

IGC 19: Second draft of facilitators' text on traditional knowledge – For informal consultation purposes

General comments

- The primary intent of the co-facilitators during the course of this exercise, was to streamline the text with a view to clearly identify stand-alone options under each article, with variations if applicable, that would represent the two fundamentally different policy approaches: the first based on a circumscribed definition of traditional knowledge with limited scope of protection and responsibilities for Member States; and the second, rights-based, more expansive and prescriptive, notably in terms of Member States' obligations.
- Article 3, which relates to the scope of protection, proved to be particularly challenging to untangle. The co-facilitators approached this by isolating on the one hand the rights of the holders of traditional knowledge, and on the other, the measures to be taken in relation to the protection of traditional knowledge such as misappropriation.
- Informal consultations have confirmed that although the facilitators' text will be helpful to the IGC, if only because it eliminates overlap and repetition, it still falls short in drawing clear linkages between the problems related to the protection of traditional knowledge, and the possible measures to be taken to address these problems.
- One suggestion put forward is to restructure the text further by clustering the current provisions under four broad approaches: a rights-based approach; a broad and flexible framework; targeted provisions for the protection of secret traditional knowledge; and a mixed approach. The co-facilitators consider this suggestion to be interesting and encourage the IGC to consider it as it moves forward on this important pillar. They also recommend keeping in the text the definition of utilization, recognizing that a later stage in the discussion, the IGC may wish to create a separate section in the body of the text containing all definitions.
- Finally, during informal consultations, some delegations questioned whether secret and/or sacred traditional knowledge should be included within the scope of this future instrument. All recognized that further discussion was required on this important issue. In the meantime, the co-facilitators have chosen to keep the language related to secret and/or sacred traditional knowledge in the text.

Article 1: Subject matter of protection	<u>Option 1: Policy approach</u> This option contains a simple, narrower definition of TK, along with a more detailed list of eligibility criteria.	<u>Option 2: Policy approach</u> This option contains a more detailed and open-ended definition of TK. However, the specific choice of terms to denote the protected subject matter is left to be determined by national/domestic law. This option also includes a reference to sacred or secret traditional knowledge.	<u>Comments on policy approach</u> With the aim to clean the text, both options exclude any elements that define what a beneficiary is. This issue is left in its entirety to Article 2. In light of comments received, the facilitators kept those two issues that deal with secret and sacred TK. Some delegations have expressed a desire to include a definition of secret traditional knowledge. However, some delegations wondered what were the boundaries of sacred traditional knowledge, and whether this issue should be addressed by this kind of instrument.
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	<p><u>Option 1: text</u></p> <p><i>Definition of traditional knowledge</i></p> <p>1.1 For the purposes of this instrument, the term “traditional knowledge” refers to the know-how, skills, innovations, practices, teachings and learning, resulting from intellectual activity and developed within a traditional context.</p>	<p><u>Option 2: text</u></p> <p><i>Definition of traditional knowledge</i></p> <p>1.1 Traditional knowledge is knowledge that is dynamic and evolving, resulting from intellectual activities which is passed on from generation to generation and includes but is not limited to know-how, skills, innovations, practices processes and learning and teaching, that subsist in codified, oral or other forms of knowledge systems. Traditional knowledge also includes knowledge that is associated with biodiversity, traditional lifestyles and natural resources.</p>	
	<p><u>Option 1: text</u></p> <p><i>Criteria for eligibility</i></p> <p>1.2 Protection extends to traditional knowledge that is:</p> <p>a) the unique product of or is distinctively associated with beneficiaries as defined in Article 2;</p> <p>b) collectively generated, shared, preserved and transmitted from</p>	<p><u>Option 2: text</u></p> <p><i>Criteria for eligibility</i></p> <p>1.2 Protection under this instrument shall extend to traditional knowledge that is generated, preserved and transmitted from generation to generation and identified or associated or linked with the cultural identity of beneficiaries, as defined in Article 2.</p>	<p><u>Comments on Article 1.2</u></p> <p>The text has been streamlined into two options.</p> <p>Option 1 maintains the concepts “distinctively”, “collectively” and “cultural identity”. The other concepts (such as the public domain and traditional knowledge that is not widely known or used, including as alternatives, need further discussion.</p>

