

A Breakthrough in Negotiations on Intellectual Property, Protection of Genetic Resources and Traditional Knowledge in WIPO?

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State of play

Developing countries led the call for negotiations in WIPO for the effective protection of GR, -TK and TCEs, yet to date no normative work has emerged from over 20 years of deliberations. The South Centre has provided various analyses on the scope and dynamics of these exchanges.¹ The Intergovern-

mental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), established in 2000 to identify the problems and solutions, is accountable to the WIPO General Assembly for its work. Since then, the IGC has met regularly, and its mandate renewed or revised every two years. The WIPO Development Agenda called explicitly in recommendation 18 of the IGC to “accelerate the process on

Abstract

This Policy Brief provides a brief summary of the current negotiations in the World Intellectual Property Organization (WIPO) for an international legal instrument or instruments relating to intellectual property to ensure the balanced and effective protection of genetic resources (GRs), associated traditional knowledge (TK) and traditional cultural expressions (TCEs). The General Assembly in June 2022 took a significant decision to schedule a Diplomatic Conference in 2024 to conclude a treaty on the protection of GRs and associated TK. However broader protection for TK and TCEs is not part of the decision. The 44th session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), held on 12–16 September 2022, focused on advancing text-based negotiations on these issues and two more sessions will follow. Developing countries must coordinate closely, in parallel to the IGC sessions, to agree on a common negotiating position for the treaty to be concluded no later than in 2024.

Esta Informe sobre políticas ofrece un breve resumen de las negociaciones actuales en la Organización Mundial de la Propiedad Intelectual (OMPI) para un instrumento o instrumentos jurídicos internacionales relativos a la propiedad intelectual que garanticen una protección equilibrada y eficaz de los recursos genéticos, los conocimientos tradicionales asociados y las expresiones culturales tradicionales. En junio de 2022, la Asamblea General tomó la importante decisión de programar una Conferencia Diplomática en 2024 para concluir un tratado sobre la protección de los recursos genéticos y los conocimientos tradicionales asociados. Sin embargo, una protección más amplia de los conocimientos tradicionales y las expresiones culturales tradicionales no forma parte de la decisión. La 44ª sesión del Comité Intergubernamental de la OMPI sobre Propiedad Intelectual y Recursos Genéticos, Conocimientos Tradicionales y Folclore (CIG), celebrada entre el 12 y el 16 de septiembre de 2022, se centró en el avance de las negociaciones basadas en textos sobre estas cuestiones, a las que seguirán otras dos sesiones. Los países en desarrollo deben coordinarse estrechamente, en paralelo a las sesiones del CIG, para acordar una posición común para las negociaciones del tratado a más tardar en 2024.

Ce Rapport sur les politiques présente un bref résumé des négociations en cours au sein de l'Organisation mondiale de la propriété intellectuelle (OMPI) pour un ou plusieurs instruments juridiques internationaux relatifs à la propriété intellectuelle afin d'assurer une protection équilibrée et efficace des ressources génétiques, des savoirs traditionnels associés, et des expressions culturelles traditionnelles. En juin 2022, l'Assemblée générale a pris la décision importante de programmer une conférence diplomatique en 2024 afin de conclure un traité sur la protection des ressources génétiques et des savoirs traditionnels associés. Cependant, une protection plus large des savoirs traditionnels et des expressions culturelles traditionnelles ne fait pas partie de cette décision. La 44e session du Comité intergouvernemental de la propriété intellectuelle relative aux ressources génétiques, aux savoirs traditionnels et au folklore de l'OMPI (IGC), qui s'est tenue du 12 au 16 septembre 2022, s'est attachée à faire progresser les négociations textuelles sur ces questions et deux autres sessions suivront. Les pays en développement doivent se concerter étroitement, pendant les sessions de l'IGC, afin de convenir d'une stratégie de négociations commune pour que le traité soit conclu au plus tard en 2024.

