A Balanced Outcome*

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Just after it signed the WIPO Treaty on Intellectual Property (IP), Genetic Resources (GR) and Associated Traditional Knowledge (ATK)[1], the Brazilian delegation was effusively greeted by the representatives of Brazilian indigenous peoples present at the Diplomatic Conference (DipCon). Their emotions conveyed the tremendous effort put into a decades-long struggle of megadiverse countries, Indigenous Peoples and local communities (IPLCs) to have their contribution to the advancement of human knowledge and technological progress recognised by and inscribed in the international system of intellectual property.

The Treaty's adoption by consensus demonstrated that multilateralism "is alive and well at WIPO"[2], as highlighted by Director General Daren Tang. It represented a victory for both developed and developing countries in using multilateralism to address global issues.



* The views expressed are those of the author and may not represent the position of the Brazilian Government.

Notwithstanding the successful result, the history of negotiations did not anticipate a positive outcome. Over the past decades, an insurmountable gap existed between developed and developing countries. The latter demanded an international mandatory disclosure requirement for GR and ATK, while the former resisted.

That gap was bridged thanks to the support of WIPO, the diplomatic engagement of all delegations and the adept leadership of the President of the Conference, Brazilian Ambassador Guilherme Patriota, along with the two main committees chairs, Australia's Jodie McAlister and Namibia's Vivienne Katjiuongua. Ambassador Patriota described the DipCon's outcome as a "technically sound and balanced outcome"[2], celebrated by delegations and intergovernmental organisations[3-5].

Delegates and observers witnessed that the converging voice from the Global South was fundamental to the positive result. Countries from Latin America and the Caribbean, the African Group, the Asia-Pacific Group and the Like-minded Megadiverse Countries engaged in extensive and exhausting negotiations to defend their long-held positions on the key issues of the text, such as the "trigger" for the disclosure requirement, sanctions, and the review and revision processes.

What is the Treaty about?

The Treaty's main achievement is creating an international mandatory disclosure requirement concerning the origin of GR and ATK in patents. It harmonises rules for over 30 countries that already provide such disclosure requirements and sets a minimum standard for other countries willing to introduce it in their laws.[6]

This requirement enhances patent transparency and quality by ensuring that patent applications disclose if they are "based on" GR and ATK (Article 3). The term "based on" is known as the trigger of disclosure and applies to GR and ATK "necessary for the claimed invention" that "depend on the specific properties". The text does not detail what necessary or specific properties mean.

It took a lot of work to arrive at this solution for the trigger. Some delegations defended a more restrictive trigger such as "materially and directly based on"; many countries from the Global South defended the term "utilisation", as mentioned in the Nagoya Protocol and the BBNJ Treaty.[7] They all found common ground by agreeing to just "based on".

Most delegations understood that the disclosure requirement should not overburden patent offices (especially small ones) and agreed that contracting parties do not make offices verify the authenticity of the disclosure (Article 3.5). The provision, however, does not forbid offices that are willing to verify the authenticity of the disclosure.

As with most legal rules, the Treaty provides for sanctions for non-compliance with its obligations (Article 5). Before imposing sanctions, parties are required to offer an "opportunity to rectify failure to disclose," except in cases of "fraudulent conduct or intent". Each party will interpret fraudulent intent "according to national law," facilitating the application of different legal regimes.

Readers familiar with the history of the negotiations already expected that Articles 3 and 5 would be the most contentious during the DipCon, but negotiations on other provisions were also challenging, such as those concerning the evolution of the Treaty. The main difference was which countries could vote during revision: only Treaty members or all WIPO members.

The possibility of modifying the Treaty will be part of the review process (Article 8) to be conducted by the assembly of the contracting parties (Article 10), empowered to address "issues arising from new and emergent technologies." Following the review, a diplomatic conference might amend the Treaty "in accordance with the Vienna Convention[8] on the Law of Treaties" (Article 14). Article 39 of this Convention states that a "Treaty may be amended by agreement between the parties."

Given the new technologies may be addressed in the future, some delegates lamented that the Treaty does not expressly mention current technologies like digital sequence information (DSI). Other delegates, on the contrary, were pleased that it did not.

The Treaty would not have innovated if it mentioned DSI. The BBNJ Treaty[7] mentions it, and a decision under the CDB[9] addresses it. It would also be compatible with practices of the International Nucleotide Sequence Database Collaboration (INSDC), which includes data on the country of origin and date of collection of the nucleotide sequences (a synonym for DSI).[10] It is a good thing that decisions in other forums might complement the implementation of the Treaty.

A Win-Win Game

Some people might think that developing countries, like Brazil, do not have much to gain from the Treaty because their IP legislation already cater for stronger protection to GR and ATK. This view, however, fails because it overlooks spillover effects. The GR and ATK mandatory disclosure requirement introduces in the international IP system the recognition of the contribution of IPLCs to scientific and technological development. It creates an obligation that will contribute to innovation in developing countries. It will also strengthen megadiverse countries' positions in other fora, providing, for instance, with stronger arguments to demand more benefit sharing initiatives.

Additionally, the Treaty is flexible enough to be attractive to some developed countries that are really committed to the conservation of biodiversity and to the respect of human rights of IPLCs. Even those that only pay lip service to those two objectives might find reason in the future to join the system.

