

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

Twenty-First Session
Geneva, April 16 to 20, 2012

**REPORT FROM HIS EXCELLENCY AMBASSADOR PHILIP RICHARD OWADE ON
KEY ISSUES PENDING FROM THE 2010-2011 BIENNIUM**

Document submitted by His Excellency Ambassador Philip Richard Owade

1. At the Nineteenth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the IGC”), held from July 18 to 22, 2011, the IGC Chair for the 2010-2011 biennium, His Excellency Ambassador Philip Owade indicated that he may prepare a summary of some of the key issues that he believed needed to be taken forward to the next round of negotiations.
2. Ambassador Owade has prepared such a report and provided it to the Secretariat.
3. The Annex to this document contains the part of the said report dealing with traditional knowledge.
4. *The IGC is invited to take note of this document and the Annex to it.*

[Annex follows]

INTRODUCTION

1. I had the honor of chairing the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the IGC”) in 2010 and 2011. During this session, the Committee was able to make considerable progress in developing texts for traditional cultural expressions (TCEs), traditional knowledge (TK) and genetic resources (GRs). However, certain policy issues still remain unresolved, and, as the IGC enters a new mandate and new phase in its work, under a new Chair, I thought it might be useful if I were to try to summarize the key issues as I see them on each of the IGC’s themes, namely TCEs, TK and GRs.
2. I have therefore prepared notes on the 3 themes and given them to the Secretariat. I have instructed the Secretariat to make the TK section available to the present session. The GRs section has been made available at the Twentieth Session of the IGC, which is taking place from February 14 to 22, 2012. The TCEs section will be made available at the Twenty-Second Session of the IGC, which will take place from July 9 to 13, 2012.
3. These notes are merely an attempt to capture the policy issues that seem to me to be the most important in the negotiations of the IGC and to identify some of the main views on them. The notes may help to frame and focus the IGC’s continuing discussions. Of course, the IGC and its new Chair are not bound to follow or use these notes but I hope they may be helpful.
4. In preparing these notes, I have referred to the more recent main documents and reports prepared for the IGC, as well as the various notes I made while I was the Chair.

NOTES ON KEY TK ISSUES

Article 1 – Subject Matter of Protection

5. Article 1 is made up of two parts: a definition of TK and criteria for eligibility.
6. Regarding the definition of TK, there are two options which reflect two policy approaches:
 - Option 1 contains a simple, narrower definition of TK, along with a more detailed list of criteria for eligibility.
 - Option 2 contains a more detailed and open-ended definition, along with simple criteria for eligibility.
7. Regarding criteria for eligibility, Options 1 and 2 share two similar criteria: Option 1 provides that TK is collectively generated, shared, preserved and transmitted from generation to generation, and integral to the cultural identity of beneficiaries; and Option 2 provides that TK is generated, preserved and transmitted from generation to generation, and identified or associated or linked with the cultural identity of beneficiaries. There is no consensus on other criteria, namely that TK is the unique product of or is distinctively associated with beneficiaries, that TK is not in the public domain, that TK is not widely known or used, that TK is not protected by an IP right, and that TK is not the application of principles, rules, etc.
8. In sum, (1) which kind of definition of TK is needed, a general and open definition, or a more descriptive definition? (2) Which concepts should be included as criteria for eligibility?

