

Information Note^{*} for IGC 32

Prepared by Mr. Ian Goss, the IGC Chair

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Introduction

1. To assist Member States in their preparations for IGC 32, I have prepared an information note building upon the information note I prepared for IGC 31, after careful consideration of the discussions that took place in IGC 31 and of document WIPO/GRTKF/IC/32/4. This short information note includes:

- Key elements of the 2016-2017 mandate.
- Reflections on IGC 31.
- A summary of the core issues I believe Member States should consider during IGC 32.
- A summary of other issues that IGC 32 should also consider, noting they are, in my view, secondary to resolution of the core issues.

2. This note is informal and has no status. **I emphasize that any views that may be expressed in this note are mine alone and are without prejudice to any Member States' positions on the issues discussed.**

The mandate for the 2016/2017 biennium

3. In considering the focus of our work for the next session, Member States should note the following key elements in the current IGC mandate:

- “focus on narrowing existing gaps”;
- “with the objective of reaching an agreement on an international legal instrument(s) relating to intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs)” (my underlining);
- “a primary focus on reaching a common understanding on core issues, including definition of misappropriation, beneficiaries, subject matter, objectives, and what TK/TCEs subject matter is entitled to protection at an international level, including consideration of exceptions and limitations and the relationship with the public domain”;
- “using an evidence-based approach”; and
- “inter-sessional seminars and workshops to build regional and cross-regional knowledge and consensus on issues related to IP and GRs, TK and TCEs with a focus on unresolved issues”.

4. IGC 32 will be the second of two sessions this year on TK. As detailed in the work program, IGC 32 should undertake negotiations on TK with a focus on addressing unresolved issues and considering options for a draft legal instrument.

^{*} Note from the WIPO Secretariat: The Chair of the IGC, Mr. Ian Goss, has prepared this information note to assist Member States in their preparations for the next session of the IGC.

Reflections on IGC 31

5. IGC 31 involved a comprehensive discussion on most of the core issues identified in the mandate, namely objectives, beneficiaries, subject matter, scope of protection and the meaning of “misappropriation”.

6. As foreseen in the agreed methodology for IGC 31, the facilitators prepared a Rev. 2, which has become document WIPO/GRTKF/IC/32/4. In my view, they managed to include in this document all the views expressed on the core issues discussed in IGC 31 in a streamlined and orderly way. In particular, they gave clarity to the different positions of Member States expressed as alternatives within the text. It will be important during IGC 32 that we attempt to narrow these positions, in accordance with the mandate.

7. As you may recall, I prepared an “Indicative List of Outstanding/Pending Issues to be Tackled/Solved at the Next Session”, which was transmitted by IGC 31 to IGC 32 and has been issued as document WIPO/GRTKF/IC/32/5. This is simply to guide our work at IGC 32, and I do not intend to re-open discussion of it. At the end of IGC 31, some comments were made on it, which I thought were useful and I summarize them here:

- GRULAC noted that there should not be brackets around “indigenous peoples”. It pointed out that it would be more accurate to replace, in point 2. Subject matter, “Where and how to include criteria for eligibility” with “Whether to include criteria for eligibility”. It suggested adding an element for consideration: “Consider the overlap between TK and TCEs”.
- The Tulalip Tribes pointed out that, in point 1. “Use and meanings of certain terms and concepts”, it would be helpful to have “moral rights” explained; and in point 4. “Scope of protection”, after “economic and/or moral rights”, “and other relevant rights” could be added to capture all rights that could be needed to make the tiered approach go forward.
- Canada, the USA and Japan raised the importance of discussing Article 3 BIS “Complementary Measures” and also the role of customary law.

8. I think those remarks are reasonable and valuable and, therefore, I plan to take them on board for discussions at IGC 32. We will therefore be guided by the “Indicative List” as developed at IGC 31, taking into account these additional views.

Core issues

Objectives

9. Objectives are fundamental to the development of the operative text of any instrument as they detail the purpose and intent of the instrument.