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the protection of Genetic Resources (GRs), TK and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments.”² The IGC is open to observers from intergovernmental organizations, business representative groups and civil society groups, as well as indigenous groups and local communities.

The IGC mandate is “to expedite its work, **with the objective of finalizing an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to intellectual property which will ensure the balanced and effective protection of GRs, TK and TCEs**”, and “use all WIPO working documents, including WIPO/GRTKF/IC/40/6, WIPO/GRTKF/IC/40/18 and WIPO/GRTKF/IC/40/19, [...] as well as other contributions of Member States, [...] and outputs of any expert group(s) established by the Committee and related activities conducted under Program 4”.³

The WIPO General Assembly has revised the IGC mandate slightly over the past years and has adopted new work plans, as regularly it has fallen behind in progressing towards text-based negotiations. In particular, it delayed calling for a Diplomatic Conference despite the insistence by developing countries. It is thus of great significance that the General Assembly in 2022 has decided that the IGC work must lead to a norm-setting outcome on GRs and associated TK in relation to IP, setting the date for a Diplomatic Conference in 2024. The decision was reached by consensus. Only the United States of America and Japan disassociated from the consensus but did not block it. A proposal by the African Group enabled the final agreement.⁴

WIPO 2022 General Assembly Decision

The main elements of the 2022 WIPO General Assembly’s decision concerning the work of the IGC are as follows:

- a) *decided to convene a Diplomatic Conference to conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources, based on document [WIPO/GRTKF/IC/43/5](#) and any other contributions by Member States pursuant to paragraph (d) below, to be held no later than 2024;*
- b) *decided to convene a Preparatory Committee in the second half of 2023, to establish the necessary modalities of the Diplomatic Conference. The Preparatory Committee will consider at this time, the draft Rules of Procedure to be presented for adoption to the Diplomatic Conference, the list of invitees to participate in the conference, and the text of the draft letters of invitation, as well as any*

other document or organizational question relating to the Diplomatic Conference. The Preparatory Committee will also approve the Basic Proposal for the administrative and final provisions of the Treaty;

- c) *welcomed with gratitude the offer of South Africa to host the Diplomatic Conference no later than 2024;*
- d) *directed the IGC to meet in a special session for five days in the second half of 2023, preceding the Preparatory Committee, to further close any existing gaps to a sufficient level. It is understood that the Preparatory Committee will invite Observer Delegations and Observers;*
- e) *agreed that document WIPO/GRTKF/IC/43/5, the Chair’s text of a Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources will constitute the substantive articles of the Basic Proposal for the Diplomatic Conference. The Preparatory Committee shall incorporate in the Basic Proposal such further agreements of the IGC as are reached pursuant to paragraph (d) above, with the understanding that any Member State and the Special Delegation of the European Union may make proposals at the Diplomatic Conference;*
- f) *agreed to convene an extraordinary session of the WIPO General Assembly (Hybrid), if required, to adopt the decisions and preparatory works leading to the Diplomatic Conference in the second half of 2023, and to direct the secretariat to make the resulting document as the Basic Proposal for the substantive provisions to be considered at the Diplomatic Conference.*⁵

This decision paves the way for a Diplomatic Conference on the issue of protection of GRs and associated TK in relation to IPRs, based on the Chair’s suggested text from April 2019.⁶ The selection of the Chair’s text as the basis for elaborating the draft for the Diplomatic Conference was one of the important compromises reached, with the understanding that any further proposals can be made at the Diplomatic Conference.

Linkage of GRs, TK and TCEs discussions in WIPO and other fora

The linkage of the three issues (genetic resources, traditional knowledge and traditional cultural expressions) needs to be considered as the work of the IGC progresses, and bearing in mind the WIPO General Assembly guidance to use the Chair’s text as a basis for the Diplomatic Conference. The issue of TCEs as such and the overall protection of TK is not covered in the WIPO General Assembly decision of 2022. Nonetheless, based on the IGC mandate and the progress made on these issues, the General Assembly can prior to 2024 define a process to advance such work so as to incorporate it in the scope of the Diplomatic Conference.

