

DRAFT

SELECTED KEY ISSUES PROPOSED FOR DISCUSSION BY THE CHAIR

AGENDA ITEM 7: TRADITIONAL KNOWLEDGE

IGC 19TH SESSION

July 18 to 22, 2011

Reference document: Draft Articles on the Protection of Traditional Knowledge,
WIPO/GRTKF/IC/19/5

Articles suggested for discussion: Articles 1 (protectable subject matter), 2 (beneficiaries), 3 (scope of protection) and 6 (exceptions and limitations)

1. Subject Matter (Article 1)

Article 1.1 deals with the definition of TK. There are three options. Options 1 and 3 are general and open definitions. Option 2 is more descriptive. The Committee still disagreed on whether to have a general and open definition, or a more descriptive definition of TK at IGC 18. The Committee could leave this larger question at this stage.

Question: could Options 1 and 3 be merged, since they are two similar options for the more general approach?

Article 1.2 deals with criteria for eligibility. There are three options. The core concepts of Option 1 are distinctiveness, collective nature and cultural identity. Two different wordings for each of these criteria are identified.

Question: could only one option be kept for each of these three criteria?

Option 2 is the same as Option 1, but contains two additional criteria: (1) not made widely known outside that community, and (2) not the application of principles, rules, skills normally, and generally, well known. Option 3 is the same as Option 2, but without the criterion of the collective nature.

Question: could Option 3 plus the criterion of the collective nature be accepted as a basis for further discussion?

2. Beneficiaries (Article 2)

The scope of beneficiaries is one of the key outstanding policy issues, currently laid out in Article 2. There are 6 options in this Article.

In relation to **Article 1**, some options repeat the criteria as listed in Article 1.

Question: Is it possible to avoid such repetition?

The terms used to describe beneficiaries include the following: indigenous peoples, local communities, indigenous and local communities, nations, and individuals and families. It is suggested that the issues of "nations" and "indigenous peoples" (plural) not be dealt with at this stage.

Question: could "individuals or families" be considered as beneficiaries? Could a State be considered as legal representative, where the TK holders are unknown? Is it possible to merge some of these options to reduce the number of options?

Question: could Article 2 define "beneficiaries" for the purposes of the entire text? Any mention of beneficiaries in other articles would simply refer to "beneficiaries" or to "beneficiaries as defined in Article 2".

3. Scope of Rights (Article 3)

Article 3 deals with scope of protection. There are three options plus one alternative.

Option 1 provides a list of exclusive rights which the beneficiaries shall/should have. It also provides that contracting parties shall/should provide adequate and effective legal means/measures to ensure the application of these rights taking into account relevant customary laws and practices. A definition of "exploitation" is provided in this option. There are minor conceptual differences between Option 1 and Option 2. Basically, it is more or less a different way of formulating it. But it also provides more latitude to the States compared to Option 1.

Question: could the Committee merge these two options, perhaps by adding "/adequate and effective legal means/measures to" at the end of the chapeau in Option 1 and then dispensing with Option 2?

Option 3 classifies TK into two kinds: (1) TK which has not been disclosed by TK holders outside the traditional context, and (2) TK which had been previously disclosed. The scope of protection differs. Alternative Option 3 sets out different forms of protection: (1) protection for secret TK; (2) moral rights-style protection; and (3) prior informed consent for commercial use, where TK is secret or not widely known outside a community.

Question: could the Committee agree to keep just one option?

4. Exceptions and Limitations (Article 5)

Article 6 deals with exceptions and limitations.

The same language on secret and sacred TK appears in the text twice.

Question: could the one between two options of Article 6.1 be deleted?

There are two options of Article 6.1. Option 1 comes from the TCEs text, which embodies the principle according to which the measures do not affect use within and among communities and only apply to uses outside the traditional or customary context. Option 2 contains more general wording to ensure that protection does not adversely affect the continued availability of TK for the customary practice, exchange, use and transmission of TK by TK holders.

Question: could Option 2 of Article 6.1 be deleted, since the Committee may wish to keep the TK and TCEs texts consistent with each other?

There are also two options of Article 6.2. Option 1 is the same as included in the TCEs text. It calls for appropriate limitations or exceptions, compatible with fair practice, with acknowledgement where possible and if not offensive. Option 2 is based on the three step test.

Question: could only one option be kept?

Two new paragraphs on the independent discovery or the independent invention were proposed at IGC 18.

Question: should these two paragraphs stay in the text? If yes, might they rather belong in Article 3 on the scope of protection?