10. The current text¹ includes three alternatives:

- Alt. 1 includes five objectives:
 1. Provide beneficiaries with the means to prevent the misappropriation/illegal appropriation/misuse/unauthorized use of TK;

¹ Throughout this informal note, when quoting from the current draft TK text, I have removed the brackets, to make it easier to read.

2. Provide beneficiaries with the means to control ways in which their TK is used beyond the traditional and customary context;
 3. Provide beneficiaries with the means to achieve the fair and equitable sharing of benefits arising from the use of their TK, with prior informed consent or approval and involvement, and taking customary law into consideration as appropriate;
 4. Provide beneficiaries with the means to encourage and protect tradition-based creation and innovation, whether or not commercialized;
 5. Aid in the prevention of the grant of erroneous intellectual property (IP)/patent rights over TK and TK associated with GRs.
- Alt. 2 includes two objectives, which are similar to objectives 1 and 4 in Alt. 1:
 1. Prevent the misuse/**unlawful appropriation** of protected TK (the emphasis is mine);
 2. Encourage tradition-based creation and innovation.
 - Alt. 3 includes two objectives:
 1. Contribute toward the protection of innovation and to the transfer and dissemination of knowledge, to the mutual advantage of holders and users of protected TK and in a manner conducive to social and economic welfare and to a balance of rights and obligations;
 2. Recognize the value of a vibrant public domain, the body of knowledge that is available for all to use and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain.

11. These different formulations clearly reflect alternative views among Member States. In attempting to reconcile these views, key questions Member States may wish to consider are:

- Are there areas of possible convergence, e.g. prevent the misappropriation/illegal appropriation/misuse/unauthorized use/unlawful appropriation of TK?
- Are these objectives reflected in the substantive provisions?
- How would they be implemented?
- Do the objectives directly relate to the objective of our work as detailed in the IGC mandate, “... *reaching an agreement on an international legal instrument(s) relating to intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs)*”?
- Alluding to the question above, do all the objectives included in the different alternatives belong here or would it be more appropriate to include some in the preamble?

12. As stated by the Delegation of Switzerland in the last session, there are other international instruments outside the IP system that are relevant to the protection of TK. Therefore, an international legal instrument in the IGC context should contain objectives that clearly focus on the protection of TK within the context of the IP system, not objectives already contained in other international instruments or that are not relevant to the IP system.

13. As discussed above, there should be a direct link between the policy objectives and the substantive provisions in the instrument. In that context, it may be useful to come back to the policy objectives once there is more progress on substantive provisions, such as subject matter, beneficiaries and scope of protection.

14. It is expected that the *Seminar on Intellectual Property and Traditional Knowledge*, that will take place just before IGC 32, will shed some light on these issues, in particular, the keynote address: “Why and How to Protect Traditional Knowledge Internationally?”

Beneficiaries

15. The current text includes three alternatives:

- Alt. 1 considers indigenous peoples and local communities (IPLCs) as the only beneficiaries. It allows national law the choice of designating competent bodies to act as custodians on behalf of beneficiaries.
- Alt. 2 recognizes as beneficiaries IPLCs, states, nations and other beneficiaries, as may be determined under national law. It allows States to establish competent national authorities, as appropriate, to determine beneficiaries of TK in consultation with indigenous peoples, local communities, and stakeholders that create, maintain, develop, and exercise rights of TK in accordance with customary law and practices.
- Alt. 3 recognizes as beneficiaries IPLCs and other beneficiaries, as may be determined under national law. It allows national law the choice of designating competent bodies to act as custodians on behalf of beneficiaries, like Alt. 1.

16. Clearly, there is no agreement yet on this issue. Some delegations feel very strongly that IPLCs should be the sole beneficiaries, while others consider it important, noting the significant divergences in national laws and environments where TK can be found, that flexible policy space be provided to take account of these differences. Though there appears to be broad agreement that the primary beneficiaries should be IPLCs, there are also divergent views regarding the possibility of recognizing other beneficiaries, such as states and “nations”, as well as regarding the possibility of designating competent bodies/national authorities and their role.

