

April 17, 2013

**Traditional Knowledge – Informal Issues Paper prepared by the IGC Chair,  
His Excellency, Ambassador Wayne McCook**

**BACKGROUND**

In October 2012, the General Assembly agreed that the IGC should "continue intensive negotiations and engagement in good faith (...) towards concluding the text(s) of an international legal instrument(s) which will ensure effective protection of GRs, TK and TCEs".

In keeping with the mandate of the IGC for the 2012 – 2013 biennium, the goal of the TK negotiations is to find, through considering the relevant subject matter, an appropriate intellectual property (IP)-based agreement for the protection of TK.

To this end, the information provided by the "Gap Analysis", contained in document WIPO/GRTKF/IC/13/5(b), is worth noting. The "Gap Analysis", prepared for the IGC in 2008, identified the gaps that existed at the international level with respect to the protection of TK; 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. This document also analyzed the concept of 'protection'.

In view of the IP focus of the Committee's work, 'protection' should be seen to refer to the protection of the innovation and creativity inherent in TK systems against unauthorized use or inequitable exploitation. This is sometimes referred to as 'legal protection', and is distinct from the concepts of 'preservation' and 'safeguarding'.

It is also worth recalling that international declarations and agreements outside of WIPO deal with aspects of the conservation, preservation and safeguarding of TK within their specific policy contexts. For example:

- The Convention on Biological Diversity (CBD), 1992;
- The FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), 2001;
- The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003; and,
- The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007.

Despite the fact that a number of international instruments deal with TK, it seems clear that none of those instruments provide, in legal terms, for the effective protection of TK from an IP perspective.

Some, but not many, Member States have adopted national legislation for the protection of TK, and a few regional organizations have adopted or are developing regional instruments.<sup>1</sup> However, these national and regional instruments are diverse and experiences with their implementation are varied. In any event, national and even regional protection of TK does not seem to be enough to ensure the effective protection of TK, especially as TK is often exploited in jurisdictions other than where the TK is sourced or originates from.

The 'gap' therefore that the IGC seeks to fill, at the international level, is the clarification of which IP-like rights, measures and mechanisms for the IP-like protection of TK might be necessary and appropriate and the development of the mandated IP-like instrument(s) to address them.

One of the other gaps identified refers to the fact that TK "as such" remains mainly unprotected, while TK-based innovations and creations can be covered, to some degree at least, by existing IP protection. Therefore, there is a call for an international instrument to provide for the effective protection of TK "as such" (positive and/or defensive protection), as well as for the protection of community interests in respect of TK-based innovations (defensive protection).

---

<sup>1</sup> The WIPO TK website contains a database of TK laws and comparative summaries of a number of them (<http://www.wipo.int/tk/en/laws/index.html>). I am advised that these summaries are currently being updated and expanded.

Having identified the gaps, consideration should be given to a determination of which **IP-related objectives** would be appropriate for such an instrument. What is the harm that an IP instrument addressing TK would seek to address? Equally, clarity is needed on how the instrument should deal with the core issues of defining the **subject matter**, identifying **the beneficiaries**, framing **the scope of rights** and delimiting those rights through appropriate **exceptions and limitations**. There should be a direct correlation between the **objectives** and the **substantive provisions**.

#### CROSS-CUTTING ISSUES TO BE CONSIDERED BY IGC 24

##### *National vs. international*

A cross-cutting question concerns the issues that can and should be addressed at a national level, those that need to be addressed at an international level and those which are best addressed by existing international agreements or in other international fora.

The traditional approach in international IP instruments has been to agree on a set of international (minimum) standards of protection, and, where necessary and appropriate, establish international principles, regulating, for example, whether and under what circumstances rights established in one national legal system would have to be recognized in another system.

Many issues can and should be left to national law, therefore: while some of the main IP-related policy choices should be made at the international level, much of the 'detail' can be left to national legislation.

For instance, "administration of rights" and "formalities" might be examples of issues in respect of which an international legal instrument might only set overall directions in very brief terms, leaving the details to national law. "Beneficiaries" may also be an issue for which a considerable degree of latitude for national policy and legislative development and implementation is needed.

