



# **IGC 28: Informal Information Session**

Presentation by the Secretariat

June 18, 2014

Geneva

# Welcome and Introduction

Mr. Wend Wendland

Director, Traditional Knowledge Division

# Extracts from IGC mandate 2014-2015

- . . . continue to expedite its work, with open and full engagement, on 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 . .
- . . . with a view to finalising the text(s) within the biennium, the 2014 General Assembly GA 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
- studies or examples might be requested or provided by members . . examples and studies not to delay progress . .

		<p>to the negotiations on GR/TK/TCE, to further inform/guide the process. Duration – Half Day.</p> <ul style="list-style-type: none"> <li>Undertake text-based negotiations on GR with a focus on considering options for a draft legal text - Duration four and a half days.</li> </ul> <p>Duration 5 Days.</p>	
	April 2014	<p>IGC 27 TK followed by TCE.</p> <ul style="list-style-type: none"> <li>Consideration of Cross Cutting TK/TCE Issues – 1 Day.</li> <li>TK - Focus on objectives, principles, 4 key Articles viz Subject Matter of Protection, Beneficiaries, Scope of Protection and Limitations and Exceptions - Duration 4 Days.</li> <li>Consideration of Cross Cutting TK/TCE Issues – 1 Day.</li> <li>TCE - Focus on objectives, principles, 4 key Articles viz Subject Matter of Protection, Beneficiaries, Scope of Protection and Limitations and Exceptions Duration 4 Days.</li> </ul> <p>Duration 10 Days.</p>	
	July 2014	<p>IGC 28 Cross-cutting session/Stocktaking.</p> <ul style="list-style-type: none"> <li>Cross Cutting GR/TK/TCE session.</li> <li>Take stock of progress and make a recommendation to the General Assembly.</li> </ul> <p>Duration 3 Days.</p>	
	September 2014	WIPO General Assembly	



# 1. Cross cutting GRs, TK and TCEs session

- IGCs 26 and 27 decided, respectively, that the GRs, TK and TCEs texts

. . . be transmitted to the WIPO General Assembly taking place in September 2014, **subject to any agreed adjustments or modifications arising on cross-cutting issues** at the Twenty-Eighth Session of the IGC . . .

## 2. Stock-taking and recommendation to the GA

- “. . . with a view to finalising the text(s) within the biennium, the General Assembly 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”

# Structure of the rest of the presentation

- Practical arrangements for IGC 28
  - Mr. Tobi Moody, Assistant Legal Officer, Traditional Knowledge Division
- Cross-cutting issues
  - Ms. Begoña Venero, Senior Counsellor, Traditional Knowledge Division
  - Ms. Brigitte Vézina, Legal Officer, Traditional Knowledge Division
  - Ms. Daphné Zografos Johnsson, Legal Officer, Traditional Knowledge Division
- Discussion and closing

# Practical arrangements for IGC 28

Mr. Oluwatobiloba Moody

Assistant Legal Officer, Traditional Knowledge Division.

# Overview – IGC 28

- The final session of the IGC in 2014 and its third session under its 2014/2015 mandate
- A three-day, cross cutting GRs/TK/TCE session
- Take stock of progress and make a recommendation to the 2014 General Assembly
- Regional consultations held, Friday, June 13, 2014.

# Documents for the session

- A total of 17 documents prepared, as at today's date, for the session
  
- 7 Information documents
  - WIPO/GRTKF/IC/28/INF/2 (Summary of Documents)
  - WIPO/GRTKF/IC/28/INF/3 (Draft Program)
  - WIPO/GRTKF/IC/28/INF/5 (Indigenous Panel)
  - WIPO/GRTKF/IC/28/INF/7 (Glossary)
  - WIPO/GRTKF/IC/28/INF/8 (Resources on the GRTKF Website)
  - WIPO/GRTKF/IC/28/INF/9 (Report of Indigenous Expert Workshop)
  - WIPO/GRTKF/IC/28/INF/10 (Responses to Questions Regarding National-Level Databases and an International Portal)