Notwithstanding the importance of the work in the IGC, discussions on the protection of GRs, TK and TCEs are not exclusive to WIPO as the work in that Committee focuses on aspects concerning IPRs. Related discussions, broader than on IPR aspects, take place in other fora such as the Convention of Biological Diversity (CBD), the World Trade Organization (WTO), the United Nations Food and Agriculture Organization (FAO) and the World Health Organization (WHO), among others. The discussions in WIPO have focused on defensive and positive protection against misappropriation of GRs, TK and TCEs through the IP regime, and there is the expectation that the work of the IGC should lead to an international solution to these long outstanding challenges.⁷ Accordingly, to a great extent the effort in the IGC is to promote, in particular, the coherent implementation of international obligations under the CBD and its Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (adopted in 2010) and the IP system. At the same time, there are still pending questions with regards to the effective protection of TK in a broader sense, including the recognition of the rights of indigenous and local communities on the basis of human rights law and customary laws.⁸

Advancing negotiations on TK and TCEs

The agreement to convene a Diplomatic Conference in 2024, as noted, is a major step forward. However, this should not mean delaying or abandoning discussions on the protection of TK and TCEs as such, beyond what may be dealt with in the Conference. In this regard, the IGC 45th and IGC 46th sessions should serve to advance discussions on those issues. There is clear recognition of the inadequacies of the IP system as it stands now for the protection of TK and related TCEs, which will require the adaptation of current IP forms or the development of sui generis form of protection.⁹

From the IGC mandate it is evident that the work of the IGC will only be complete when international instruments are developed to ensure the balanced and effective protection of GRs, TK and TCEs. The two main documents for consideration are the consolidated “draft articles” on TK¹⁰ and on TCEs.¹¹ In these discussions there are clear options for the approach to protection, both as defensive (such as a disclosure requirement in patent applications for TK other than that associated to GRs), and offensive (positive) protection through existing IP tools or developing a sui generis system of protection expanding on such tools potentially broader than IP. The IGC has thoroughly reviewed legal and policy options for the protection of TK and TCEs.¹²

Nonetheless, consensus is still elusive on the approach to be followed to develop minimum international standards of protection.

The IGC 44th session produced two revised texts on this matter. The revised texts of “the Protection of Traditional Knowledge: Draft Articles – Facilitators’ Rev.” and “the Protection of Traditional Cultural Expressions: Draft Articles – Facilitators’ Rev.” will be forwarded to the 45th session of the IGC. An ad hoc expert group on traditional knowledge/traditional cultural expressions will meet prior to the session. The Chairperson of the IGC, Ms. Lily Claire Bellamy of Jamaica, also announced that she will produce a text on TK and TCEs, with the aim of facilitating the IGC’s work and to narrow the gaps.

Conclusions

Coordination among developing countries towards common negotiation positions will be crucial to advance the IGC negotiations, as has proved effective in reaching the General Assembly 2022 decision to advance the text on GRs and associated TK towards conclusion of an international instrument by 2024. The decision was a breakthrough in the long-running discussions on the subject. However, for the negotiations to conclude with a successful outcome that responds to the demands of developing countries and indigenous and local communities, much work has to be done before 2024. One of the key areas to advance on IP in relation to GRs and associated TK will be to agree on the red lines for instituting an international obligation to require patent applications to disclose the source and/or origin of the GRs and associated TK used in the claimed invention. While focusing on resolving issues of IP in relation to GRs and associated TK, there is also the need to consider the linkages with the broader protection of TK and of TCEs.