Article 2 – Beneficiaries of Protection

9. The IGC has in past sessions considered the definition of “beneficiaries” and the choice of terms, but there is no agreement on the extent to which the instrument should extend beyond indigenous peoples and local communities. The identification of the beneficiaries is closely related to the scope of the instrument as a whole. The same issues arise in the TCE text.
10. As with TCEs, the IGC has widely supported the approach that other articles throughout the instrument would simply use the term “beneficiaries” referring to the definition in Article 2.
11. The article contains two options:
 - In Option 1, beneficiaries are only indigenous peoples/communities and local communities.
 - In Option 2, beneficiaries include indigenous peoples/communities, local communities, traditional communities, families, nations, and individuals. It also provides that, where TK is not specifically attributable or confined to an indigenous peoples or local community, or it is not possible to identify the community that generated it, domestic law can determine any national entity to be beneficiary.
12. The policy approach in Option 1 is to limit the scope to indigenous peoples and local communities. Within that approach there are differences in terms of terminology: some prefer indigenous “peoples”, while others prefer “communities”.
13. In Option 2, “nations”, “families” and “individuals” are included as beneficiaries because some delegations consider that nations, individuals or families maintain TK. The terms “local community” and “traditional community” (potentially addressing the issue of communities in diasporas) need to be clarified. Clarity could reduce concerns and assist the IGC in agreeing on a definition of beneficiaries.
14. Perhaps the key issues are: (1) Which term should be used, “indigenous peoples” or “indigenous communities”? (2) Should families, nations and individuals be considered as beneficiaries? (3) How should “local communities” and “traditional communities” be defined? Should both be considered as beneficiaries? (4) Who would be the beneficiary, where TK is not specifically attributable or confined to an indigenous people or local community, or it is not possible to identify the community that generated it?

Article 3 – Scope of Protection

15. The text attempts to distil the two policy approaches to the issue:
 - The policy approach underlying Option 1 is that Member States should have maximum flexibility to define the scope of protection at the national level.
 - Option 2 is more detailed and prescriptive, and has a rights-based approach with stronger obligations for Member States.
16. Both Article 3.2 of Option 1 and Article 3.1 of Option 2 provide a list of exclusive rights that beneficiaries should have. One main point of disagreement is whether the rights of the beneficiaries should be collective or not. Another difference between the options is whether or not to include “the mandatory disclosure of the identity of the traditional knowledge holders and the country of origin, as well as evidence of compliance with prior informed consent and benefit-sharing requirements”.

17. Another difference between the two options of this article is that Option 2 contains the definition of the term “utilization”.
18. The degree to which Member States should have flexibility at a national level is one of the issues. Further issues include whether the rights should be collective or not, should mandatory disclosure be included or not and is it necessary to include the definition of “utilization”.

Article 4 – Sanctions, remedies and exercise of rights

19. One disagreement on this article is whether Article 4.2, which deals with the measures to be taken, should be more general (option 1) or more specific (option 2).
20. Article 4.3 states that the procedures should be accessible, fair, equitable, appropriate and not burdensome for TK holders. There is no agreement on whether they should provide safeguards for legitimate third party interests and the public interest.
21. Option 3 was inspired by part of the TCEs text (article 8). It states that the means of redress for safeguarding the protection granted should be governed by the legislation of the country where the protection is claimed. It also provides that the sanctions and remedies should reflect the sanctions and remedies that indigenous peoples and local communities would use.
22. In sum, should Article 4.2, which deals with the measures to be taken, be more general or more specific? Should the means of redress for safeguarding the protection granted be governed by the legislation of the country where the protection is claimed? And, should the sanctions and remedies reflect the sanctions and remedies that indigenous peoples and local communities would use?

Article 5 – Administration of rights

23. Article 5.1 states that an appropriate national or regional competent authority or authorities may be established. It lists possible roles of the authority, such as disseminating information about TK and its protection, ascertaining whether prior informed consent has been obtained, and supervising fair and equitable benefit-sharing.
24. Regarding TK which is not specifically attributable to or confined to a community, Article 5.2 provides that the authority may, with the consultation/and approval of the TK holders, administer the rights.
25. Article 5.3 provides that the identity of the authority shall be communicated to WIPO.
26. Article 5.4 states that the establishment of an authority is without prejudice to the rights of TK holders to administer their rights according to their customary law and practices. There is no agreement on the placement of this sub-article.
27. Article 5.5 provides that the established authority shall include authorities originating from indigenous peoples.
28. To me, it seems the key issues include (1) The extent of participation of the TK holders in the establishment/appointment of an authority and in the establishment of its functions (2) The functions the authority would have.

