
Towards a consensus [at][on] the IGC: A view from Brazil

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What's behind Brazil's approach

- Fifth largest and most **populous** country
- About **one million indigenous people** (**305 groups**, **274 languages**)
- Largest **African country** outside Africa
- **Immigration**: Portugal, Spain, Italy, Germany, Poland, Syria, Lebanon, Japan
- Both a **melting pot** and a **salad bowl**
- **Megadiverse country**, with 200,000+ known species (less than 10% of total)
- **Jesuits** documented traditional knowledge in colonial times (**medical lore**)
- **High-level biotech research** since 19th Century
- **Biopiracy** *avant la lettre*, as **country's name** shows



Once upon a time...

- Brazzaville, 1963: African countries request **protection of folklore**, esp. under Berne Convention – 1967 revision doesn't deliver
- WIPO-UNESCO, 1978-1982: **Model Provisions** for National Laws on the Protection of Expressions of Folklore...
- CBD, 1992: **sovereign control** over GR, PIC, MAT (Articles 8j, 15, etc.)
- Bellaggio Declaration, 1993: **TK unprotected**, unlike developed countries' works
- TRIPS, 1995: patentability criteria → need to **harmonize with CBD?**
- WPPT, 1996: “expressions of **folklore**”
- UNESCO/WIPO World Forum (Phuket), 1997: “at present... no international standard protection for folklore... **Copyright regime is not adequate...**”



A grand compromise?

- WIPO, 1998: **Fact-Finding Missions** (FFMs) → Foundation of IGC's work
- SCP 3, 1999: **Patent Law Treaty** to require disclosure of origin (Colombia, GRULAC, African Group)
- PLT Diplomatic Conference, 2000: Treaty adopted without disclosure of origin, but *“Member State discussions concerning genetic resources will **continue at WIPO**”*
- General Assemblies, 2000: **Creation of IGC** → No norm-setting
- Greater **legitimacy** of IP system or **isolating** the issues?



Legitimacy... but not at the IGC (so far)

- WIPO **Development Agenda**, 2007: Rec. 18 → “Accelerate process on protection of GR, TK & Folklore...”
- United Nations Declaration on the Rights of Indigenous Peoples, 2007 (**UN DRIPS**, Article 31)
- **Nagoya** Protocol (2010, i.f. 2014) → Access and Benefit Sharing
- **Marrakesh** Treaty (2013, i.f. 2016) → For the blind and visually impaired
- WTO, 2017: “**Paragraph 6 System**” enters into force, first-ever amendment to Uruguay Round agreement