## ■ 10 working documents

- WIPO/GRTKF/IC/28/1 Prov. (Draft Agenda)
- WIPO/GRTKF/IC/28/2 (Accreditation)
- WIPO/GRTKF/IC/28/3 (Voluntary Fund)
- WIPO/GRTKF/IC/28/4 (Consolidated document Relating to IP and GRs)
- WIPO/GRTKF/IC/28/5 (The Protection of TK: Draft Articles)
- WIPO/GRTKF/IC/28/6 (The Protection of TCEs: Draft Articles)
- WIPO/GRTKF/IC/28/7 (Joint Recommendation on GRs and Associated TK)
- WIPO/GRTKF/IC/28/8 (Joint Recommendation on the Use of Databases for the Defensive Protection of GRs and TK associated with GRs).
- WIPO/GRTKF/IC/28/9 (Proposal for the Terms of Reference for the Study by the WIPO Secretariat on Measures Related to the Avoidance of the Erroneous Grant of Patents and Compliance with Existing ABS Systems)
- WIPO/GRTKF/IC/28/10 (Participation of ILCs: Proposal for Subsidiary Contributions to the VF)

# Chair's Informal Issues Paper

- Made available by the Chair within the context of the cross-cutting review envisaged by the Committee's decisions and the mandate.
- A paper on some possible cross-cutting issues, as he sees them, which could be considered with respect to TK, TCEs and GRs.
- Not a formal document for the session, rather made available for reflection by Delegations only
- Not an exhaustive list of cross-cutting issues; Delegations are encouraged to identify and raise other issues they may consider to be of importance
  
- Available on the IGC Preparation Kit

# Agenda item 6

- Summary of consultations held, June 13, 2014.
- 2 main aspects:
  - Members to review the texts in the context of cross-cutting elements
  - Members to express their views on the texts and make a recommendation to the GA.
- Time to be allotted, as needed, in the discussions. Flexibility to be maintained: Member State-led
- A combination of plenary, expert group discussions as well as informal informals to be utilized, as needed.
- Expert group to retain the usual configuration; RC's + 7, 2 (2) indigenous representatives.

# Indigenous Participation in IGC 28

## ■ Indigenous Consultative Forum

- Not a formal committee session or official WIPO meeting, but endorsed by the Committee and facilitated by the Secretariat
- Sunday, July 6, 2014, 15h00

## ■ Indigenous Panel (shortened)

- Monday, July 7, 2014, around 10h30, for 1 hour only
- Theme: “Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions: Indigenous Perspectives on Cross-Cutting Issues in the WIPO IGC”
- Keynote: Ms. Dalee Sambo Dorough, Chair, United Nations Permanent Forum on Indigenous Issues and, Assistant Professor, Political Science, University of Alaska, Anchorage, United States of America.
- Panelists: Mr. Marcial Arias, Panama, and Ms. Lucy Mulenkei, Kenya.

# Resources

- The IGC Preparation Kit
  - A one-stop destination for preparatory information, substantive working documents and other materials most directly relevant to each IGC session.
  - Presently updated with relevant information relating to the 28<sup>th</sup> session (working documents, background briefs, useful links etc.)
- Indigenous Portal
  - Part of the WIPO Secretariat's effort to provide tailored resources for indigenous peoples and promote easy access to information for and about indigenous peoples and local communities

# To note...

- WIPO Voluntary Fund
  - No further funds
  - Nominations by Regional Groups to the Advisory Board to please be sent to [grtkf@wipo.int](mailto:grtkf@wipo.int)
  
- Draft report of the Twenty-Seventh Session will soon be available online
  
- Chair remains available for consultations until July 4, 2014
  - Requests to be communicated to his office or to [grtkf@wipo.int](mailto:grtkf@wipo.int)

# Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions

Ms. Begoña Venero

Senior Counsellor, Traditional Knowledge Division

Ms. Brigitte Vézina

Legal Officer, Traditional Knowledge Division

Ms. Daphné Zografos Johnsson

Legal Officer, Traditional Knowledge Division

# Preamble/Introduction/Principles/Objectives

- **Purpose**: concisely state the guiding concepts which will nurture the operative provisions by giving a clear sense of direction to the texts.  
Distinction, but direct correlation with operative provisions
- **Improvement? Consider rationalizing and reorganizing the texts to:**
  - **avoid redundancies and irrelevance**  
Ex: in the TCE text, same text appears twice
  - **place focus on IP-related principles and objectives**  
Ex:
    - prevention of misappropriation and misuse
    - promotion of innovation and creativity
    - prevention of improper or erroneous grant of IP rights
  - **provide policy framework for detailed articulation at national level**
- **Result**: simple, direct and efficient texts → bring clarity to the process → facilitate further progress

