

Information Note^{*}

for IGC 31

Prepared by Mr. Ian Goss, the IGC Chair

Introduction

1. It has been more than two years since the IGC addressed the subject of Traditional Knowledge (TK) with the last formal meeting on TK (IGC 27) held in March/April 2014. The current IGC work program includes two sessions on TK: IGC 31 and 32. To assist member states preparations for IGC 31, considering the significant gap between the last session on TK, I have prepared this short information note, which includes:

- A summary of the work undertaken by the IGC on TK since text-based negotiations began in 2010;
- Key elements of the 2016-2017 mandate;
- A summary of the core issues I believe member states should consider during IGC 31; and
- A summary of other issues that IGC 31 could consider, noting they are secondary to resolution of the core issues.

2. This note is factual, informal and has no status. **I emphasize that any views that may be expressed in this note are mine alone and are without prejudice to any member states' positions on the issues discussed.**

TK text-based negotiations

3. Since 2010, the IGC has undertaken text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of TK (as well as GRs and TCEs).

4. The 2010/2011 biennium, commencing with IGC 16, built on the existing work carried out by the IGC so far. Document WIPO/GRTKF/IC/9/5 constituted the basis for this work. The work program for that biennium included an intersessional working group (IWG) on TK which took place in February 2011 and established the framework for TK discussions. The output of this work was reviewed and amended at subsequent IGC meetings (IGC 18 and 19).

5. The 2012/2013 biennium included two thematic sessions on TK: IGC 21 and 24. Pursuant to the then-prevailing mandate, these sessions focused on four key articles: Subject matter of protection, Beneficiaries, Scope of Protection and Limitations and Exceptions. Document WIPO/GRTKF/IC/19/5 constituted the basis for this work.

6. The 2014/2015 biennium included an Ambassadorial/Senior Capital-Based Officials meeting, aimed at sharing views on key policy issues relating to the negotiations to further inform/guide the process. It also included cross-cutting sessions which focused on key issues relevant to all three subject matters, a stocktaking session and one session, IGC 27, the first part of which specifically addressed TK. This session focused on objectives, principles and the

^{*} Note from the WIPO Secretariat: Given the fact that it has been more than two years since the IGC addressed the subject of traditional knowledge in a focused manner (it was at IGC 27 which took place in March/April 2014) and that the IGC has only focused on four key articles since 2012, the Chair of the IGC, Mr. Ian Goss, has prepared this information note to refresh delegates' memories as to the background to WIPO/GRTKF/IC/31/4 and to the core issues concerning intellectual property and traditional knowledge.

four articles referred to in the mandate (Subject matter of protection/Beneficiaries/Scope of Protection/Limitations and Exceptions). Document WIPO/GRTKF/IC/25/6 constituted the basis for this work.

7. Other working documents on TK have also been discussed by the IGC, such as:
- *Recommendations of the Second Session of Like Minded Countries Meeting on the Protection of Genetic Resources, Traditional Knowledge and Folklore*, submitted by the Delegation of Indonesia;
 - *Joint Recommendation on Genetic Resources and Associated Traditional Knowledge*, submitted by the Delegations of Canada, Japan, Norway, the Republic of Korea and the United States of America;
 - *Joint Recommendation on the use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources*, submitted by the Delegations of Canada, Japan, the Republic of Korea and the United States of America; and
 - *Proposal for the Terms of Reference for the Study by the WIPO Secretariat on Measures Related to the Avoidance of the Erroneous Grant of Patents and Compliance with Existing Access and Benefit-Sharing Systems*, submitted by the Delegations of Canada, Japan, Norway, the Republic of Korea, the Russian Federation and the United States of America.

The mandate for the 2016/2017 biennium

8. In considering the focus of our work for the next session, members should note the following key elements in the current IGC mandate:

- “focus on narrowing existing gaps”;
- “with the objective of reaching an agreement on an international legal instrument(s) relating to intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs)”;
- “a primary focus on reaching a common understanding on core issues, including definition of misappropriation, beneficiaries, subject matter, objectives, and what TK/TCEs subject matter is entitled to protection at an international level, including consideration of exceptions and limitations and the relationship with the public domain”;
- “using an evidence-based approach”; and
- “inter-sessional seminars and workshops to build regional and cross-regional knowledge and consensus on issues related to IP and GRs, TK and TCEs with a focus on unresolved issues”.

9. IGC 31 will be the first of two sessions this biennium on TK. As detailed in the work program, IGC 31 should:

- Undertake negotiations on TK with a focus on addressing unresolved issues and considering options for a draft legal instrument; and
- Elaborate an indicative list of outstanding/pending issues to be tackled/solved at the next session on TK.