### *Defining protectable subject matter*

One of the main divergences is linked to the treatment to be given to "diffused" or "publicly available" TK" (also referred to as "dispersed" or "spread" TK).

"Diffused TK" may refer to three distinct issues. First, it could refer to TK that is no longer "secret": should diffused/publicly available TK be granted protection? Should it deserve the same degree and form of protection as TK that is still kept "secret" or that remains within the control of the beneficiaries? This aspect relates to defining the nature and characteristics of TK that ought to be protected.

Second, "diffused TK" could also refer to TK that is not "unique to" or "distinctive of" a single indigenous people and local community: should such TK be protected, and, if so, who would the rightsholders and/or beneficiaries be? From whom would consents, if needed, be obtained? These questions relate to the nature of the holders of the rights in protected TK.

Third, in a related manner, "diffused TK" could refer to TK that is located in the territories of different Member States: what legal and/or practical mechanisms might be needed to administer rights in such "trans-boundary TK", which might belong to the same people found in different States or to different peoples found in different States?

"Diffused TK" is, therefore, a key and cross-cutting question: it concerns most directly the scope of protectable subject matter but it also impacts on other core issues, such as beneficiaries, scope of rights, exceptions and limitations, administration of rights and trans-boundary cooperation.

### **OTHER KEY ISSUES**

#### *Policy Objectives and General Guiding Principles*

With reference to the text before the IGC, WIPO/GRTKF/IC/24/4, there are certain Policy Objectives that are most directly related to IP (the text below is exactly as the Objectives currently appear in the text), including:

- Repress] Prevent [unfair and inequitable uses] misappropriation and misuse
- Promote innovation and creativity
- Ensure prior informed consent and exchanges based on mutually agreed terms
- Promote mandatory disclosure requirement
- Preclude the grant of [improper] IP rights to unauthorized parties
- Utilization of traditional knowledge by third parties, and
- Promote access to knowledge and safeguard the public domain.

Regarding the General Guiding Principles found in the text, several could be merged with the Objectives, and others might no longer be regarded as relevant or useful.

### *Subject Matter of Protection<sup>2</sup>*

#### Definition of TK

With respect to the definition of TK, the main difficulties seem to be with respect to which further characteristics of TK, as set out in the Optional Additions, may be included in the definition. Most of the Optional Additions are descriptive, and could be put aside or placed in a preamble.

The wording in paragraph 3 of Article 1 of the TCEs text from IGC 22 may offer a useful addition: "The terminology used to describe the protected subject matter shall/should be determined in accordance with national law and, where applicable, regional law."

#### Criteria for eligibility

A central issue here would be whether only TK which is not in the so-called "public domain" or TK **which is not widely known or used outside the community** would be eligible for protection. This recalls again the question of whether and to what extent 'publicly available' or 'diffused' TK should be protected. Some degree of consensus may need to be reached on this, as this is a matter that would seem too closely linked to the core of the protection to be established at an international level to be dealt with entirely at a national level.

<sup>2</sup> See Article 1.

### *Beneficiaries of Protection*<sup>3</sup>

The Optional Additions in the text provide a range of potential beneficiaries, although the precise meaning of some of the concepts is not clear (for example, "traditional communities", "families" and "nations").

Instead of including the Optional Additions, the IGC could redraft this Article using the wording included in the TCEs text as developed at IGC 22 as a basis:

"Beneficiaries of protection are indigenous [peoples] or [local communities], [or as determined by national law or by treaty] [who hold, maintain, use or develop] the traditional cultural expressions as defined in/determined by Article 1."

What about TK that is shared by different indigenous peoples and local communities either in a country or in different countries, in other words, not confined to a single indigenous people or local community?

### *Scope of Protection (including a proposed Disclosure Requirement)*<sup>4</sup>

More generally, there are different approaches to TK protection, including (i) an exclusive rights-based approach, which could include protection based on a right of prior and informed consent (ii) a moral rights-based approach and (iii) an equitable benefit-sharing/compensation-based approach. These are not necessarily mutually-exclusive alternatives, however. For example, some have suggested that exclusive rights could be appropriate for some forms of TK (for instance, for sacred and secret TK), whereas a moral rights-based and benefit-sharing model could be appropriate for TK that is secular and already publicly available. Could these options be seen not as mutually-exclusive alternatives but rather as elements of a 'menu of options'?

