

Non-paper

Chair's Text of a Draft International Legal Instrument relating to Intellectual Property and Traditional Knowledge/Traditional Cultural Expressions

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**Second Draft
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INTRODUCTION

1. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is conducting negotiations on traditional knowledge (TK) and traditional cultural expressions (TCEs) towards reaching agreement on an appropriate legal instrument for their international protection in an intellectual property (IP) sense.¹
2. At IGC 44, after informal consultations, I committed to preparing a Chair's Text on TK and TCEs, advised by an informal advisory body.
3. I accordingly prepared a zero draft text of an international legal instrument relating to intellectual property and TK/TCEs for IGC 45, and a first draft text for IGC 46. Taking into account the comments received from the advisory body and the IGC participants, and the discussions at IGCs 45 and 46, I have prepared this second draft text. It is noted that I cannot incorporate each single comment into the text, as I intend to balance the rights and interests of all stakeholders.
4. I have prepared this draft text solely under my own authority as a contribution to the negotiations on TK/TCEs at the IGC. This draft is without prejudice to any Member States' positions and reflects my views alone. I thank my Vice-Chairs and the members of the advisory body for their valuable advice so far, as well as others whom I have consulted.
5. I reviewed both Draft Articles on TK and Draft Articles on TCEs (documents WIPO/GRTKF/IC/47/4 and WIPO/GRTKF/IC/47/5), and saw the similarity of these two documents. Therefore, I prepared one single document covering both TK and TCEs. Again, this draft is without prejudice to any Member States' positions and reflects my views alone.
6. IGC 46 managed to address many cross-cutting issues on TK and TCEs, though future elaboration is still needed. In my view, an international legal instrument on TK/TCEs should not be overly detailed and prescriptive. The draft aims to be less rather than more detailed.
7. In addition, since there is no agreement yet on whether this international legal instrument should be binding or non-binding, I have not used the term "Article" or "Section" as proposed by some Member States, nor included any final and administrative provisions. I have included explanatory notes to provide further background and explanations.

¹ To this end, the information provided in the "Gap Analyses", contained in documents WIPO/GRTKF/IC/47/8 and WIPO/GRTKF/IC/47/9, is worth noting. The "Gap Analyses" identified the gaps that existed at the international level for the protection of TK and TCEs; set out considerations relevant to determining whether those gaps needed to be addressed; and described options that existed or might be developed to address any identified gaps. These documents also analyzed the concept of "protection" in an IP sense.

8. This draft text is a work in progress. I invite all IGC participants to consider this second draft text and provide me with feedback on it. Feedback may be sent to me at Chairigclilyclaire@gmail.com.

PREAMBLE

1. Acknowledging the UN Declaration on the Rights of Indigenous Peoples, and the aspirations of Indigenous Peoples [therein];
2. Recognizing that Indigenous Peoples and local communities, as holders of traditional knowledge and traditional cultural expressions, have the right to maintain, control, protect and develop their intellectual property over their cultural heritage, including their traditional knowledge and traditional cultural expressions;
3. Recognizing that the situation of the Indigenous Peoples and local communities varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration;
4. Recognizing that the traditional knowledge and traditional cultural expressions of Indigenous Peoples and local communities have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values;
5. Acknowledging that traditional knowledge systems and traditional cultural expressions are frameworks of ongoing innovation and distinctive intellectual and creative life that are important for Indigenous Peoples and local communities;
6. Respecting the continuing customary use, development, exchange and transmission of traditional knowledge and traditional cultural expressions by, within and between communities;
7. Promoting respect for traditional knowledge systems and traditional cultural expressions, for the dignity, cultural integrity and spiritual values of the traditional knowledge and traditional cultural expressions holders who conserve and maintain those systems;
8. Recognizing the role of the intellectual property system in preventing traditional knowledge and traditional cultural expressions from being misappropriated;
9. Ensuring mutual supportiveness with international agreements relating to the protection and safeguarding of traditional knowledge and traditional cultural expressions, and those relating to IP.

Explanatory Notes:

A preamble does not form part of the operative text of a multilateral instrument, though it does aid in the interpretation of the operative provisions by providing context to the instrument and the intent of the drafters. The language is usually reflected in the form of principles irrespective of whether the instrument is declaratory or legally binding upon those that ratify or accede to it.

