whether associated or not to GRs.

Uncertainty whether TK is part of the public domain

Clarifying the concept of “public domain” in respect to TK is necessary in order to define the boundaries of the extent to which TK is freely accessible, usable, appropriable or not. Currently there is no international common understanding. The “public domain” refers to all works, knowledge and information that

against persons outside of the community against practices such as extracting knowledge from a TK community without consent or compensation, unless national law recognizes and extends customary laws to apply to third parties outside the community. The Nagoya Protocol of the CBD now requires that national ABS laws take into account indigenous and local communities’ customary laws, community protocols and procedures with respect to TK associated with GRs, but it is up to countries decide on implementation at national level. Thus, there are no international obligations for the IP system to take into account customary laws and practices of TK holders in respect to their TK, whether or not associated to GRs.

Misrepresentation, derogatory or culturally offensive use

Even when the TK is accessed legally, there are concerns that the use is culturally, morally or spiritually offensive to the TK holder or in a manner that is mis-

The work in WIPO should focus on developing international standards within the IP system against the misappropriation and misuse of GRs and TK, that cannot be dealt with solely under national law but rather require international cooperation.

were never protected by IP rights, e.g. not eligible for protection, as well as those that are no longer protected, e.g. the time period has expired. Defining what is part of the public domain at the international level is particularly complex and there is no uniform legal meaning. Thus, the public domain is of “different sizes at different times and in different countries.”⁸ Generally, in IP law TK that is disclosed in written, oral, or any form outside the community is considered to be as part of the public domain, thus available, and free, for anyone to use. But this view is often not shared by TK-holders that reject the concept and consider it is a form of misappropriation. In response, some countries have adopted legislation that separates TK from the public domain by conferring exclusive or remuneration rights to TK holders.⁹ To a similar effect, there are also demands to extend the application beyond the local context of the customary laws and practices of indigenous and local communities that regulate how their knowledge is to be shared and used within the community.¹⁰

Lack of recognition of customary laws and practices

TK holders seek greater control over the use by third parties in relation to their TK. For TK, the lack of recognition of customary laws and practices that may exist that regulate access and use of GRs and TK can be considered as conducive to misappropriation. Customary laws are not legally enforceable

representative or deceptive of the TK. The TK holder cannot control use made outside the community. Examples include the use of logos in sports teams or branding using names or symbols of TK communities without consent or passing off TK expressions such as handicrafts as authentic without attribution or consent from the TK community.

2. Proposed Solutions

There are multiple policy options to address the concerns highlighted. Many of these can be implemented concurrently. WIPO is considering policy options that have been implemented in national law to extend these internationally, as well as new international rules or practices, with the aim of creating a stronger and more harmonized system of protection against misuse and misappropriation of GRs and TK through the IP system.¹¹

Requirement to disclose the source of the GR/TK

A practical measure for the IP system to support the international ABS regime is to use patent applications to increase transparency with regards to ABS. National patent offices could require that patent applicants provide information relating to GRs and/or TK, whether associated or not to GRs, used in the development of inventions claimed in patent applications. It may also be extended to applications for plant breeders’ rights.

Such disclosure requirement can work as a “checkpoint” to monitor and examine compliance by a user of GRs and/or TK with the national ABS laws of the country provider and in accordance to the international ABS rules set out in the CBD and Nagoya Protocol. The disclosure requirement can also assist in preventing the grant of erroneous patents over GRs and/or TK by facilitating the monitoring patent grants in order to eventually challenge their validity, e.g. in cases where the TK is widely disclosed and thus part of the public domain.

The current negotiating text at WIPO includes a proposal to make mandatory for all countries to require disclosure of the country of origin or source of GRs and/or TK in patent applications and evidence of compliance with ABS requirements, including PIC.¹² Moreover, it is also proposed that international systems for filling patent applications, e.g. the Patent Cooperation Treaty and the Patent Law Treaty, also be amended to include the disclosure requirement.¹³

Introducing a disclosure requirement in national patent law is important but insufficient, as the impact is limited to national patent applications. Thus, the current negotiating text at WIPO also would include an agreement that would cover all national patent offices as well as international systems for filling in national patent applications, e.g. introducing the disclosure requirement in relation to GRs and/or TK in the WIPO Patent Cooperation Treaty and Patent Law Treaty. The disclosure requirement could also be extended to cover plant breeders’ rights.

Rigorous patent examination

To improve the patent examination process to avoid erroneous patents over GRs and/or TK, several complementary actions can be taken. These include, reducing the scope of what is patentable – i.e. making use of exclusions and limitations to patent rights – and patent offices to apply a higher threshold in determining whether a patent application meets the criteria of patentability. The tightening of the standards of patentability and more rigorous examination process is conducive to the overall good functioning of the patent system, ensuring that only real innovation is rewarded.

