

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

Eighteenth Session Geneva, May 9 to 13, 2011

DRAFT ARTICLES ON THE PROTECTION OF TRADITIONAL KNOWLEDGE PREPARED AT IWG 2

Document prepared by the Secretariat

INTRODUCTION

1. The Second Intersessional Working Group (IWG 2) met from February 21 to 25, 2011 to discuss traditional knowledge. With reference to document WIPO/GRTKF/IC/18/5 Prov. ("The Protection of Traditional Knowledge: Revised Objectives and Principles"), IWG 2 extensively discussed each of the draft articles contained therein.
2. The results of IWG 2 are reported on in the session's "Summary Report" (WIPO/GRTKF/IWG/2/2), made available at this session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) as document WIPO/GRTKF/IC/18/6. In particular, after extensive discussions in the plenary of IWG 2, six informal, open-ended drafting groups were established to further discuss, exchange and consolidate the various views expressed in the plenary, and to propose streamlined text, including options, comments and scenarios. Those drafting groups were established to address one or more issues. The work of the drafting groups was coordinated, during a meeting on the evening of Wednesday, February 23, 2011, between the Chair of IWG 2 and the Conveners and Rapporteurs of the drafting groups, as well as the Vice-Chairs of IWG 2, after which, on the morning of Thursday, February 24, 2011, the drafting groups had a further opportunity to review their respective article or articles. Thereafter, each drafting group's article(s) were presented to and discussed by all the experts in the IWG 2 plenary in the afternoon of Thursday,

February 24, 2011 and on Friday, February 25, 2011. The draft articles and comments, including specific texts suggested by experts, were noted by IWG 2 and not adopted as such.

3. IWG 2 requested the Secretariat to prepare, for this session of the IGC, a document (WIPO/GRTKF/IWG/2/3) incorporating the draft articles prepared by the informal drafting groups, as well as the comments and texts proposed by the individual experts in the IWG 2 plenary on February 24 and 25, 2011 as referred to in paragraph 2 above, with attribution and including comments made by experts representing observers. This present document fulfils that request.

Preparation and structure of this document

4. The articles prepared at IWG 2 appear in the annex to this document. In respect of each article, there also appear: (i) the introduction made by the rapporteur of the relevant drafting group; (ii) comments on the proposed articles made by the experts in the IWG 2 plenary in the afternoon of Thursday, February 24, 2011 and on Friday, February 25, 2011; and, (iii) any alternative options presented by experts on the same day. Alternative options were presented in respect of articles 1 and 12.

Related document

5. The "Summary Report of the Second Intersessional Working Group (IWG 2)", which includes the List of Participants of IWG 2 (WIPO/GRTKF/IC/18/6) is also made available at this session of the IGC and is directly related to the present document.

6. *The Committee is invited to review and comment on the articles contained in the Annex towards developing a revised and updated version thereof.*

[Annex follows]

ANNEX

ARTICLE 1

SUBJECT MATTER OF PROTECTION

Definition of traditional knowledge

Option 1

- 1.1 Traditional knowledge means knowledge resulting from intellectual activity in a traditional context including the know-how, skills, innovations, practices and learning that form part of the traditional knowledge systems of an [indigenous people or local community¹].

Option 2

- 1.1 (a) Traditional knowledge is dynamic and evolving. It is the result of the intellectual activities in diverse traditional contexts, including knowledge, skills, innovations, practices and teachings in a collective framework of [indigenous peoples and local communities];
- (b) Traditional knowledge is part of a collective, ancestral, territorial, spiritual, cultural, intellectual and material heritage;
- (c) Traditional knowledge is transmitted from generation to generation in diverse forms and is inalienable, indivisible and imprescriptible;
- (d) Traditional knowledge is intrinsically linked to biodiversity and sustains cultural, social and human diversity embodied in traditional lifestyles.

Criteria for eligibility

Option 1

- 1.2 [Protected traditional knowledge is knowledge that is:] / [Protection extends to traditional knowledge that is:]
- (a) the unique product of or is [distinctively] associated with [an indigenous people or local communities];

Alternative

- (a) distinctively associated with and customarily recognized as belonging to a [local or traditional community];
- (b) collectively generated, preserved and transmitted [from generation to generation] OR [in a traditional and intergenerational context].

¹ The term "indigenous people and local community" is used as a place holder. This term will be addressed by the group considering beneficiaries of protection.

Alternative

(b) generated and collectively shared, preserved and transmitted [from generation to generation] OR [in a traditional and intergenerational context];

(c) integral to the cultural identity of [an indigenous people or local community].

Alternative

(c) integral to the cultural identity of a [local, indigenous or traditional peoples or communities] that is recognized as the owner through a form of custodian or collective and cultural ownership responsibility. Such a relationship may be established formally or informally by customary practices, laws or protocols.

Option 2

(a) to (c) above, plus;

(d) not made widely known outside that community;

(e) not the application of principles, rules, skills normally, and generally, well known

Option 3

(a) to (c) above, plus;

(d) [the property of the [indigenous peoples and local communities]];

(e) [not made widely known outside that community with their free prior and informed consent of the [indigenous peoples and local communities] on mutually agreed terms];

(f) [traditional knowledge may have diverse qualities and are viewed in the collective and are shared within the community. They are traditional in nature, often sacred or holy, and are often secret.];

(g) [this traditional knowledge is part of the identity of one or more peoples [indigenous and local] given that sometimes this is shared knowledge more than one peoples and/or communities];

(h) [this traditional knowledge is recognized by the [indigenous and local peoples and communities] so that they may exercise this knowledge and that they may exercise the custody of this knowledge and conserve it. There is a cultural responsibility that is recognized within customary law and practice.]

Secret traditional knowledge

- 1.3 [Protected secret traditional knowledge is knowledge that is kept secret by the beneficiary group and is not shared, and has not been shared, by those outside of the beneficiary group.]

[Commentary on Article 1 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Kim Connolly-Stone introduced the work of the drafting group on Article 1. The group had decided to structure article 1 in two parts, the first being a definition of traditional knowledge, and a second part dealing with eligibility criteria.

There were two options for the definition of TK. The first was a general and all inclusive definition. The second was more descriptive and included examples of aspects of TK, and expressed aspirations of indigenous people and local communities. The two definitions reflected the different drafting styles of members of the group: some took a more legal approach to the definition, while others considered that a strictly legal approach was not appropriate for a subject such as TK. A second version of option two was prepared by Heng Gee Lim (see below), however, the group did not have enough time to fully consider and adopt it.

There were, in effect, three categories of options for dealing with eligibility for protection.

All three dealt with the core concepts of distinctiveness, the collective nature of TK and its transmission between generations, and cultural identity. The experts identified two options for each of these criteria. During the discussion of the criteria that TK be integral to cultural identity, it was suggested that this criteria be expanded to cultural heritage.

The first option simply contained the various options for distinctiveness, the collective nature of TK, and cultural identity.

The second set of options was as for option one, but contained two additional criteria for eligibility which provided that where TK was widely known outside the community then it should not be eligible for any protection. There was not general agreement on the inclusion of these criteria. Some experts were of the view that issues concerning whether TK was widely known or easily discoverable or not were better dealt with under Article 3 concerning the scope of protection.

Option 3 was also as for option one, but with a number of additional criteria. Some of these additional criteria were considered by some members of the group to duplicate other criteria for eligibility or to stray into the definition of TK rather than the eligibility for protection. However, the group did not have sufficient time to work through these issues.

The text also included a proposal to include a third element in the article which was a definition of protected secret knowledge, on the basis that other articles dealt with secret TK and so it might be useful to define it. Unfortunately, the group did not have sufficient time to discuss the definition in any detail.

References to indigenous peoples and local communities were in square brackets. The group decided to use this term as a place-holder on the basis that group 2 on Article 2 was looking at the issue of beneficiaries. As at previous WIPO meetings there had been questions about whether to include nations, individual TK holders, and whether to refer to the singular or the plural. The group concluded that it could not resolve these issues during its drafting session.

Due to time constraints, the group had not been able to conclude its discussion of all issues.

COMMENTS BY EXPERTS

Christopher Mapani stated that Article 1 was basically to address two questions: (1) what was supposed to be protected under this instrument? In other words, what was TK? and, (2) which TK qualified for protection among the various TK? He believed that options 1 and 2 could easily be merged. However, some of the issues raised in option 2 did not really address the question of what was the subject matter. They were more descriptive. Regarding Article 1.2(a), he had a problem with the word “distinctively”: (1) what was the import of this word? and, (2) where did it leave TK which was owned by various groupings? Did it mean that at least a particular group could be identified with TK? Regarding Article 1.2(c), he had a problem with the word “integral”: (1) did it mean to differentiate what was central to a community and what was not? and, (2) who determined what was central to a community and what was not? He also made comments on the term “widely known”. He wondered whether how something became widely known was being taken into account. TK could have become widely known by misappropriation, as a result of theft, or by disclosure by the community. He suggested that it should be TK which had been disclosed by the holders themselves as opposed to just any individual.

Musa Usman Ndamba asked why there were brackets around “indigenous peoples and local communities”. He also wondered what was meant by “distinctively”.

Lucia Fernanda Inácio Belfort had concerns with the expression “in a traditional context”, which could lead to a legal interpretation which excluded certain TK. So as to avoid any legal misunderstandings, she proposed to replace “in a traditional context” with “in a specific cultural context”. It would not exclude the knowledge which could be found in a traditional context, for example, TK linked to territories. Regarding Article 1.1, she supported Heng Gee Lim’s proposal [note from Secretariat: see below]. The proposal also added “sacred” and “secret”, which were fundamental for indigenous peoples, although not all TK was sacred and not all TK was secret. Regarding the footnote, since the term “indigenous peoples and local communities” had been approved in Article 2 by group 2, she suggested to use the same term throughout the text. She did not accept option 2 of Article 1.2, which dealt with the knowledge not made widely known outside the communities. She stated that it could be an exception.

Amadou Tankoano supported Yonah Ngalaba Seleti’s proposal [note from Secretariat: see below]. He also endorsed Heng Gee Lim’s proposal [note from Secretariat: see below].

Arjun Vinodrai underlined the importance of certainty and clarity for lawyers and judges when drafting definitions. Particularly, the issue was about celebrating cultural diversity. For that reason, he noted that there was definite value in option 2 of Article 1.2. Option 2 of Article 1.2 included and identified two items which would not fall within the scope of TK.

Natacha Lenaerts preferred option 1 of Article 1.1 and option 2 of Article 1.2. Regarding option 2 of Article 1.2, she preferred regular Articles 1.2(a), 1.2(b) and 1.2(c).

Carla Michely Yamaguti Lemos preferred option 2 of Article 1.1, because it was more complete to address the complex issue of what was TK. She addressed two more situations: (1) TK was available outside of the specific cultural context, and (2) the same TK was provided by more than one people or community. She believed that those situations needed to be included in the definition of TK. Regarding the criteria for eligibility, she stated that the better phrase was “protection extends to traditional knowledge that is”. She could not accept the expression “not made widely known” which appeared in options 2 and 3, because it implied differences in the rights of the communities and indigenous peoples. It was not necessary to put secret TK in this article.

Nabiollah Azami Sardoue suggested that the term “indigenous peoples or local communities” be replaced by “beneficiaries” in all parts of the text. Regarding Article 1.2, his preference was “protection extends to traditional knowledge that is” in option 1. He proposed to remove or bracket “collectively”, because TK could be developed, preserved, transmitted by families or by individuals.

Yang Hongju stated that on Article 1 there were many divergent opinions on the substance that were difficult to resolve which would have to be sorted out by the IGC. Regarding secret TK, she noted that Article 1.3 might lead to some misunderstandings. The term “protected secret traditional knowledge” implied that some secret TK was protected while some was not. She did not understand the purpose of that paragraph. If “secret” was regarded as a precondition of protection, it should be included in Article 1.2. If “secret traditional knowledge” was regarded as a type of protected TK, other types of protected TK needed to be added, such as “disclosed TK” as mentioned in Article 3.

Justin Hughes indicated that alternative Article 1.2(a), regular Article 1.2(b), and alternative Article 1.2(c) were actually from Yonah Ngalaba Seleti [note from Secretariat: see below]. Regarding Heng Gee Lim’s proposal [note from Secretariat: see below], he suggested keeping it on the record as something that was very highly thought of by a number of experts. Regarding secret TK, he believed that any TK which was genuinely kept secret by an indigenous community or local community should be subject to protection.

Bala Moussa Coulibaly endorsed option 2 of Article 1.1. He stated that there was extensive experience of medical treatment using medical plants in his country. There was also a national pharmacopeia and there was a need to obtain approval for such plants to be sold through pharmacies. Article 1.1 did not take into consideration that kind of use of medical plants and he believed that it should be dealt with very clearly.

Lorena Bolaños stated that the general approach was to have a definition which would faithfully reflect the aspirations of the indigenous peoples, and in which no element was sacrificed. She was concerned that the definition did not make a distinction between TK and scientific knowledge. In fact, both types of knowledge should be considered on an equal footing. She highlighted the Policy Objective (i), which explicitly recognized the scientific value of TK. As to the terms to be used, she suggested making reference to terms recognized in international instruments such as the term “indigenous peoples”. It was not appropriate that this term be replaced by beneficiaries. She supported Lucia Fernanda Inácio Belfort’s proposal to replace the term “traditional context” with “cultural context”. That would keep the IGC away from having to define what “traditional context” was. Regarding Article 1.2, she was concerned that option 2 made reference to knowledge which was widely known outside the community.

Xilonen Luna Ruiz agreed with Heng Gee Lim that the terms “sacred” and “secret” needed to be included. TK could have different qualities, such as shared within the community, traditional, sacred or secret. It was necessary to explain in the definition the qualities of TK, but secrecy should not be considered an eligibility criterion. TK was often secret because the indigenous peoples and local communities did not want other people to know about that knowledge. Regarding regular Article 1.2(a), she believed that it would be highly questionable to use the term “unique product”.