It is advisable to keep the concepts that are directly related to intellectual property since the IGC's mandate is to finalize an agreement on an international legal instrument(s) relating to intellectual property for the balanced and effective protection of traditional knowledge and traditional cultural expressions.

USE OF TERMS

For the purposes of this instrument:

“Use”/“utilization” means

- (a) where the traditional knowledge or traditional cultural expression is included in a product, or where a product has been developed or obtained on the basis of traditional knowledge or traditional cultural expression, the manufacturing, importing, offering for sale, selling, stocking or exploiting the product;
- (b) where the traditional knowledge or traditional cultural expression is included in a process, or where a process has been developed or obtained on the basis of traditional knowledge: exploiting of the process; or carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process;
- (c) where the traditional knowledge or traditional cultural expression is included as part of commercial or non-commercial research and development.

OBJECTIVES

The objectives of this instrument are to:

- (a) effectively, adequately and in a balanced manner protect traditional knowledge and traditional cultural expressions; and
- (b) prevent the erroneous grant or assertion of intellectual property rights over traditional knowledge and traditional cultural expressions.

Explanatory notes:

Objectives are often articulated in laws and legal instruments, clarifying the policy and legal context and providing a common direction to the protection established in the legal instrument. The draft policy objectives draw on the common goals expressed within the Committee.

The mandate of the IGC is to arrive at an appropriate IP-like agreement for the protection of TK and TCEs at the international level.

SUBJECT MATTER

1. For the purposes of this instrument, traditional knowledge refers to knowledge, including know-how, skills, innovations, practices, teaching, or learning, in a traditional context, connected to health, land, environment and other fields.
2. For the purposes of this instrument, traditional cultural expressions are any forms in which traditional culture and knowledge are expressed, including verbal forms, musical forms, expressions by movement, tangible or intangible forms of expression, or combinations thereof.
3. Protection shall be extended under this instrument to traditional knowledge and traditional cultural expressions, which are:
 - (a) created, developed, generated, held, used, or maintained by Indigenous Peoples and local communities;
 - (b) linked with, and an integral part of, the cultural and social identity and traditional heritage of Indigenous Peoples and local communities; and
 - (c) transmitted between or from generation to generation, whether consecutively or not.

Explanatory notes:

This provision provides a general description of TK and TCEs for the purposes of this legal instrument (in paragraphs 1 and 2) and sets appropriate bounds to the scope of protectable subject matter (in paragraph 3). The IGC moved the definitions of TK and TCEs to the "Use of terms" section and kept a provision on eligibility criteria. I believe these two elements are interlinked and propose to place them together.

The characteristics of TK and TCEs throughout the world vary greatly; therefore, it is key to identify those high-level and universal characteristics that belong in an international instrument.

I wish to emphasize that there is an interplay between the key issues of the definition of subject matter and the scope of rights, and exceptions and limitations. This interplay may also relate to the balance that is inherent to all types of IP protection systems, i.e. the balance between private rights and public interests.

International IP standards typically provide general guidance for the national level in the determination of the precise scope of protected subject matter. The international level can range between a description in general terms of eligible subject matter, a set of criteria of eligible subject matter, or no definition at all. I believe that the combination of a description of the subject matter and a set of eligibility criteria would better define the protectable subject matter.

BENEFICIARIES

- 1 The beneficiaries under this instrument are Indigenous Peoples and local communities.
- 2 A Member State may, under its national law, recognize other beneficiaries of the protection of protectable subject matter.

Explanatory notes:

Paragraph 1 reflects the agreement that Indigenous Peoples and local communities are the beneficiaries, noting that there remain divergences on the use of the term "peoples".

There is still no agreement on the extent to which the instrument should extend beyond Indigenous Peoples or local communities to include other potential beneficiaries. Therefore, paragraph 2 leaves to national legislation the option of recognizing other beneficiaries of the protection of traditional knowledge and traditional cultural expressions as referred to in this instrument.