Core issues

10. As indicated above, the IGC in previous sessions mainly focused on the objectives and the four articles detailed above, pursuant to the mandates prevailing at that time. The current mandate does not refer to the same four articles, but identifies some “core issues” (refer to

paragraph 8 above). Based on past work and on the core issues detailed in the mandate, I propose the following issues be prioritized for discussion at IGC 31:

Objectives

11. Objectives are fundamental to the development of the operative text of any instrument as they detail the purpose and intent of the instrument. In recent years, the objectives within the TK text have been significantly refined and modified with five themes reflected, though not agreed, in the document:

- a. Prevent the misappropriation/misuse/unauthorized use/unfair and inequitable uses of traditional knowledge;
- b. *Enable beneficiaries to control ways in which their traditional knowledge is used beyond the traditional and customary context; [I have added the text in italics]*
- c. Promote the equitable sharing of benefits arising from their use with prior informed consent or approval and involvement/fair and equitable compensation, as necessary;
- d. Encourage [and protect] [tradition-based] creation and innovation; and
- e. Prevent the grant of erroneous intellectual property/patent rights over traditional knowledge and traditional knowledge associated with genetic resources.

12. In reviewing the objectives, members could reflect on which of the concepts detailed in the Policy Objectives set out in document WIPO/GRTKF/IC/31/4 are most directly related to intellectual property (IP), noting the mandate of the IGC is to “...reach an agreement on an international legal instrument(s) relating to IP for the balanced and effective protection of TK”.

Beneficiaries

13. The IGC has in past sessions considered the definition of “beneficiaries” and the choice of terms. However, there is no agreement on the extent to which the instrument should extend beyond indigenous peoples and local communities, so as to include nations. References are also made to a national authority acting as a custodian.

14. As has already been alluded to in past sessions, the question of identifying the beneficiaries should be distinguished from the question of whether an entity, such as a “competent authority”, might be tasked under national law with exercising rights in cases where the beneficiaries cannot be identified. A “competent authority” might also play a role where the beneficiaries seek assistance with the management and enforcement of their rights. It is also noted that “competent authorities” are dealt with in Article 5 dealing with the administration of rights/interests. Member states may wish to consider if the issue of “competent authority” should be dealt with under Article 5 rather than under Article 2.

15. The identification of the beneficiaries is closely related to the scope of the instrument as a whole, as such, it will be important that member states reach a common understanding of who the beneficiaries should be.

Subject matter

16. The TK text details the subject matter, though not agreed, in paragraph 1 of Article 1. Paragraph 2 attempts to define the criteria for eligibility. However, it is noted that most of the key elements detailed in paragraph 1 are also detailed in paragraph 2. Whilst these paragraphs appear to be similar, I would suggest that paragraph 2 is attempting to introduce the concept of “protected TK”, that is a definition of TK that should be protected with specific rights.

17. Article 3 Scope of Protection also details eligibility criteria, though different to Article 1 paragraph 2. The IGC may wish to consider the appropriate place to deal with the criteria for eligibility, and whether to consolidate all the criteria for eligibility. There is also the question as to whether criteria for eligibility are necessary at all in Article 1, since, in the view of some delegations, in elaborating rights it could be left to scope of protection and exceptions and limitations to define what is ultimately to be protected.

Scope of protection

18. IGC 27 introduced for discussion, as alluded to above, a tiered approach to scope of protection whereby different kinds or levels of rights or measures would be available to rights holders depending on the nature¹ and characteristics of the subject matter, the level of control retained by the beneficiaries and its degree of diffusion.

19. The tiered approach proposes differentiated protection along a spectrum from TK that is available to the general public to TK that is secret/not known outside the community and controlled by the beneficiaries².

20. This approach suggests that exclusive economic rights could be appropriate for some forms of TK (for instance, secret TK, and TK uniquely attributable to specific indigenous peoples and local communities), whereas a moral rights-based model could, for example, be appropriate for TK that is disclosed, already publicly available but still attributable to specific indigenous peoples and local communities.

21. Whilst it is for the IGC to decide, I consider that the differentiated protection in the tiered approach offers an opportunity to reflect the balance referred to in the mandate of the IGC and the relationship with the public domain, as well as the rights and interests of owners and users. It could provide a means by which a balancing of the objectives of the instrument (protection and access) could be explored with a view to unblocking some of the key issues related to the levels of protection to be afforded to TK, whilst ensuring that the interests of the owner (beneficiaries), user (academia, research and development institutions, industry, etc.) and the wider public interest are considered.

¹ In regard to the nature of TK, document WIPO/GRTKF/IC/17/INF/9 (“List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May Be Found”) identifies the various forms in which TK may be found.

