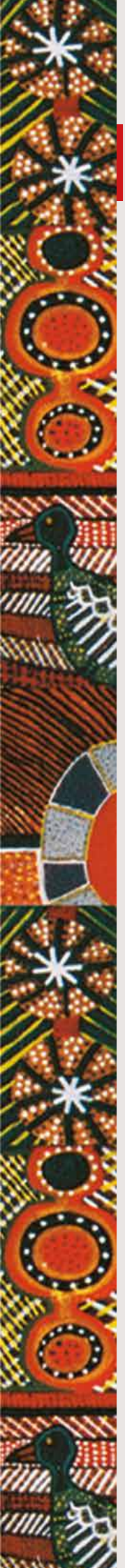

Background Brief

No. 2

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

Established in 2000, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is a forum where WIPO member states discuss the intellectual property issues that arise in the context of access to genetic resources and benefit-sharing as well as the protection of traditional knowledge and traditional cultural expressions (the terms "traditional cultural expressions" and "expressions of folklore" are used interchangeably in WIPO discussions).

The IGC holds formal negotiations with the objective of reaching agreement on one or more international legal instruments that would ensure the effective protection of genetic resources, traditional knowledge and traditional cultural expressions. Such an instrument or instruments could range from a recommendation to WIPO members to a formal treaty that would bind countries choosing to ratify it.

This brief describes the origins and rationale of the IGC, the participation of members and observers including indigenous and local communities, its achievements and the state of ongoing negotiations under its mandate.

Origins and rationale

Work within the intellectual property (IP) community on the protection of traditional cultural expressions (TCEs) goes back to the 1960s. The impetus came from a growing sense in developing countries that folklore embodied creativity and was part of the cultural identity of indigenous and local communities; it was therefore seen as worthy of IP protection, especially since new technologies were making folklore increasingly vulnerable to exploitation and misuse.

The 1967 revision of the Berne Convention for the Protection of Literary and Artistic Works, where protection is based on originality and identifiable authorship, fell short of ensuring adequate protection for TCEs. The member states of WIPO and UNESCO (United Nations Educational, Scientific and Cultural Organization) developed in 1982 a set of Model Provisions for national laws to serve as a source of inspiration for interested countries. In 1996, the WIPO Performances and Phonograms Treaty succeeded in providing for the protection of the rights of performers of expressions of folklore.

Work on the relationship between IP, traditional knowledge (TK) and genetic resources (GRs) is more recent, and stems from concerns regarding the role that IP protection should play in achieving global policy objectives as varied as the conservation of biodiversity (as enshrined in the Convention on Biological Diversity, 1992), food security, free and fair trade, and development.

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These linkages, mainly established by discussions in other international forums, have significant implications for the IP system.

In particular, the spread of new technologies, such as biotechnology, highlighted the potential economic value of GRs and associated TK, which became an increasingly important component of patentable inventions. As a result, many people began to argue that the patent regime should help to prevent misappropriation and promote fair benefit sharing between holders of those assets (mostly biodiversity-rich countries) and those with the modern technologies to access and use them. IP issues regarding access to GRs and associated TK came onto the agenda of the WIPO Standing Committee on Patents in the late 1990s, and were raised in the preparatory work leading up to the WIPO Diplomatic Conference for the adoption of a new Patent Law Treaty in 2000.

In parallel, the WIPO secretariat conducted fact-finding missions, regional consultations, workshops and roundtables on GRs, TCEs and TK, to ascertain the needs and expectations of indigenous and local communities as well as representatives of government, industry and civil society around the world. These activities were undertaken by a new WIPO division, the Global Issues Division — established in 1997 — which in 2009 became the Traditional Knowledge Division.

At the same period, the Director General of WIPO held informal consultations on the question of GRs and associated TK. These ultimately led to a proposal that a distinct body be established within WIPO to facilitate discussions thereon It was also proposed that the discussions should include the results of WIPO's previous work in the related field of TCEs. In 2000, this body was established as the IGC.

At roughly the same time, indigenous peoples' rights and issues began to command greater attention internationally. In 2000, the United Nations Permanent Forum on Indigenous Issues was established as an advisory body to the UN Economic and Social Council. In 2007, the UN Declaration on the Rights of Indigenous Peoples was adopted by the UN General Assembly. Longstanding claims by indigenous peoples for control over their cultural property and IP became more pressing.

In sum, the origins of the IGC and its rationales are varied. First, it was established to address three new themes that shared certain distinct features: GRs, TK and TCEs were regarded as the "common heritage of humanity" and as intellectual valuables requiring appropriate forms of IP protection. Second, GRs, TK and TCEs were seen as the intellectual assets of new key players in IP policy-making, namely developing countries and indigenous and local communities. Third, and more broadly, the IGC was conceived as part of a larger and structured endeavor by WIPO to move towards a modern, responsive IP system that could embrace non-Western forms of creativity and innovation, be comprehensive in terms of beneficiaries, and be fully consistent with developmental and environmental goals.

Participation

Each session of the IGC usually lasts around five working days and takes place at WIPO headquarters in Geneva. Participants comprise IGC members (WIPO member states) and a wide array of observers.

The IGC's intergovernmental character gives it the authority to initiate norm-setting discussions and to propose international rules for adoption by a Diplomatic Conference or another WIPO body as appropriate.