A further key choice lies in having either a measures-based approach (for example, "States should provide adequate and effective legal, policy or administrative measures to . . ."), or, on the other hand, a rights-based approach that vests enforceable IP-like rights in TK (for example, "Beneficiaries have the rights to. . .").

<sup>3</sup> See Article 2.

<sup>4</sup> See Articles 3, 3BIS and 4BIS.

Furthermore, "prior informed consent" and "mutually agreed terms" are very important concepts. Would they be required in every case? Would they only be required in some circumstances (for secret TK, for instance)? What about TK that is shared by different indigenous peoples and local communities? Who would grant the prior informed consent? With whom should the terms be agreed? What about the chilling effects in communities long used to freely using TK if such TK becomes subject to "ownership rights"?

Another key divergence is related to disclosure requirements, as also discussed at IGC 23, in relation to genetic resources.

### *Exceptions and Limitations*<sup>5</sup>

Some of the key issues here concern the extent of protection to be afforded to TK that is 'publicly available'. There are also divergences on the nature of the criteria to be fulfilled in order to establish limitations or exceptions under national law, and on whether secret or sacred TK should be subjected to exceptions and limitations or not.

## **OTHER ISSUES**

### *Article 4 and Article 3 BIS 3 – Sanctions, Remedies and Exercise of Rights / Application*

The main issue here seems to be what level of detail is required at an international level. A number of references to national law are included in this Article. It might be worth discussing whether these references are necessary, and, if so, whether these references can also be included in other Articles.

### *Article 5 – Administration [of Rights]*

#### *Article 5 bis – Application of Collective Rights*

The two alternatives of Article 5.1 seem to deal with different issues, and the second alternative refers rather to the scope of protection (see above). The first alternative of Article 5.1 and Article 5 BIS are true alternatives, and it would be helpful to focus the discussions on a single merged text.

<sup>5</sup> See Article 6 and Article 3 BIS 5.

### *Article 7 – Term of Protection*

Two broad approaches are included in this Article: the protection should last as long as the TK fulfills/satisfies the criteria of eligibility (Option 1), and the duration of protection should vary upon the characteristics and value of TK (Option 2).

Option 2 seems too vague. It might be advisable to focus on Option 1. However, it is worth noting that negotiations on Articles 1 and 3 might have an impact on the wording of Option 2. For instance, it might be envisaged to grant a longer term of protection for secret TK.

The TCEs text from IGC 22 is worth looking at. It seems to include a distinction based on the moral (indefinite protection) and economic aspects of TCEs (protection limited in time), that might be applicable to TK, at least to a certain extent.

### *Article 8 – Formalities*

This Article includes two clearly divergent views (not to subject the protection to any formalities / to require formalities). It would be useful to consider whether this issue could be covered by national legislation.

The TCEs text is worth looking at: "[As a general principle], the protection of TCEs shall/should not be subject to any formality".

### *Article 9 – Transitional Measures*

### *Article 10 – Consistency with the General Legal Framework*

The different alternatives within these Articles seem clear. More discussion is needed to reconcile the different views.

### *Article 11 – National Treatment and other means of Recognizing Foreign Rights and Interests*

This Article seems to include basically two options: "National treatment" (in short, an eligible foreign right holder should enjoy the same rights as domestic nationals) and "Reciprocity" (in short, whether a country grants protection to nationals of a foreign



country depends on whether that country in turn extends protection to nationals of the first country), though the wording of the alternatives could be improved.

*Article 12 – Trans-boundary Cooperation*

This Article also relates to the discussion above on "diffused TK". Option 1 does not seem to belong to this Article. It might be better considered elsewhere, such as in draft Article 8 on formalities, or simply removed.

The Optional Addition seems to be inspired by Article 10 of the Nagoya Protocol. However, it might be helpful to learn more about the rationale and relevance of this paragraph. The proponents are invited to provide further information.

---