	<p>generation to generation; and</p> <p>(c) integral to the cultural identity of beneficiaries as defined in Article 2;/. <u>alternative</u></p> <p>(d) not widely known or used outside the community of the beneficiaries as defined in Article 2, for a reasonable period of time with prior informed consent;</p> <p><u>or</u></p> <p>(d) not widely known or used outside the community of the beneficiaries as defined in Article 2, for a reasonable period of time;</p> <p>(e) not in the public domain;</p> <p>(f) not protected by an intellectual property right; and</p> <p>(g) not the application of principles, rules, skills, know-how, practices, and learning normally and generally well-known.</p>		
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Article 2: Beneficiaries	<u>Option 1: Policy approach</u>	<u>Option 2: Policy approach</u>	<u>Comments on policy approach:</u>
	<p>In this option “beneficiaries” are indigenous and local communities.</p> <p><u>Option 1: text</u></p> <p>2. Beneficiaries of protection of traditional knowledge, as defined in Article 1, are indigenous peoples/communities and local communities.</p>	<p>In this option, “beneficiaries” include families, nations, and individuals. This option reflects the position of countries that do not use the term indigenous peoples or local communities but consider that individuals or families maintain TK.</p> <p><u>Option 2: text</u></p> <p>2. Beneficiaries of protection of traditional knowledge, as defined in Article 1, may include:</p> <ul style="list-style-type: none"> a) indigenous peoples/communities; b) local communities; c) traditional communities; d) families; e) nations; 	<p>The facilitators believe that the term “beneficiaries” merits a parallel discussion in the TCE and the TK texts.</p> <p>As a placeholder, the facilitators have reflected in this draft the same texts that have been presented by the TCE facilitator.</p> <p>Option 1 contains the core types of beneficiaries. Option 2 contains additional types of beneficiaries that will require further discussion.</p>

		<p>f) individuals within the categories listed above, and</p> <p>g) where traditional knowledge is not specifically attributable or confined to a, or it is not possible to identify the community that generated it, any national entity determined by domestic law.</p>	
<p>Article 3: Scope of protection</p>	<p><u>Option 1: Policy approach</u></p> <p>The policy approach underlying this option is that Member States should have maximum flexibility to define the scope of protection (responsibilities of Member States and, in the alternative, the rights of the traditional knowledge holders).</p>	<p><u>Option 2: Policy approach</u></p> <p>This policy approach is more detailed and prescriptive, and is a rights-based approach with stronger obligations for Member States.</p>	<p><u>Comments on policy approach</u></p> <p>For the purposes of this article, the facilitators have distinguished the rights given by the instrument to the traditional knowledge holders and the actions to be taken by Member States to support those rights.</p>