17. In my view, Member States need to consider the necessity of giving some latitude to national law regarding the definition of beneficiaries, given the different situations regarding TK holders throughout the world and the context of some of these positions, e.g. French constitutional issues in relation to the term “peoples”. Also, more clarity is required regarding the role of competent bodies/national authorities and in which circumstances they would have a role to play.

18. A way forward could be for Member States to agree on the inclusion of other beneficiaries (such as states or nations), but with a different scope of protection. It would need to be clearly specified in which cases other beneficiaries could be considered, for example, when TK is not attributable to specific IPLCs. Article 3 could deal with this issue and specify the rights that could be granted to other beneficiaries.

19. I would also like to note that “competent authorities” are dealt with in Article 5 dealing with the administration of rights/interests. To avoid duplication in these areas, Member States may wish to consider if the issue of “competent authority” should be dealt with under Article 5 rather than under Article 2. In my view, references to a beneficiary as such, entitled to the rights to be specified by Article 3, belong in Article 2, while references to competent authorities, which manage, administer or enforce the rights of beneficiaries, for their benefit, belong in Article 5. If you allow me to borrow an example from the copyright system, a collective management organization manages the rights of authors and copyright owners (and would be addressed in Article 5 and not in Article 2). Indeed, the authors and owners of copyright works would be the “beneficiaries” (rights holders), while the collective management organization acts, in the interest and on behalf of the authors/owners, to ensure, among others, that they receive payment for the use of their works.

20. In my view, the issue of beneficiaries could benefit from the establishment of a small *ad hoc* contact group at IGC 32. It is an issue that has been extensively discussed and the different positions are known. Therefore, a small *ad hoc* contact group that includes IGC

participants representing the different positions around this issue could try to reconcile views and, eventually, work on some text, which could be submitted to plenary or informals.

21. The *Seminar on Intellectual Property and Traditional Knowledge*, that will take place just before IGC 32, will hopefully shed some light on this issue, in particular, Roundtable 1: “Regional, National and Community Experiences Relevant to Identifying “Protectable Traditional Knowledge” at an International Level”.

Subject matter

22. The current text includes four alternatives:

- Alt. 1 simply states that the subject matter is TK. This alternative should be read together with the definition of TK detailed in the “Use of Terms” section, noting there are two alternative definitions for TK.
- Alt. 2 incorporates a definition/description of TK.
- Alt. 3 is similar to alternative 2 but includes a broader definition/description of TK.
- Alt. 4 expands on alternate 1 by including criteria for eligibility, which comprise some elements included in the definitions/descriptions of TK in Alt. 2 and 3.

23. I have prepared a table to illustrate the similarities and differences between the Definition of TK – Alt. 1, the Definition of TK – Alt. 2, Subject matter - Alt. 2, Subject matter - Alt. 3 and Subject matter - Alt. 4²:

Definition of TK – Alt. 1	Created, maintained, and developed by IPLCs, and nations/states	Linked with, or is an integral part of, the national or social identity and/or cultural heritage of IPLCs, and nations /states	Transmitted between or from generation to generation, whether consecutively or not	Subsists in codified, oral, or other forms	May take the form of know-how, skills, innovations , practices, teachings or learnings.	May be dynamic and evolving
Definition of TK – Alt. 2	Created, maintained, controlled, protected and developed by IPLCs, and nations	Directly linked with the social identity and/or cultural heritage of IPLCs	Transmitted from generation to generation, whether consecutively or not	Same as in Definition of TK – Alt. 1	Same as in Definition of TK – Alt. 1.	Same as in Definition of TK – Alt. 1.
Alt. 2	Created and maintained in a collective context	Directly linked with the social identity and/or cultural	Transmitted between generations or from generation to generation,	Same as in Definition of TK – Alt. 1		

² The emphasis is mine.

