

IGC Draft Articles on the Protection of
Traditional Knowledge: Indigenous Peoples and
Local Communities Perspectives

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Policy Objectives

- “Protection” is inferred but not mentioned until “d. encourage [and protect] [tradition-based] creation and innovation.” Where it is bracketed and appears as an afterthought and this is evident in other Articles of the document.
- Particularly relevant example is Article 1.
- The instrument is “The Protection of Traditional Knowledge – Draft Articles” the intent of the title is watered down/lost/not supported in the Articles that comprise itat this point.

Use of Terms

- The terms “Misappropriation” and “Misuse” do not fully address harm that may be caused through such actions.
- “Public domain” and “Publicly available” are too broad for a definition as it infers the information is publicly available if one other person outside of the TK holders know of its existence e.g. a researcher
- “Unauthorised use” refers to “protected” TK which is restrictive. The use of the term “Protected traditional knowledge” within the instrument may be interpreted as restricting the protection of TK to only that TK that falls within the definition of this term.

Traditional Knowledge

- Described in WIPO/GRTKF/IC/31/4 under “Use of Terms” as:

Traditional knowledge [refers to]/[includes]/[means], for the purposes of this instrument, knowledge, skills, innovations, practices, teachings and learnings of [indigenous [peoples] and [local communities]]/[or a state or states].

Traditional Knowledge

- Current description does not identify the true substance of TK
- Does not cater for the value of invention, experimentation, innovation that lies within TK that has been developed by Indigenous Peoples over generations.

Article 1

- The use of the term “nations” is extraneous and does not add to the terms Indigenous Peoples or local communities.
- Criteria for Eligibility – does look to protect TK that has been in existence for a period of not less than 50 years

Article 2

- The beneficiaries within this article is at odds with others in that it now includes “nations”.
- Alternative 2.1 raises the issue of “protection” where there is no detail as to what this “protection” may encompass and does not cross reference to any other Article that details what is meant by “protection”.
- Alternative 2.1 also includes within the footnote [1] that a Member State/Contracting Party may act as a beneficiary with regard to TK if the constitution of the Member State/Contracting Party does not recognize indigenous or local communities. This is abhorrent to Indigenous Peoples.
- Articles 2.2 and 2.3 address the establishment of a national authority however neither mention that the governance of any such authority should be by Indigenous Peoples funded by the Member State to a level commensurate to maintain its sustainability.

Article 3

- Article 3 has introduced “protected traditional knowledge” and it would appear that this term is to be distinctive from that of “traditional knowledge”. In this case the term is confusing and/or restrictive as it, if used, limits protection to distinct category of TK.
- Scope of Protection para 3.1(a)iv should include “mutually agreed terms” after the word “approval”.
- “mutually agreed terms” should also be included in Alternative 3.2(b) after the word “establish”.

[Article 3 BIS]

- [Article 3 BIS] 3BIS.1(b) insert “in accordance with mutually agreed terms based on the free prior and informed consent of Indigenous Peoples” after the term “as appropriate”.
- If 3BIS.1(f) is to be incorporated into the article then there needs to be more certainty around protection, enforcement and penalties e.g. a National Indigenous Authority established for such purposes.

[Article 3 BIS] cont.

- 3BIS.1(g) and 3BIS.2 – insert the words “in concert with Indigenous Peoples” at the end of these sub-paras.
- 3BIS.3 refers to “article 1.2”. This Article does not exist in this version of the draft instrument.
- Some bracketed terms e.g. [should] if incorporated do not allow/generate strong protection of the rights of Indigenous Peoples to their TK

Article 4

- As with earlier comments, again some bracketed terms e.g. [should] if incorporated do not allow/generate strong protection of the rights of Indigenous Peoples to their TK.
- The bracketed sub-paras within this Article is a reflection on the diversity of views among Member States and the hesitancy of the IGC to enforce protection, sanctions and remedies.

[Article 4 BIS]

- On the face of it, Alternative 4 BIS.4 provides for mandatory enforcement action of disclosure.
- However the Alternative Article 4BIS, *No Disclosure Requirement* requires no disclosure “unless such disclosure is material to the patentability criteria of novelty” – open to opinion, conjecture and interpretation and therefore challenge.

Article 5

- Recommends the establishment of a national authority
- As for Article 2 – “governance of any such authority should be by Indigenous Peoples funded by the Member State to a level commensurate to maintain its sustainability.”

Article 6

- The effect of the Exceptions and Limitations within this Article is overall to narrow the scope of protection for Indigenous Peoples' TK.
- James Anaya states in his review of this instrument that “ the suggestion that it be left to national law to determine exceptions and limitations to the scope of protection are particularly problematic as it leaves states the latitude to decide that certain TK should not be subject to protection at all.” His recommendation on this issue is that any exceptions and limitations should be formulated cognizant of and in compliance with human rights law.

Article 7

- The effect of this Article is to limit the protection of TK to a period as long as the TK satisfies the criteria for eligibility.
- Article 1 suggests that this period should no less than 50 years.
- However, how does this fit with the concept of TK as part of the rights of Indigenous Peoples and our human rights. As such can our rights around TK be limited?

Article 8

- Formalities can be seen as problematic as it places the onus on communities to register their TK. In Australia, this would mean that communities would have to find an English literate person to assist them in registering their TK. The technicalities would be problematic in remote Australian communities and for similar communities in other countries.
- In this regard formalities should be optional.

Article 9

- Within the transitional period of the instrument coming into force it is suggested that paragraph 9.1 and Alternative 9.2 with the deletion of [subject to respect for rights previously acquired by third parties in good faith]/should be allowed to continue] after the word “force”.

Article 10

- It is imperative that this instrument reflects other international agreements that protect the rights of Indigenous Peoples.

Article 11

- No comment at this point as it is fully bracketed.

Article 12

- Article 12 is supported with the inclusion of the term “Indigenous Peoples” used in lieu of “indigenous community” in both para 12.1 and 12.2.

Conclusion

Professor James Anaya conducted a review within the framework of human rights and pointed out that rights of Indigenous Peoples are grounded in universal human rights including rights of culture, religion, property, and self-determination.

In this regard:

- A right to a particular way of life based on the use of land resources and other aspects of Indigenous Peoples heritage (TK) related to Indigenous belief systems and thereby fall within the ambit of the right to religion
- Property rights over lands and natural resources traditionally used, including by implication genetic resources;
- The right to freely dispose of their natural wealth and resources.

The Articles in their present form soften as to what is TK; who are the beneficiaries; what is misappropriation; exceptions and limitations; and the need to identify and apply penalties for breaches.