Putting the W back in WIPO

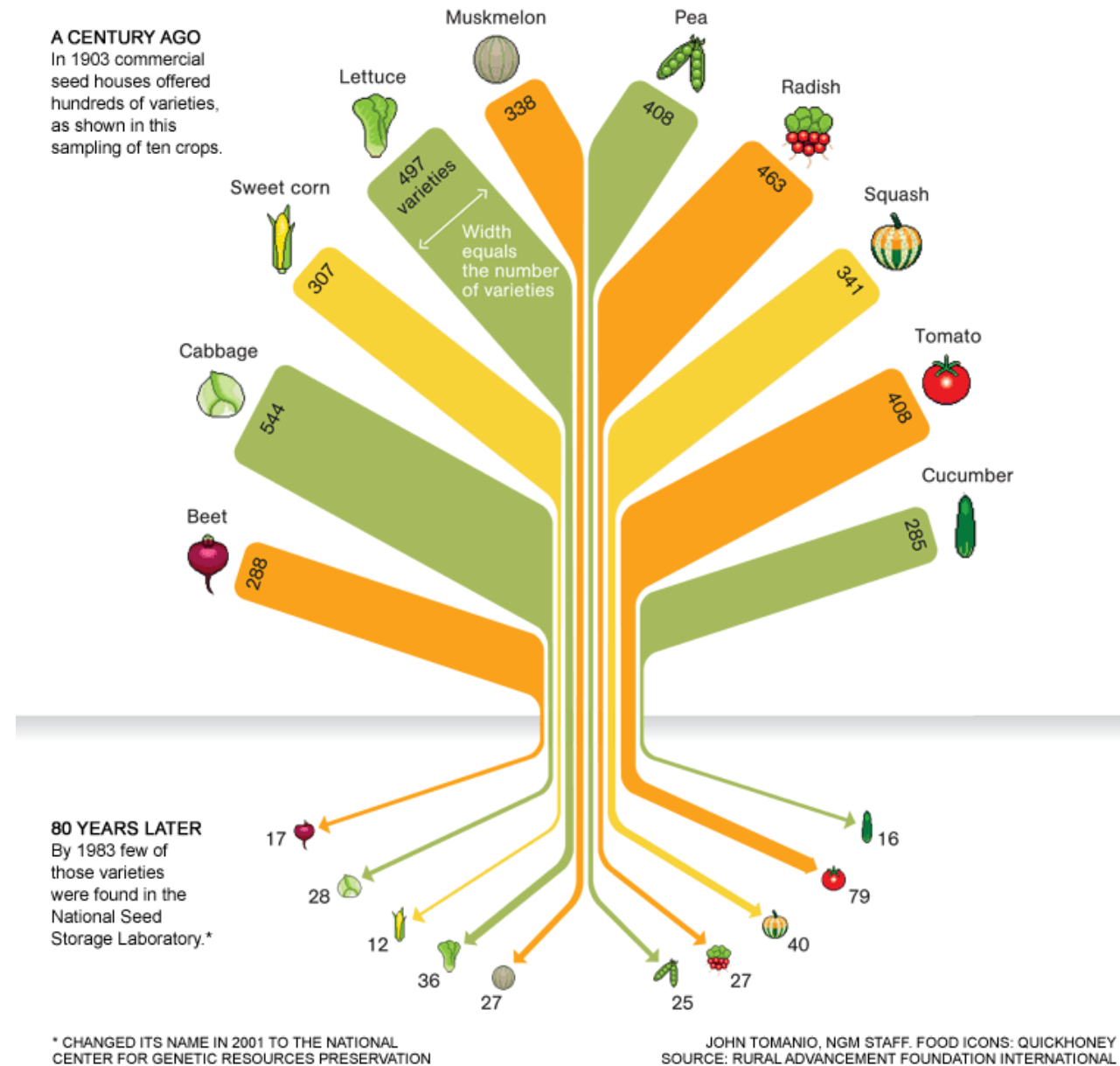
“...there is a need to **recognize explicitly** the **contribution** to human society of **collectively generated and maintained innovation and creativity** and to **protect the artifacts** of that innovation and creativity. The Organization has undertaken a long process of discussion and negotiation on the means of meeting this need. I believe that it is time to move this process to **concrete outcomes** that will see WIPO embrace a **broader base of constituents** and a **more universal mission.**”

(DG Francis Gurry, Acceptance speech, 2008)



A sense of urgency - I

Between 1903 and 1983, **75 percent** of genetic diversity of important staples was **lost**



“What ... God hath joined together, let not man put asunder”

“Conserving **biodiversity** without conserving **associated knowledge systems** is like building and maintaining a library without a catalogue.”

(Dr. V. K. GUPTA, Director
India’s Traditional Knowledge Digital Library)