		heritage of IPLCs and nations	whether consecutively or not			
Alt. 3	Created, maintained, and developed by IPLCs and nations/states , whether it is widely spread or not	Linked with, or is an integral part of, the social identity and/or cultural heritage of IPLCs	Same as in Definition of TK – Alt. 2	Same as in Definition of TK – Alt. 1	Same as in Definition of TK – Alt. 1	May be associated, in particular, with fields such as agriculture, the environment, healthcare and indigenous and traditional medical knowledge, biodiversity, traditional lifestyles and natural resources and GRs, and know-how of traditional architecture and construction technologies
Alt. 4	Created, generated, developed, maintained, and shared collectively	Distinctively associated with the cultural heritage of beneficiaries	Transmitted from generation to generation for a term as has been determined by each Member State, but not less than for 50 years			

24. As already pointed out, a definition of TK (with two alternatives) is also included in the “Use of Terms” section. As you can see in the table, these definitions include some of the elements of Alt. 2, 3 and 4. Further consideration should be given to the appropriate place to deal with the definition of TK/description of TK/criteria of eligibility, in order to avoid repetition.

25. Perhaps some clarity would be useful around the definition or description of TK generally, on the one hand, and criteria of eligibility for protection, on the other. It might be useful to recall that, in the IP system, distinctions are often made between creations or inventions in a general sense, on the one hand, and creations and inventions that can be protected using the IP system, on the other.

26. To clarify this, allow me to take the patent system as an example: Patent laws do not necessarily include a definition or a description of what an “invention” is. They do, however, delineate which inventions are patentable (i.e., those that are novel, involve an inventive step, and are industrially applicable or useful), using “criteria for eligibility of protection”.

27. An example from the copyright system could also be useful: The Berne Convention, 1971, does not include a definition of “literary and artistic works”, but it includes a list of examples of literary and artistic works. However, in so far as which “literary and artistic works” are protected, copyright law identifies the criteria for eligibility of protection (such as “originality”).

28. In the same way, the text under discussion reflects this approach: it contains possible definitions of TK in a general sense, and also some examples in some alternatives, and it contains, separately, suggested “criteria for eligibility for protection”. The latter serve to clarify which TK, which might be broadly defined in a general sense, would be “protected TK”.

29. Once again, I would like to point out the interlinkages between most of the core issues. The definition of subject matter will probably have an impact on other core issues, such as beneficiaries and scope of protection.

30. This issue could also benefit from the establishment of a small *ad hoc* contact group at IGC 32, which should include IGC participants representing the different positions around this issue. The small *ad hoc* contact group could try to reconcile views and would report back to the plenary or informals.

31. It is expected that the *Seminar on Intellectual Property and Traditional Knowledge*, that will take place just before IGC 32, will shed some light on this issue, in particular, Roundtable 1: “Regional, National and Community Experiences Relevant to Identifying “Protectable Traditional Knowledge” at an International Level”.

Scope of protection

32. As already explained in the information note I prepared for IGC 31, IGC 27 introduced for discussion a tiered approach to scope of protection whereby different kinds or levels of rights or measures would be available to rights holders depending on the nature³ and characteristics of the subject matter, the level of control retained by the beneficiaries and its degree of diffusion.

33. The tiered approach proposes **differentiated protection** along a spectrum from TK that is available to the general public to TK that is secret/not known outside the community and controlled by the beneficiaries⁴.

³ In regard to the nature of TK, document WIPO/GRTKF/IC/17/INF/9 (“List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May Be Found”) identifies the various forms in which TK may be found.