Krisztina Kovács preferred option 1 of Article 1.1 and option 2 of Article 1.2. Regarding option 2 of Article 1.2, she preferred regular Articles 1.2(a) and 1.2(c).

N.S. Gopalakrishnan stated that the methodology followed was to define TK broadly and to introduce conditions that limited the scope of TK which would receive protection under the

instrument. He believed that that methodology was faulty, since it made an attempt to classify TK into two categories: (1) those capable of getting protection, and (2) those capable of getting no protection. He believed that all TK, once it was recognized as TK, should get protection under the instrument. The approach followed was also to look at TK from the standards of IP systems. That was reflective of the words, such as “unique”, “distinctively” and “integral”. He believed that the notion of public domain as understood in the formal IP system dominated the identification of the definition as fixing the criteria for the protection of TK. That fundamentally questioned the customary right of the TK holders. TK was part of the communities and they owned it. The eligibility conditions were putting the burden on the holders of TK to prove that it belonged to them. That was against the basic understanding that TK belonged to the community. The policy objective was to prevent misappropriation and misuse of valuable TK. This approach would facilitate misappropriation and put the burden of establishing ownership on TK holders rather than enabling them to empower, preserve and protect their culture and tradition. He acknowledged that a few elements in the various options could be picked up and put from the perspective of preventing misappropriation, though they were not clear and adequate enough to protect and cover all forms of valuable TK.

Daphné De Beco preferred option 1 of Article 1.1 and option 2 of Article 1.2. Regarding option 2 of Article 1.2, she preferred regular Articles 1.2(a), 1.2(b) and 1.2(c).

Leila Garro Valverde endorsed what Yonah Ngalaba Seleti had said. She also supported Heng Gee Lim’s proposal. She raised concerns on the use of the terms “people” or “peoples” and highlighted the importance of the different shades of meaning of both terms.

Tim Roberts supported Arjun Vinodrai’s intervention. It was important to have a text that lawyers could use. The drafting groups were not really drafting laws, but were drafting meta laws, which were for lawyers to put into language suitable for their own particular countries. To be clear was the first priority. It would be nice if it was fair and sensible as well. Regarding Article 1.3, he believed that it was important to treat secret TK in a different way from other forms of TK. He suggested giving it greater protection.

Horacio Gabriel Usquiano Vargas highlighted that Article 1 was going to generate the results of all the other articles as far as TK was concerned. Regarding option 2 of Article 1.1, the main structure was the fruit of coordination amongst many experts. It was very important that that be made clear in the plenary. He supported option 2. Regarding Article 1.2, referring to TK as a product was not recommendable, and the term “product” was not accepted. TK had a collective nature.

Natalia Buzova preferred option 1 of Article 1.1 and option 2 of Article 1.2.

Hemachandra Leelanath Obeysekera agreed with the comments made by Bala Moussa Coulibaly. There was the same problem in Sri Lanka with medicinal plants. He suggested adding “competencies” after “skills” in option 2 of Article 1.1.

Ken-Ichiro Natsume believed that having concrete and detailed criteria and definitions would make it easier to understand what was eligible, what was in the scope of TK, what was not eligible, and what was not in the scope of TK. If there was a vague definition, there would be more disputes. Therefore, he preferred option 2 of Article 1.1 and believed that option 3 of Article 1.2 would be a good start. He agreed with the comments made by Arjun Vinodrai. Indicating what was not in the scope or not eligible would make the scope clearer. He believed that that kind of exercise had value, as reflected, for example, in options 2(d) or 3(e). He suggested including option 3(e), because he did not see any reasonable ground why TK which was widely known had to be protected.

Debra Harry generally agreed with option 2 of Article 1.1. However, she supported the comments made by Lucia Fernanda Inácio Belfort and Lorena Bolaños regarding the terminology. She supported the use of the term “cultural context” instead of “traditional context”. Regarding option 1 of Article 1.2, she did not support some terms, such as “product” and “distinctively”, because those terms could be used to define TK in very narrow terms and would exclude much of TK. Regarding the term “generated” used in alternative Article 1.2(b), she stated that indigenous peoples might generate new knowledge. Regarding the term “not widely known” used in option 2 of Article 1.2, she agreed with Carla Michely Yamaguti Lemos that this term excluded TK which might be wrongly considered to be in the public domain. Regarding option 2 (e), she disagreed with the term “generally, well known” which imposed IP rights criteria on TK. She supported Article 1.3 and suggested including “and sacred” after “secret”. It was important not to exclude knowledge that was particularly culturally sacred to indigenous peoples and local communities. However, she disagreed with the phrase “and has not been shared”, because, in many cases, secret and/or sacred knowledge had been taken, misappropriated, or wrongly released from indigenous communities, and therefore might be known by others. That knowledge should not be excluded from protection. Regarding the beneficiaries, she stated that group 2 had full agreement on the terminology of “indigenous peoples and local communities”.

Edwina Lewis supported the comments made by Arjun Vinodrai and Tim Roberts on the need for legal clarity. She raised the importance of flexibility to accommodate vastly different domestic circumstances and suggested a definition that was broad and inclusive. She believed that option 1 of Article 1.1 provided a very broad and inclusive definition. Option 2 of Article 1.1 was seeking to define TK systems rather than TK itself.

Vittorio Ragonese stated that there were some different anthropological visions of the concept of TK. From a more legal view, he preferred option 2 of Article 1.1. In the field of IP, there were criteria for protection that needed to be complied with. In order to be inventions, the specific criteria had to be fulfilled. That should apply also for TK. Regarding Article 1.1(c) of option 2, he believed that the imprescriptible nature should be included in Article 7, which dealt with duration of protection. Regarding Article 1.2(a), he recalled that there was a different text “where the knowledge is unique to or distinctively associated with” and he did not find that particular text. He wondered whether it was left out from the beginning or it was changed. He preferred option 2 of Article 1.2. Regarding option 2 of Article 1.2, he preferred regular Articles 1.2(a), 1.2(b) and 1.2(c).

Kijoong Song believed that definition of TK had to be concise but accurate. He preferred option 1 of Article 1.1, because paragraphs (b), (c), and (d) of option 2 were more like criteria for eligibility. He preferred option 2 of Article 1.2. Regarding option 2 of Article 1.2, he preferred alternative Articles 1.2(a), regular Article 1.2(b) and regular Article 1.2(c).

Irène-Mélanie Gwenang preferred option 1 of Article 1.1. She proposed to replace “a traditional context” with “a traditional and cultural context” so there was no need to make a choice between the two. Regarding Article 1.2, she preferred option 1. She also supported Bala Moussa Coulibaly and Hemachandra Leelanath Obeysekera regarding their concerns on medicinal plants.

Ronald Barnes supported the comments made by Lucia Fernanda Inácio Belfort, Debra Harry, Leila Garro Valverde and Lorena Bolaños. He highlighted that the term used in Article 2 was “indigenous peoples” which was in the plural form. That needed to be standardized. Regarding the criteria for eligibility, he preferred alternative Article 1.2(b) and alternative Article 1.2(c).

Weerawit Weeraworawit endorsed Heng Gee Lim's proposal because it dealt with the content of knowledge and the way in which knowledge was kept, maintained and used. Regarding the criteria for eligibility, he believed that not all knowledge should be considered to be worthy of protection. It was a pity that the group had not managed to come out with a decisive view on the effect of "widely known" TK.

Albert Deterville preferred option 2 of Article 1.1. Regarding the criteria, he preferred alternatives Article 1.2(a), 1.2(b) and 1.2(c). He supported the comments made by Debra Harry on the inclusion of sacred and secret TK. He suggested continuing to use "indigenous peoples and local communities" as the standard expression.

Miranda Risane Ayu preferred option 2 of Article 1.1, but believed that clarity was needed on some new terms, which should be explained legally. Regarding the criteria of eligibility, she preferred option 1 and preferred alternative Article 1.2(a), regular Article 1.2(b), and alternative Article 1.2(c). She supported Yonah Ngalaba Seleti's proposal. She also expressed her interest in option 3, but there were lots of problems of clarity and legal certainty in the terms, such as "secret", "shared knowledge".

ALTERNATIVE OPTIONS BY EXPERTS

Heng Gee Lim proposed alternative text for Article 1.1:

"Traditional knowledge is the result of the intellectual activities in diverse traditional contexts, including knowledge, skills, innovations, practices and teachings in a collective framework of [indigenous peoples and local communities]. It is:

- (a) dynamic and evolving and is part of a collective, ancestral, territorial, spiritual, cultural, intellectual and material heritage,
- (b) transmitted from generation to generation in diverse forms and is inalienable, indivisible and imprescriptible,
- (c) intrinsically linked to biodiversity and sustains cultural, social and human diversity embodied in traditional lifestyles, and
- (d) often sacred and / or secret."

Yonah Ngalaba Seleti proposed alternative text for Article 1.2:

"Protection shall be extended to traditional knowledge that is:

- (a) generated and collectively shared, preserved and transmitted from generation to generation,
- (b) distinctively associated with and customarily recognized as belonging to a [local or traditional community],
- (c) integral to the cultural identity of a [local, indigenous or traditional peoples or communities] that is recognized as the owner through a form of custodian or collective and cultural ownership responsibility. Such a relationship may be established formally or informally by customary practices, laws or protocols."

ARTICLE 2

BENEFICIARIES OF PROTECTION

Beneficiaries of protection are holders of traditional knowledge who generate, preserve and transmit knowledge in a traditional or intergenerational context [in accordance with Article 1]. Holders of traditional knowledge include, but are not limited to, indigenous peoples, local communities [and nations].

[Commentary on Article 2 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Marisella Ouma introduced the work of the drafting group on Article 2.

The participants in the drafting group were Leonilla Kishebuka, Nabiollah Azami Sardoue, Musa Usman, Hongju Yang, Richard Aching, Corleta Babb-Schaefer, Jens Gaster, Kristina Kovács, Marc Perlman, Debra Harry, Giancarlo Leon, Miguel Valbuena, Rodrigo Valencia, Hayat Mehadji, Dioniso Madureira, Xilonen Luna Ruiz and Joseph Olesarioyo.

The rapporteur stated that the main working document was WIPO/GRTKF/IC/18/5/ Prov. The group also made reference to WIPO/GRTKF/IWG/2/INF/1/Prov. and WIPO/GRTKF/IWG/2/INF/2. It was clear from the document on TCEs that there was a need to come up with a single proposal.

Some experts were concerned about the use of the terms “tradition” and “protect” as contained in WIPO/GRTKF/IC/18/5/ Prov. The emphasis was on the dynamic aspect of tradition and on the fact that protection should not be a requirement for the granting of rights.

After some discussions, the following proposal was made which was used as a working document:

“The relevant legislation or law and practices of member states shall /should provide for identification of beneficiaries as TK holders such as indigenous peoples, local and traditional communities who generate, constitute, develop, preserve and transmit in a traditional or intergenerational context.”

It was clear from the above proposal that there were certain elements that needed to be addressed especially in relation to indigenous peoples’ status as recognized by the United Nations Declaration on the Rights of Indigenous People. The final proposal was intended to ensure that the TK holders were identified but at the same time that any restrictive wording should be avoided.

The last sentence was drafted to give an open list including indigenous peoples, local communities and nations. However, the experts were of the opinion that until there was a clear definition of the term “nation”, it would be left in brackets. There were several definitions of this term that might result in different interpretations.

The term “nations” was placed in brackets. It was felt that this term had various connotations and thus required a precise definition. It was the understanding of experts that the text should cover situations where certain Member States neither had indigenous peoples nor local communities but enjoyed TK as a nation.

There was a discussion on the issue of the term “protect”. The experts recommended the deletion of the term “protect” as it would presuppose a requirement of existing TK protection provided by States. Experts agreed to delete the words “constitute” and “develop”.

There was need to make reference to Article 1 in relation to the scope of protection thus the bracketing of the term “in accordance with the Article 1”. The group noted that the “traditional or intergenerational context” should be addressed in Article 1 defining the subject matter of

protection. Furthermore, it was felt that the enumeration of TK holders in the second sentence of Article 2 was a non-exhaustive list that provided for examples only.

Some experts proposed the deletion of the whole sentence and to leave the matter to national legislation instead of listing the TK holders. The provision for relevant legislation to provide for the identification of beneficiaries was deleted and experts proposed that it should be moved to other articles within the instrument.

COMMENTS BY EXPERTS

Carla Michely Yamaguti Lemos stated that there were no beneficiaries beyond indigenous peoples and local communities. She proposed to replace “or” with “and” in the second line. She proposed to replace the second sentence with “Holders of traditional knowledge are indigenous peoples and local communities.”

Carmen Adriana Fernández Aroztegui suggested deleting the brackets around “indigenous peoples and local communities” after seeing the result achieved by the group. She wished to have the meaning of “local” and the meaning of “community” checked in other languages. She believed that nations which did not have any indigenous peoples or indigenous communities should not be excluded from protection of TK. She considered that in the term “community” in Spanish, the concept of nation was implicit. Her understanding was that communities could be interpreted as a whole set of people of a region or nation, or a whole set of people who were linked by common characteristics or interests. Using the term “local communities”, the TK of nations would be included.

Lucia Fernanda Inácio Belfort supported Carla Michely Yamaguti Lemos’ comments that nobody could be the owner or the right holder of TK besides indigenous peoples and local communities. She proposed to replace “traditional context” with “specific cultural context”. She also proposed to add “owners” before “holders”. Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples clearly expressed the ownership of TK.

Albert Deterville stated that it was obvious from Article 1 whom the beneficiaries were. He supported Lucia Fernanda Inácio Belfort and Carla Michely Yamaguti Lemos on the reconstruction of Article 2. He also supported the deletion of some of the words in the second sentence, because the beneficiaries were indigenous and local communities.

Benny Müller wondered whether it would not be clear to say “who generate, preserve and transmit traditional knowledge as defined in Article 1” so as to avoid making reference to a traditional and intergenerational context. He highlighted that the indigenous peoples and local communities should be the holders, the beneficiaries and the managers of their rights. In other words, protection should not be for nations or for states. Therefore, he proposed to delete “nations” which was in brackets.