Option 1: text	Option 2: text	Comments on Article 3.1
<p>3.1 Adequate and effective legal, policy or administrative measures should be provided, as appropriate and in accordance with national law, to:</p> <p>a) prevent the unauthorized disclosure, use or other exploitation of [secret] traditional knowledge;</p> <p>b) where traditional knowledge is knowingly used outside the traditional context:</p> <p>i) acknowledge the source of traditional knowledge and attribute its holders where known unless they decide otherwise;</p> <p>ii) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its holders.</p> <p>c) encourage traditional knowledge holders and users to establish mutually agreed terms addressing approval requirements and the sharing of benefits</p>	<p>3.1 Member States shall ensure, that the beneficiaries, as defined in Article 2, have the following exclusive collective rights to:</p> <p>a) enjoy, utilize, maintain, develop, preserve, protect and exclusively control their traditional knowledge;</p> <p>b) authorize or deny the access and use of their traditional knowledge;</p> <p>c) have a fair and equitable share of benefits arising from the use of their traditional knowledge based on mutually agreed terms;</p> <p>d) prevent misappropriation and misuse, including any acquisition, appropriation, utilization or practice of their traditional knowledge without the prior and informed consent of the holders and the establishment of mutually agreed terms;</p> <p>e) require, in the application for intellectual property rights involving the use of their traditional knowledge, the mandatory disclosure of the identity of</p>	<p>In Option 1, facilitators have created two sub-options. The first one contemplates measures to be taken by Member States, while Option 2 contemplates rights to be provided to beneficiaries, in addition to the aforementioned measures. This mirrors used in the TCE facilitators' text.</p> <p>Facilitators have used the term Member States as to avoid prejudging the nature of this instrument</p> <p>Regarding sub-paragraph e) under option 2, facilitators wonder whether this should be a right given to traditional knowledge holders or, rather, an obligation for Member States like under option 1.</p> <p>Regarding the country of origin, facilitators wondered whether it was the country of origin of the traditional knowledge or of the holders of the traditional knowledge</p> <p>Facilitators have suggested to move</p>

	<p>arising from commercial use of that traditional knowledge. <u>optional addition</u></p> <p>3.2 Beneficiaries, as defined in Article 2, should, according to national law, have the following exclusive rights:</p> <p>a) enjoy, control, utilize, maintain, develop, preserve and protect their traditional knowledge;</p> <p>b) authorize or deny the access and use of their traditional knowledge;</p> <p>c) have a fair and equitable share of benefits arising from the commercial use of their traditional knowledge based on mutually agreed terms;</p> <p>d) prevent misappropriation and misuse, including any acquisition, appropriation, utilization or practice of their traditional knowledge without the establishment of mutually agreed terms;</p> <p>e) prevent the use of traditional knowledge without acknowledgment and attribution of the origin of their traditional knowledge and its holders, where known;</p> <p>f) ensure that the use of the traditional</p>	<p>the traditional knowledge holders and the country of origin, as well as evidence of compliance with prior informed consent and benefit-sharing requirements in accordance with domestic law or requirements of the country of origin;</p> <p>f) prevent the use of traditional knowledge without acknowledging the source and origin of that traditional knowledge and its holders, where known;</p> <p>g) ensure that the use of the traditional knowledge respects the cultural norms and practices of the holders.</p> <p>3.2 For the purposes of this instrument, the term "utilization" in relation to traditional knowledge shall refer to any of the following acts:</p> <p>a) Where the traditional knowledge is a product:</p> <p>i) manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or</p> <p>ii) being in possession of the</p>	<p>suggested 3.4 to article 6 since it refers to exclusions.</p> <p>The paragraph referring to the principles of the right to self-determination was removed as the facilitators felt it did not deal with scope of protection, and would be more appropriate under principles and objectives.</p> <p>For paragraph 3.2 under Option 3, facilitators were unsure as to the intent of the proposed paragraph and did not include it in the two options.</p>
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	knowledge respects the cultural norms and practices of the holders.	
	<p>product for the purposes of offering it for sale, selling it or using it beyond the traditional context.</p> <p>b) Where the traditional knowledge is a process:</p> <ul style="list-style-type: none"> i) making use of the process beyond the traditional context; ii) carrying out the acts referred to under sub-clause 1 with respect to a product that is a direct result of the use of the process; or iii) research and development leading to profit-making or commercial purposes. <p>3.3 Member States shall provide adequate and effective legal measures to:</p> <ul style="list-style-type: none"> a) ensure the application of the aforementioned rights, taking into account applicable domestic law and customary practices; b) prevent the unauthorized disclosure, use or other exploitation of traditional 	