⁴ In this context, it might be worth recalling a couple of comments noted in the Non-Paper prepared by the then IGC Chair for IGC 27:

- The characteristics of TK (and TCEs) throughout the world vary greatly, hence the importance of identifying those high-level and universal characteristics that belong in an international instrument.
- In more general terms, one view is that the definition should be broad enough to cover all kinds of TK and TCEs, while another view is that the definition should be precise and limited for clarity and transparency purposes. If the definition is broad, then other elements, such as the criteria for eligibility and/or the exceptions and limitations, would probably need to act as a limiting filter, otherwise, this would have an impact on the scope of protection (the extent of the rights), which may need to be more limited, in order to reach agreement. Thus, there is interplay between the key issues of definition of subject matter, scope of rights and exceptions and limitations. This interplay may relate

34. This approach could suggest that, for example, exclusive economic rights could be appropriate for some forms of TK (for instance, secret TK), whereas a moral rights-based model could, for example, be appropriate for TK that is widely disclosed.

35. The new text includes four alternatives:

- Alt. 1 basically leaves the issue of scope of protection to be dealt with at a national level and does not incorporate the tiered approach.
- Alt. 2, and 3 include a tiered approach with the same levels of protection afforded to secret and narrowly diffused TK. The main area of difference is the nature of rights afforded to TK which is widely diffused.
- Alt. 4 replicates Alt. 2 but with a requirement to comply with the eligibility criteria, based on the use of the term “protected TK”, which is the only form of TK which would be afforded any rights. This term is defined in the “Use of Terms” section and linked to the eligibility criteria in Alt. 4 of Article 1.

36. I have prepared a table to illustrate the similarities and differences between Alt. 2, Alt. 3 and Alt. 4⁵:

Alternative/Rights granted	3.1 Where the TK is secret, whether or not it is sacred	3.2 Where the TK is narrowly diffused, whether or not it is sacred	3.3 Where the TK is widely diffused/ is neither secret nor narrowly diffused
Alt. 2	<p>(a) Beneficiaries have the exclusive and collective right to maintain, control, use, develop, authorize or prevent access to and use/utilization of their TK; and receive a fair and equitable share of benefits arising from its use</p> <p>(b) Users attribute said TK to the beneficiaries, and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the</p>	<p>(a) Beneficiaries receive a fair and equitable share of benefits arising from its use; and</p> <p>(b) Users attribute said TK to the beneficiaries, and use the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the TK (Same as 3.1 (b)).</p>	Member States should use best endeavors, in consultation with indigenous and local communities, to protect the integrity of TK that is widely diffused

also to the balance that is inherent in all types of IP protection systems (and that underlies all four cross-cutting issues), i.e. the balance between private rights and public interests.

⁵ The emphasis is mine.

	TK		
Alt. 3	Same as Alt. 2	Same as Alt. 2	<p>(a) Attribute said TK to the beneficiaries;</p> <p>(b) Use the knowledge in a manner that respects the cultural norms and practices of the beneficiary as well as the inalienable, indivisible and imprescriptible nature of the moral rights associated with the TK; and</p> <p>(c) Where applicable, deposit any user fee into the fund constituted by such Member state, except in cases where the use is for research or development leading to new and useful products or processes, and in such cases, provide the beneficiaries with a fair and equitable share of benefits realized from the use of said TK, based on prior and informed consent and on mutually agreed terms.</p>
Alt. 4	<p>(a) Same as Alt. 2, with the addition of “protected” before TK.</p> <p>(b) Same as Alt. 2, with the addition of “protected” before TK.</p>	<p>(a) Same as Alt. 2, and</p> <p>(b) Same as Alt. 2, with the addition of “protected” before TK.</p>	Very similar to Alt. 2, with the addition of “protected” before TK and “and sacred”.

37. I consider that the differentiated protection in the tiered approach offers an opportunity to respond to reality, namely, to the differences between secret TK, narrowly diffused TK and widely diffused TK.

38. Secret TK, narrowly diffused TK and widely diffused TK are defined in the “Use of Terms” section, as follows:

- Secret TK is TK that is held by beneficiaries under certain measures of secrecy, in accordance with customary law, and under the common understanding that the TK is to be used and known only within the specific group.
- Narrowly diffused TK is TK that is shared by beneficiaries amongst whom measures to keep it secret are not taken, but is not easily accessible to non-group members.
- Widely diffused TK is TK which is easily accessible by the public but is still culturally connected to its beneficiaries' social identity.