Miranda Risane Ayu stated that “nation” sometimes could be differentiated from “State” in her country. When the government or the State did something unjustly, the nation could make it right. So nation was the concept which was wider. Article 32 of the Constitution of the Republic of Indonesia stated that the government should advance the national culture of Indonesia. She stated that it was not only a political explanation, but also their stand as a nation. So she believed that if “nations” were excluded as beneficiaries, it would be considered as a threat to the unity of Indonesia. She insisted that the term “nations” be retained in the text.

Arjun Vinodrai raised one question on the last sentence on whether the intent was to include individuals within the beneficiaries. He wondered whether it might be useful at some point to actually define what “traditional” was. Some of the options for Article 1 provided some guidelines, but it might be useful moving forward with the document to provide something in operational terms. Regarding “a traditional or intergenerational context”, he wondered why the word “or” was used, as opposed to “and”. He noted that a university, particularly in older areas such as in Europe where there had been universities for the last 500 years, could perhaps be seen as intergenerational, passing knowledge from one generation to another.

Khamis Al-Shamakhi stated that there were some homogeneous peoples and they were not necessarily local or indigenous. He agreed with Miranda Risane Ayu and other experts who had supported the use of the word “nations”.

Horacio Gabriel Usquiano Vargas proposed that the term “nations” be included. He stated that a nation was not just a unique single state. Bolivia was a plurinational state. Plurinationality of nations should be considered in this article. He invited all of the experts to read Article 1 of the Constitution of Bolivia where there was an explanation of the concept of plurinational.

Lilyclaire Elaine Bellamy suggested deleting the brackets around “and nations”.

Justin Hughes disagreed with Debra Harry’s comments on the term “generate” in relation to Article 1. The term “generate” was intended to include creativity. He noted that if the experts were concerned about it in Article 1, they had to be concerned about it in Article 2 also. He agreed with Benny Müller on keeping a straightforward connection to the conditions in Article 1 and to remove the reference to “traditional or intergenerational context”. He preferred the bracketed language “in accordance with Article 1”. He personally supported not including the word “nations”. His understanding was that many nations were local communities and, in particular, many Caribbean nations constituted local communities.

Musa Usman Ndamba suggested deleting “nations”. He stated that he came from Africa where nations and states were sometimes confusing. He believed that “community” actually covered “nation”.

Hayet Mehadji stated that the option selected by the drafting group was a flexible solution. She stressed that it was very important to come up with an instrument that reflected the realities of all Member States. She supported keeping the word “and nations”.

Xilonen Luna Ruiz agreed with the words “indigenous peoples and local communities”. She recommended that each state worked towards definitions of those peoples and communities that were both indigenous and local. The terms including indigenous peoples and local communities might have different definitions in specific regions and countries.

Lorena Bolaños supported Benny Müller’s proposal to replace “traditional or intergenerational context”, so as to get rid of the ambiguity created by the two terms. She also supported Carla Michely Yamaguti Lemos’ proposal on the deletion of “include, but are not limited to”. That gave a mistaken impression that the international instrument aimed to protect third parties also.

Weerawit Weeraworawit stated that the draft was reasonable and flexible. He supported Miranda Risane Ayu’s comments on the retention of the word “nations”, because each country had different requirements, different conditions and different needs. For example, the traditional massage knowledge in Thailand was not attributable to any local community in Thailand. It had been handed down for generations and it was being developed and improved. If the definition of beneficiaries was limited to only indigenous peoples and local communities, it would exclude the

wide range of nations and cultural communities which were entitled to the benefit of that TK. So he preferred to keep the definition flexible with the inclusion of the words “include, but are not limited to” and with the retention of the word “nations”.

Joseph Kolegwi-Nzakpe stated that the text might need to take into account all African realities. Apart from indigenous peoples and local communities, individuals in the traditional communities of his country were the holders of TK. They were recognized and had been for many years in their societies. He suggested adding individuals who were the holders of TK.

Kijoong Song believed that holders of TK should be limited to indigenous peoples and local communities, because there was no mention of “nations” in defining TK in Article 1. Every article had to be consistent.

Yonah Ngalaba Seleti gave the example of Lesotho, constituted by a singular people called Basotho. The same applied to the Swazi people, living in the kingdom of Swaziland. He believed that the phrase “include, but are not limited to” privileged indigenous peoples and local communities, but did not exclude others from proving that they were holders of knowledge. So it shifted the burden from knowledge holders to those who wanted to claim.

N.S. Gopalakrishnan supported keeping the words “include, but are not limited to” and removing the brackets from “and nations”. He stated that the flexible text covered divergent conditions in different countries. The word “nations” would help particularly to identify representative bodies of countries as beneficiaries, in cases where the knowledge moved from the specific communities to different groups of communities in national context.

Martha Evelyn Menjivar expressed her satisfaction with the content and the wording of Article 2. She supported Horacio Gabriel Usquiano Vargas’ comments on the use of the term “nations”.

Robert Leslie Malezer stated that the draft was not meant to be exclusive. It might be possible that nations, meaning governments, actually generated, preserved and transmitted knowledge in a traditional and intergenerational context. For example, indigenous peoples in the Pacific formed nation states. However, there were distinctions between nations, states or governments and peoples or populations. He preferred the terminology which talked about peoples including indigenous peoples and local communities. He believed that if the term “nations” was included in the final text, the first sentence had to be tested as to how such TK was handled, maintained and continued on intergenerational basis.

John Asein proposed to replace “or” with “and”. He assumed that “traditional” in that context meant “cultural”. He also proposed to delete “included, but are not limited to”. He suggested having an indefinite, non-exhaustive enumeration of the beneficiaries. He believed that there should be certainty in the definition of the beneficiaries. He had the same question as raised by Arjun Vinodrai on the admission of individuals. There had been concerns on individuals and families who held TK and he believed that they should be able to stand as beneficiaries. Regarding the issue of “nations”, he believed that if “nations” was understood to mean countries, the article had also to consider countries with diverse cultural communities who might want to be covered.

Rodrigo Valencia Castañeda believed that “local communities” could be understood as a concept which included the term “nations”. Therefore, he suggested deleting “and nations”.

Natalia Buzova stated that because the phrase “include, but are not limited to” was in the text, whether keeping “nations” or not did not make any difference. Since it was not limited, it could

include nations, individuals, and many others who could be seen as TK holders. She believed that the definition needed to be clarified.

Debra Harry supported Lucia Fernanda Inácio Belfort to include “cultural context”. She agreed with Carla Michely Yamaguti Lemos on replacing “or” with “and”. She proposed to replace the word “generate” with “develop”. She also supported the proposal on deleting “include, but not limited to”. She did not agree with the addition of the term “and nations”.

Nabiollah Azami Sardoue stated that TK could be developed, preserved, transmitted by individuals and also families. So he suggested retaining “include, but are not limited to” as it stood. He also suggested deleting “and nations”, because the term “nations” had many definitions and made it difficult to recognize the right holders of TK.

Ulpiano Prado believed that the beneficiaries of the protection should be not only those who created TK, but also those who preserved it and transmitted it. In his country, much of this knowledge was in the hands of people who were already quite elderly. So the government was carrying out safeguarding. He suggested that besides indigenous peoples and local communities, groups of people, organizations, or individual people who were creating that knowledge could also be included.

Mohamed El Mhamdi proposed to delete the brackets and to add the words “and nations” in Article 1 too in order to be consistent. He stated that the word “nations” was very important. There was a wealth of TK in the ancient town of Fez in Morocco. TK subsequently was disseminated everywhere and it could be found in most towns in Morocco. If the term “nations” was deleted, only communities in the town of Fez which created and transmitted the knowledge would benefit. All the other communities would be left out, even though they were producing things.

Heng Gee Lim believed that there was no need to bring the words “generate, preserve and transmit” in Article 2 since TK had been defined in Article 1. He agreed with Benny Müller on the fact that the beneficiaries should be actually indigenous people and local communities. He agreed with those who suggested that the brackets be removed from the words “and nations”.

Salma Bashir stated that the wording was rather flexible and that it guaranteed a balance amongst the different beneficiaries. She suggested adding it to or linking it to Article 1.

Joseph Olesarioyo supported the retention of the words “traditional” and “intergenerational”. For example, TK was transmitted in traditional cultural practices or ceremonies in the Maasai community and it was from generation to generation. He believed that those two words had holistic meaning in defining beneficiaries of protection.

ARTICLE 3

SCOPE OF PROTECTION

Option 1

- 3.1 The beneficiaries of traditional knowledge protected under this instrument shall/should have the exclusive rights to:
- (a) control and exploit their traditional knowledge;
 - (b) authorize or deny the access and use of their traditional knowledge;
 - (c) have a fair and equitable share of benefits arising from the use of their traditional knowledge based on mutually agreed terms;
 - (d) prevent misappropriation and misuse, including any acquisitions, appropriation, use or exploitation of their traditional knowledge, without their prior and informed consent and establishment of mutually agreed terms;
 - (e) prevent the granting of IP rights involving the use of their traditional knowledge without the mandatory disclosure of traditional knowledge holders and their country of origin as well as evidence of compliance with prior and informed consent and benefit-sharing requirements;
 - (f) prevent the use of traditional knowledge beyond its traditional context without acknowledging the source of that traditional knowledge; acknowledging and attributing the traditional knowledge holders where known; and respecting the cultural norms and practices of its holders.
- 3.2 Contracting parties shall/should provide adequate and effective legal means/measures to ensure the application of these rights taking into account relevant customary laws and practices.
- 3.3 For the purposes of this instrument, the term “exploitation” in relation to traditional knowledge shall refer to any of the following acts:
- i. Where the traditional knowledge is a product:
 - (a) manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or
 - (b) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context;
 - ii. Where the traditional knowledge is a process:
 - (a) making use of the process beyond the traditional context;
 - (b) carrying out the acts referred to under sub clause (i) with respect to a product that is a direct result of the use of the process.
 - iii. Research and development leading to profit making or commercial purposes.

Option 2

- 3.1 The beneficiaries of protected traditional knowledge, shall/should have adequate and effective legal means/measures to exercise control and exploit their traditional knowledge, to authorize the access and use of their traditional knowledge, to have a fair and equitable share of benefit arising out of the use of their traditional knowledge and to prevent any unauthorized disclosure, use, or other exploitation and in particular any acquisitions, appropriation, or use that fails to meet the prior and informed consent of the traditional knowledge holders or infringes the mutually agreed terms.
- 3.2 In respect of traditional knowledge there should/shall be measures to require that those using traditional knowledge beyond its traditional context:
- (a) acknowledge the source of traditional knowledge and attribute the traditional knowledge holder where known, unless the traditional knowledge holders decide otherwise; and
- (b) use traditional knowledge in manner that respect the cultural norms and practices of its holders.

Option 3

- 3.1 In respect of traditional knowledge which has not been disclosed by traditional knowledge holders outside the traditional/cultural context the beneficiaries of protected traditional knowledge shall/should have adequate and effective legal means /measures to prevent any unauthorized disclosure, use or other exploitation. Measures should be put in place with the aim of ensuring prior and informed consent is obtained for use of the traditional knowledge, and that any benefits arising from that use are shared in a fair and equitable way with the relevant traditional knowledge holders based on mutually agreed terms.
- 3.2 Measures should/shall also be put in place to ensure prior and informed consent is obtained for the commercial or industrial use of traditional knowledge and any benefits arising from that use are shared in a fair and equitable way where a user would not have reasonably been expected to know that the traditional knowledge had been previously disclosed.
- 3.3 In respect of protected traditional knowledge including that which has been disclosed outside the traditional context there should/shall be measures to require that those using traditional knowledge beyond its traditional context:
- (a) acknowledge the source of traditional knowledge and attribute the traditional knowledge holder where known, unless the traditional knowledge holders decide otherwise; and
- (b) use traditional knowledge in manner that respect the cultural norms and practices of its holders

[Commentary on Article 3 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Christopher Mapani introduced the work of the drafting group on Article 3. The assignment of the group had been to come up with a set of rights that would be enjoyed by TK holders. A subsidiary issue was to make sure that such rights could be realized or enforced by the holders.

The philosophy underlying their discussion was essentially that holders had property rights in their TK. Consistent with such philosophy, the group proposed both positive and negative rights. They were categorized into two: (1) economic rights and (2) moral rights.

Option 1 essentially encapsulated the predominant view. This view was that as long as TK qualifies for protection under the eligibility criteria, it should follow that the holders should enjoy rights. There should be no further classification of TK in terms of whether it was publicly known or publicly available.

In Article 3.1, the group was careful to bring clarity in terms of the use of the word “protected”. TK that was protected under the instrument meant TK that qualified under the criteria of eligibility.

Article 3.2 tried to place an obligation on States. But the group noted that under Article 4 there were more or less similar provisions. The group retained Article 3.2 because it was not certain in terms of which option would be adopted in Article 4.

The other point under Article 3.2 was that the group was trying to propose a definition for what constituted “exploitation”. Regarding the definition of “exploitation” itself, the group referred to “product”, considering that the definition of TK also included innovations which could be products, processes, and things like that.

Option 2 was an abridged version of option 1. There were minor conceptual differences between option 1 and option 2. Basically it was more or less a different way of formulating it. But it also provided more latitude to the states compared to option 1.

Option 3 was the minority view. Option 3 attempted to classify the TK which qualified for protection. Different terms were used to classify this TK. For example, TK which was obtained from a textbook could not be treated the same as TK which was obtained from a community. Another concern was that pharmaceutical companies were becoming reluctant to invest in research.

Various terminologies were proposed to classify this TK. One of them was TK in the public domain. But other experts cautioned that public domain was not the same as being publicly available. The emphasis was that this was a *sui generis* form of protection. Another terminology was to classify it as secret TK but the view was that this placed the obligation on holders to keep the TK secret. The other thing was that much TK was held by a community, not by an individual. It was very difficult to keep it secret. The questions on secret TK were: (1) what was “secret”? and, (2) what parameters would be used to determine it? The group also discussed the term “widely known”. The questions were: (1) how to determine what was wide? (2) who determined what was wide? and, (3) should the community still enjoy some rights if it was widely known? The last term that the group looked at was “disclosed TK”. The group wondered what parameters would be applied to determine whether something was disclosed. Who had disclosed the TK should also be taken into account.