Endnotes:

¹ See Syam N., WIPO Negotiations for an International Legal Instrument on Intellectual Property and Genetic Resources, February 2021, Policy Brief 87, February 2021, [The South Centre | Genetic Resources & TK](https://www.southcentre.int/policy-brief-22-september-2015/); Munoz V., The WIPO Negotiations on IP, Genetic Resources and Traditional Knowledge: Can It Deliver?, Policy Brief 22, 2015 <https://www.southcentre.int/policy-brief-22-september-2015/>.

² The WIPO Development Agenda recommendations, [The 45 Adopted Recommendations under the WIPO Development Agenda](https://www.wipo.int/about-wipo/en/development_agenda/).

³ Report of the WIPO General Assembly, Fifty-Fourth (25th Ordinary) Session Geneva, October 4 to 8, 2021. Document WO/GA/54/15, Para. 168, https://www.wipo.int/about-wipo/en/assemblies/2021/a_62/doc_details.jsp?doc_id=555951.

⁴ Proposal to Advance WIPO Normative Agenda on the Subjects of Genetic Resources Associated with Traditional Knowledge, and the Design Law Treaty, proposal by the African Group, document WO/GA/55/11, https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=578591.

⁵ Draft Report of the WIPO General Assembly Fifty-Fifth (30th Extraordinary) Session, July 14 to 22, 2022, Para 309, document WO/GA/55/12,

https://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_55/wo_ga_55_12_prov.pdf.

⁶ Chair's Text on GRs and associated TK, Prepared by Mr. Ian Gross (IGC Chair), document WIPO/GRTKF/IC/40/CHAIR TEXT, 7 June 2019, [Chair's text on GRs and ATK \(wipo.int\)](#).

⁷ See Syam N., Romero T., Misappropriation of Genetic Resources and Associated Traditional Knowledge: Challenges Posed by Intellectual Property and Genetic Sequence Information, Research Paper 130, April 2021, [The South Centre | Research Paper 130, April 2021](#).

⁸ See for example, Update of the Technical Review of Key Intellectual Property-Related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions within the Framework of Indigenous Human Rights, document WIPO/GRTKF/IC/44. Available from https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=579032; and Okediji, R. Traditional Knowledge and the Public Domain in Intellectual Property, Traditional Knowledge and the Public Domain in Intellectual Property. In: Correa, C., Seuba, X. (eds.) Intellectual Property and Development: Understanding the Interfaces. Springer, Singapore, [Traditional Knowledge and the Public Domain in Intellectual Property | SpringerLink](#); Tobin M. B., Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous Peoples' Resource and Knowledge Rights, Law, Environment and Development Journal, 9/2, 2013, p. 142, [LEAD-journal.org - Customary Law and Indigenous Peoples' Resource and Knowledge Rights](#)

⁹ See for example, Oguamanam, Chidi. Towards a Tiered or Differentiated Approach to Protection of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs) in Relation to the Intellectual Property System. AJIC [online]. 2019, vol. 23, pp. 1-24,

http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-72132019000100004&lng=en&nrm=iso; Okediji, R, A Tiered Approach to Rights in Traditional Knowledge, 58 Washburn Law Journal, vol. 58, 2019, [CONTENTdm \(washburnlaw.edu\)](#).

¹⁰ The Protection of Traditional Knowledge: Draft Articles, document WIPO/GRTKF/IC/44/4, [The Protection of Traditional Knowledge: Draft Articles \(wipo.int\)](#).

¹¹ The Protection of Traditional Cultural Expressions: Draft Articles, document WIPO/GRTKF/IC/44/5, [The Protection of Traditional Cultural Expressions: Draft Articles \(wipo.int\)](#).

¹² See The Protection of Traditional Knowledge: Updated Gap Analysis, document WIPO/GRTKF/IC/44/6, available at [The Protection of Traditional Knowledge: Updated Draft Gap Analysis \(wipo.int\)](#); and The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis, Document WIPO/GRTKF/IC/44/7. Available from [The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis \(wipo.int\)](#).



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