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IGC Draft Articles on the Protection of Traditional Cultural Expressions: Indigenous and Local Communities' Perspectives

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Introduction

Indigenous Peoples have stressed the need for any text from the IGC process, including the Draft Article on the Protection of Traditional Knowledge,² be informed by international laws especially those that touch on indigenous peoples rights.³ Some of the international instruments include the Convention on Biological Diversity,⁴ the International Covenant on Economic, Social and Cultural Rights⁵ the Paris Agreement⁶ to the Framework Convention on Climate Change⁷ but more importantly provisions of the UN Declaration on the Rights of Indigenous Peoples.⁸

Article 31 of the Declaration specifically articulates indigenous peoples right “to maintain, control, protect and develop” aspects of their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their

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² WIPO/GRTKF/IC/33/4

³ See for example, Prof. James Anaya's Technical review of key intellectual property-related issues of the WIPO draft instruments on genetic resources, traditional knowledge and traditional cultural expressions submitted by the UNPFII to the IGC 33.

http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_33/wipo_grtkf_ic_33_inf_9.pdf

⁴ Articles 8 (j) and 10(c), Convention on Biological Diversity, 1992

⁵ International Covenant on Economic, Social and Cultural Rights, 1966

⁶ Paris Agreement, 2016

⁷ United Nations Framework Convention on Climate Change, 1992

⁸ United Nations Declaration on the Rights of Indigenous Peoples, 2007 *A/61/L.67 and Add.1*

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sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. Indigenous peoples also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.⁹ It is important to also note that the Declaration also advocates for collaboration between indigenous peoples and States in developing effective measures to recognize and protect the exercise of indigenous peoples cultural rights,¹⁰ as may be happening in the IGC process.

Previous panelists/speakers have also informed the IGC process of the Constitutional and other legal protections indigenous peoples and their cultures enjoy at the national level, including increasingly in many African countries.¹¹ Human rights mechanism have also affirmed that Indigenous peoples cultural rights, the subject matter of the draft articles, extend to the distinctive cultural characteristics of indigenous peoples, which include the traditional knowledge they have generated through their own patterns of observation and experiences, as well as their distinctive art forms and other cultural expressions.¹² Indigenous cultures are not fixed in time and space. They are constantly evolving to reflect changing circumstances. Increasingly in some, if not most African countries for example, TCE's are being adapted to and communicated in modern ways,

⁹ Article 31 (1), UN Declaration on the Rights of Indigenous Peoples, 2007

¹⁰ Article 31 (2), UN Declaration on the Rights of Indigenous Peoples, 2007

¹¹ See for example, Marcella Ouma, WHY AND HOW TO PROTECT TRADITIONAL KNOWLEDGE AT THE INTERNATIONAL LEVEL, Seminar of Intellectual Property and Traditional Knowledge, Geneva, Switzerland, 25 November 2016.

¹² See Cmte. E.S.C.R., General comment no. 21, E/C.12/GC/21, para. 37; Universal Declaration on Cultural Diversity, UNESCO 2001, art. 4

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either by members of indigenous communities themselves or by outsiders seeking to profit from such TCEs. The draft articles on TCEs must therefore speak to all these issues.

The steps being undertaken in the IGC process should not only therefore aim to achieve the protection and conservation of Indigenous Peoples' cultural rights but also their development and diffusion with science as provided for by the International Covenant on Economic, Social and Cultural Rights¹³ and some national laws. The Kenyan constitution, for example, obligates the state to recognize the role of science and indigenous technologies in the development of the nation¹⁴ while its Climate Change Act, 2016 requires that traditional knowledge including TCEs inform any national climate change mitigation and adaptation strategies.¹⁵

Coming back to the draft articles on TCEs, the Chair of the IGC has thankfully prepared an information note that reminds us of past IP-related work undertaken on TCEs at the international level, a summary of the work undertaken by the IGC on TCEs since text-based negotiations began. He has also outlined the core issues to be considered during IGC 33.¹⁶ The chair has may be inviting suggestions on specific wording or language for the draft text.