² In this context, it might be worth recalling a couple of comments noted in the Non-Paper prepared by the then IGC Chair for IGC 27:

- The characteristics of TK (and TCEs) throughout the world vary greatly, hence the importance of identifying those high-level and universal characteristics that belong in an international instrument.
- In more general terms, one view is that the definition should be broad enough to cover all kinds of TK and TCEs, while another view is that the definition should be precise and limited for clarity and transparency purposes. If the definition is broad, then other elements, such as the criteria for eligibility and/or the exceptions and limitations, would probably need to act as a limiting filter, otherwise, this would have an impact on the scope of protection (the extent of the rights), which may need to be more limited, in order to reach agreement. Thus, there is interplay between the key issues of definition of subject matter, scope of rights and exceptions and limitations. This interplay may relate also to the balance that is inherent in all types of IP protection systems (and that underlies all four cross-cutting issues), i.e. the balance between private rights and public interests.

22. If this tiered approach is agreed upon, I believe that the IGC should move quickly to find convergence on core elements that will define each tier.

Exceptions and limitations

23. This provision (Article 6) is divided into General Exceptions and Specific Exceptions.

24. The TK text under General Exceptions attempts to articulate the conditions to be fulfilled, that would be applied at the national level, when developing limitations and exceptions (paragraph 6.1). There appears to be a view that the conditions could include elements of the “classic” three-step test, reflected in the Berne Convention in relation to copyright, and moral-rights relating to concepts of acknowledgement, non-offensive use and compatibility with fair practice.

25. The Specific Exceptions section covers what kind of exceptions and limitations should be included/allowed. Article 6.7 is closely linked to discussion of a possible tiered approach and of the public domain. Based on the possible introduction of a tiered approach to defining the scope of protection, some delegations have also asked whether the provisions on exceptions and limitations should not also follow this approach, i.e., that various degrees of excepted acts would mirror the various kinds of subject matter (the various forms in which TK is found) and the tiered rights applied to them.

Relationship with the public domain

26. IGC 27 introduced into the TK text a definition of the term “public domain.” This concept is integral to the balance inherent in the IP system. Exclusive rights are balanced against the interests of users and the general public, with the intent to foster, stimulate and reward innovation and creativity. This concept links to understandings of the related concepts of “publicly available” and “prior art”³.

27. The IGC should consider those concepts carefully as this issue is directly linked with the “tiered approach” under Article 3. However, whilst the “public domain” concept is relevant to understanding the IP/TK interface and to the design of a balanced and effective IP-like system of protection for TK, the merits of developing and including a specific definition of the public domain within the TK instrument are unclear. I believe that defining the “public domain” is a challenging exercise with significant and wide-reaching policy ramifications going beyond the scope of the IGC.

Definition of “misappropriation”

28. The IGC mandate calls for a common understanding on a definition of misappropriation. The term “misappropriation” is not currently defined in any other international instrument. IGC 29 and IGC 30 which addressed the subject of GRs discussed this term. There was no agreement on its meaning or on the need to specifically define it.

29. Document WIPO/GRTKF/IC/31/4 includes two options for the definition of misappropriation. I have paraphrased the key elements below:

³ These concepts are discussed notably in document WIPO/GRTKF/IC/17/INF/8 (Note on the Meanings of the Term “Public Domain” in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore). See also document WIPO/GRTKF/IC/31/INF/7 (Glossary of key terms related to intellectual property and genetic resources, traditional knowledge and traditional cultural expressions).

- Option 1, **any** access or use without prior informed consent or approval or involvement and, where applicable, without mutually agreed terms, for whatever purpose, would be misappropriation (the emphasis is mine); and
- Option 2, there would be misappropriation only if the TK has been acquired by the user from the holder through improper means or a breach of confidence, and which results in a violation of national law in the provider country.

30. A key question member states may wish to consider as a first step is: does the IGC mandate require the IGC to agree on a new definition of the term “misappropriation” or is a common understanding of the plain language meaning sufficient?

Other issues

Preamble / Introduction

31. A preamble is not a legally binding or operative text of a multi-lateral instrument, though it does aid in interpretation of the operative provisions by providing context to the instrument and the intent of the drafters. The language is usually reflected as principles whether the instrument is declaratory or legally binding. The IGC could reflect on which of the concepts featuring under Preamble/Introduction are most directly related to IP, since its mandate is to reach an agreement on an international legal instrument relating to IP for the balanced and effective protection of TK.

32. The Preamble includes 9 paragraphs. The IGC could verify their relevance and try to prevent redundancies.

Use of terms

33. The definitions included in this section need to be revisited. In my view, IGC 31 could readily address the following terms: TK and Use/Utilisation.