There actually are reasons to believe the Treaty benefits all countries. If the decades-long resistance to adopting the disclosure requirement on GR and ATK was based on protecting innovation, the Treaty might also deliver to those interests. Evidence from Brazil suggests that the transparency and legal certainty provided by the disclosure requirement encourage innovation: Figure 1 shows an increase in patent applications after Brazil adopted its current regulation on access to GR and ATK, the Biodiversity Law, in 2015.[11]

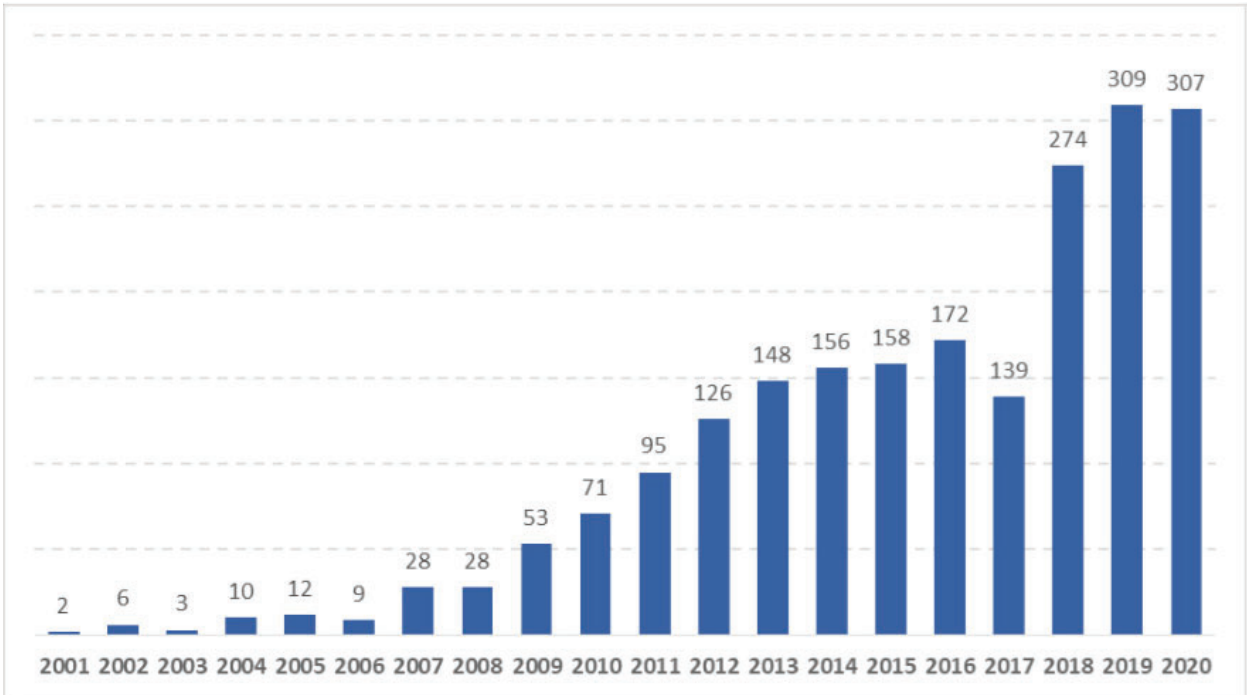


Figure 1. Patent Applications with Access to GRATK (Source: Instituto Nacional da Propriedade Industrial (Data as of February 2020))

While there is no in-depth explanation for that correlation, one can assume that the disclosure requirement incentivises IPLCs to collaborate with industry stakeholders in a positive sum interaction.

The disclosure requirement also results in more widespread gains. IPLCs "often manage their lands in ways that are compatible with, and often actively support biodiversity conservation." [12] A World Bank study stated that 80% of Earth's biodiversity is located in traditional indigenous territories.[13] It is in everyone's interest to incentivise Indigenous communities to maintain their role as guardians of biodiversity, especially in times of global warming. These incentives might come from benefit-sharing mechanisms, which the Treaty might facilitate.

However, the Treaty may present challenges for some developing countries that do not currently have a disclosure requirement and might find difficulties in processing foreign applications. It should be a temporary challenge limited to a transitional implementation period, during which WIPO may provide technical assistance and capacity building for them (Article 10.2, g). Countries that already have a mandatory disclosure requirement should not face significant problems, as Article 9.2 clarifies that the Treaty should be implemented "within their own legal systems and practices." The biggest challenge is getting as many countries to join as quickly as possible so that the Treaty can enter into force.

Conclusion

As happens in any meaningful negotiation, no party left the DipCon completely satisfied, but the Treaty struck a fine balance between the interests of developed and developing countries. It is flexible enough to allow countries to maintain higher levels of protection for GR and ATK (Article 9.2), and it is also an attractive invitation for new parties to join. Although futurology is not the craft of diplomats, it might be safe to bet that if the Treaty delivers results, currently hesitant countries will understand the advantages of acceding to it.

Regardless of the future, the existence of the Treaty already sends an important message. It welcomes contributions to the international system of intellectual property from those far from positions of power, like the IPLCs. It places the intellectual property system as a contributor to addressing global challenges, such as biodiversity conservation, shaped by multilateral norms and institutions.

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