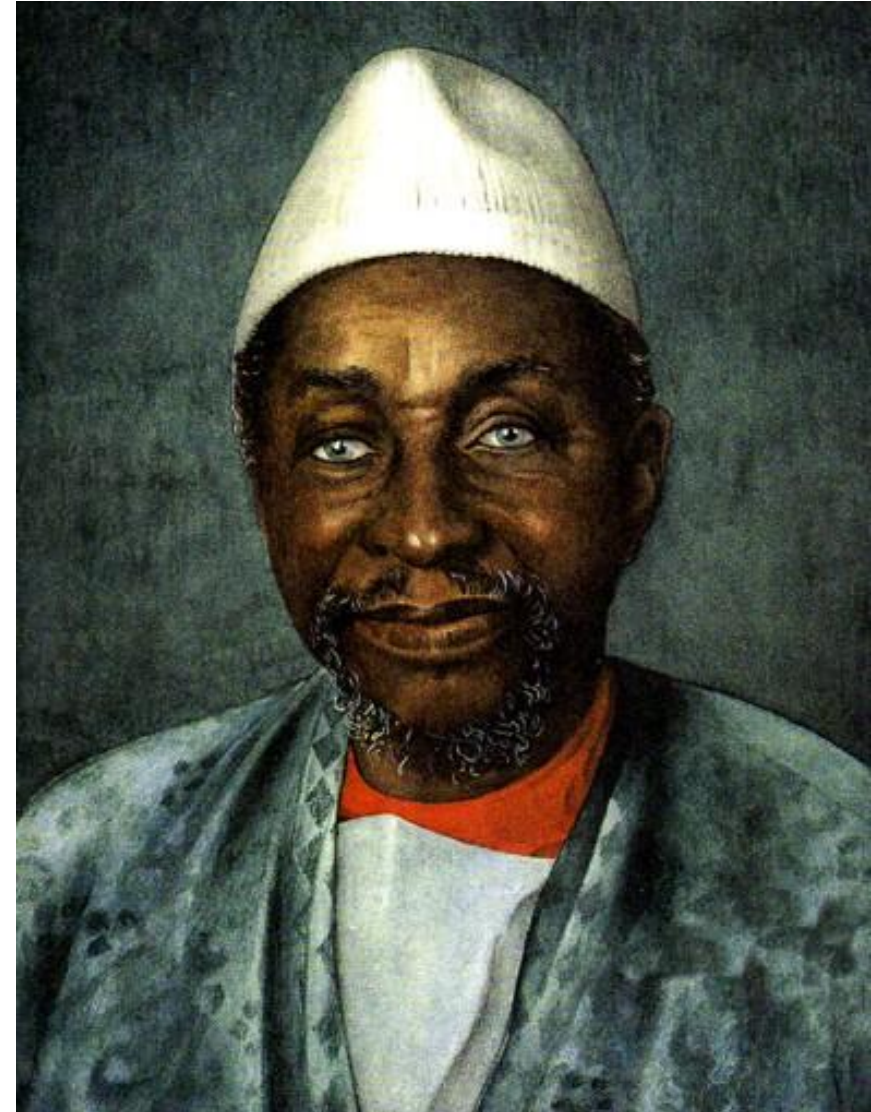


A sense of urgency – II

« En Afrique, quand un vieillard meurt, c'est une bibliothèque qui brûle. »

[“In Africa, when an **old man** dies, it's a **library** burning.”]

(Amadou Hampâté Bâ, c.1900-1991,
Statement at UNESCO, 1960)



<https://alchetron.com/Amadou-Hampate-Ba-1319629-W>



IGC: A “process without an outcome”?

- IGC a way of **dodging** discussions on GR and TK in other WIPO bodies?
- Little progress in **root idea behind creation** of IGC: use of IP system to prevent misappropriation of genetic resources
- Discussions sometimes **rehash** previous debates
- Inevitable effects of any protracted process: **incoherence** and **discontinuity** in negotiating positions over time (Nirmalya Syam)
- Lack of minimum consensus on most basic terms: the **M-word** (misappropriation), the **B-word** (biopiracy)
- Should we be *ambiguous* or *precise* to move forward?
→ **Speed** or **teeth**?



And yet...