Although representatives from the IP offices of WIPO member states constitute a substantial part of the government delegations, the cross-cutting nature of the issues under discussion encourages and calls for a very diverse spectrum of participation. IP office representatives frequently coordinate their views with government experts specialized in issues related to the environment, agriculture, trade, foreign affairs, food, health and culture, to mention only a few.

This diversity of participation goes beyond government officials. It also characterizes the observers, which include relevant intergovernmental organizations (notably the secretariats of the Convention on Biological Diversity, the World Trade Organization, UNESCO and the United Nations Food and Agriculture Organization) and numerous accredited non-governmental organizations (NGOs).

Indigenous and local communities in particular need to be able to participate, express their views and have their voices heard in the IGC decision-making process, in accordance with the 2007 UN Declaration on the Rights of Indigenous Peoples, as the outcome will affect their rights.

In April 2001, a fast-track accreditation procedure was put in place to register almost 300 *ad hoc* accredited observers, many of whom are representing indigenous and local communities. The IGC decided in 2004 that its sessions should be preceded by panel presentations chaired by and composed of representatives of indigenous and local communities, whose participation is funded by WIPO. Among other practical measures to enhance participation, which include briefings, consultative processes and logistical support, one of the most important was the creation in 2005 of the WIPO Voluntary Fund for accredited indigenous and local communities, designed to finance their participation. A large number of representatives of various indigenous and local communities have since been funded through this mechanism.

Funding is also available for representatives of developing countries and certain countries in Europe and Asia, in order to facilitate their participation in the IGC process.

The IGC elects its chair and vice-chairs every two years. The WIPO secretariat plays a facilitating role and provides administrative support, from preparing documentation to providing briefings, organizing consultations, producing studies on specific subjects, and generally assisting the chair in the performance of his or her functions. Working documents and interpretation of the proceedings are available in the six official United Nations languages.

Achievements to date

The founding mandate of the IGC in 2000 left open what tangible outcomes might arise from its work. The issues were largely new to WIPO, and, at that stage, the IGC was described as a "forum for discussion." Subsequently, and formalized in 2009, the IGC worked towards the adoption of an international legal instrument or instruments. In the meantime, however, it can claim some important achievements.

For example, the IGC process stimulated increased recognition of TK within the patent system. In 2002, certain TK journals were included in the minimum documentation for applications under WIPO's Patent Cooperation Treaty, and TK classification tools were integrated within the International Patent Classification in 2003. In 2002, the IGC accepted technical standards for the documentation of TK developed at a WIPO meeting in Cochin, India.

In order to provide guidance on the IP aspects of mutually-agreed terms for fair and equitable benefit-sharing related to GRs, WIPO has developed, and regularly updates, an online database of relevant contractual practices. It has also prepared draft guidelines on IP clauses in access and benefit-sharing agreements.

Under the auspices of the IGC, WIPO has carried out numerous studies and developed other resources (such as glossaries, surveys of national experiences, a laws database and training programs), which have proved useful for member states and others. They are the result of a wide exchange of data and views between member states based on questionnaires and surveys of relevant national experiences and practices, from existing *sui generis* (special, specific) national or regional protection systems for TK and TCEs to IP-related clauses in contracts framing the access and use of GRs.

These resources illustrate the very rich and living cultural traditions that are the subject of the IGC's negotiations and help to better identify the different policy and legal options available.

Since its first session in 2001, the IGC's achievements also include certain "intangibles" such as:

- Inclusion and consultation: the IGC has established new benchmarks for inclusion and consultation;
- Clarity and understanding: age-old IP terms, such as "protection," "originality," "novelty" and the "public domain" are being re-thought;
- Content and context: the IGC is considering innovative and *sui generis* (special, specific) approaches. Through coordinating closely with other relevant forums, its work has re-energized WIPO's engagement with the rest of the United Nations system and other intergovernmental bodies.

In parallel, an international treaty on the protection of audiovisual performances, adopted in June 2012 in Beijing, includes the performers of expressions of folklore among its beneficiaries, thereby extending the rights already granted to them by the WIPO Performances and Phonograms Treaty of 1996.

Progress in ongoing negotiations

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. Since 2009, the exploratory "forum" has evolved into a true negotiating body, framed by clear schedules and sound working methods.

The negotiating texts on TK and TCEs owe their origins to draft "objectives and principles" first published by the WIPO secretariat in 2005. The draft texts reflect the many views and comments of member states and observers who have participated in the IGC over several years. "Gap analyses" prepared in 2008 have also contributed to clarifying the issues and options. On GRs, an initial "options" paper prepared by the WIPO secretariat was complemented by several member state proposals, all of which are now consolidated into a single text for further negotiation.

In 2015, WIPO members agreed to continue its work, including negotiations on the texts. WIPO member states may in due course decide to convene a diplomatic conference for final adoption of one or more international instruments.

Further Information

For the fact-finding report on the needs and expectations of indigenous and local communities as well as government representatives and representatives of industry and civil society, see *www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf*.

On the creation of the IGC, see document WO/GA/26/6 at *www.wipo.int/edocs/mdocs/govbody/en/wo_ga_26/wo_ga_26_6.doc*.

For the gap analyses, see *www.wipo.int/tk/en/igc/gap-analyses.html*.

For the texts which are being negotiated at the IGC as well as further information regarding the IGC and its mandate, see *www.wipo.int/tk/en/igc/index.html*.

For the United Nations Declaration on the Rights of Indigenous Peoples, see *https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement*.

On the WIPO Voluntary Fund, see *www.wipo.int/tk/en/igc/participation.html*.

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