Comprehensive prior art search

With the objective of improving patent examination in relation to GRs and/or TK, patent offices should expand their searches for prior art, to include material disclosed in any form, in writing or otherwise,

and anywhere in the world. International agreement on this principle would be valuable. But beyond promoting that patent offices carry out extensive searches in relation to GRs and/or TK, practical measures need to be developed to effectively facilitate such search. One way to improve information available to patent examiners in conducting searches for prior art in relation to GRs and/or TK is to increase documentation of disclosed TK, whether associated or not to GRs, and make such material available to patent offices. One form of documentation is databases. Database development can serve as a complementary activity as part of a larger set of policies to prevent misuse and misappropriation; alone it is of very limited effect. It is important that such databases only include TK that has been disclosed –is known- outside the TK community, and that such collection be made with the consent of the TK holders, where it is possible to identify the identity. Otherwise, databases could serve to increase the misuse and misappropriation by third parties. In a situation where the status of TK in the IP definition of the public domain is unclear, e.g. where national law does not recognize or given means for TK holders to enforce their pre-existing moral and human rights over their TK against uses by third parties, databases could serve to effectively place TK in the public domain. Hence, databases also raise concerns on access to the database by third parties and further dissemination of TK without consent or benefit sharing. Emphasis on databases also places the burden on the country and TK communities to prove their knowledge is in the public domain, rather than on patent offices to establish the lack of prior art.

Special attention must be given to TK that is undisclosed or secret. While there may be policy rationale for documenting such TK for conservation purposes, the decision must lie with TK holders and process led by them. Moreover, prior to documentation of and disclosure of secret/sacred TK, TK holders must be provided with legal means under national law to maintain such information secret and protected against unauthorized use by third parties.

Use of IP for the protection of TK

Existing IP tools can, to some extent, serve to provide legal protection against unauthorized use by third parties – defensive protection- and to address cases of misuse. For example, trademark law can be changed so that the registration of a trademark is not allowed or can be cancelled in case the trademark is offensive or falsely suggests a connection to an indigenous or a local community.

IP law may also be used to provide positive protection to certain forms of TK, in the form of IP rights to

TK holders. In doing so, it recognizes the innovative and creative character of TK, as these are creations of the mind. For example, tangible expressions of folklore such as original handicrafts can be protected through certification marks or trademarks. However, the effectiveness of the IP tool for the purported objectives depends largely on the implementation. Without long-term sustained support, including technical and financial, it is very difficult and costly for TK holders to assert and enforce IP rights. Moreover, the particularities of TK, -e.g. held collectively, passed on from generation to generation, intangible forms of TK-, may not fit easily within the current IP system, thus there are limited cases in which TK based innovations can be protected with existing IP rights. An additional limitation to the use of IP tools to protect TK is the uncertainty of status of the TK in the context of the 'public domain' from an IP perspective, if national law does not extend beyond the community context the recognition of the rights of TK holders under customary law and human rights law. Importantly, the concepts of the IP system may also be at odds TK systems and TK holders, inappropriate or incompatible with their beliefs and practices, and therefore not the tool of preference of TK holders.

Developing a Sui Generis regime of protection for TK

Another policy option is to design a distinct -sui generis- legal system specifically for the protection of TK and TCEs. However, there is no single definition for what can constitute a sui generis system, rather there is an understanding of what it is not – a sui generis system is not the application of existing IP tools to TK. Thus, a sui generis system can be narrowly defined and focus on a single policy measure or it can be designed more broadly to include a range of policy measures and mechanisms, which can be tools for defensive and/or positive protection, e.g. changes to existing IP laws for defensive protection such as not allowing registration of offensive trademarks and introducing a disclosure requirement for GRs and TK in IP applications, or extension of IP concepts for positive protection. These mechanisms can in principle co-exist with the use of existing IP tools, where applicable, to protect TK.

While there can be a range of possible measures, within the context of WIPO the discussion on the protection of TK including TCEs has focused in the past years on developing an IP-type sui generis regime for positive protection that would grant exclusive IP-type rights to TK holders as a means to control use beyond the community and recognize the value of TK. An IP-type of sui generis regime is one

inspired in IP concepts that are extended to the particularities of TK innovations or creations (e.g. extension of patent or copyright). The effect of such regime would be to broaden the IP system to include TK innovations and creations by recognizing collective IP-type rights for TK-holders. While there are some national experiences with IP-type regimes, its extension to international law is challenging and it may not respond to the broader demands for protection of TK by indigenous and local communities. This approach will necessarily entail curtailing the scope of the TK and its expressions that could be covered for protection under this system. For example, TK that is already widely known outside the community or that cannot be distinctively associated to a single community would be difficult to protect under an IP type sui generis system of positive protection. Problems with the sui generis IP approach include difficulties in identifying the title-holders particularly where TK is shared among the TK community or among several TK communities, the subject matter of protection, the criteria for eligibility and modes of acquisition and the duration of protection, e.g. TK holders seek indefinite protection.¹⁴

Alternative approaches include sui generis regimes built on the recognition and enforcement of customary law beyond the community, or a compensatory liability regime for TK that is already disclosed that would give TK holders compensation for the use by third parties of their TK.