Wishing that my perspectives could have been informed by a deliberately organized indigenous communities discussion on the draft TCEs at the African Regional level,¹⁷ I shall

¹³ Article 15 (2) International Covenant on Economic, Social and Cultural Rights, 1972

¹⁴ Article 11 (2) (b), Constitution of Kenya, 2010

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¹⁶ See information note for IGC 33 prepared by Mr. Ian Goss, the IGC Chair available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_33/wipo_grtkf_ic_33_ref_information_note.pdf

¹⁷ I haven't heard of any African Indigenous Peoples organizations deliberately organizing or inputting into the TCE's draft articles

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now discuss some of the issues and propose some wordings from an African indigenous person perspective.

(i) Objectives

As the IGC Chair aptly stated, objectives are fundamental to the development of the operative text of any instrument as they detail the purpose and intent of the instrument. The draft articles outline four broad objectives that range from protecting, facilitating use, the rights of third parties and TCEs deemed to be in the public domain.¹⁸ However, most of the text still remains bracketed.

I think it must first be important to agree that the overall objective of any TCE instrument that may result from the IGC process should be to provide minimum standards that shall be observed and adhered to by member states in the design and development of TCEs specific laws and policies that will be informed by national circumstances. I therefore propose the deletion of the bracketed "*legislative, policy [and]/[or] administrative/[and practical/appropriate] means*" and be replaced by "*an internationally binding agreement on TCEs* to. The bullet points would then outline the specific objectives of the agreement. The specific objectives should be informed by the objectives of TCE laws developed by some countries outlined in recent WIPO seminar on TK.

However, the TCE objectives should not just focus on and reflect on the type of harm(s) to be addressed and on the gaps that may currently exist that ought to be filled from a policy perspective. The objectives should also aim at conserving TCEs as they are

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being lost at rapid pace due to globalization and also to ensure that the TCEs economically benefit the concerned communities.

On the issue of words to identify the communities, “Peoples] and [local communities] [and nations] / [beneficiaries” are still bracketed. It is important to note that different states identify and or recognize indigenous peoples by different names depending on historical realities, national circumstances that include the degree of acceptance, state officialdom comfort with the use of certain terms and the level of understanding of international human rights by the ruling elites. For example, in USA, Indigenous Peoples are recognized as “nations” and enjoy limited constitutionally guaranteed sovereignty over their lands and resources. In Kenya, IPs are constitutionally recognized as “marginalized communities” but do not enjoy any form of sovereignty. In the Republic of Congo, the law on the promotion and protection of the rights of Indigenous Populations¹⁹ recognizes them as “Indigenous peoples”.²⁰ The IGC should therefore avoid being entangled in national identity politics and use the internationally accepted, more accommodative term “Indigenous Peoples and Local Communities”. An explanation of the term can be included in the “use of terms” section to include “nations”, “tribes”, “marginalized communities” or whichever other name used at the national level.

I also wish to propose the deletion of the brackets in objective 1 (a) on the words “prevent” and “misappropriation” and “adaptations therefore”. Prevention of misappropriation of TCEs is at the core of indigenous peoples and local communities struggles and should be by extension the core objective of any TCE instrument that will be

¹⁹ Act No. 5-2011 of 25 February 2011.

http://www.iwgia.org/images/stories/sections/regions/africa/documents/0368_congolese_legislation_on_indigenous_peoples.pdf

²⁰ Article 1

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agreed upon in the IGC process. The prevention of misappropriation should obviously extend to any adaptations of TCEs undertaken without the free, prior and informed consent of the indigenous peoples and local community originator of the TCE. The words “misuse/offensive and derogatory use” could therefore be deleted and included in a definition of “misappropriation” that can be included in the use of terms section. Likewise, bracketed areas on the draft text that speak on compensation and equitable benefit sharing should be removed, as these issues are critical for indigenous and local communities. WIPOs TK division can subsequently develop guidelines on compensation and equitable benefit sharing from the utilization of TCE’s and adaptations thereof, once an international instrument becomes operational.