It was indicated that the holders of publicly available TK should enjoy rights, except probably prior informed consent.

COMMENTS BY EXPERTS

Edwina Lewis stated that one threshold question was what protection would or should not apply to TK that was widely known. One option provided by group 1 was that this TK should not meet the eligibility criteria. She stated that option 3 tried to identify what rights, for example moral or economic rights, could practically be applied to TK that might meet broad eligibility criteria in Article 1. Article 3.1 in option 3 mirrored the equivalent paragraph in the TCEs text where secret TCEs were given extensive economic protection. Article 3.3 in option 3 was intended to capture an expectation that it was appropriate to recognize the association between the knowledge itself and the originators of that knowledge, whether or not it was widely known. Article 3.2 in option 3 was perhaps less clear. But the intent was to capture situations where it was possible to conceive that even if TK was known by a limited number of people outside the traditional context, there might be certain circumstances where it would still be fair, reasonable and practical to share commercial benefits from the use of that knowledge.

Mara Rozenblate preferred option 2 because it was quite comprehensive and flexible.

Heinjoerg Herrmann proposed to replace the term “contracting parties” with “Member States” throughout the document.

Ken-Ichiro Natsume stated that, in light of the history of humans’ migration across the world since the dawn of humanity and the intergenerational and interregional dissemination of culture and tradition therewith, once a TK system on the basis of exclusive rights would be established, there would be, theoretically, ambiguity of right holders or scope of rights among related communities and regions. There was fear that, accordingly, complex conflicts between already powerful exclusive rights might be able to occur, which could hinder adequate protection of TK. Therefore, option 2 or 3 would be preferable to option 1, which adopted an exclusive right based system. He pointed out that option 3 would be preferable to option 2 because option 3 allowed the extent of secrecy or disclosure of TK to correlate with the level of TK protection based upon prior informed consent or mutually agreed terms, and such structure of the option had high affinity with the concept of unfair competition, as for which a sufficient common ground of understanding had been nurtured among Member States. Regarding Article 3.1(e) of option 1, since TK was, generally, not a tangible entity but knowledge as such, there would be virtually no tracing of the origin of such knowledge with evidence-based practice. Then where origin-disclosure requirement on TK should be introduced, it would be difficult to check out appropriately whether or not such requirement was met during each actual case of IP rights granting, for the following two reasons. First, since it would be extremely difficult, from the outset, to determine whether or not specific knowledge fell into the definition of TK during the IP rights granting process, it would be almost impossible to determine whether or not that knowledge was subject to the obligatory requirement. Even if there was a subject matter for granting IP, which seemed to fall under the scope of TK, it might have been invented, created or discovered totally independently without any relationship with TK or a TK holder. Therefore, it would not be able to determine if the subject matter was coming from TK. Second, since there would be almost no tracing of the origin of knowledge as such, such knowledge would never help to trace its origin in the practice of granting IP rights. Therefore, the disclosure requirement provided in Article 3.1(e) of option 1 would neither be expected to properly act as a deterrent against misappropriation or misuse of TK nor be an effective or realistic measure.

Leonila Kalebo Kishebuka preferred option 1. What was indicated in option 2 was not the responsibility of the TK holders but the responsibility of contracting parties.

Andrew Jenner preferred option 3 because of the much higher levels of legal certainty. Article 3.1(e), for example, was extremely difficult on a practical level given the level of training that an examiner would be expected to have and the access to the evidence of fulfilling such obligations. He believed that this particular provision caused legal uncertainty. Considering that the overall objective might be to get benefits back to the TK holders, it was important to understand that creating the right environment that incentivized research and development in that area was important. If legal certainty was not achieved to a sufficient level, the amount of benefits to be shared would be diminished because there would be few commercial products.

Justin Hughes stated that the level of protection should vary depending on the nature of the TK. He fundamentally believed that TK should be subject to a heightened level of protection where an indigenous people or local community had kept their TK secret. That was why the distinction drawn in Option 3 was quite important. He agreed with the comments concerning legal certainty. He highlighted that the norms should respect independent invention or independent discovery.

Yonah Ngalaba Seleti introduced the Pelargonium patent case as an example of the ability of indigenous communities to prevent the granting of patents on their knowledge. He stated that prior and informed consent was a tracking mechanism which indigenous people could use. He believed that option 1 gave certainty which could assist the IGC.

Hemachandra Leelanath Obeysekera indicated that, on Article 3.1(e) of option 1, most of the countries used herb plants in medicine and that the traditional medical knowledge, generated for thousands of years without any clinical practices, could be used for indigenous medicine purposes now. Some new practices had been granted patent rights, but most of the patent rights were not linked with the indigenous peoples. He believed that it was reasonable that those benefits went back to the TK holders.

Heng Gee Lim believed that option 3 that defined secret TK would be appropriate. He suggested setting up a separate right in option 1 by adding a new paragraph (g) to address the issue of secret and/or sacred TK: "(g) prevent the secret and/or sacred traditional knowledge from unauthorized disclosure or utilization". He stated that the specific right to prevent unauthorized disclosure was very important because the right to prevent unauthorized disclosure had not been specifically provided under paragraphs (a) to (f).

Amadou Tankoano preferred option 1. He proposed to insert the definition of the term "exploitation" as a footnote because that would clarify and interpret the whole article.

Bala Moussa Coulibaly preferred option 2, but he proposed to add "advantages arising from the scientific, commercial and other uses of TK" in Article 3.1. He believed that under option 2 States would be encouraged to ratify all instruments promoting proper development of IP. The assets of IP were an important part of the economy and instruments that could support and defend rights were needed to be able to perform well.

Lucia Fernanda Inácio Belfort stated that "exploit" in Article 3.1(a) might not allow for legal certainty. She proposed to replace "exploit" with "develop" which was used in Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples. She also proposed to add "maintain, protect" after "control". Based on Article 16 of the Nagoya Protocol, she proposed to add "based on free, prior and informed consent of the indigenous peoples and local communities" at the end of Article 3.1(c). Regarding Article 3.1(f), she proposed to add "cultural" after "traditional". In Article 3.2 of option 1, she suggested adding "in conjunction with indigenous

peoples and local communities” at the beginning, which could be found in Article 12 of the Nagoya Protocol and Article 31.2 in the United Nations Declaration on the Rights of Indigenous Peoples. The same wording could be applied to Article 3.1 of option 2. She highlighted that the states had an obligation to protect but they had to do that together with indigenous and local communities.

Robert Nereo Samson stated that option 1 of this article was formulated to ensure the granting of positive rights to holders of TK. It was very important in order to ensure the recognition of the rights of TK holders. The term “exclusive” was used to provide certainty to those rights enumerated under this article. Article 3.1(e) of option 1 referred to the TK holders and their country of origin which was a distinction that should be considered when dealing with such innovations.

N.S. Gopalakrishnan stated that the notion of exclusive rights existed in all three options. The major difference within those three options was the nature of the right. He believed that once TK qualified, an eligibility condition should not be any further discrimination on the nature of protection based on further classification of TK because this might be unfair to the community. Regarding knowledge kept in secret, it was an accepted fact that knowledge kept in secret would receive higher protection through the basic principles of trade secrets. He stressed that it should be clear that this was a *sui generis* law, which was different from an IP instrument.

Marisella Ouma believed that, regarding option 3, the whole issue was secret versus well known or publicly known TK. She wondered whether it was appropriate to give that different classification. She suggested having TK protected as a whole.

Lilyclaire Elaine Bellamy stated that Article 3.1 of option 1 used the term “the beneficiaries of traditional knowledge protected under this instrument”. Options 2 and 3 used the term “the beneficiaries of protected traditional knowledge”. She requested the clarification of those terms.

Carla Michely Yamaguti Lemos believed that option 1 reflected the real intent of this instrument. In regards to the effectiveness of the implementation of Article 3.1(e), she introduced the experience of Brazil in relation to disclosure requirements for TK associated to GR. In general terms, in Brazil, to receive a patent, the applicant should request information regarding the origin of the associated TK that led to the invention or innovation. He should disclose the information or not receive the right. To check whether the information was true or not, the patent office provided information on the internet and the community or people who knew that that information was false, could claim the right. In an international context, a clearing house mechanism could be used. In regard to TK which had not been disclosed or was publicly available, she reiterated that it was very important to note the difference in the meaning among those terms and the term “traditional knowledge in the public domain”. In Brazil, most of the TK of indigenous and local communities was published in scientific research. In some cases, researchers would ask communities about their knowledge. The communities did not refuse to talk. It was the nature of indigenous and local communities to show what they knew and to talk about their TK. Moreover, the nature of TK was dynamic and transgenerational and that meant not to keep it secret. To treat widely known or publicly available TK differently from secret TK ran counter to the nature of the holders of knowledge that were indigenous and local communities. She believed that a tool was needed to stop misappropriation and the consequent use without, monetary or non-monetary, benefit-sharing.

Kijoong Song stated that in a seminar on GR and TK, one of the issues was a disclosure requirement and patent examiners almost unanimously stated that to implement this requirement in the process of granting patents was almost impossible because there were no means to validate or invalidate applicant statements in the application form. Disclosure requirements

would impose tremendous amount of burden on patent offices administratively and financially. Additionally, applicants would be reluctant to apply for a patent because of lack of legal certainty.

John Asein agreed with Justin Hughes' comments on the need for certainty. He also agreed that some TK, such as sacred/secret TK, should be given special attention. He agreed with N.S. Gopalakrishnan that the three options sought to achieve effective protection by granting exclusive rights to TK holders. But option 1 best achieved the certainty. He believed that it was difficult to accept that the word "exploit" could be replaced with "develop". Regarding the classification of well-known TK and secret TK, he stated that that might create more difficulties in understanding the clear scope of the protection sought in the instrument.

Albert Deterville stated option 1 explained exactly what needed to be achieved.

Ronald Barnes preferred option 1 noticing that the term "mutually agreed terms" was included. States had an obligation to implement their international obligations. He proposed to add "in accordance with an international standard to protect the interests of indigenous peoples and local communities" at the end of Article 3.1(d). He also agreed to replace "exploit" with "develop".

Martha Evelyn Menjivar preferred option 1. She thanked Carla Michely Yamaguti Lemos who gave a clear idea of how this was dealt with in her national office when it came to disclosure of origin. She stated that in El Salvador there would be a lot of work to do to come up with the same standards.

Xilonen Luna Ruiz preferred option 1. She suggested adding "based on a recognition of the customary system" in Article 3.1(d) of option 1. She made comments on the definition of "exploitation". Article 1 talked about TK as a unique product. This definition gave some clarification and she agreed with this definition. She also stated that the term "protected TK" was not acceptable.

Debra Harry stated that option 1 contained many of the key elements that were very important to indigenous peoples. But some elements in the other options could also be valuable and useful. She shared the same concern of Lucia Fernanda Inácio Belfort on "exploit" and she supported the word "develop". She suggested using the term "free, prior and informed consent" throughout the text as it was the term used in the UN Declaration on the Rights of Indigenous Peoples. Regarding Article 3.2 of option 3, she was concerned about non-commercial use and believed that non-commercial use should be added because non-commercial use often was the first step towards further development or commercial use. She suggested replacing "acknowledge" with "recognize". Regarding "widely known", the questions were: widely known by whom, when and where. Some knowledge might be widely known, but yet still belonged to the indigenous or local community. Even if it was widely known, it should not be excluded from protection. If this process was to prevent and address the issue of misuse and misappropriation, she believed that a requirement for the repatriation or the return of wrongfully taken TK was missing.

Nabiollah Azami Sardoue preferred option 1. He agreed with the comments made by Yonah Ngalaba Seleti and Hemachandra Leelanath Obeysekera on Article 3.1(e) of option 1. In his country, holders had the same problems, especially in the case of herbal medicine.

Mohamed El Mhamdi preferred option 1. He proposed to replace "protected under this instrument" with "fulfilling the criteria under Article 1" in Article 3.1. In Article 3.2, he proposed to add "and the protection" after "application".

Miranda Risane Ayu believed that option 1 was the clearest option. She understood the concern raised by Kijoong Song. She suggested making the wording in Article 3.1(e) softer. But it depended on the policy of each country.

Antonia Aurora Ortega Pillman preferred option 1. She shared the experience of her country regarding 3.1 (e). Disclosure was required for knowledge which was not in the public domain. This facilitated and reduced the burden of the IP office. When TK was still held within the community and still belonged to the community, prior informed consent and benefit-sharing requirements needed to be met.

Benny Müller stated that Switzerland had already introduced mandatory disclosure requirements for TK and GR in its patent law. He believed that the way this requirement was formulated and implemented in Switzerland helped to increase transparency in the trade of TK. However, the disclosure of source requirement would be by itself not sufficient to resolve all issues arising in the context of access and benefit-sharing. There were additional measures which had to be taken outside of the patent system. With regard to the Swiss disclosure requirement, there was no empirical evidence that would indicate an undue burden of this requirement for patent applicants.

Heng Gee Lim stated that the formulation of the definition of the term exploitation basically followed that of the UK Patent Act and the TRIPS Agreement. He had a problem with the definition in relation to exploiting the product from which a process had been used because, in the way it was presently formulated, protection was very narrow. He wondered whether TK holders would want it. A UK court had ruled, in relation to patent law, that a product was the direct result of the use of a process, which meant that there should not be any intermediary between the protected process and the final product. He believed that to give a fairer right to holders of TK, this provision could be redrafted to say that “carrying out the acts referred to in sub-clause 1 with respect to products in which a not insignificant use has been made of the protected process”.

Natalia Buzova stated that it would be difficult to implement Article 3.1(e) as pointed out by Ken-Ichiro Natsume. Many patent offices did not resolve substantive issues of rights, but examined whether there had been a breach of practice or procedure. Article 3.1(e) was controversial and it needed to be amended because it talked about the rights after a patent had been granted.