SCOPE OF PROTECTION

Member States shall take legislative, administrative and/or policy measures, as appropriate, in accordance with national law and with reference to the customary laws and practices of Indigenous Peoples and local communities, and with the aim of ensuring that:

- (a) where access to traditional knowledge and traditional cultural expressions is restricted, including where the traditional knowledge and traditional cultural expressions is or are secret or sacred, beneficiaries have the following collective exclusive rights to:
 - i. maintain, control, use, develop, authorize or prevent access to and use/utilization of their traditional knowledge and traditional cultural expressions;
 - ii. receive a fair and equitable share of benefits arising from their use; and
 - iii. be attributed and use their traditional knowledge and traditional cultural expressions in a manner that respects the integrity of such traditional knowledge and traditional cultural expressions.

- (b) Where the traditional knowledge or traditional cultural expression is not restricted as described in paragraph (a), the beneficiaries have the collective rights to:
 - i. receive fair and equitable benefit-sharing for its use; and
 - ii. be attributed and use their traditional knowledge and traditional cultural expressions in a manner that respects the integrity of such traditional knowledge and traditional cultural expressions.

Explanatory notes:

IGC 27 introduced for discussion a tiered approach, where different kinds or levels of rights or measures would be available to rights holders depending on the nature and characteristics of the subject matter and based on how, by whom, why and where they are used.

The tiered approach proposes differentiated protection for the restricted TK or TCEs, including secret or sacred TK or TCEs, and the TK or TCE which is no longer restricted.

I believe that the tiered approach balances different interests and trade-offs, and could unblock some of the most difficult issues, especially those concerning the nature of the claimed TK/TCEs and current access to them.

I understand that there are concerns on right-based approach and measure-based approach. WIPO/GRTKF/IC/47/12 has further explained these two approaches.

EXCEPTIONS AND LIMITATIONS

In complying with the obligations set forth in this instrument, Member States may in special cases, adopt justifiable exceptions and limitations necessary to protect the public interest, where applicable, provided such exceptions and limitations shall not unreasonably conflict with the rights of beneficiaries nor unduly prejudice the implementation of this instrument.

Explanatory notes:

I believe that Member States should have flexibility at the national level to regulate exceptions and limitations, though a framework should be provided at the international level.

SANCTIONS AND REMEDIES

Member States shall put in place appropriate, effective, dissuasive, and proportionate legal and/or administrative measures, which may include alternative dispute resolution procedures, to address violations of the rights contained in this instrument.

Explanatory notes:

This provision provides a general framework at the international level, leaving the details to each Member State to determine appropriate, effective, dissuasive, and proportionate legal and/or administrative measures at the national level.

TERM OF PROTECTION

Term of protection shall last as long as the traditional knowledge and traditional cultural expressions comply with [the provision dealing with subject matter].

Explanatory Notes:

An important element of any protection measure is the duration of the rights or entitlements. Existing *sui generis* systems for traditional knowledge and/or traditional cultural expression protection have utilized a range of options to define the duration of protection: a single, limited term of protection; successively renewable limited terms; or an unlimited term of protection.

This provision foresees a duration of protection which is not limited to a specific term, and stipulates that the duration of protection should last as long as a "traditional knowledge" or "traditional cultural expression" complies with the criteria of protection outlined in the provision dealing with subject matter.

FORMALITIES

Member States may require formalities for the protection of traditional knowledge and traditional cultural expressions, without prejudice to any existing rights of Indigenous Peoples and local communities.

Explanatory Notes:

This provision provides that Member States would have the flexibility to decide on formalities. This reflects concerns and skepticism that certain countries and communities have expressed about the use of registry and database systems.

ADMINISTRATION OF RIGHTS

Member States may establish or designate a competent authority or authorities, in accordance with national law and/or customary laws, as may be applicable, to administer the rights provided for by this instrument.

Explanatory Notes:

Administration of rights deals with how and by whom the rights or interests of beneficiaries should be administered.

This provision leaves flexibility at the national level to implement arrangements relating to competent authorities, rather than to attempt to establish a “one-size-fits-all” solution at the international level.