The current WIPO consolidated texts on GRs and TK include a proposal for a mandatory disclosure requirement for GRs and/or TK used in a claimed invention or new plant variety, an important defensive protection measure.

3. State of Play of Negotiations at WIPO

Developing countries first requested that WIPO start discussions on intellectual property and GRs and TK in 1999 in the Standing Committee on the Law on Patents (SCP).¹⁵ In 2000 a compromise reached to create a time-limited body to discuss IP issues that arise in the context of (i) access to GRs and the sharing of benefits; (ii) the protection of TK, whether or not associated with those resources; and (iii) the protection of expressions of folklore (similarly referred to as TCEs). The focus of WIPO discussions would be the IP linkages that are not dealt with in other international fora.

An intergovernmental committee – the IGC- was established with a two-year mandate to identify the problems and solutions. The IGC is accountable to the General Assembly -the highest Member state body in WIPO-, for its work. Since 2000, the IGC has met regularly and its mandate renewed or enhanced every two

years. The Committee is open to intergovernmental and civil society observers, including indigenous groups and local communities. These however do not have decision-making power.

WIPO Member States have continuously renewed the mandate of the IGC since 2009 with the aim to “continue to expedite its work with full engagement to undertake text-based negotiations with the objective of reaching an agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs” (WO/GA/43/22). Additionally, the IGC is requested “to submit to the General Assembly the text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs, with a view to finalizing the text(s) within the biennium [more recently 2014/15]. The General Assembly [more recently in 2014] will take stock of and consider the text(s), progress made and decide on convening a Diplomatic conference, and will consider the need for additional meetings, taking account of the budgetary process.” A detailed work plan for the IGC – calendar of meetings and topics- is also regularly established to cover the work in the biennium. The Development Agenda also called explicitly in recommendation 18 on the IGC to “accelerate the process on the protection of GRs, TK and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments.”¹⁶

Breakdown in the negotiations

The last –twenty-eighth– session of the IGC took place in July 2014. The usual format of plenary negotiations was replaced by a smaller expert group to undertake an assessment of issues that cut across the three current negotiating texts on GRs, TK and TCEs. Six main cross-cutting issues were identified: 1) capacity building (GRs, TK, TCEs), 2) disclosure requirement (GRs, TK), 3) a tiered approach to the protection of TK and TCEs, 4) non-diminishment provisions (GRs, TK, TCEs), 5) objectives (GRs, TK, TCEs) and 6) public domain (TK, TCEs). However, the IGC could not agree on a common assessment of the progress made nor the way forward to recommend to the General Assembly. Thus, it only forwarded to the General Assembly 2014 the three texts that the IGC has advanced until its twenty-seventh session: 1) a consolidated document relating to IP and GRs, 2) draft articles on the protection of TK, and 3) draft articles on the protection of TCEs.¹⁷

The General Assembly in 2014 failed to make a decision to continue the negotiations in the IGC. The General Assembly is the highest decision making

body in WIPO related to norm-setting activities. It takes the final decisions, but it is generally informed by recommendations from the expert technical committees such as the IGC, which advance the substantive negotiations. The General Assembly in 2014, based on an assessment of the state of the work on the three texts on GRs, TK and TCEs had to decide whether to convene a Diplomatic Conference – the last treaty making stage in WIPO. It also had to provide guidance on the process forward in 2015, such as the need for additional meetings of the IGC or other set up in 2015.

The lack of any decision by the General Assembly in 2014 was a setback in the negotiations. However, it has also provided a space for reflection. The upcoming General Assembly in 2015 will be decisive. The mandate of the IGC is expiring this year unless it is renewed by the General Assembly.