Weerawit Weeraworawit preferred option 1. It clearly stipulated the exclusive rights of the beneficiaries. Option 3 was not preferred at all because it assumed the unfinished business of group 1 on the eligibility of protection. Disclosure requirements were nothing new and those who put in place measures to protect the beneficiaries should be accustomed to them.

Musa Usman Ndamba preferred option 1. He supported Lucia Fernanda Inácio Belfort, Debra Harry and Albert Deterville. He supported to use “control, maintain and develop”. Regarding Article 3.1(c), he suggested replacing “mutually agreed terms” with “free, prior and informed consent”. He also suggested adding an additional paragraph on “wrongfully taking TK”.

ARTICLE 4

SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

- 4.1 Contracting Parties undertake to adopt, as appropriate and in accordance with their legal systems, the measures necessary to ensure the application of this instrument.

Option 1

- 4.2 Contracting parties [shall/should] ensure that appropriate enforcement procedures are available under their laws against the [willful or negligent] infringement of [the economic and/or moral interests] of the beneficiaries sufficient to constitute a deterrent to further infringements.

Option 2

- 4.2 Accessible, appropriate and adequate enforcement and dispute resolution mechanisms, border measures, sanctions and remedies, should be available in cases of breach of the protection of the traditional knowledge so as to permit effective action against any act of misappropriation or misuse of traditional knowledge, including expeditious remedies which would constitute a deterrent to further misappropriation or misuse.
- 4.3. These procedures should be accessible, fair, equitable, appropriate and not burdensome for holders of traditional knowledge. They should also provide safeguards for legitimate third party interests and the public interests.
- 4.4 Where a dispute arises between beneficiaries or between beneficiaries and users of a traditional knowledge each party shall be entitled to refer the issue to an [independent] alternative dispute resolution mechanism recognized by international, regional or national law.

[Commentary on Article 4 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Margreet Groenenboom introduced the work of the drafting group on Article 4. She stated that during the discussions the group could not agree on some elements and those elements appeared therefore in brackets.

The group based its discussions on the article on sanctions as included in the TCE document. During the group conveners meeting, it appeared that several articles in the text were dealing with the issue of sanctions and enforcement. It was agreed to take up the article prepared by Group 5 on enforcement of rights.

On the second day, the group started with a clean up of the structure of Article 4 and decided to separate the general concepts mentioned throughout the paragraphs. Those appeared currently in paragraph 1, which covered the need to take measures, paragraph 3 which covered the need for measures to be accessible, fair and equitable, and finally, paragraph 4, which covered dispute resolution.

Paragraph 2 dealt with the measures to take. The group decided to include two options: the first one being more general and the second one being more specific. In the first option, some experts wanted to remove “willful or negligent”, others did not. With regard to the brackets around “the economic and moral rights”, it was discussed that there could be other interests as well, such as interests relating to environment and cultural interests. The second option was a combination of the TK text as found in WIPO/GRTKF/IC/18/5 Prov. and the option put forward by Group 5. The group decided to remove the reference to the form of a sanction, as that was already covered by the broader notion of “remedies”.

To both options applied that there was a link with Article 3 on scope.

Paragraph 4 included a provision for an alternative dispute resolution (ADR) mechanism, based upon the text in document WIPO/GRTKF/IC/18/5 Prov. Some experts expressed that it was unclear which forum was meant. Some said that the WIPO Arbitration and Mediation Center could be an example, as this example was mentioned in the TCE text as a footnote. It was said that there could be regional mechanisms as well, therefore, the group included “regional”. It was discussed that it would be up to Member States to recognize the mechanism. Some expressed concerns about the meaning of the word “independent” and asked for it to be bracketed.

COMMENTS BY EXPERTS

Arjun Vinodrai highlighted the policy issue with respect to option 2 of Article 4.2, where there was a reference to border measures. He also noted that there was an article on trans-boundary issues. He emphasized that until there was a full policy understanding of how the issue of TK that either resided in the community that traversed a national boundary or TK that was located in one or more locations was handled, it was very difficult to determine the appropriateness of including border measures.

Lorena Bolaños made comments on Article 4.4 which dealt with ADR mechanisms. She believed that it was a good idea to give the power to the beneficiaries to use that type of mechanisms, provided they were effective and offered more rapid and dynamic solutions than going through the normal legal channels. But indigenous peoples were not always familiar with the use of those

alternative mechanisms. She believed that it would be one of the appropriate places to say something about technical assistance and capacity building. Those ideas had been mentioned by Carla Michely Yamaguti Lemos. Capacity building should concentrate particularly on the achievement of Policy Objective (v), which was aimed at helping holders of TK to really exercise the authority over their rights. She expected that measures would be agreed even before this instrument came into force. She believed that the role of WIPO would be essential.

Martha Evelyn Menjivar preferred option 2 because it was very clearly drafted. She considered that Article 4.4 was not sufficiently applicable. The issue of dispute resolution should be clarified.

Amadou Tankoano stated that the group had done well in articulating what would be effective as sanctions and enforcement mechanisms. He highlighted that option 2 essentially came from the language of TRIPS. He preferred option 2.

John Asein suggested deleting “as appropriate and” in Article 4.1. He highlighted that option 2 was more in line with the general policy objective of preventing unfair use of TK. He preferred option 2.

Robert Nereo Samson suggested adding “and make available to traditional knowledge holders” after “undertake to adopt” in Article 4.1. He suggested adding “and violations of the rights of traditional knowledge holders provided in this instrument” after “misuse of traditional knowledge” in option 2 of Article 4.2, because he believed that this article should cover not only misappropriation or misuse of TK but also all of the violations of the rights provided in Article 3.

Edna Maria Da Costa E. Silva suggested adding “cultural” after “moral” in option 1 of Article 4.2. She stated that it was very important to protect their cultural heritage and to guarantee those rights.

Ronald Barnes supported John Asein’s proposal on the deletion of “as appropriate and” in Article 4.1. He proposed to revise Article 4.1 as “Contracting Parties undertake to adopt in accordance with an international agreed upon standard to ensure that the legal systems of protection take necessary measures to the application of this instrument.” Regarding Article 4.2, he preferred option 2. Regarding Article 4.3, he suggested bracketing “They should also provide safeguards for legitimate third party interests and the public interest.” He also suggested taking the brackets out of the word “independent” in Article 4.4.

Debra Harry preferred option 2 of Article 4.2 because it contained many important elements necessary for sanctions, remedies, protection and exercise of rights. She believed that Article 4.3 including safeguards for third party interests and the public interest broadened the scope of this instrument. She supported to not bracket “independent” in Article 4.4. She believed that indigenous peoples would need access, oversight and protection mechanisms from human right bodies and experts, because TCEs, TK and GRs were related to their cultural rights and their cultural heritage.

Danny Edwards stated that option 1 of Article 4.2 was well worded and comprehensive. He believed that the words “willful or negligent” could ensure that the text provided the right degree of clarity and certainty for users and holders of TK. Removing the brackets around “willful or negligent” would also help to alleviate his concern on the enforcement procedures being taken out on a person who either independently discovered TK or for other reasons could not have known or reasonably known that an infringement was being committed. Regarding Article 4.4, he stressed that the dispute resolution mechanism should be independent. So he suggested deleting the brackets around “independent”.

Mara Rozenblate preferred option 1 of Article 4.2. She suggested deleting the brackets around “willful or negligent” in order to create more predictable and certain ground.

Lucia Fernanda Inácio Belfort supported John Asein’s proposal on the deletion of “as appropriate and” in Article 4.1. She also suggested adding “and take into account customary laws, community protocols and procedures of indigenous peoples and local communities” at the end of Article 4.1. It was in line with the wording of Article 12.1 of the Nagoya Protocol. She supported Edna Maria Da Costa E. Silva’s proposal on adding “cultural” after “moral” in option 1 of Article 4.2. She also agreed with Ronald Barnes that the second paragraph of Article 4.3 should be either bracketed or deleted. She stated that third party interests and public interests had already been widely guaranteed in other legal instruments. The purpose of this instrument was to protect TK. She agreed with Lorena Bolaños and Martha Evelyn Menjivar that Article 4.4 was not clear enough and perhaps not applicable when it came to the situations of many indigenous peoples or local communities in many countries around the world. She believed that there should be a paragraph in Article 4 on facilitated access to justice or improved access to justice because most of indigenous peoples and local communities had an oral tradition and they did not have the same level of access to justice as other communities with a written tradition. It was very difficult for the indigenous peoples to prove that their rights had been violated.

Salma Bashir believed that option 2 of Article 4.2 was more specific. She suggested adding “copying” to acts in option 2 of Article 4.2 because technological advances made TK easy to be copied.

Edwina Lewis stated that there were important policy questions regarding Danny Edwards’ comments on “willful or negligent”. She also suggested that it might be better to be flexible in the application of the policies, for example, by referring to legal and/or administrative systems to take into account different national circumstances.

Carla Michely Yamaguti Lemos preferred option 2 of Article 4.2, but suggested adding “shall” before “should” and adding “and rights of indigenous and local communities” after “breach of the protection of traditional knowledge”. She also suggested replacing “misuse of traditional knowledge” with “without establishment of prior and informed consent and mutually agreed terms”. Regarding Article 4.3, she suggested adding “shall” before “should”. Regarding Article 4.4, she supported Lorena Bolaños’ comments and reiterated that capacity-building was key.

Horacio Gabriel Usquiano Vargas stated that sanctions, remedies and exercise of rights were the key of the international instrument. He agreed with the proposal on the deletion of “as appropriate and” because it was too ambiguous. Regarding Article 4.2, he preferred option 2. Regarding Article 4.4, he reminded the experts the fact that there was sometimes a cross-border issue which could often lead to disputes. He believed that this article needed to be consistent with Article 3 where he preferred option 1.

Benny Müller stated that option 2 of Article 4.2 was not clear to him. He supported Carla Michely Yamaguti Lemos in that capacity-building measures could be considered to support the implementation of this article. He wondered whether there should be some wording that recognized the complex relationship between the national legal system and the customary law of indigenous and local communities.

Nabiollah Azami Sardoue preferred option 2 of Article 4.2 which was the language of the TRIPS Agreement. Regarding Article 4.3, he needed some clarification on the meaning of “third party interests”. He suggested deleting the second sentence of Article 4.3. Regarding the dispute resolution in Article 4.4, he suggested that the dispute resolution mechanism between beneficiaries and users be assigned solely to national law when beneficiaries and users were

from one country. He had no concern with that formulation if disputes arose between nationals of two or more countries.

Leila Garro Valverde preferred option 2 of Article 4.2 because it was more in line with protecting the rights of indigenous peoples and local communities. She shared the concern on Article 4.3 and suggested bracketing the second sentence. She also suggested deleting the brackets around “independent” in Article 4.4 because there should be an independent mechanism in order to guarantee the appropriate resolution of disputes and differences between indigenous peoples. She believed that the customs and practices of indigenous peoples should be recognized.

Innocent Mawire stated that the words “willful or negligent” in option 1 of Article 4.2 limited the scope of the rights of the TK holders. The explicit mention of economic and moral rights also presented a lot of challenges because it would automatically exclude others such as cultural and social rights from being protected. So he preferred option 2 of Article 4.2.

Bala Moussa Coulibaly stated that the notion of “legitimate third party interests and the public interest” was not a new concept. It could be found in the Doha Declaration on public health. That was why the group had decided to include it in the text.

Xilonen Luna Ruiz preferred option 2 of Article 4.2. Following the comments made by Lorena Bolaños and Horacio Gabriel Usquiano Vargas, she suggested including the ideas of promoting relevant measures for capacity-building and promoting measures that would allow cultural arbitration bringing together the law of the land, as well as customary laws and protocols. Regarding the dispute resolution mechanism, she suggested including a provision on providing interpreters and translators of indigenous languages, and accepting expert opinion or expert advice from those indigenous communities and with the support of anthropologists which would allow for an appropriate and effective resolution for those kinds of disputes. She agreed with Horacio Gabriel Usquiano Vargas that many of those communities operated orally and everything was done through speaking. There were more than 340 languages or dialects in Mexico. When there was a legal problem that involved indigenous peoples or indigenous communities, national legal courts accepted the input from cultural experts and provided interpreters and translators in indigenous languages to ensure justice.

ARTICLE 5

ADMINISTRATION OF RIGHTS

- 5.1 A contracting party may, in consultation with the holders of traditional knowledge, establish an appropriate national or regional competent authority or authorities. The functions may include, but need not be limited to, the following:
- (a) disseminating information about traditional knowledge and its protection;
 - (b) ascertaining whether prior informed consent has been obtained;
 - (c) supervising fair and equitable benefit-sharing; and
 - (d) assisting, where possible and appropriate, the holders of traditional knowledge in the use, exercise and enforcement of their rights over their traditional knowledge, including assisting in the maintenance of traditional knowledge databases,
- 5.2 Where traditional knowledge fulfills the criteria under Article 1, and is not specifically attributable to or confined to a community, the authority may, with the consultation of the traditional knowledge holders where possible, administer the rights of that traditional knowledge.
- 5.3 The identity of the competent national or regional authority or authorities [shall/should] be communicated to the World Intellectual Property Organization.
- 5.4 The establishment of a national or regional authority or authorities under this article is without prejudice to the right of traditional knowledge holders to administer their rights according to their customary protocols, understandings, laws and practices.

[Commentary on Article 5 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Danny Edwards introduced the work of the drafting group on Article 5.

The participants in the drafting group were John Asein, Albert Deterville, Danny Edwards, Ewa Lisowska, Boryana Argirova, Lilyclaire Bellamy, Silke von Lewinski, S. P. Ashok, Miranda Risang Ayu Palar and Kijoong Song.

The rapporteur stated that the group agreed that the functions of the competent authority this article provided for should be clearly administrative, with the judicial elements which appeared in the list removed. The group thus agreed to delete 1 (ii), (iii), (v) and paragraph 2 from the original Article 5.

The group agreed that where a body (such as WIPO) had an existing function, it did not need to express it again in this text. Therefore, the group deleted the mention of WIPO making widely available information about the competent authorities, as it was presumed that this would be the case.

