

13 May 2011

IGC 18 Open-Ended Drafting Group on Traditional Knowledge – Report of the Rapporteur

Introduction

1. Following the discussion of the Draft Articles on the Protection of Traditional Knowledge [document 18/7] during plenary, an open ended drafting group was formed. The group had two tasks:
 - a. To reduce the number of options and alternatives in the text; and
 - b. To identify significant, outstanding policy issues.
2. The drafting group was able to clean the text by deleting the following:
 - a. The names of Member States or accredited observers that had made proposals;
 - b. The proposals of accredited observers that had not been supported by Member States; and
 - c. Commentary from IWG 2.
3. The group was also able to reduce the number of options and alternatives in some articles. I would like to acknowledge the flexibility and good spirit shown by a number of delegations who withdrew their proposals or agreed to combine them with those of other delegations.
4. This report identifies the outstanding policy issues in each article.

Article one: subject matter of protection

5. There are outstanding policy issues in relation to both the definition of traditional knowledge and the eligibility criteria.

Definition of traditional knowledge

6. On the definition of traditional knowledge, we still disagree on whether to have a general and open definition, or a more descriptive definition of the features of traditional knowledge. The text still contains two similar options for the more general approach (options 1 and 3), and it has been suggested that the proponents of options 1 and 3 work together to condense their options ahead of the next IGC.

Eligibility criteria

7. There are still several options for the eligibility criteria of distinctiveness, the collective nature of traditional knowledge, and cultural identity. The variants are very similar and in some cases the differences only reflect drafting preferences, which unfortunately we were unable to resolve.
8. There is still substantive disagreement on the inclusion of the following eligibility criteria:

- a. Whether TK must be a unique product of a particular indigenous people or local community;
 - b. Whether to only include TK that has not been made widely known outside the community; and
 - c. Whether to exclude principles, rules, skills that are normally and generally well known.
9. We also disagree on the following issues:
- a. whether the eligibility criteria should be cumulative or stand alone; and
 - b. whether we need a definition of secret TK, and whether the definition should also include sacred TK.

Article 2: beneficiaries of protection

10. The outstanding policy issues on the question of beneficiaries include:
- a. how to deal with the issue of nations;
 - b. whether individuals or families should be included; and
 - c. whether we can refer to indigenous peoples (plural) – some states could not support this.
11. Within the options that do not include the concept of nations, the differences are in many cases a matter of drafting preference. As these could not be resolved in the time available, it was suggested that the proponents of the various options work together to combine their texts ahead of the next IGC.

Article 3: scope of protection

12. On the scope of protection we still have three options which reflect different policy approaches. One approach is to prescribe rights. The other focuses on certain activities which should be regulated or not be permitted and provides States with flexibility to determine how to achieve this.
13. Within both approaches we continue to disagree on the scope of protection, including:
- a. Whether protection should be limited to matters such as acknowledgement, attribution and offensive use, or whether it should also extend to commercial use; and
 - b. The extent to which protection could apply to traditional knowledge which is considered, in the legal sense, to be currently in the public domain. For example, should protection only apply where traditional knowledge is not widely known outside an indigenous people or local community.

Article 4: sanctions, remedies and exercise of rights

14. There are three options on sanctions, remedies and exercise of rights. The outstanding policy issue is whether we should be prescriptive about sanctions (as in option 2), or provide domestic flexibility (as in options 1 and 3).

Article 5: administration of rights

15. There is only one option on the management of rights, but with different views on the appropriate functions of competent authorities. Outstanding policy issues include:
- a. The degree to which States should have a role, for example should "consultation" or "authorisation" of indigenous and local communities be the standard.
 - b. Whether the functions of a competent authority are directed to the internal business of an indigenous people or local community – such as negotiating mutually agreed terms, or relate more to administrative or judicial functions that would be carried out by government authorities – such as supervising benefit sharing or determining if certain acts are an infringement.

Article 6: exceptions and limitations

16. There is general agreement that the article on exceptions and limitations should allow for continued customary use, but disagreement (in the options for paragraph 6.1) on how to reflect this.
17. We also agree that the Article should include a test for the formulation of domestic exceptions (as reflected in paragraph 6.2), but disagree on how this should be formulated. For example should we use a variant of the Berne 3 step test or create a new test that is more tailored to the characteristics of traditional knowledge.
18. There is not consensus on whether we should prohibit the creation of exceptions dealing with secret or sacred traditional knowledge.
19. The inclusion of a limitation on the scope of protection, so that it would not hinder or encumber the independent discovery, is contentious for some delegations. There was no agreement on its inclusion so it remains an outstanding policy issue. There was also a question about the placement of such a provision, and whether it might sit in article three on the scope of protection.

Article 7: term of protection

20. On term of protection we have two options. The outstanding policy issue is whether the term of protection would last as long as traditional knowledge meets the eligibility under Article 1 (as expressed in option 1), or could be limited in some way (under option 2).

Article 8: formalities

21. There are two options on the question of formalities. The outstanding policy is whether or not to require formalities.

Article 9: transitional measures

22. There are two options on transitional measures. The outstanding policy issues include:
- a. Whether or not the protections for traditional knowledge would apply to ongoing uses of traditional knowledge that began before such protections come into force; and
 - b. Whether or not intellectual property rights over traditional knowledge subject matter previously obtained by third parties should be preserved.

Article 10: consistency with the general legal framework

23. There are two options on consistency with the general legal framework. One approach is to "take account" and "act consistently" with other international instruments. The other approach is to "leave intact" or "not affect" protection under other instruments. The outstanding issues include whether to:
- a. Make references to particular instruments, such as the Nagoya Protocol, as this would necessitate the inclusion of a long list of relevant treaties.
 - b. Refer to national and regional as well as international instruments (in paragraph 10.1 option 1).
 - c. Refer to processes as well as instruments (in paragraph 10.1 option 1); and
 - d. Refer to indigenous peoples specifically or beneficiaries generally in the provision dealing with diminishing or extinguishing rights (in paragraph 10.2 option 2).

Article 11: national treatment and other means of recognising foreign rights and interests

24. We have yet to determine the most appropriate way to recognise foreign rights and interests. A number of options have been identified, including national treatment, reciprocity or the development of an alternative means.
25. One of the policy issues we need to consider is the impact that recognition of foreign right holders would have on mechanisms that have been put in place domestically to address the situation of particular indigenous peoples.

Article 12: transboundary cooperation

26. There is one option on transboundary cooperation. The general approach is that where traditional knowledge is located in different territories, then States would co-operate. One of the outstanding issues is whether the cooperation is with the "participation" or with the "consent" of traditional knowledge holders.

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