Cause of the breakdown

This follows a series of stalemates in the negotiations on GRs and TK at WIPO. While in the IGC the work has advanced –there are three negotiation texts and numerous studies and analysis produced-, the diverging negotiation positions remain largely unchanged. Critically, despite the mandate of the IGC under instruction of the General Assembly and reasserted by the Development Agenda recommendation, a number of developed countries are not in agreement to move work forward on the basis of the three existing texts or on the outcome of the exercise to establish new binding treaty or treaties. As an example of this, a group of countries have submitted separate proposals for “Joint recommendations” on GRs and TK, and on databases for defensive protection of GRs and associated TK, which if agreed would move the work of the IGC away from work on the consolidated texts and binding norm-setting.¹⁸ At the General Assembly 2014 discussions centred on defining the future work of the IGC. There were divergent views on the assessment as to whether the work on the texts is mature enough to recommend to the General Assembly to set a date for a Diplomatic Conference and on the work plan to follow to advance the outcome. However, the underlying cause for the stalemate is conflicting interpretations on what is the work that the IGC has been entrusted to do. The majority of developing countries interpret the IGC mandate as requiring a hard-law, norm-setting outcome, in the form of a new treaty or treaties. In contrast, developed countries organized as Group B, –notably the United States, Japan and the European Union-, maintain that no agreement has been reached on the form of the international legal instrument(s) and prefer soft law, non-binding solutions, such as a declaration of principles or voluntary norms. The United States recently has gone as far as to assert that the IGC

mandate has been regularly renewed “to allow for continued conversation.”¹⁹

At the past 28th session of the IGC, two main contrasting views were evident in the General Assembly 2014. On the one hand, the African Group supported by a group of Like-Minded Countries, and on the other hand, the United States, supported by Japan and the European Communities. The African Group affirmed that substantial progress had been made on all three texts to enable the IGC to recommend to the GA in 2014 to decide to convene a Diplomatic Conference and proposed that a date be set for November 2015. It also proposed a work program of IGC sessions in 2015 to finalize the texts ahead of the Diplomatic Conference. In contrast, Group B, seen by developing countries as an attempt to change or deviate from the original mandate given to the committee by the WIPO General Assembly. The group of Latin American Countries (GRULAC) took a conciliatory view and proposed a work program for 2015 that included IGC sessions and one including a high-level segment with Ambassadors and senior capital-based officials, and to recommend the General Assembly in 2015 to decide on convening a diplomatic conference, but not recommending any date. Essentially, it proposed a continuation of the current mandate.

Negotiation positions

Predictably, the negotiations are fraught with tensions. There are many diverging interests concerning the international regulation and use of GRs and TK among countries, users and providers, and indigenous peoples and local communities. These divergences that exist at the national level are only amplified in international negotiations.

One way of understanding the current state of negotiations is to identify the variances among countries’ international obligations and national laws in relation to IP, GRs and/or TK, and to draw a parallel to their negotiation positions. At least three distinct profiles can be identified in the IGC. First, and currently the biggest obstacle to advancing the work, is the lack of genuine interest of some countries in reforming their national IP norms and opening up the international IP system to accommodate issues related to GRs, TK and TCEs. The United States stands out in this category, together with Japan. The US and Japan, across various negotiation fora (i.e. CBD, WTO), have consistently maintained the position that issues related to access and benefit-sharing of GRs and associated TK, and the protection of TK and TCEs belong outside the IP field and any perceived problems can be addressed without requiring

any changes to the IP system. Private law contracts are considered to be adequate means for ABS. The most the United States has conceded is in bilateral agreements, where it has supported in principle PIC and ABS and agreed to best efforts to improve patent searches to avoid erroneous patents in relation to GRs and associated TK.²⁰ In WIPO the same position stands. Second, there are countries with various degrees of experience and offensive interests on the issues. On the disclosure requirement, this category includes large developing countries such as Brazil, China, India, South Africa and countries of the Andean Community. The European Union has expressed in principle support for the disclosure requirement, provided it does not affect the validity of a granted patent. On the protection of TK and TCEs, there a diversity of interested countries, including developing countries, Australia and New Zealand, and to a lesser extent the European Union and the Central European Baltic States. The discrepancies are the tools for protection and the legal nature of the instrument. Third, there are countries with offensive interests but with limited experience with related national legislation, which explains why they play a more passive role in the negotiations. This is the case of many developing countries that are participating in the international discussions while in parallel working towards developing related national legislation.

The negotiation positions among TK holders such as indigenous and local communities are also not unanimous. While there is general support for developing rules within the IP system against misappropriation and misuse of GRs and/or TK, views on the development of IP-type tools for positive protection diverge. For example, while some representatives in the IGC emphasize the need for a broader *sui generis* regime for TK protection that builds upon customary law rather than IP concepts, others support the extension of IP-type *sui generis* tools for TK protection as a way to make their pre-existing rights under customary law enforceable against third parties outside the community.

4. The Future of Negotiations at WIPO

The WIPO General Assembly in October 2015 will discuss and decide on the future of the negotiations on GRs and TK. Critically, it will decide on whether to extend the IGC mandate for the 2016-2017 period and the terms of the extension.²¹

There are various proposals for consideration by the General Assembly, including by the African Group,²² the United States,²³ by the Holy See, Kenya, Mozambique, New Zealand, Norway and Switzerland (joint-proposal),²⁴ and the group of Latin American countries

(GRULAC) which has been submitted to the IGC facilitator. These provide a frame for the informal deliberations to arrive at the final decision.