The group then named the article “Administration of Rights”.

The group also created a further Article 5*bis* to determine the creation of appropriate enforcement procedures, according to the national laws of contracting parties. Some of this language derived from the TRIPS Agreement, and aimed to address some of the elements shifted from Article 5. During the convenors’ meeting, it was agreed that the content of this article covered the same ground as options presented under Article 4 as discussed by Group 4. The group thus handed this text over to Group 4.

On the second day, following the convenors’ meeting, a concern was raised on that, if the TK was not attributable to or confined to a community, the protection under this instrument should be enjoyed by an appropriate national authority.

The members of the group discussed that and some felt that that might stray into issues of public domain/publically available TK. Others felt that such rights should not be attributed to an authority. Some members worried that TK not attributable to a specific community, but which met the criteria for protection, should be administered in some sense. It was also felt that if an authority was to manage those rights, a consultation – if that was possible – needed to take place. The group thus added paragraph 2.

A further concern raised following the convenors’ meeting was with regards to ensuring that the beneficiaries should have the right to manage their own rights under this instrument. The group discussed that and felt that that was captured under paragraph three.

A final modification was made to Article 5 – to express that contracting parties might establish a competent authority, but that there would be situations where this provision was not taken up by a contracting party – for example where the rights were adequately administered by appropriate indigenous peoples and local communities.

COMMENTS BY EXPERTS

Martha Evelyn Menjivar wondered whether Member States had had experiences implementing administration of rights.

Leonila Kalebo Kishebuka considered that Article 5.1 was optional because of the word “may”, but Article 5.3 made the communication to WIPO mandatory. For the purpose of uniformity, she suggested replacing “may” in Article 5.1 with “shall”.

Weerawit Weeraworawit suggested adding another item in Article 5.1, reading as “assisting the holders of traditional knowledge in the protection of their environment”. He stated that the livelihood of indigenous peoples and local communities was threatened by economic development.

Yonah Ngalaba Seleti stated that the administration of rights had been aligned with the scope of protection. This article did not assume that there was only one group of beneficiaries, but undertook to make options and provisions for the complexity of beneficiaries. Another complexity was orphan TK. Article 5.4 did not diminish the rights of the indigenous peoples and local communities to set up their own competent authority.

Benny Müller reiterated that the indigenous peoples and local communities should be the holders, beneficiaries and managers of their rights. In light of that and the outcome of IWG 1, he believed that the word “consultation” seemed not to be sufficiently clear and strong. If the management of the rights belonged to the beneficiaries and to the indigenous and local communities, it was only with their prior informed consent that a national authority should be allowed to assume the task of administering the rights.

Carla Michely Yamaguti Lemos agreed with Benny Müller’s comments. She proposed to add another two items in Article 5.1: (1) “supporting the needs and priorities of indigenous and local communities and relevant stakeholders”; and (2) “monitoring the use of traditional knowledge”. She proposed to delete “including assisting in the maintenance of traditional knowledge databases” in Article 5.1(d). She also proposed to delete Article 5.2 because she believed that only indigenous and local communities could administer the rights to their TK.

Musa Usman Ndamba suggested adding “indigenous and local communities” after “the maintenance of traditional knowledge” in Article 5.1. He also suggested that capacity building needs of the indigenous and local communities be included in Article 5.1(d).

Lucia Fernanda Inácio Belfort agreed with the comments made by Carla Michely Yamaguti Lemos and Benny Müller. Regarding Article 5.1(d) on the maintenance of TK databases, she stated that it was not acceptable to create databases before the rights of the indigenous peoples and local communities had been guaranteed. She had heard that States wanted to have rights over TK and they wanted to be the beneficiaries. But beneficiaries should be those that generated, developed and protected TK.

Albert Deterville agreed with Benny Müller that the indigenous peoples and local communities should be the holders and managers of their rights. Article 5.4 indicated that even if the State or the contracting party established an authority or authorities, that did not override or prevent holders from exercising their rights. Regarding databases, he stated that records were needed, from the standpoint of a researcher as an anthropologist. If someone did not want to participate and did not want the information to be recorded, it was fine. But there were indigenous peoples who maintained their databases and collaborated with other organizations and States in having their information recorded. He was not opposed to databases as an indigenous expert. As a

consultant to the Government of Saint Lucia for the national biodiversity enablement project, he stated that they had to go through the process of making a recording.

N.S. Gopalakrishnan suggested that this article start with Article 5.4, Article 5.2 and Article 5.1, and end with Article 5.3, because he believed that Article 5.4 was the first right to be managed.

Ronald Barnes suggested replacing “in consultation with” with “with the prior and informed consent of” in Article 5.1. He also proposed to replace “an appropriate national or regional competent authority or authorities” with “a competent international authority to develop the criteria and provide oversight to the regional and national authorities”. Regarding Article 5.2, he suggested bracketing “the criteria under Article 1”. He also suggested replacing “in consultation with” with “with the prior and informed consent of” in Article 5.2. He proposed to delete “where possible” in Article 5.2. Regarding Article 5.4, he proposed to replace “a national or regional authority or authorities” with “an international authority”.

Miguel Valbuena Guariyu suggested replacing “consultation” with “participation” or “involvement” in Article 5.1 because indigenous peoples were consulted but not always involved in the decision-making process. He also suggested strengthening Article 5.1(a) to set up standard working groups with TK holders in the defense of their rights. He proposed to add “international standards or norms and” before “their customary protocols” in Article 5.4.

Justin Hughes pointed out that “contracting party” should not be in the text. He disagreed with Carla Michely Yamaguti Lemos and Benny Müller. He was not concerned about the word “consultation” in Article 5.1 because the first part of Article 5.1 was allowing a country to establish a national authority and the country could do that without the prior informed consent of every single indigenous group in its borders. The only place where prior informed consent became an issue was Article 5.1(d). Regarding Article 5.2, he did not believe that there was going to be TK that fulfilled the criteria under Article 1 that was ever not specifically attributable to an indigenous group or local community. He believed that Article 5.2 produced an empty set.

Xilonen Luna Ruiz believed that Article 5.1(d) was directly connected with Article 5.4. She suggested adding another subparagraph “providing specialized information on the beneficiaries and TK in accordance with Articles 1 and 2”. She stated that there were specialized institutions which were able to provide all that information, some were specialized in IP, while others developed public policy on indigenous peoples. She agreed with Albert Deterville that indigenous communities had made a great progress on registering their own TK. She supported to add “in coordination” or “with the participation” in Article 5.1(d). Regarding Article 5.2, she believed that cultural arbitration was important and would determine or reach agreements between the holders of the knowledge and the authorities.

Miranda Risane Ayu stated that the discussions on databases were actually under Article 8 about formalities. But on the ground of the importance of databases, it was agreed to keep it in Article 5. She clarified that setting up a database in Article 5 would favor a defensive protection mechanism rather than to disclose anything. Certain TK may be included in a database in a restricted way.

Robert Leslie Malezer believed that Article 5.4 should be a part of Article 5.1. Article 5.4 was not empowering or authorizing indigenous peoples to have a national authority. It was just recognizing a right. He suggested restructuring Article 5.1 as Article 5.1(A) and Article 5.4 as Article 5.1(B). He wondered whether Article 5.1 where it talked about establishing appropriate competent authorities at the regional and national level, should also be able to recognize competent authorities of indigenous peoples or others in that process. Regarding Article 5.2, he agreed with Justin Hughes’ comments.

Debra Harry noted that a couple of concepts that were in the previous drafts were missing, such as determining whether acts of misappropriation had taken place. She had concerns about Article 5.1(c) which used the word “supervising fair and equitable benefit-sharing”. It was not the role of a competent national authority to overlook the supervision of access and benefit-sharing agreements particularly from the perspective of an indigenous people. She suggested deleting the term “where possible and appropriate” in Article 5(d). There was an obligation on States to support indigenous peoples and local communities in the protection of their rights, particularly in ensuring that free, prior and informed consent was properly implemented. Indigenous peoples and local communities did not need a national competent authority to assist them in the use of their TK. She supported Lucia Fernanda Inácio Belfort’s proposal to bracket references to TK databases since this was only one mechanism for the protection of TK. She agreed with Robert Leslie Malezer that the role of the national competent authority was to recognize the right of TK holders to exercise their rights, not simply administer their rights in regard to the protection of their TK.

ARTICLE 6

EXCEPTIONS AND LIMITATIONS

Option 1

6.1 Measures for the protection of traditional knowledge should/shall:

(a) not restrict the generation, creation, customary use, transmission, exchange and development of traditional knowledge within and among communities in the traditional and customary context by the beneficiaries [as determined by customary laws and practices] consistent with domestic laws of Member States; and

(b) extend only to utilization of traditional knowledge taking place [outside the membership of beneficiary community or] outside traditional or customary context.

Option 2

6.1 The application and implementation of protection of traditional knowledge should not [adversely affect] be prejudicial to continued availability of traditional knowledge for the customary practice, exchange, use and transmission of traditional knowledge by traditional knowledge holders.

Option 1

6.2 Parties may adopt appropriate limitations or exceptions, provided that the use of traditional knowledge is compatible with fair practice, acknowledges the indigenous and local community where possible, and is not offensive to the indigenous or local community.

Option 2

6.2 Parties may adopt appropriate limitations or exceptions, provided such exceptions are limited and do not conflict with the normal use of the traditional knowledge by the beneficiaries and do not unreasonably prejudice the legitimate interests of the beneficiaries, taking into account the legitimate interests of third parties.

6.3 Secret and sacred traditional knowledge may/shall not be subjected to exceptions and limitations.

[Commentary on Article 6 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Margreet Groenenboom introduced the work of the drafting group on Article 6.

During the discussions the group could not agree on some elements, these elements appeared therefore in brackets.

For paragraph 1, the group based its discussions on the article on exceptions and limitations as included in the TCE text. The group agreed that there should be two options. Firstly, there was the option based on the TCE text, this option made a distinction between use within the community and use outside the traditional context. Secondly, there was the option mentioned in WIPO/GRTKF/IC/18/5 Prov. under (i). This option contained a more general wording.

The group agreed to include a general, normative, exception, as this seemed more flexible in practice. As a consequence, the group decided not to list any of the specific exceptions mentioned in WIPO/GRTKF/IC/18/5 Prov. With regard to paragraph 3 contained in WIPO/GRTKF/IC/18/5 Prov., some noted that the relation between this protection and other existing provisions as mentioned in that paragraph should be covered by the scope of protection or subject matter.

Both general exceptions in paragraph 2 were already included in WIPO/GRTKF/IC/18/5 Prov. Option 1 would be a *sui generis* model and option 2 would be based upon the three step test as mentioned in the Berne Convention and TRIPS Agreement.

During the conveners' meeting participants agreed that secret and sacred TK may or shall not be subjected to exceptions and limitations, and that this should be taken up in the article on exceptions in a separate paragraph. The group discussed whether secret as well as sacred should be included. Some experts favored inclusion of both. Others felt that only secret TK should be included as it was not clear what could be considered sacred, whereas secret TK related to trade secrets and the efforts made to keep something secret.

Initially, the group included the paragraph mentioned in WIPO/GRTKF/IC/18/5 Prov. on the relationship between readily available TK and PIC. As a result of the group conveners meeting, the group removed this paragraph as this topic was covered by subject matter and/or scope of protection.

Lastly, the group discussed whether "consultation with right holders" should be included in this article. Some favored such an inclusion, others expressed that it would be more valuable to address this issue in the article on management of rights. The group decided eventually not to take up the suggestion.

COMMENTS BY EXPERTS

Justin Hughes expressed his disappointment that there was no reference to a mandatory exception for independent invention and independent discovery of some knowledge which was held elsewhere by an indigenous community or a local group, that ensured that there would be no litigation. He believed that it would not be possible to have a legal framework that was workable in this area without such a mandatory exception.

Salma Bashir made comments on option 2 of Article 6.2. She stated that the TRIPS Agreement declared a three-step test which was a mandated term. She proposed to replace “may” with “shall” and to replace “limited” with “in a certain special case”.

Christopher Mapani stated that his understanding of the limitations was that they were intended to legalize what would be unlawful in a particular law. TK was the property of those traditional communities and they did not really need an exception to use their properties and they had the right to use it. Regarding the application of the law, he wondered to what extent the law applied. He believed that Article 6.1(a) was a better basis. The other option by placing “customary” before the use, practice, exchange and transmission appeared to limit the exception. It gave the impression that indigenous people could only be exempted from using it for other customary practice, exchange and use. He proposed to adopt Article 6.1(a) with some of the elements from option 2, in particular where it talked about prejudicial to continued availability. He proposed to include at the end “otherwise prejudicial to enjoyment of their rights”. He preferred option 2 of Article 6.2. “Provided that the use of” was used in option 1, whereas “provided such exceptions” was used in option 2. He believed that the second one was the appropriate terminology. The alternative language “there should be as much as possible to ensure that all deserving exceptions are granted” could be used. He also proposed to add “in compelling circumstances” after “may” in option 2. He believed that there should be another addition to option 2 of Article 6.2 which should be consistent with this treaty. Some of the elements could be borrowed from option 1, such as “with fair practice, acknowledge the indigenous and local community”. Regarding Article 6.3, he stated that he did not share the view of classifying TK. He believed that there should be no exceptions regarding Article 6.3.

Kim Connolly-Stone stated that option 1 of Article 6.2 included the concept of “offensive”. She noted that in Article 3 the language used for the moral rights style protection was around respect for cultural norms. In the interest of having consistent language between the articles, she suggested replacing “is not offensive” with “does not unreasonably conflict with the cultural norms and practices of the traditional knowledge holders”. She expressed that she did not have preference for any option.

Marisella Ouma stated that Article 6 was intrinsically linked to Article 3. So it was difficult to formulate Article 6 without the decision on Article 3. She stated that it was difficult to find any of the exceptions and limitations acceptable.

Weerawit Weeraworawit stated that the group had identified general principles, not specifying any specific exceptions. Part of the exceptions and limitations could be derived from the criteria of eligibility and scope of protection.