39. The definitions of secret TK, narrowly diffused TK and widely diffused TK still need to be discussed. However, if you allow me to use them to make a blunt simplification of the situation:

- Secret TK is still under the control of its holders and, by definition, is not publicly available. It is protected *de facto*, therefore, it is clear to whom it can be attributed.
- Narrowly diffused TK is not necessarily under the control of its holders, but it might still be attributable to specific IPLCs and, therefore, it is quite easy to identify its holders.
- Widely diffused TK is not anymore under the control of its holders, and as such it is likely to be difficult to identify its holders or to attribute it to specific IPLCs.

40. This tiered approach or differentiated protection could facilitate the recognition of stronger protection to secret TK, while still granting some rights to narrowly diffused TK and widely diffused TK.

41. It should be noted that the article on scope of protection needs to be read together with the article on subject matter of protection and the section on "Use of Terms", in order to fully understand what TK would be protected under this instrument. It is also noted that the term "protected TK" has been introduced in different parts of the text and is specifically linked to Article 1 Alt. 4 and Article 3 Alt.4. To attempt to narrow gaps, it may be useful to further explore the pros and cons of the different tiered approaches reflected in Alternatives 2, 3 and 4.

42. Last but not least, should my idea of agreeing on the inclusion of other beneficiaries (such as states or nations), but with a different scope of protection, find some support, the rights to be granted to these other beneficiaries would need to be thoroughly considered.

43. It is expected that the *Seminar on Intellectual Property and Traditional Knowledge*, that will take place just before IGC 32, will shed some light on this issue, as well as on exceptions and limitations, in particular, Roundtable 2: "Perspectives on and Experiences with a "Tiered Approach" to the Protection of Traditional Knowledge - Scope of Protection and Exceptions and Limitations".

Exceptions and limitations

44. This provision (Article 6) is divided into "General Exceptions" and "Specific Exceptions".

45. The TK text under "General Exceptions" attempts to articulate the conditions to be fulfilled that would be applied at the national level, when developing limitations and exceptions (paragraph 6.1). There appears to be a view that the conditions could include elements of the "classic" three-step test, reflected in the Berne Convention, 1971, in relation to copyright, and moral-rights relating to concepts of acknowledgement, non-offensive use and compatibility with fair practice.

46. The “Specific Exceptions” section covers what kind of exceptions and limitations should be included/allowed. Article 6.7 is closely linked to discussion of a possible tiered approach and of the public domain. Based on the possible introduction of a tiered approach to defining the scope of protection, some delegations have asked whether the provisions on exceptions and limitations should not also follow this approach, i.e., that various degrees of excepted acts would mirror the various kinds of subject matter (the various forms in which TK is found) and the tiered rights applied to them.

Relationship with the public domain

47. IGC 27 introduced into the draft TK text a definition of the term “public domain.” This concept is integral to the balance inherent in the IP system. Exclusive rights are balanced against the interests of users and the general public, with the intent to foster, stimulate and reward innovation and creativity. This concept links to understandings of the related concepts of “publicly available” and “prior art”⁶.

48. The IGC should consider those concepts carefully as this issue is directly linked with the “tiered approach” under Article 3. However, whilst the “public domain” concept is relevant to understanding the IP/TK interface and to the design of a balanced and effective IP-like system of protection for TK, the merits of developing and including a specific definition of the “public domain” within the TK instrument are unclear. I believe that formally defining the “public domain” is a challenging exercise with significant and wide-reaching policy ramifications going beyond the scope of the IGC.

Definition of “misappropriation”

49. The IGC mandate refers to a common understanding on a definition of misappropriation. As already pointed out, the term “misappropriation” is not currently defined in any other international instrument. IGC 29 and IGC 30, which addressed the subject of GRs, discussed this term. There was no agreement on its meaning or on the need to specifically define it.