Proposals on the future of the IGC Committee

The main question is the renewal of the mandate for the negotiations. Developing countries are united in seeking a strong mandate for negotiations leading towards the conclusion of an international treaty or treaties. Most countries support at minimum a renewal of the mandate. That is to continue the negotiations "to submit to the General Assembly [date to be defined] the text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs, with a view to finalizing the text(s) within the next biennium. The General Assembly will take stock of and consider the text(s), progress made and decide on convening a Diplomatic conference, and will consider the need for additional meetings, taking account of the budgetary process." The negotiations would continue to build on the existing work carried out by the Committee and use all WIPO working documents, including WIPO/GRTKF/IC/28/4, WIPO/GRTKF/IC/28/5 and WIPO/GRTKF/IC/28/6, which are to constitute the basis of the Committee's work on text-based negotiations, as well as any other textual contributions by members. Funding and expertise would continue to be provided by the Secretariat to experts of developing countries and LDCs as regular practice.

There are different ideas on how to move forward the mandate structure the work plan. Notably, developed countries that are organized under Group B do not have a unified position. The African Group proposes to renew the mandate but to continue the work not in the IGC but under a new structure, as a Standing Committee. GRULAC proposal is also supportive of a renewed mandate. The joint-proposal also calls for a renewal of the mandate. In all proposals, the General Assembly would review the state of negotiations in 2016 and by 2017 the texts to take decision on a Diplomatic Conference. However, the joint proposal would water down the current mandate, as it proposes that the IGC "continue its work to arrive at a recommendation to the General Assembly 2017 *on the future work*, including on convening a diplomatic conference, continuing negotiations, or otherwise concluding the negotiations, on an international legal instrument(s) on intellectual property and GR, TK and TCEs."

Only the United States wants to put an end to negotiations, by proposing that the IGC mandate is allowed to lapse. However, this appears to be a strategic tactic rather than a final position, given that

as recent as the last July 2014 session of the IGC the United States had proposed a renewal of the IGC mandate with an automatic renewal of the period the IGC, proposing that the IGC could continue to meet "in the next biennium with the same frequency as other WIPO committees, with an agenda to be decided on a meeting-by-meeting basis".

Possible Conversion of the IGC to a Standing Committee

The African Group is proposing, in addition to continuing the negotiation mandate towards a treaty or treaties outcome, to establish a new permanent standing committee in replacement of the time-bound IGC. One of the benefits of creating a standing committee is that it would remove the constraint in the current time-bound IGC of having to spend time negotiating the renewal of the mandate every two years. However, the establishment of a permanent committee in itself will not reduce the uncertainty surrounding the negotiations. The burden of negotiating procedural aspects such as detailed future work plans or the specific recommendations to be forwarded to the General Assembly would remain, as is currently the case in the IGC. In fact, the working method of standing committees is such that in each meeting it decides on its agenda and future work, thus in essence the political resistance that is raised in the context of speeding up the work of the IGC, -which is the main obstacle-, is not likely to be diminished by the establishment of a standing committee. The norm-setting exercises in various existing WIPO standing committees also reveals that even when agreement on a norm-setting goal is achieved, it does not ensure a speedy conclusion to the exercise.

Another challenge of creating a new standing committee is that member states at the level of General Assembly would need to expend significant political capital to negotiate and agree by consensus on its mandate. In light of the continued divergent readings of the current IGC mandate and the inability of the General Assembly in 2014 to set a future date for a Diplomatic Conference or even to agree on a work program for the IGC in 2015, it does not appear that it is politically viable to seek agreement on a mandate for a new standing committee that would improve upon the existing IGC mandate. That is, to introduce explicit language to define unequivocally the form of the outcome that the committee should produce. Instead, opening a negotiation to revise the IGC mandate carries the risk of resulting in a watering down of as opposed to the strengthening of the current mandate. Certainly a number of developed countries would seek to do away with the existing commitment to negotiate towards concluding an international legal instrument(s) in a time bound manner (as is already the case in the proposal by the

United States). The establishment of a standing committee also carries the risk of removing the urgency of working towards an agreed solution. The work could deviate towards sharing of national and regional experiences and discussions on activities other than norm-setting that while informative may further delay the text-based work. In fact, the proposal of the United States, an open deterrent of norm setting in the area of GRs and TK in WIPO, submitted during the IGC in July 2014 a proposal that headed towards the direction of a standing committee.²⁶ The United States proposed to focus the work of the IGC in 2015 on sharing local, national and regional experiences on GRs and protection of TK. It foresaw that if no agreement could be reached by the IGC on the recommendation to forward to the GA in 2015, the IGC would continue to meet “in the next biennium with the same frequency as other WIPO committees, with an agenda to be decided on a meeting-by-meeting basis”.