Carla Michely Yamaguti Lemos preferred option 2 of Article 6.2. She proposed a new paragraph “Protection on traditional knowledge shall not be subjected to exceptions and limitations”. Regarding option 2 of Article 6.1, she proposed the following wording: “The application and implementation of protection of traditional knowledge should/shall not be prejudicial to exchange or use of traditional knowledge held by indigenous and local communities among themselves and for their own benefit.”

Ewa Lisowska preferred option 2 of Article 6.1. It was more general and more clear and she believed that it better captured the main idea of the article.

Natalia Buzova stated that the article should provide a list of the exceptions.

Ronald Barnes suggested either deleting “consistent with domestic law of Member States” in Article 6.1 or replacing it with “consistent with international law and principles that conform to the

domestic law of Member States”. He proposed to delete “and do not unreasonably prejudice the legitimate interests of the beneficiaries, taking into account the legitimate interests of third parties” in option 2 of Article 6.2. He stated that that was not acceptable until indigenous peoples could determine exactly what it was of the third parties that states would like to protect. Regarding Article 6.3, he proposed to delete “may”.

ARTICLE 7

TERM OF PROTECTION

Option 1

Protection of traditional knowledge should last as long as the traditional knowledge fulfills the criteria of eligibility for protection according to Article 1.

Option 2

Duration of protection of traditional knowledge varies based upon the characteristics of traditional knowledge.

[Commentary on Article 7 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Danny Edwards introduced the work of the drafting group on Article 7.

The participants in the drafting group were John Asein, Albert Deterville, Danny Edwards, Ewa Lisowska, Boryana Argirova, Lilyclaire Bellamy, Silke von Lewinski, S. P. Ashok, Miranda Risang Ayu Palar and Kijoong Song.

On the first day, the group initially agreed to change the title of this article to term of protection, in line with the TCE document. Then option 1 was drafted. The group agreed to maintain paragraph 1, but the group felt that this was, of course, contingent on what Article 1 looked like.

The group agreed to remove “misappropriation and misuse” to simplify the sentence.

The group agreed to delete paragraph 2 as it did not add additional value to this article.

One expert felt that protection of TK should be in perpetuity.

At the convenors’ meeting it was agreed not to refer to Article 1(3) and only refer to Article 1 as its content was not yet set.

No specific areas were referred from the convenors’ meeting for the group’s consideration regarding Article 7.

On the second day, option 2 was added.

A member of the group was concerned about the possibility for indefinite protection of TK, and wanted to insert a second option. In his opinion, the term of protection would vary depending on the characteristics of the TK. In some cases there should be a specific time period for protection. He felt that what that time period was would require further analysis.

COMMENTS BY EXPERTS

Tim Roberts stated that nobody had the right to monopolize public knowledge in perpetuity. Quite apart from this moral principle, there were also practicalities. Once information was widely publicized, it generally could not be withdrawn from the public domain, without running time backwards. However great the wrong done to indigenous peoples, it could not be put right like that. There might be a question of civil or even criminal responsibility of those responsible, but the publication remained a fact. It was not going to be easy for holders to enforce their rights. There was a continuum in possible TK protected subject-matter, from what clearly could not and should not be protected, to what clearly was entitled to be protected. In the latter category, one might put the secret knowledge of Amazonian Indians about medicinal properties of a local plant. In the former, it was conceded in the Group 1 discussions that the wheel (and probably fishing nets) was available to all mankind. But there was endless room for argument about intermediate cases. It would not do for holders to say “According to our law, you have taken our property”. They had to prove it to the satisfaction of an independent judge. “*Nemo iudex in sua casa*” - nobody was to judge his own case - was a non-negotiable legal principle.

Yonah Ngalaba Seleti stated that option 2 introduced the concept of “characteristics of traditional knowledge” which had not been discussed in Article 1 or Article 3. So he could not accept this option.

Robert Leslie Malezer proposed to add “and scope” after “the criteria of eligibility” in option 1. He took into account that Article 3 also had some aspect of protection.

Debra Harry stated that the rights were inalienable and lasted in perpetuity, and the protection should be consistent with that.

Lucia Fernanda Inácio Belfort stated that option 2 could lead to legal uncertainty. Option 2 referred to characteristics of TK which would never expire. It never stopped being indigenous or traditional.

Ronald Barnes proposed new text: “Protection of indigenous knowledge should last in perpetuity.” He expressed that he did not see any reason to have option 2.

Arjun Vinodrai stated that when thinking about the issue of term of protection, there were two sides: (1) certainly a lengthy term of protection protected the interests of the beneficiary; and (2) the terms of protection limited creativity and innovation and that was something that was of value in terms of the economic and social growth of communities, individuals, etc. So he believed that it was important to consider the balance between the two.

Emil Žatkuliak preferred option 1 from the point of view of clarity and authenticity.

Horacio Gabriel Usquiano Vargas stated that the duration of protection would have to be discussed in depth if issues directly related to IP or mechanisms administered by IP were being discussed. However, the characteristic of TK was its collective nature. As a result, the duration should be in perpetuity; specifically because TK belonged to the indigenous peoples. In Article 1, one of the characteristics listed was the lack of expiration. That was something which should be taken into account when examining this article.

Carla Michely Yamaguti Lemos preferred option 1 but with some amendments. She proposed the following wording: “Protection of traditional knowledge should last as long as, but not limited to, the traditional knowledge fulfills the criteria of eligibility for protection according to Article 1.”

Clara Inés Vargas Silva preferred option 1.

Leila Garro Valverde preferred option 1.

Martha Evelyn Menjivar preferred option 2 because it complied with the objectives of protection.

ARTICLE 8
FORMALITIES

Option 1

8.1 The protection of traditional knowledge shall not be subject to any formality.

Option 2

8.1 The protection of traditional knowledge requires some formalities.

8.2 In the interests of transparency, certainty and the conservation of traditional knowledge, relevant national authorities [should/shall] maintain registers or other records of traditional knowledge.

[Commentary on Article 8 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Danny Edwards introduced the work of the drafting group on Article 8.

The participants in the drafting group were John Asein, Albert Deterville, Danny Edwards, Ewa Lisowska, Boryana Argirova, Lilyclaire Bellamy, Silke von Lewinski, S. P. Ashok, Miranda Risang Ayu Palar and Kijoong Song.

On the first day, option 1 was drafted.

The group agreed to use the TCE document language, simplifying paragraph 1 and removing paragraph 2. The group agreed that the use of databases was important, but should not be a precondition of protection. The group moved mention of databases to Article 5.

The convenors' meeting made no suggestions on Article 8.

On the second day, option 2 was added.

A member had expressed concerns about not requiring formalities, and felt that protection of TK would require some formalities, for example databases. That was expressed as option 2.

COMMENTS BY EXPERTS

Lorena Bolaños believed that the protection of TK could not be subject to any formality because of the nature of TK and because they were intrinsic rights of indigenous peoples. So she preferred option 1. Regarding Article 8.2, she believed that it was useful to refer to TK conservation, but it might be better to include it in another article. She also believed that any creation of a register or a database should take place in consultation and cooperation with the relevant communities.

Agustin Saguier Abente supported Lorena Bolaños' comments. He expressed that he could agree to a register, but as long as it was simply descriptive and it would not prejudice the preservation of TK.

Hemachandra Leelanath Obeysekera preferred option 2, especially Article 8.2. Most of the countries had germplasm and irrigation systems and there were really large amounts of resources. There was a real need for the relevant national authorities to maintain the records.

Lucia Fernanda Inácio Belfort supported Lorena Bolaños' statement. Regarding Article 8.2, she proposed to add "along with indigenous and local communities who are holders of these rights, based on prior informed consent" after "national authorities". She also proposed a new article "8.3 Registers would not constitute a requirement to offer protection to traditional knowledge." It would be duly guaranteed that protection was not subject to any formality and that the registers were purely declarative in nature and did not constitute rights.

Ronald Barnes preferred option 2 of Article 8.1. He supported Lucia Fernanda Inácio Belfort's proposal on Article 8.3.

Miranda Risane Ayu preferred option 1.

Amadou Tankoano stated that option 1 conformed to the objectives and principles and the fact that protection needed to be accessible for most of the traditional communities, a lot of whom were illiterate. The fact that there was no formality was excellent. Regarding Article 8.2, he proposed to reformulate it in such a way that it was no longer an obligation. He proposed to replace “should/shall” with “could/can” and to add “with the permission of the holders” at the end.

Nabiollah Azami Sardoue preferred option 1.

Clara Inés Vargas Silva preferred option 1. Regarding Article 8.2, she agreed with Lorena Bolaños' comments.

Albert Deterville supported option 1.

Carla Michely Yamaguti Lemos supported the comments made by Lorena Bolaños and Lucia Fernanda Inácio Belfort. She preferred option 1.

Timothy Leatile Moalusi preferred option 1. Regarding Article 8.2, he proposed to replace “should/shall” with “may”.

Oswaldo Reques Oliveros suggested including “The protection of traditional knowledge is not subject to any formality” in a preamble as a general principle.

Mohamed El Mhamdi proposed to keep both options: “The protection of traditional knowledge is not subject to any mandatory formality. However, the contracting parties have the option to maintain registers or other formalities for the recording of traditional knowledge in order to achieve transparency and conservation of traditional knowledge.”

Martha Evelyn Menjivar preferred option 1. She indicated that it might be able to combine it with Article 8.2.

ARTICLE 9

TRANSITIONAL MEASURES

- 9.1 These provisions apply to all traditional knowledge which, at the moment of the provisions coming into force, fulfills the criteria set out in Article 1.

Option 1

- 9.2 The state should ensure the necessary measures to secure the rights acknowledged by national [or] domestic law, already acquired by third parties.

Option 2

- 9.2 Continuing acts in respect of traditional knowledge 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, should be brought into conformity with these provisions within a reasonable period of time after they entry into force, subject to respect for rights previously acquired by third parties in good faith.

[Commentary on Article 9 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Violet Ford introduced the work of the drafting group on Article 9.

As a general remark, the group considered that the substance of this article was contingent upon the fundamental debate that the IGC maintained on the issue of “public domain”.

Concerning discussions about Article 9.1, the group considered that the wording of the article dealt adequately with the issue of temporary application of the norms or provisions of this instrument.

Concerning discussions on article 9.2, the group came up with two options. These two options reflected the opposing views within the group regarding the application of TK provisions to events prior to their entry into force.

Option 1 attempted to address the concern of some experts with the application of norms to events that took place or began to produce legal effects, before the norm was approved (i.e. retroactivity). Thus, the wording of this option sought to ensure the legal certainty of third parties' rights (e.g. prior users). Some experts highlighted the importance of ensuring that these rights were acquired through prior use in good faith. In this regard, the experts acknowledged that the term “good faith” lacks common consensus and thus, there was value in providing clarity and precision on the scope of this standard. In doing so, the experts recommended weighing up the protection of legitimate expectations of TK owners and the doctrine of abuse of rights.

Also in this option, the conjunction “or” in brackets was placed between the terms “national” and “domestic” so as to encompass an alternate use of these terms. The group signaled that due to the different legal regimes of WIPO Member States, the scope and practical consequences of using one or another term varied. In addition, one expert expressed that the application of international law (such as this treaty) was interpreted differently according to each country's approach to implementation. Hence, the group considered that flexibility should be provided in the use of the terms “national” and “domestic”.

Option 2 reflected the views of experts who asserted that, in light of the particular nature of TK and its long account of misappropriation, some retrospective effects should be acknowledged in these provisions (e.g. regularization of recent utilizations within a reasonable period). In addition, some experts considered that equal protection should be granted against “past and unauthorized use” of TK which was registered (listed, catalogued) at the time of the unauthorized used and to that which was not registered then. In this line, some experts suggested that the IGC might consider establishing a mechanism for remedies and recognition of moral rights.

The group also considered that the expression “reasonable time” was uncertain and thus suggested that the IGC should provide clarity to the time frame envisioned and in doing so, it should take into account indigenous people capacities and resources.

COMMENTS BY EXPERTS

Lucia Fernanda Inácio Belfort stated that not only the rights of third parties, but also the rights of indigenous peoples before the entry into force of this instrument needed to be protected by States when they had been violated, either by repatriation or reparation. Option 1 of Article 9.2

should include the idea that the State would make sure that the necessary measures would be taken to guarantee the rights of the holders of TK which had been violated before the entry into force of this instrument. Regarding option 2, she suggested setting a number of years or months as a reasonable period of time in order to provide legal certainty. From the legal point of view of indigenous peoples, she believed that good faith meant that the requirement of prior informed consent had been met and the benefits had been shared with the holders of those rights.

Niels Holm Svendsen supported the wording in Article 9.1 because it provided legal certainty and clearly stated that this instrument did not seek to have retroactive effect. With regard to third parties, he preferred option 1 of Article 9.2. He believed that option 2 did not provide legal clarity.

Ronald Barnes stated that options 1 and 2 of Article 9.2 were not acceptable. He proposed language for a new option 3: "Indigenous peoples and local communities and states shall develop international guidelines consistent with international human rights law to address the acquisition of traditional knowledge by third parties, to determine the criteria for resolving the application of rights by indigenous peoples, local communities and third parties."

Carla Michely Yamaguti Lemos suggested adding ", but not limited to," before "all traditional knowledge" and deleting the phrase "at the moment of the provisions coming into force" in Article 9.1. Between the two options, she preferred option 1 but with some amendments. She suggested adding "shall/" before "should" and deleting the last phrase "already acquired by third parties". Regarding option 2, she believed that it related to continuing use and that it should be regulated by national legislation.

Leila Garro Valverde preferred option 1 of Article 9.2. She highlighted Lucia Fernanda Inácio Belfort's suggestion on including reparation when there was violation of the rights of indigenous people.

Yonah Ngalaba Seleti preferred option 2 of Article 9.2 but he believed that the wording needed to be tidied up. He highlighted the comments made by the rapporteur on the word "or". He also wondered how to interpret the term "respect" in the last line of option 2 of Article 9.2.