50. Document WIPO/GRTKF/IC/32/4 includes four alternatives:

- According to Alt. 1, **any** access or use without prior informed consent or approval or involvement and, where applicable, without mutually agreed terms, for whatever purpose, would be misappropriation (the emphasis is mine).
- According to Alt. 2, there would be misappropriation only if the TK has been acquired by the user from the holder through improper means or a breach of confidence, and which results in a violation of national law in the provider country.
- The recently added Alt. 3 links misappropriation to **any** access or use of TK **in violation of customary law and established practices governing the access or use of such TK** (the emphasis is mine).
- The recently added Alt. 4 somehow links Alt. 1 and Alt. 3, considering misappropriation any access or use without the compliance of requirements very similar to those specified in Alt. 1 (**free** prior informed consent, mutually agreed terms) and Alt. 3

⁶ These concepts are discussed notably in document WIPO/GRTKF/IC/17/INF/8 (Note on the Meanings of the Term “Public Domain” in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore). See also document WIPO/GRTKF/IC/31/INF/7 (Glossary of key terms related to intellectual property and genetic resources, traditional knowledge and traditional cultural expressions).

(customary law), and established practices governing the access and use of such TK (the emphasis is mine).

51. I would like to note that a definition of “Unlawful appropriation” has been included in the section on “Use of Terms” and a reference to this term has been added in one of the alternatives of the Policy Objectives.

52. Should the IGC consider that a definition of misappropriation is necessary, and that a common understanding of the plain language meaning is insufficient, it might be useful to revisit this definition once other key issues become clearer.

Other issues

Preamble / Introduction

53. A preamble is not a legally binding or operative text of a multi-lateral instrument, though it does aid in interpretation of the operative provisions by providing context to the instrument and the intent of the drafters. The language is usually reflected as principles whether the instrument is declaratory or legally binding. The IGC could reflect on which of the concepts featuring in the Preamble/Introduction are most directly related to IP, since its mandate is to reach an agreement on an international legal instrument relating to IP for the balanced and effective protection of TK.

54. The Preamble now includes ten paragraphs, with the recent addition of (vii). The IGC could verify their relevance and try to prevent redundancies.

Use of terms

55. In the last session, some definitions included in this section have been revisited and some new definitions have been included.

56. Regarding Use/utilization, as pointed out by a delegation during IGC 27, the definition in this section refers to uses outside the traditional context, while the term “use” in Article 2.1 refers to the use by the beneficiaries. The use of the same term with a different sense in separate instances could be confusing. The IGC might wish to find a way to avoid confusion.

57. As already noted, document WIPO/GRTKF/IC/32/4 contains a definition of TK in this section, which includes some of the elements of Alt. 2, 3 and 4 of Article 1 on “Subject Matter”. Where would it be more appropriate to include these elements?

Complementary Measures and Disclosure Requirement

58. The TK and the GRs texts deal with the possibility of establishing databases and other complementary measures. It could be useful to take a look at the relevant articles in the GRs text. The IGC could consider the aims and objectives of such databases and their modalities of operation. Other key issues that might need to be considered include: Who should be responsible for compiling and maintaining the databases? Should there be standards to harmonize their structure and content? Who should have access to the databases? What would be their content? In what form would the content be expressed? Should there be accompanying guidelines? What would be the benefits and risks of facilitating and encouraging the development of publicly accessible databases?

59. Disclosure requirements have been extensively discussed during IGCs 29 and 30, and in previous sessions. The IGC has not yet reached a shared view on this and continues to address this measure.

60. It is expected that the *Seminar on Intellectual Property and Traditional Knowledge*, that will take place just before IGC 32, will shed some light on this issue, in particular, Roundtable 3: “Complementary Measures and Customary Law for the Protection of Traditional Knowledge: Examples and Lessons Learned”.

Sanctions, remedies and exercise of rights

61. The TK, TCEs and GRs texts contain provisions on sanctions and remedies. The approaches are different. For example, the GRs provisions are very specific. I believe there is merit in looking at the three texts⁷, in order to improve the TK text. The concept of providing a general framework based on harmonized high-level norms and principles at the international level and leaving details to national legislation is, in my view, also worth considering.