Scenario of no agreement reached by the General Assembly in 2015

The WIPO General Assembly in 2015 should produce a decision to continue the negotiations on IP, GRs, TK and TCEs towards norm-setting. The informal role of the Facilitator, Ian Gross, will be important to mediate between the polarized positions.

However, if the General Assembly fails to agree to a decision that would satisfy all Member States, it does not mark the end of the process. Therefore, demandeurs of the negotiations should not shy away from aiming to arrive at a solution that does not, at minimum, diminish the current language of the mandate and continues to build upon the work already achieved (the consolidated texts on GRs, TK and TCEs). In any scenario, the more fundamental issues underlying the ability of the IGC to progress its work will need to be dealt with, which none of the three proposals to the General Assembly 2015 directly tackle.

If the General Assembly 2015 fails to take a decision, the issues can continue to be raised for discussion at WIPO in the existing Standing Committees for norm setting. For example, for issues in relation to patents, the Standing Committee on Patents (SCP) is well suited. The proposal for patent offices to require patent applicants to disclose the origin/source of the GRs and TK can be brought to the SCP. In fact, Group B at the outset of the IGC was of the view that “the Committee should study all aspects of this issue, but advised that, when the Committee recognized that particular issues, such as patents, required specialized expertise, the corresponding

WIPO Standing Committees should be responsible for addressing these issues” (WO/GA/26/10, Para 35). Similarly, the working texts on TK and TCEs can also be brought for discussion to the SCP, the Standing Committee on Copyright and Related Rights (SCCR), the Standing Committee on Trademarks and Industrial Designs (SCT), the Committee on Development and Intellectual Property (CDIP), or the Advisory Committee on Enforcement (ACE), for discussion on aspects related to the expertise of each committee.

Finally, developing countries and LDCs, as well as indigenous peoples and local groups demandeurs of the IGC process should continue to explore in parallel other fora to advance related discussions, including the CBD Working Group on Article 8(j) and the WTO Council for TRIPS.

5. Addressing Negotiation Challenges

As countries aim to put an end to the stalemate and restart talks at WIPO, one of the issues at hand is whether to continue negotiations in a time-limited body, as the current IGC, or in a new format. The upcoming WIPO Assembly in October 2015 will settle the question. The choice is important, but not decisive in moving negotiations forward. Progress can only be achieved by addressing the problems that have kept the IGC from advancing its work. Some of the challenges are as follows:

- *Political will to negotiate.* The lack of political will by many developed countries is the key obstacle to moving forward. Despite the IGC mandate to speed up text-based negotiations, they are backtracking on commitments. Rather than focusing the work of the IGC on the consolidated texts on GRs, TK, TCEs and GRs, they are calling for additional studies and to return to sharing of local, national, regional experiences, stalling and delaying the text based work of the IGC.

- *Commitment to mandate.* The current mandate for negotiation allows for divergent interpretations on what should be the outcome of the negotiations. The mandate of the IGC is specific in elaborating that the outcome of negotiations should be text(s) of an international instrument(s) for the protection of GRs, TK and TCEs. However, the wording used has proven controversial. The “instrument” is open for interpretation, with developed countries preferring a non-binding solution and developing countries a binding treaty.

- *Focus and narrow down texts.* For a binding treaty solution to be workable, it will require narrowing the scope of the international obligations to be harmonized and/or increasing the flexibility in the choice of measures for implementation at the national level of

the treaty obligations. Consensus needs to be built on creating new rules within the international IP system to tackle misappropriation and misuse of GRs and TK - problems that cannot be dealt with effectively through national legislation and implementation alone. The current draft working texts do not centre sufficiently on this goal. While the policy objectives and scope of the texts, particularly on GRs, have been narrowed down, the substantive articles, particularly on TK and TCEs, lack sufficient focus. Consensus also should be built around key principles of ABS of prior informed consent for access and benefit sharing with respect to the utilization of GRs and associated TK. The new international instruments should set minimum international standards for member states to take measures to tackle misappropriation and misuse of GRs and TK and provide protection for TK, while Issues that do not fall within the criteria of gaps in the international dimension of the problem should be left out of the scope of the texts and rather supported by technical assistance by the WIPO Secretariat as requested by countries and stakeholders or more relevant international fora. For example, in relation to information and experience sharing via seminars and studies, the documentation and development of databases of prior art for disclosed TK, whether or not associated to GRs, and the establishment and/or reform of national laws on ABS and IP laws.