Article 6 – Exceptions and Limitations

29. This Article comprises two options.
30. Option 1 provides less exceptions and limitations than Option 2. In option 1, the use of TK in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes is permitted. The creation of an original work of authorship inspired by TK is permitted. Option 1 also provides that there shall be no right to exclude others from using knowledge that: (a) has been independently created; (b) derived from sources other than the beneficiary; or (c) is known outside of the beneficiaries' community.
31. The IGC generally agreed on some elements, in particular: not affecting customary use, and developing domestic/national limitations and exceptions.
32. Regarding the development of domestic/national limitations and exceptions (Article 6.3), there is no agreement on whether or not the prior and informed consent of the beneficiaries is needed.
33. The text regarding secret and/or sacred TK is in brackets because some delegations wondered whether it should be included within the scope of this future instrument.
34. In sum, (1) Should the prior and informed consent of the beneficiaries be needed for the development of domestic/national limitations and exceptions? (2) Should the text include more exceptions and limitations as provided in Option 2 or less exceptions and limitations as provided in Option 1? (3) Should "independent discovery or independent innovation" be included or not? (4) Should secret and/or sacred TK be included or not?

Article 7 – Term of protection

35. Article 7 consists of two options:
 - Option 1 provides that TK is protected as long as it meets the criteria of eligibility for protection.
 - Option 2 states that the duration of protection of TK varies based upon the characteristics and value of TK.
36. The main issues seem to be: (1) Should the term of protection last as long as TK meets the eligibility criteria under Article 1? (2) Should the duration of protection vary according to the characteristics and value of TK?

Article 8 – Formalities

37. Option 1 of Article 8.1 states that the protection of TK shall not be subject to formalities, while Option 2 states that the protection of TK requires some formalities.
38. Article 8.2 further provides that registers or other records may/should/shall be maintained by relevant national authorities.
39. In other words, (1) Should formalities be required or not? (2) Should/May registers be established or not?

Article 9 – Transitional measures

40. There seems to be consensus that this instrument applies to all TK which, at the moment of coming into force, fulfills the criteria.

41. Two options in Article 9.2 differ in the handling of acquired rights of third parties:
- Option 1 is to the effect that necessary measures would be taken to secure the rights acquired by third parties.
 - Option 2 states that continuing acts should be brought into conformity within a reasonable period, subject to respect for rights previously acquired by the third parties in good faith.
42. The main questions may be: (1) Would the protection for TK apply to ongoing uses of TK that began before such protection came into force? (2) Should rights already obtained by third parties be secured? (3) Should continuing acts in respect of TK, that had commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by these provisions, be brought into conformity?

Article 10 – Consistency with the general legal framework

43. Article 10.1 consists of two options:
- Option 1 generally provides that the protection shall take account of, and operate consistently with, other international and regional instruments and processes.
 - Option 2 provides that the protection should leave intact and in no way affect the protection provided for in international legal instruments.
44. In summary, (1) Should this instrument take account and act consistently with other instruments or should it leave intact and not affect the protection provided for under other instruments? (2) Should particular instruments be referred to, such as the Nagoya Protocol, or not? (3) Should Article 10.2 be kept or not?

Article 11 – National treatment and other means of recognizing foreign rights and interests

45. There is no consensus on this article.
46. The same text as included in the TCEs text was proposed. It states that the rights and benefits are available to nationals and residents, and that eligible foreign beneficiaries should enjoy the same rights and benefits as nationals, as well as the rights and benefits granted by these provisions.
47. Reciprocity and an appropriate means of recognizing foreign rights holders were proposed by some delegations as means to recognize foreign rights and interests.
48. The main question is whether foreign rights and interests should be recognized through national treatment, reciprocity or the development of an alternative means?

Article 12 – Trans-boundary cooperation

49. Where TK is located in territories of different States, there seems to be consensus that Member States should co-operate by taking measures that are supportive of and do not run counter to the objectives of this instrument.
50. The extent of the participation of the TK holders is not clear. The text provides that this cooperation shall be done with the participation/consent/prior informed consent of the traditional knowledge holders.

51. This article includes a paragraph inspired by article 10 of the Nagoya Protocol related to a global mutual benefit-sharing mechanism which might be considered.
52. To me, it seems the key issues would include: (1) Is the cooperation with the “participation” or with the “consent”/“prior informed consent” of TK holders? (2) Would a global mutual benefit-sharing mechanism be necessary?

[End of Annex and of document]