62. It is expected that the *Seminar on Intellectual Property and Traditional Knowledge*, that will take place just before IGC 32, will shed some light on this issue, as well as on the following issues, in particular, Roundtable 4: “Perspectives on and Experiences with Other Issues: Sanctions and Remedies, Management of Rights, Term of Protection, Formalities, Transitional Measures, Relationship with other International Agreements, National Treatment and Transboundary Cooperation”.

Administration of rights/interests

63. Article 5 deals not with “beneficiaries” but with how and by whom rights or interests should be administered, and it includes different alternatives. There appears to be no agreement on the extent of participation of the TK holders in the establishment/appointment of the authority or whether the establishment of a competent authority is mandatory or not. I believe a key question which Member States need to consider is: should there be flexibility at a national level to implement arrangements relating to competent authorities, rather than attempt to establish a “one size fits all” solution at the international level? This might be a good example of an issue that an “international legal instrument” can more or less leave to national legislation.

Term of protection

64. I would like to point out that Option 1 and Option 3 in Article 6 of the TCEs text⁸ make a distinction between moral rights and economic rights. The IGC might wish to consider a similar approach for Article 7.

Formalities

65. The options included in Article 8 of document WIPO/GRTKF/IC/32/4 reflect diverging views. The alternative deals specifically with secret/sacred/closely held TK. This issue is related to the type of rights that would be granted. When discussing formalities, the IGC could consider how the tiered approach in Article 3 affects possible formalities. For example, it might be envisaged to establish formalities only for some kinds of TK.

⁷ The latest GRs and TCEs texts are available at: <http://www.wipo.int/tk/en/igc/>.

⁸ Available at: <http://www.wipo.int/tk/en/igc/>.

Transitional measures

66. Article 9 of the TCEs text⁹ also deals with this issue, but not in an identical manner. The IGC might wish to look at both texts side-by-side and make appropriate changes to the TK text.

Relationship with other international agreements

67. The GRs text¹⁰ (Article 8.3) and the TCEs text¹¹ (Article 10) include a non-diminishment clause regarding indigenous peoples' rights. The IGC might wish to include a non-diminishment clause in the TK text.

National treatment

68. Article 11 of the TCEs text¹² and Article 11 of the TK text deal with this issue but differ significantly. These different views need to be reconciled. The IGC could benefit from looking at both texts and making appropriate changes to ensure consistency.

Transboundary cooperation

69. Article 12 deals with the very important issue of TK shared across borders. The IGC needs to reflect on the most suitable formulation, in view of Articles 12.1 and 12.2.

Other useful resources

70. I note that there are some useful resources available on the WIPO website which Member States may wish to use as reference materials in their preparations for IGC 32, such as:

- WIPO/GRTKF/IC/17/INF/8, Note on the Meanings of the Term “Public Domain” in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore, <http://www.wipo.int/tk/en/resources/publications.html#1> ;
- WIPO/GRTKF/IC/17/INF/9, List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May Be Found, <http://www.wipo.int/tk/en/resources/publications.html#1>;
- Regional, National, Local and Community Experiences, http://www.wipo.int/tk/en/resources/tk_experiences.html;
- Presentations from:
 - *Seminar on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions: Regional, National and Local Experiences*, that took place in Geneva, March 30 to April 1, 2015: <http://www.wipo.int/tk/en/>;

⁹ Available at: <http://www.wipo.int/tk/en/igc/>.

¹⁰ Available at: <http://www.wipo.int/tk/en/igc/>.

¹¹ Available at: <http://www.wipo.int/tk/en/igc/>.

¹² Available at: <http://www.wipo.int/tk/en/igc/>.

- *Seminar on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions: Regional and International Dimensions*, that took place in Geneva, June 23 to 25, 2015:
<http://www.wipo.int/tk/en/>.