Flexibility is important to drive consensus, particularly for situations in which a diversity of approaches and preferences are possible among countries and distinct indigenous and communities in a given local context. An example of flexibility could be to allow parties choice among range of policies and measures to recognize the rights of indigenous peoples and local communities in relation to their TK while ensuring protection on the basis of reciprocity. The agreement could allow countries to implement various measures for the protection for TK and differentiate according to specific characteristics of the TK as is the current "two-tiered" approach introduced in the TK working text, e.g. that which is already disclosed outside of the community from that which is held within the community, and allow for national laws to recognize existing customary laws with regards to TK management and control over access to GRs by indigenous or local communities.

- *Insufficient preparedness to negotiate.* Negotiators at the IGC often lack of decision-making power and/or detailed instructions from capital. This in turn may reflect insufficient political priority assigned to the negotiations or due to poor coordination among relevant capital-based institu-

tions (i.e. Ministries of Environment, Ministries of Foreign Affairs, IP Offices) and with Geneva-based missions. The coherence and continuation in negotiation positions over time is also fragile due to the rapid turnaround of negotiators and insufficient coordination among departing and new entrants, leading to unnecessary re-opening of issues already discussed which delays text based work.

- *Gap in technical expertise and neutral facilitators.* The issues being addressed are complex and cut across various areas of law, including intellectual property, environment and human rights. Single focus expertise is insufficient in negotiator teams. Knowledge is required on the international and national ABS regime, existing means of GR and TK protection in national law and knowledge of national IP laws and the international IP system. Most delegations are unable to set up a mixed team of negotiators and experts for every IGC session that can thoroughly cover all relevant aspects. In the earlier years of the IGC the WIPO Secretariat played an important role in bringing additional technical expertise to the discussions. Some of the activities included elaborating background documents such as a glossary of definitions and analyses of gaps in the international legal framework for the protection of TK including TCEs as well as providing text-based language suggestions for the draft texts that served as the basis for the negotiations.

The Secretariat also acted as facilitator, following a standard practice in WIPO norm-setting bodies. While norm-setting negotiations are and must remain member-state driven, facilitation is necessary to drive divergent views towards consensus. But after the mandate of the IGC was strengthened by the GA in 2009 for the 2010-11 biennium to focus on text-based work for an international instrument(s), and renewed thereafter, the Secretariat has scaled back its input and facilitation role at the insistence of some member states. In more recent IGC sessions the Chairperson has taken a key facilitator role also aided by a "Friend of the Chair" for the future work and other ad hoc facilitators for the crosscutting review of issues. However, the Chair and other facilitators have not received full backing from all member states. Facilitators must be seen by all member states as neutral and then be allowed to mediate, in informal settings, to help find common ground. Member states then need to be ready to seriously consider and build upon the compromise solutions proposed.

- *Insufficient funding to ensure broad participation.* The participation of negotiator teams from developing countries and LDCs with sufficient expertise and of observers of indigenous and local communities requires funding to be provided by the WIPO Secretariat.

6. Conclusion

The current international IP system currently facilitates the grant and enforcement of exclusive IP rights for while not providing sufficient safeguards against the misappropriation and misuse of GRs and TK or recognizing the rights of indigenous and local communities in respect to GRs and TK. Under existing international IP agreements, IP rights are allowed over subject matter involving GRs and/or TK that are accessed and/or utilized –conduct R&D–without the consent of the country of origin or of the holders of TK whose rights may be established in national legislation or customary laws, and without sharing of monetary or other benefits that may arise from their utilization. The current IP system also allows the grant of patents and other forms of IPRs involving GRs and/or TK that fail to meet the requirements of novelty and inventiveness, which are difficult and costly to challenge. These situations are contrary to the objectives of the CBD and of its Nagoya Protocol that call for the implementation of international agreements to be mutually supportive.

WIPO has embarked since 2000 on discussions on the interrelationship of IP, GRs and TK, and since 2010 agreed to find common international solutions to the cross-boundary problems of misappropriation and misuse of GRs and TK. It is also agreed to examine the demands of indigenous peoples and local communities with respect to their pre-existing legitimate rights to control and manage the access and use their TK whether or not related to GRs, whether such rights can be recognized and protected in international law through changes within the IP system or by other means, such as by extending the recognition and enforcement of the related customary practices against third parties.

Even though a negotiating mandate was agreed, the progress in the work of the IGC is at risk of being derailed as Member States have hardened their negotiation positions. This Policy Brief provided with a reflection on the substantive questions that the WIPO negotiations should work towards providing international solutions, and identified challenges and constraints in the current process that need to be addressed to move forward the negotiations. Ultimately, the future of the WIPO negotiations on GRs and TK ultimately depend on the good will, commitment and compromise from all parties.

Note: The views expressed in this paper are the personal views of the author and do not necessarily represent the views of the South Centre or its

Member States. Any mistake or omission in this paper is the sole responsibility of the author.