- Starting with reports of original FFMs, IGC has produced **huge amount of data, high-quality work** and **sophisticated analysis**
- Involvement of humanitarian organizations and indigenous communities enriched debate and **broadened perspective**
- Negotiators have been exposed to **diverse viewpoints**
- Discussions led to substantial increase in **academic studies** worldwide
- Conferences offer opportunities to **exchange views, share experiences**
→ Even beyond WIPO: New Delhi, March 2017
- **Better understanding** of complexity of issues



Definitely NOT a waste of time

“...research on the nature, programmes and regimes of **traditional forms of knowledge** has become crucial – and I use the plural here deliberately, because we are looking not at just one way of accessing knowledge and at just one regime, but at a **multitude of forms** that are yet to be understood. Also essential is to discern the **effects on traditional communities themselves of new policies** that take their contributions into account. Ignoring these aspects would jeopardise the very continuity of indigenous knowledge systems.”

(Manuela Carneiro da Cunha, Anthropologist, University of Chicago, 2012)



So what can we do?

- Look **inward**: Were we ever close to an agreement? If so, when? Why were we getting close? Why did it fail?
- Draw on **body of knowledge built by IGC**: studies, **success stories**, legislations, and local initiatives
- IGC to continue supporting exchanges on **best practices**, drafting **model legislations**, providing **capacity building** → **Guided development?**
- Give IGC **longer timeframe** to conduct negotiations in realistic and serene way
- Intensify negotiations at WTO on **TRIPS-CBD harmonization**
- Learn from **successful negotiations**: Nagoya and Marrakesh



Lessons from Nagoya

- Some important demands of developing countries left out (**compliance**)
- Yet retained **ABS**
- Received with **frustration** by some at close of negotiations
- Now viewed as landmark and reference, even as **discussions to move forward** continue
- **“Perfect is the enemy of good”**
- General framework, **flexible** enough to accommodate diverse national legislations, but with **main objective** preserved
- **Unlike IGC**: a Protocol to an existing, **nearly universal** Convention



Lessons from Marrakesh - I

- Need for open **dialogue** in mutual respect with staunchest adversaries
- Define clear objectives “starting from **reality on the ground**” (Kenneth Nóbrega)
- **Avoid loaded**, confrontational language
- Focus on **technical** aspects
- Whenever necessary, engage in **smaller groups** of negotiating Parties while preserving full **transparency**
- Important role of **non-governmental organizations**: World Blind Union, Knowledge Ecology International, National Federation for the Blind



Lessons from Marrakesh - II

- Coordinate with **demandeur lobbies** in reluctant countries
- Do not alienate **private sector**: Motion Picture Association of America, Association of American Publishers
- Participation of **experts** respected “across the aisle”, including Professor Ruth Okediji (member of Nigerian delegation/African Group)
- Address **concerns**: fear of precedent-setting, subverting three-step test
- Strange bedfellows? NFB + MPAA: “Stick to **core message!**”
- WBU: “**Avoid distractions**”
- **Persevere** during difficult moments: “*IP issues have become impossible to talk about without the entrenchment.*” (Ruth Okediji)



Lessons from Marrakesh - III

- Avoid **misunderstandings** and **misperceptions**: how Parties viewed themselves often differed from how others viewed them:
“A lot of people had a lot of trouble with the US positions.”
“We were always open to a treaty.”
- Not as general as Nagoya, and preserving arduously negotiated **core goals** in final instrument → **cross-border exchange**
- **Unlike IGC**: objective of V.I.P. inclusion unanimously shared (even if through lip service in some cases)
- **“Reasonable compromises** were found to shape copyright law to serve an important social purpose while still protecting the interests of authors and book publishers” (Justin Hughes)



To conclude, a vision

- IGC has a **strategic role** in making IP system **balanced, sustainable** and **inclusive**
- Reaching one or more of the three **instruments** indicated in IGC's mandate would be a resounding and far-reaching **success**
 - This would afford opportunity to turn IGC into a **Standing Committee**, thus acknowledging the full importance of **TK/aTK** and **TCEs** in the IP system
 - It would go a long way towards demonstrating that **intellectual property** works for **every person**, in the **whole world**
- IP system as a whole would get unprecedented **legitimacy**



THANK YOU

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