34. I would note, in particular, that document WIPO/GRTKF/IC/31/4 contains a definition of TK in this section, and also further elements are linked to that definition in Article 1.

35. Regarding Use/utilization, as pointed out by a delegation during IGC 27, the definition in this section refers to uses outside the traditional context, while the term “use” in Article 2.1 refers to the use by the beneficiaries. The use of the same term with a different sense in separate instances could be confusing. The IGC might wish to find a way to avoid confusion.

Complementary measures and Disclosure Requirement

36. The TK and the GRs texts deal with the possibility of establishing databases and other complementary measures. It could be useful to take a look at the relevant articles in the GRs text. The IGC could consider the aims and objectives of such databases and their modalities of operation. Other key issues that might need to be considered include: Who should be responsible for compiling and maintaining the databases? Should there be standards to harmonize structure and content? Who should have access to the databases? What would be their content? In what form would the content be expressed? Should there be accompanying guidelines?

37. Disclosure requirements have been extensively discussed during IGC 29 and 30, and in previous sessions. The IGC has not yet reached a consensus on this and continues to address this measure.

Sanctions, remedies and exercise of rights

38. The TK, TCEs and GRs texts contain provisions on sanctions and remedies. The approaches are different. For example, the GRs provisions are very specific. I believe there is merit in looking at the three texts⁴, in order to improve the TK text. The concept of providing a general framework based on harmonized principles at the international level and leaving details to national legislation is, in my view, also worth considering.

Administration of rights/interests

39. Article 5 includes different alternatives. There appears to be no agreement on the extent of participation of the TK holders in the establishment/appointment of the authority or whether the establishment of a competent authority is mandatory or not. I believe a key question which member states need to consider is: should there be flexibility at a national level to implement arrangements relating to competent authorities, rather than attempt to establish a one size fits all solution?

Term of protection

40. I would like to point out that Option 1 and Option 3 in Article 6 of the TCEs text⁵ make a distinction between moral rights and economic rights. The IGC might wish to consider a similar approach for Article 7.

Formalities

41. The options included in Article 8 of document WIPO/GRTKF/IC/31/4 reflect diverging views. The alternative deals specifically with secret/sacred/closely held TK. This issue is related to the type of rights that would be granted. When discussing formalities, the IGC could consider how the tiered approach in Article 3 affects possible formalities. For example, it might be envisaged to establish formalities only for some kinds of TK. It might also be worth reflecting on the possibility of leaving this issue to be dealt with at a national level.

Transitional measures

42. Article 9 of the TCEs text⁶ also deals with this issue, but not in an identical manner. The IGC might wish to look at both texts side by side and make appropriate changes to the TK text.

Relationship with other international agreements

43. The GRs text⁷ (Article 8.3) and the TCEs text⁸ (Article 10) include a non-diminishment clause regarding indigenous peoples' rights. The IGC might wish to include a non-diminishment clause in the TK text.

⁴ The latest GRs text is available at: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=340736. The latest TCEs text is available at: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=276220.

⁵ Available at: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=276220.

⁶ Available at: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=276220.

⁷ Available at: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=340736.

⁸ Available at: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=276220.

National treatment

44. Article 11 of the TCEs text⁹ and Article 11 of the TK text deal with this issue but differ significantly. These different views need to be reconciled. The IGC could benefit from looking at both texts and making appropriate changes to ensure consistency.

Transboundary cooperation

45. Article 12 deals with the very important issue of TK shared across borders. The IGC needs to reflect on the most suitable formulation, in view of Articles 12.1 and 12.2.

Other useful resources

46. I note that there are some useful resources available on the WIPO website which member states may wish to use as reference materials in their preparations for IGC 31, such as:

- WIPO/GRTKF/IC/17/INF/8, Note on the Meanings of the Term “Public Domain” in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=149213;
- WIPO/GRTKF/IC/17/INF/9, List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May Be Found, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=147152;
- Regional, National, Local and Community Experiences, http://www.wipo.int/tk/en/resources/tk_experiences.html;
- Presentations on legislation or legal frameworks for protection of TK, http://www.wipo.int/meetings/en/details.jsp?meeting_id=35602;
- Presentations on the uses of TK, http://www.wipo.int/meetings/en/details.jsp?meeting_id=35602;
- Presentations on the public domain, http://www.wipo.int/meetings/en/details.jsp?meeting_id=35602;
- Presentations on cross-border protection, http://www.wipo.int/meetings/en/details.jsp?meeting_id=36502; and
- Presentations on transboundary (shared) TK, http://www.wipo.int/meetings/en/details.jsp?meeting_id=36502.

⁹ Available at: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=276220.