DISCLOSURE REQUIREMENT

- 1 Applications for intellectual property rights developed using traditional knowledge shall disclose information on the Indigenous Peoples and local communities or other beneficiaries providing such traditional knowledge. The application shall also state whether free, prior and informed consent or approval and involvement to access and use has been obtained.
- 2 If the information set out in paragraph 1 is not known to the applicant, the applicant shall state the immediate source from which the applicant collected or received the traditional knowledge.
- 3 If the applicant does not comply with the provisions in paragraphs 1 and 2, the application shall not be processed until the requirements are met.
- 4 Each Member States may provide for post grant sanctions or remedies where there has been fraudulent intent in this regard, in accordance with its national laws and regulations.

Explanatory notes:

Noting that a Diplomatic Conference to conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources will be convened no later than 2024, which addresses patent disclosure requirements relating to genetic resources and TK associated with genetic resources, this provision provides a disclosure requirement regarding TK. It is a placeholder provision for now. A disclosure requirement should not lead to obligations for intellectual property applicants who cannot fulfill or can only fulfill with unreasonable time and effort, so as to not hinder innovation based on traditional knowledge. Nor should they unduly burden IP offices.

Paragraph 4 provides flexibility to Member States to decide on post-grant sanctions or remedies where there has been fraudulent intent.

As disclosure requirements were not discussed by the IGC in the context of TCEs, this provision covers only TK at this stage.

I intend to develop this provision further taking into account developments in the genetic resources and associated traditional knowledge area.

DATABASES

Member States are encouraged to support the establishment of databases of traditional knowledge, including appropriate safeguards, in consultation with relevant stakeholders, taking into account their national circumstances. Such databases may be accessed by intellectual property offices for the purpose of prevention of the erroneous grant of intellectual property rights.

Explanatory Notes:

This provision deals with the possibility of establishing databases of traditional knowledge, which is considered a complementary and defensive measure of protecting traditional knowledge.

This provision leaves flexibility to Member States to decide on the establishment of databases, and access by intellectual property offices.

This provision also reflects that the establishment of databases could be either Member State driven, or Indigenous Peoples driven with support from Member States.

This provision also emphasizes the importance of consulting with Indigenous Peoples and local communities when establishing databases.

To draft this provision, I also took into account the recommendations made by the virtual expert meeting on information systems of genetic resources, traditional knowledge and traditional cultural expressions.

NON-RETROACTIVITY

Member States shall not impose the obligations of this instrument in relation to intellectual property applications that have been filed prior to that Member State's ratification of or accession to this instrument, subject to national laws that existed prior to such ratification or accession.

RELATIONSHIP WITH OTHER INTERNATIONAL AGREEMENTS

This instrument shall be implemented in a mutually supportive way with other relevant international agreements and treaties.

NON-DEROGATION

Nothing in this instrument may be construed as diminishing or extinguishing the rights that Indigenous Peoples or local communities have now or may acquire in the future.

NATIONAL TREATMENT

Each Member State shall accord to beneficiaries that are nationals of other Member States treatment no less favourable than it accords to beneficiaries that are its own nationals with regard to the protection provided for under this instrument.

Explanatory Notes:

“National treatment” is a principle where a host country would extend to foreign traditional knowledge or traditional cultural expression holders treatment that is at least as favorable as the treatment it accords to national traditional knowledge or traditional cultural expression holders in similar circumstances. In this way, national treatment standards seek to ensure a degree of legal equality between foreign and national traditional knowledge or traditional cultural expression holders. It is important to note that national treatment is a relative standard of which the content depends on the underlying state of treatment for domestic traditional knowledge or traditional cultural expression holders.

TRANSBOUNDARY COOPERATION

Where the same traditional knowledge or traditional cultural expression is located in the territory of more than one Member State, or is shared by one or more Indigenous Peoples and local communities in several Member States, those Member States shall endeavor to cooperate, as appropriate, with the involvement of the Indigenous Peoples and local communities concerned, with a view to implementing the objectives of this instrument.

Explanatory Notes:

This provision deals with the important issue of traditional knowledge and traditional cultural expressions that are shared across national borders.

This provision leaves flexibility to the concerned Member States to cooperate as appropriate.

REVIEW

Member States commit to a periodic review of this instrument starting no later than four years after the entry into force of this instrument.

Explanatory Notes:

This provision introduces a review mechanism to address additional issues within a predetermined time frame.