# Definitions/use of terms

## ■ Public domain

- IGC 27 introduced a **definition** of the term
- PD is integral to the **balance** in the IP system:
  - exclusive rights
  - interests of users and the general public
    - foster, stimulate and reward innovation and creativity
- PD is **relevant** to design a balanced IP-like system of protection for TK/TCEs
- **Tension**: robust PD / robust protection of TK/TCEs
- Defining the term is a **challenging exercise** with significant policy ramifications going beyond the scope of the IGC
- **The IGC is not required to define the term**

# Definitions/use of terms (2)

## ■ Misappropriation

- All three texts make reference to the concept
- The TK and GRs texts both carry proposed definitions
- No definition in the TCEs text
- The IGC could consider the possibility of providing an appropriate definition of misappropriation in the TCEs context in the Use of Terms section

# Definitions/use of terms (3)

- **Associated traditional knowledge/traditional knowledge associated with genetic resources**
  - Definitions of ATK and TKA in the GRs text
  - Definition of TK in the TK text in Use of Terms Section with further elements in Article 1
  - IGC encouraged to **examine the definitions of TK in both texts and formulate a common definition of TK**

# Definitions/use of terms (4)

- Use/utilization
- GRs text: Utilization ... quite distinct
- TK text: Use/Utilization
- TCEs text: Two different definitions of the term Use:
  - in the Use of terms section (Use/Utilization) ... Applicable to TCEs?
  - in footnote 5 (Use) ... quite distinct
- Use outside the traditional context vs. Use by the beneficiaries

# Criteria for eligibility

- TK text: Article 1 ... + Alternative 3.3 (TK that would not be protected)?
- TCEs text: Article 1 ... + 3.2 of Option 2 (TCEs that would not be protected)?
- Which would be the appropriate place to deal with the criteria for eligibility? Should all the criteria for eligibility be consolidated in one single place?
- Are criteria for eligibility necessary at all?

# Beneficiaries (1)

- Paragraph 2.1 in the TCEs text: “Beneficiaries [of protection] are ... [... nations that are custodians for the beneficiaries as provided for in Paragraph 3]” “[as part of their collective cultural or social identity]” “[... **or as determined by national law**]”
- Paragraphs 2.2, 2.3 and 2.4 in the TCEs text and paragraphs 2.2 and 2.3 in the TK text: Could these paragraphs fit better in Article 4 in the TCEs text and in Article 5 in the TK text, which deal with Administration of rights/interests?

# Beneficiaries (2)

- Paragraph 35 of the Chair’s non-paper prepared for IGC 27: “This should be distinguished from an entity (such as a “competent authority”) that might be tasked under national law with exercising rights in cases where the beneficiaries cannot be identified (which we could perhaps refer to as “orphan TK” and “orphan TCEs”). (...) A national entity might also play a role where the beneficiaries seek assistance with the management and enforcement of their rights. These “national entities” are not, in my mind, “beneficiaries” as such, and are dealt with in the articles in the two texts dealing with the administration and management of rights”.

# Scope – “tiered approach”

- Introduced at IGC 27 (pyramid, matrix)
- Different kinds of rights for different kinds of TK/TCEs\* (degree of dissemination)
  - publicly available → moral rights
  - access- and use-restricted → economic rights
- Means of better securing the correct balances between protection and access
- IGC to **explore trade-offs** to unblock difficult issues and to find convergence on core elements that will **define each tier**

\* Approach relevant for TCEs? Can the same categories apply to TK and TCEs?

Cf. TCE Text (9/4, 2006)

# Databases and information systems (1/2)

- The TK and GRs text provide for the possibility of establishing respectively databases of TK, and databases of GRs/their derivatives/ATK/TKA
- The TK text also makes reference to databases of GRs and TKA
- The IGC is encouraged to further consider
  - the aims and objectives of such databases
  - their modalities of operation

# Databases and information systems (2/2)

- Some key questions to consider
  - Who should have responsibility for compiling and maintaining the databases?
  - Should there be minimum standards to harmonize structure and content?
  - To whom should the databases be accessible?
  - What should the content of the databases be?
  - In what form should the content be expressed?
  - Should there be accompanying guidelines?

# Sanctions, remedies and exercise of rights

- Identified as cross-cutting issue at IGC 27, with emphasis on enforcement and respect for rights
- Several different concepts...
- ...but also similar concepts expressed differently
- **IGC could re-look at TK and TCE versions, simplify them and see where cross-pollination could improve both texts**
- **How to simplify?** Provide a general framework based on harmonized principles at the international level, leaving details to national legislation
- Agreement on alternative dispute resolution mechanisms?