(ii) Definition of misappropriation

It is very necessary for the TCE text to include a definition of misappropriation in the “use of terms” section. Such a definition would bring clarity that would ideally lessen conflict that may arise from any misinterpretations of the word. However, such a definition should be broad enough to include all *“acts aimed at or which have the effect of wrongfully or unlawfully appropriating TCEs without a verifiable agreement with the community concerned.”* TCE holder communities will themselves define how they will enter into such agreements. Section 32 of Kenya’s Protection of Traditional Knowledge and Cultural Expressions Act, 2016 is explicit that the TCE “owners shall consider a user agreement application and determine whether to reject the application or accept the application and enter into negotiations for a written authorized user agreement.” For the full support of any such agreements, the Act is also explicit that “the owners of the TCE shall, before

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entering into an authorized user agreement, consult the members of the community on the proposed terms and conditions of the agreement. “

(iii) Article 1 - Subject Matter of Protection

The draft articles identify TCEs as the subject matter of protection. While a definition of TCE is provided for in the Use of Terms section, most of the text remains bracketed. The chair has noted that there might be concerns about the use of certain terms and also questions on some eligibility criteria. However it is important to note that TCEs might have been used for centuries or may be as new as last week because culture is not static but constantly evolving as communities exercise their creativity. Time limitations should not therefore be placed on TCEs protections.

(iv) Article 2 – Beneficiaries of Protection

The draft text recognizes indigenous peoples and local communities as beneficiaries. However, the word “peoples” is still bracketed and there are questions on whether the beneficiaries should extend beyond indigenous peoples to include “nations”. I already spoke on the need to use “indigenous peoples and local communities” and explain the context in the use of words section. However, the word “nation” may itself need to be clarified. Is it being used in the context of indigenous nations or in the context of nation states?

A competent national authority may be necessary to facilitate coordination and support TCEs work at the national level. Am not sure there can be any TCE not claimed by

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any specific indigenous peoples or local communities to designate such a competent authority to be the custodians of. What will be necessary is good faith effort by the member to identify the origin of any such TCE. However, any competent authority established at the national level must have strong representations of indigenous peoples. For the purposes of the draft articles, the discussion on a competent authority can be moved to Article 4.

Article 3 - Scope of protection

Article 3 of the draft articles outline two proposed options under the scope of protection. As opposed to option two that gives states maximum flexibility in determining the scope of protection, I would like to reflect that the tiered or differentiated approach provided in option one would be more realistic in the African context. Some TCEs like the regalia associated with the Maasai, are now readily available to the general public in markets, shops etc and among different sections of the Maasai. Different components of the regalia might also be part of other communities' cultures in the Kenya and the region. While everyone in Kenya associates such regalia with the Maasai therefore extending moral rights to the Maasai²¹, I believe that it will be very difficult for any Maasai group to prevent the use of such regalia by any other Kenyan. However, there are TCEs that are secret, sacred or not known outside the Maasai community and are controlled exclusively by the community or section of the community. In such situations, the Maasai could enjoy exclusive protection and use of such TCEs. However, I don't believe that the IGC can have

²¹ Section 21 of Kenya's Traditional Knowledge and Cultural Expressions Act, 2016 defines the numerous rights accruing to a holder of a moral right and is explicit that moral rights exist independent of cultural rights.

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the time to determine tiers according to the quality, level of control and the degree of diffusion of the TCEs. This should be left to national level, with the WIPOs TK division developing guidelines for such determination.

(v) Article 5 – Exceptions and Limitations

Depending on what will be included in the tiered approach to at the national level, exceptions and limitations should be developed with the full and effective participation of indigenous peoples and local communities and the free, prior and informed consent of indigenous peoples. This is because national laws advance citizen participation in matters that affect them including in TCEs matters.²² However, there is no clarity on whether local communities should also give FPIC. The current practice is that only indigenous peoples give FPIC. The challenge will then to distinguish between indigenous peoples and local communities in African countries. This matter is already being addressed in countries like the Republic of Congo where there is already an indigenous peoples law and in Kenya where the National Gender and Equality Commission has just finalized a mapping of indigenous communities in Kenya.

Thank you!

²² See for example, Section 28, The Protection of Traditional Knowledge and Cultural Expressions Act, 2016 of Kenya.
http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProtectionofTraditionalKnowledgeandCulturalExpressionsAct_No33of2016.pdf