Oswaldo Reques Oliveros stated that in his view Lucia Fernanda Inácio Belfort had referred to reparations for the people and not to retroactivity. He explained that, since the current effects of violations were still in existence, there was not a retroactive application of rights.

Preston Hardison stated that the issue of retrospectivity only applied to existing uses or continuing uses of TK. He believed the language should affect issues of repatriation of TK and associated GR that was not in existing use or continuing use.

ARTICLE 10

CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

Option 1

- 10.1 Protection under this instrument shall take account of, and operate consistently with, other international and regional instruments and processes.

Option 2

- 10.1 Protection under this instrument should leave intact and should in no way affect the protection provided for in international legal instruments.
- 10.2 Nothing in this instrument may be construed as diminishing or extinguishing the rights that indigenous people have now or may acquire in the future.

[Commentary on Article 10 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Lorena Bolaños reported on the development and conclusions reached by the group in relation to Article 10.

The main aim of the group was to guarantee the consistency between this legal instrument and the international legal instruments in force, without, of course, undermining the specific independence of each one of them.

Notwithstanding, the group noted that, as the wording of this article stood, the article focused exclusively on instruments relating to biodiversity.

In that connection, the group considered it important to include a sentence which provided broader coverage of the relationship to be maintained between all international instruments and to avoid specific mentions of concrete subjects such as intellectual property, human rights, etc.

The group recognized that different experts suggested, at the plenary session, listing different international instruments. Nevertheless, the group considered that it was counterproductive to do so. The fact of highlighting or making particular mention of certain international instruments could be to the detriment of other instruments that were not specifically included.

She further explained how the group had drafted the article.

As might be observed, paragraph 10.1 envisaged two options.

Option 1 was taken from Policy Objective (ix) of this instrument, entitled “respect for and consistency with international and regional agreements and instruments”. Because of the importance of the subject, the group considered that the text could be moved or would be better located as part of the body of this article.

Option 2 was taken from Article 10 of the TCE text (WIPO/GRTKF/IC/18/4) and led a number of experts to consider that use of the phrase “should leave intact” gave greater certainty to the text.

The text of Article 10.2 was taken from Article 45 of the United Nations Declaration on the Rights of Indigenous Peoples. The aim was to guarantee that none of the content of this instrument was interpreted in a way that it harmed or impeded the rights which indigenous peoples currently had or might acquire in the future. In the opinion of the group, Article 45 was a general article, which had to appear in any international instrument in which the rights of indigenous peoples were dealt with.

COMMENTS BY EXPERTS

Amadou Tankoano stated that the terminology “protection under this instrument should leave intact” in option 2 of Article 10.1 was too strong. Switzerland had decided to change its legislation, so that if somebody was applying for a patent which applied to TK, they should indicate the origin and the source. To indicate the origin and the source did not mean leaving intact.

Martha Evelyn Menjivar believed that two options complemented each other. She considered the possibility to merge those three provisions, or at least two options.

Debra Harry agreed with Martha Evelyn Menjivar that elements in option 1 and option 2 could be combined. She preferred option 2 but she proposed to simplify Article 10.1 using the following wording: "This instrument should be consistent with the other international legal instruments". She supported Article 10.2. It was a necessary safety net for indigenous peoples in particular and was important to indigenous people.

Krisztina Kovács expressed her preference for the wording "should leave intact" in option 2 of Article 10.1. That language seemed more appropriate from the point of view of legal certainty. She stated that the terms "international and regional instruments" or "international instruments" in both options might be construed as covering rights that indigenous people had now or might acquire in the future, as referenced in Article 10.2.

Lucia Fernanda Inácio Belfort agreed with Amadou Tankoano's comments on option 2 of Article 10.1. She suggested bracketing it for the consideration of the IGC. She supported Martha Evelyn Menjivar's suggestion on merging options 1 and 2 of Article 10.1. Article 10.2 was consistent with Article 45 of the United Nations Declaration on the Rights of Indigenous Peoples.

Bala Moussa Coulibaly stated that this was a very important article for his country, where the authorities were making tremendous efforts to establish a system of IP protection and to bring it up to a fairly generalized level. Those efforts were also aimed at improving and harmonizing the legislation in his country with what was being done in WIPO within this context. His country intended to establish a national position in accordance with this Article.

Miranda Risane Ayu agreed with Amadou Tankoano that option 2 of Article 10.1 was too strong. She believed that Article 10.2 was good, because that could control the competent authority to keep its role as the manager of rights, and to always respect the indigenous peoples. She believed that it was not only for indigenous peoples, but also for local communities and traditional communities who possessed TK.

Salma Bashir stated that option 2 was in conformity with the Vienna Convention on the Law of Treaties, mainly Article 6 and Article 59.

Albert Deterville suggested merging two options of Article 10.1. He supported Article 10.2 as was written.

Ruth Deyanira Camacho Toral believed that option 1 of Article 10.1 and Article 10.2 were the best paragraphs to keep.

Mohamed El Mhamdi recalled that, as a principle, each agreement had to be respected by contracting parties and the other agreements could only implicate those parties that were contracting. On the basis of that principle, he suggested combining the two options of Article 10.1 with some modifications which could read as follows: "The protection under this instrument cannot affect in any way the protection provided by other international legal instruments."

ARTICLE 11

NATIONAL TREATMENT AND OTHER MEANS OF RECOGNIZING FOREIGN RIGHTS AND INTERESTS

Comments

A prior basic question is whether or not domestic entitlements on traditional knowledge should be extended to foreign right holders or beneficiaries. Further consideration shall be given to existing choices for recognizing the rights of foreign right holders or beneficiaries including reciprocity and mutual recognition (See WIPO/GRTKF/IC/8/6 for a fuller discussion).

A secondary core question is whether existing domestic arrangements for protecting traditional knowledge, and the subsequent entitlements, would be extended to foreign right holders or beneficiaries. Certainly foreign traditional knowledge holders and beneficiaries who experience an abuse of their rights should be entitled to protection of their rights, as set out in this instrument. The issue is the extent to which they could gain access to entitlements recognized in the domestic regimes. For example, in country X, the unique situation of forest dwellers is recognized with specific domestic traditional knowledge protections. Should that unique concession be extended to foreign right holders as they would not apply beyond the particular group for which the protections were designed?

Discussion on conflicts of law is also encouraged by the group in the terms included in article 8.3 of the TCE's text (WIPO/GRTKF/IC/18/4).

[Commentary on Article 11 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Kathy Hodgson-Smith introduced the work of the drafting group on Article 11.

The group addressed the issue of how the rights and interests of foreign right holders of TK were to be recognized in national laws. In doing so, experts recognized that the principle of national treatment was a cornerstone of international IP treaties. Likewise, experts acknowledged the need for consistent recognition of foreign right holders in Member States' national jurisdictions and the consequent desire to prevent discrimination against foreigners' rights and interests.

However, when envisaging the implementation of the national treatment principle in domestic regimes, the group of experts identified practical difficulties in extending effectively equal treatment to foreigners. In other words, questions arose in the group concerning the viability of extending to foreigners automatic and unconditional access to other domestic legal systems. These practical questions dealt mostly with: (i) the inherently local characteristic of TK; (ii) the holistic relationship that indigenous peoples had with their TK and genetic resources; and (iii) the fact that some domestic laws were specifically tailored to the cultural and historical context of TK holders within the countries concerned (e.g. national programs on environmental management and land law).

Thus, albeit the principle of national treatment could potentially be relevant in addressing this issue, the experts decided to recommend the IGC to continue exploring other existing choices for recognition of rights and interests of foreign right holders. These choices included, *inter alia*, reciprocity and most favoured nation treatment.

COMMENTS BY EXPERTS

Preston Hardison wondered whether it might be the appropriate place to bring forward the issue of controlling rights. There had been some discussion of what to do about communities in diaspora from their original context in which TK was developed and used. There was the issue of foreign indigenous people in local communities who might now be separated from their original communities.

Ronald Barnes suggested that the text should reflect a need for developing an international monitoring or arbitration system in order to give oversight for the benefit of indigenous peoples and local communities.

ARTICLE 12

TRANS-BOUNDARY COOPERATION

In instances where traditional knowledge is located in territories of different contracting Parties, those contracting Parties shall co-operate by taking measures that are supportive of and do not run counter to the objectives of this instrument. This cooperation shall be done with the participation [and consent] of the traditional knowledge holders.

[Commentary on Article 12 follows]

COMMENTARY

INTRODUCTION BY RAPPORTEUR

Krisztina Kovács introduced the work of the drafting group on Article 12.

The participants in the drafting group were Leonilla Kishebuka, Nabiollah Azami Sardoue, Musa Usman, Hongju Yang, Richard Aching, Corleta Babb-Schaefer, Jens Gaster, Kristina Kovács, Marc Perlman, Debra Harry, Giancarlo Leon, Miguel Valbuena, Rodrigo Valencia, Hayat Mehadji, Dioniso Madureira, Xilonen Luna Ruiz and Joseph Olesarioyo.

The group noted that there was no specific document or article within the draft treaty that dealt with this issue. The Chair, Ian Heath, made reference to the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization and proposed a draft article which was used as a working document.

The group had to be sure as to what the article was meant to address. It noted that the issue of trans-border cooperation came up in discussions in several articles such as the administration of rights and international and regional cooperation. There was a concern as to what type of cooperation was necessary. The issue that indigenous peoples and local communities would have their consent obtained was raised and opened a discussion about the relevance of such a provision in this context. Considering that their consent was already addressed in other articles, some experts underlined a possible source of conflict.

The discussion then focused on option 2 prepared by Group 4. The initial proposal by the group was adopted as the new proposal only covered part of the issue and the original proposal included a further element, since it also provided for the involvement of the TK holders themselves. Article 12 as suggested by this group provided for duty to cooperate which had to be distinguished from the general implementation obligations of any contracting party.

COMMENTS BY EXPERTS

Arjun Vinodrai stated that the IGC should consider the aspirations of diaspora and immigrant communities in a number of countries. He wondered whether one of the items covered in the scope of this instrument would include physical cultural property that was used to transmit TK. If that was the case, in relation to this specific article, he would note that the Member States would probably need to consider the manner in which they had implemented the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

Debra Harry stated that the right of indigenous peoples and local communities to prior and informed consent must be recognized in any treatment of transboundary TK. Therefore, she suggested removing the brackets around “and consent” and replacing it with the standard phrase “free, prior and informed consent”.

Leonila Kalebo Kishebuka, who had been in the drafting group, explained that the group considered two situations: (1) where TK was located in two or even more countries which were neighbors; and, (2) where TK was in various jurisdictions due to people who happened to be internationals from the states in which the TK originated? The group felt that the first situation should be considered as a second paragraph. But during the discussion the group decided to

consolidate the two as it appeared. She suggested the IGC to consider that situation because it was a different circumstance.

Leila Garro Valverde highlighted that Article 36 of the United Nations Declaration on the Rights of Indigenous Peoples referred to peoples across borders.

Violet Ford suggested adding “of the transboundary indigenous peoples” after “in instances where traditional knowledge”. She stated that the various manners and approaches that indigenous peoples had with their TK depended on the indigenous group concerned, and on the way they applied, shared, maintained and created their TK. She also stated that similar concepts were reflected in the Nagoya Protocol.

Horacio Gabriel Usquiano Vargas highlighted that the transboundary issue was paramount in TK, particularly in his country which shared TK with other neighboring countries. There were two elements which this Article had to reflect. Firstly, there had to be a determination of which TK had been extracted from their places of origin and had been misappropriated. It was a question of how those types of TK should be treated in transboundary cooperation. The second element had to do with the mechanisms of cooperation for countries that shared TK, based on the territory where they were determined. The Constitution of the Plurinational State of Bolivia determined repatriation of the traditional and ancestral knowledge which had been extracted from the Bolivian territory.

Yonah Ngalaba Seleti highlighted Leonila Kalebo Kishebuka’s comments. There were countries between South Africa and Tanzania that had that kind of sharing.

Ronald Barnes stated that indigenous peoples were contracting parties. He believed that the transboundary issue could be given more breadth after it was elaborated further in an international instrument. He agreed with Debra Harry on the prior informed consent issue.

Miranda Risane Ayu agreed with the comment that there were a lot of questions regarding TK associated with GR. There were also a lot of shared TK associated with TCEs between Indonesia and Malaysia, Brunei and Australia to some extent. It could be managed in a good way to live in harmony to each other. She agreed with Debra Harry’s comments on the consent issue.

Bala Moussa Coulibaly considered that there was a link between Article 12 and Articles 4 and 10. When TK was taken abroad by various peoples that were scattered in different territories, the State authority could come to play. It was very important to stress that the public authorities had to assist the TK holders in the whole matter of reconciliation. That was something that should be considered in the integration of people who had a heritage linked to biodiversity and history. He stressed the very important role played by states as an arbitrator or a mediator in conflicts.

Lorena Bolaños endorsed the questions and concerns raised by Horacio Gabriel Usquiano Vargas.

Albert Deterville supported Carla Michely Yamaguti Lemos’ proposal on that particular issue. He stated that there were many communities in St. Lucia. A community was composed of direct African descendants who had not mixed with anybody else. There were communities from Guinea, Ghana and Nigeria that maintained their cultures. There were large populations of Indians who were in the Caribbean. That was something that would need to be taken into consideration. He expected the experts from India, Ghana, Nigeria and Guinea to take that up with the State of St. Lucia, because it was very unique there.

Mohamed El Mhamdi suggested simplifying the second part of the first sentence with “taking the necessary legal measures to ensure the objectives of this instrument”.

ALTERNATIVE OPTIONS BY EXPERTS

Carla Michely Yamaguti Lemos believed that the language of the Nagoya Protocol could be used for these issues. She proposed alternative text for this article:

“Parties shall consider the need for modalities of a global mutual benefit sharing mechanism to address the fair and equitable sharing of benefits derived from the use of traditional knowledge that occurs in transboundary situations for which it is not possible to grant or obtain prior informed consent.”

[End of Annex and of Document]