		<p>knowledge;</p> <p>c) where traditional knowledge is knowingly used outside the traditional context:</p> <p>i) acknowledge the source of traditional knowledge and attribute its holders where known unless they decide otherwise;</p> <p>ii) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its holders.</p> <p>iii) encourage, where the traditional knowledge is secret or is not widely known, traditional knowledge holders and users to establish mutually agreed terms addressing approval requirements and the sharing of benefits arising from commercial use of that traditional knowledge.</p>	
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Article 6: Exceptions and limitations	<u>Option 1: Text</u>	<u>Option 2: Text</u>	<u>Comments</u>
	<p>6.1 Measures for the protection of traditional knowledge should not restrict, according to domestic/national law, the generation, customary use, transmission, exchange and development of traditional knowledge by the beneficiaries, within and among communities in the traditional and customary context.</p> <p>6.2 Limitations on protection should extend only to the utilization of traditional knowledge taking place outside the membership of the beneficiary community or outside traditional or cultural context.</p> <p>6.3. Member States may adopt appropriate limitations or exceptions under domestic/national law, provided that the use of traditional knowledge: <i>alternative</i></p> <p>6.3 Member States may adopt appropriate limitations or exceptions under domestic/national law, with the prior and informed consent of the</p>	<p>6.1 Measures for the protection of traditional knowledge should not restrict the generation, customary use, transmission, exchange and development of traditional knowledge by the beneficiaries, within and among communities in the traditional and customary context [consistent with national/domestic laws of the Member States].</p> <p>6.2 Limitations on protection shall extend only to the utilization of traditional knowledge taking place outside the membership of the beneficiary community or outside traditional or cultural context.</p> <p>6.3 Member States may adopt appropriate limitations or exceptions under domestic/national law, provided that the use of traditional knowledge: <i>alternative</i></p> <p>6.3 Member States may adopt appropriate limitations or exceptions under domestic/national law, with the prior and informed consent of the</p>	<p>Language was proposed in Plenary to the effect that "[t]he independent discovery or the independent innovation is based on traditional knowledge, exemptions and limitations should be over traditional knowledge with country of origin." The facilitators chose not to include that language until clarification is obtained from its proponents.</p>

	<p>beneficiaries, provided that the use of traditional knowledge:</p> <p><u>alternative</u></p> <ul style="list-style-type: none"> a. acknowledges the beneficiaries, where possible; b. is not offensive or derogatory to the beneficiaries ; and c. is compatible with fair practice. <p><u>alternative</u></p> <ul style="list-style-type: none"> a. does not conflict with the normal utilization of the traditional knowledge by the beneficiaries; and b. does not unreasonably prejudice the legitimate interests of the beneficiaries. <p>6.4 Regardless of whether such acts are already permitted under Article 6.2 or not, the following shall be permitted:</p> <ul style="list-style-type: none"> a) the use of traditional knowledge in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research and 	
	<p>beneficiaries, provided that the use of traditional knowledge:</p> <p><u>alternative</u></p> <ul style="list-style-type: none"> a. acknowledges the beneficiaries, where possible; b. is not offensive or derogatory to the beneficiaries ; and c. is compatible with fair practice. <p><u>alternative</u></p> <ul style="list-style-type: none"> a. does not conflict with the normal utilization of the traditional knowledge by the beneficiaries; and b. does not unreasonably prejudice the legitimate interests of the beneficiaries. <p>6.4 [Secret and sacred traditional knowledge shall not be subjected to exceptions and limitations.]</p>	

	<p>presentation should be permitted; and</p> <p>b) the creation of an original work of authorship inspired by traditional knowledge.</p> <p>6.5 There shall be no right to exclude others from using knowledge that:</p> <p>a) has been independently created;</p> <p>b) derived from sources other than the beneficiary; or</p> <p>c) is known outside of the beneficiaries' community.</p> <p>6.6 [Secret and sacred traditional knowledge should not be subjected to exceptions and limitations.]</p>		
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