# The disclosure requirement (1/2)

- The TK and GRs texts both propose the development of disclosure requirements
- i.e. provisions which require patent (and perhaps other IP) applications to provide information related to TK and GRs
- The IGC is invited to further consider the **modalities of a disclosure requirement** in the TK and GRs texts

# The disclosure requirement (2/2)

- Some key questions to consider
  - What should be the subject matter of disclosure?
  - What should trigger disclosure?
  - What should be the content of the disclosure?
  - What should be the nature of the obligation to disclose?
  - Should IP/patent offices have to verify the content of disclosure?
  - Should there be exclusions from disclosure?
  - What should be the consequence of non-compliance?
  - Should liability be strict?
  - How should the requirement be implemented?
  - Relationship with PCT and PLT?

# Exceptions and limitations (1/2)

## ■ General Exceptions

Test to develop limitations and exceptions at national level

“Classic” three-step test + moral rights (acknowledgement, non-offensive use, compatibility with fair practice)

**Two alternatives in the TCE text?**

## ■ Specific Exceptions

IGC 27 tried to align TK and TCE texts...

...redundancies. Need to **streamline?**

Ex.

- creation of an original work inspired by or borrowed from TK/TCEs
- preservation and safeguarding functions of cultural institutions

# Exceptions and limitations (2/2)

## ■ Tiered approach

Also **follow the approach** defined under Scope?

Various degrees of excepted acts for various kinds of subject matter/kinds of rights

## ■ Incidental use

At IGC 27 “incidental use” under Sanctions (TCE text). **Move it to this article?** Where could the texts benefit most from including such a concept?

## ■ Rights and interests of third parties

Both texts are quite similar, only minor differences. What is the **most desirable formulation?**

# Term of protection/rights

- The TK text includes most of the elements of paragraph 6.1 in the TCEs text.
- Paragraph 6.2 in the TCEs text refers to the term of protection for moral rights and Option 3 - 6.1 in the TCEs text refers to the term of protection for economic rights.
- Could a similar approach be considered in the TK context?

# Formalities

- Different options within the TK text and the TCEs text:
  - No formalities
  - Formalities may be required, but not for secret TK/TCEs
- + In the TK text: Registers or other records of TK may be maintained

# Transitional measures

- Consensus: instruments should apply to all TK/TCEs which, at entry into force, fulfill criteria of protection
- Drafting is not identical in both texts; what is the clearer expression of where agreement lies?
- On acquired rights of third parties, several drafting options in both texts. How to reconcile them?
- **Look at both texts side by side, make appropriate changes, redraft the text into a clearer and simpler expression of this concept**

# Relationship with other agreements and the non-diminishment clause

- All three texts provide for mutual supportiveness between the instrument and other international agreements and treaties – though different wording
- TCEs text also contains a paragraph establishing a non-diminishment clause
- GRs text also contains a paragraph providing that the instrument should support, in particular, Art 31 UNDRIP
- Non-diminishment clause: where indigenous peoples' rights have already been recognized and are contained in treaties, agreements and other constructive arrangements, the instruments on TK, TCEs and GRs should not nullify or diminish those rights
- IGC could consider whether a non-diminishment clause should be included in all three texts, and where it should be placed

# National treatment

- First and third paragraphs of the TK text: Different wording but similar content to the TCEs text.
- Second paragraph of the TK text - Different option: to grant nationals of other Member States/Contracting Parties (only) protection equivalent to that contemplated in the instrument, while nationals could have more extensive protection.

# Transboundary cooperation

- TK/TCEs shared across cultures and territories
- Language is more or less similar at first glance, but variations in terminology. What is the **most suitable formulation** in both texts?
- Note: GRs text makes reference to customary laws and protocols while TK/TCEs do not

# Capacity building

- The TCEs and GRs texts provide provisions for “Capacity Building and Awareness Raising”, and “Technical Assistance, Cooperation and Capacity Building”, respectively
- The IGC could consider including an article on capacity-building in the TK text as well, or, at least, adopt a uniform approach to this issue

# Structure of text and headings of articles

- For the sake of clarity and ease of reference, it is recommended that
  - as far as possible, a **similar structure** be used in the texts
  - where applicable and possible, **the titles of the articles be reviewed and standardized across the texts**

# Discussion and Closing Remarks

Sign up for our TK e-Updates!

Copies of this presentation will be made available to Regional Coordinators and on the “IGC Preparation Kit”