Endnotes

1. There are linked processes within the context of the Convention on Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the CBD, the Food and Agriculture Organization (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Union for the Protection of Plant Varieties (UPOV), the World Trade Organization's Agreement on Related Aspects of Intellectual Property Rights (TRIPS), and the UN Permanent Forum on Indigenous Issues (UNPFII).
2. Other forms of IP rights include plant breeders' rights, geographical indications, industrial designs, copyright and trademarks.
3. The CBD refers to IP rights in Article 16, and notes that "The Contracting Parties, recognizing that patents and other IP rights may have an influence on the implementation of the Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive and do not run counter to its objectives".
4. See for example, EU ABS legislation. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014R0511>
5. The United States, though not party to the CBD, recognized the importance of obtaining PIC prior to access to GRs, equitable benefit sharing from use of TK and GRs in a side letter to the Free Trade Agreement with Peru. Available at https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file719_9535.pdf.
6. For further elaboration on the international ABS regime under the Nagoya Protocol, see South Centre Policy Brief 18, May 2015. Available at <http://www.southcentre.int/policy-brief-18-may-2015/>.
7. Detailed descriptions of cases are found in Robinson, Daniel F. "Patent-Related Biopiracy Cases." *Confronting Biopiracy: Challenges, Cases and International Debates*. (pp. 67-76). United Kingdom: Earthscan, 2010.
8. Samuelson P., "Mapping the Digital Public Domain: Threats and Opportunities" *Law and Contemporary Problems* 66.1 (2003): 147-172. Available at: http://works.bepress.com/pamela_samuelson/18.

9. See Correa C., *Access to Knowledge: The case of Indigenous and Traditional Knowledge*. Available at https://mitpress.mit.edu/sites/default/files/titles/free_download/9781890951962_Access_to_Knowledge_in_the_Age_of_Intellectual_Property.pdf.
10. For further discussion on customary law regulating TK access and use, see http://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf.
11. The WIPO secretariat has produced analysis identifying the gaps in the protection of TK and TCEs. Available at <http://www.wipo.int/tk/en/igc/gap-analyses.html>.
12. At the WTO, developing countries also propose the disclosure requirement as an amendment to the TRIPS Agreement, with the added effect of securing its enforcement through the WTO Dispute Settlement Mechanism. See document TN/C/W/59.
13. Switzerland has also proposed the amendment to the PCT to include the disclosure requirement, document WIPO/GRTKF/IC/11/10. Available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_11/wipo_grtkf_ic_11_10.pdf.
14. See Correa, C. *Traditional Knowledge and Intellectual Property* (Quakers United Nations Office, Geneva, 2001).
15. Discussions were initiated at the third session of the Standing Committee on the Law of Patents (SCP) in September 1999. See *Genetic Resources: Factual Update of International Developments*, document WIPO/GRTKF/IC/11/8 (b). Available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=79193.
16. See <http://www.wipo.int/ip-develop-ment/en/agenda/recommendations.html#b>.
17. See Annex A, B and C of the WIPO document WO/GA/47/12, Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). Available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=307937
18. See WIPO document WIPO/GRTKF/IC/28/7, Joint Recommendation on Genetic Resources and Traditional Knowledge, submitted by the Delegations of Canada, Japan, Norway, the Republic of Korea and the United States of America, and WIPO document WIPO/GRTKF/IC/28/8, Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge associated with Genetic Resources, Joint Recommendation on Genetic Resources and Traditional Knowledge, submitted by the Delegations of Canada, Japan, the Republic of Korea and the United States of America.
19. See WIPO document WO/GA/47/17, Matters Concerning the IGC, Proposal by the United States.
20. Ibid, at 5.
21. See WIPO document WO/GA/47/12, Matters Concerning the IGC, Prepared by the Secretariat, decision Para. 7.
22. See WIPO document WO/GA/47/16, Conversion of the WIPO IGC to a Standing Committee, proposal by the African Group.
23. See WIPO document WO/GA/47/17, Matters Concerning the IGC, Proposal by the United States.
24. See WIPO document WO/GA/47/18, Matters Concerning the IGC, Proposal by the Holy See, Kenya, Mozambique, New Zealand, Norway and Switzerland.
25. See WIPO document WO/GA/47/17, Matters Concerning the IGC, Proposal by the United States.
26. See IGC Work Plan for 2015, proposal of the United States of America circulated during the IGC 28th session.

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**SOUTH
CENTRE**

Chemin du Champ-d'Anier 17
PO Box 228, 1211 Geneva 19
Switzerland

Telephone: (4122) 791 8050

Fax: (4122) 798 8531

E-mail: south@southcentre.int

<http://www.southcentre.int>