

Information Note¹

for IGC 38

Prepared by Mr. Ian Goss, the IGC Chair

Introduction

1. In accordance with the IGC's mandate for 2018/2019 and the work program for 2018, IGC 38 should undertake negotiations on traditional knowledge (TK)/traditional cultural expressions (TCEs) with a focus on addressing unresolved and cross-cutting issues and considering options for a draft legal instrument(s).

2. To assist Member States in their preparations for IGC 38, I have updated the information note prepared for IGC 37, summarizing the unresolved and cross-cutting issues and some other issues relating to TK/TCEs that Member States may wish to give focused attention to.

3. I would like to note that the Secretariat has, as requested, updated the 2008 Draft Gap Analyses on TK and TCEs for IGC 37, and re-issued them for IGC 38 as documents WIPO/GRTKF/IC/38/6 and WIPO/GRTKF/IC/38/7, respectively.

4. I emphasize that the views in this note are mine alone and are without prejudice to any Member States' positions on the issues discussed. As an information note, it has no status, nor is it a working document for the session. It is only a paper to assist participants in their preparations for IGC 38.

5. Member States are strongly encouraged to reflect on whether the international instrument(s) should simply provide a policy framework(s) or possible minimum and/or maximum standards and allow for the more detailed articulation of those concepts, as well as issues of implementation, to be determined at the national level.

6. I would also encourage Member States to show flexibility and pragmatism, and make a concerted effort towards "reaching agreement" (as referred to in the IGC's mandate), and to do so in a spirit of negotiation and compromise.

Cross-cutting Issues for Consideration by IGC 38

7. As I indicated before, it seems to me that most of the issues addressed in the TK and TCEs texts are "cross-cutting". By this I mean that many of the same policy and technical issues arise in both texts. This is to be expected given the close similarity between the two subject matters, TK and TCEs. Indeed, indigenous peoples, amongst others, have long argued that the two subject areas are interconnected parts of a whole. However, recognizing that, within intellectual property (IP) discourse, TK and TCEs raise some distinct IP questions and have, historically, been treated distinctly, the IGC has, so far, largely worked on each text in parallel but separately.² This has meant that, in some cases, the same or very similar policy and legal issues have been addressed differently in the two texts and opportunities for direct comparison and coordination between the texts, where necessary and so desired, may have been missed. By contrast, IGC 37 enabled IGC

¹ Note from the WIPO Secretariat: The Chair of the IGC, Mr. Ian Goss, has prepared this information note to assist Member States in their preparations for IGC 38.

² I note, however, that IGC 27 (in April 2014), IGC 28 (in July 2014) and IGC 37 (in August 2018) worked on cross-cutting issues.

participants to work on both texts at the same time, side-by-side, and provided an opportunity to make the changes that they considered appropriate to simplify and improve the texts in a coordinated, coherent and holistic way, such as the preamble/introduction section and the subject matter. IGC 38 is the second of four sessions specifically dedicated to enabling a cross-cutting discussion of TK/TCEs. Taking into account that IGC 37 discussed some cross-cutting issues and that the IGC has another two sessions to address TK/TCEs, I will make suggestions separately as to what ground, I suggest, IGC 38 could cover.

8. There are a number of key inter-related issues which Member States need to consider collectively, in particular, subject matter and related definitions, eligibility criteria for protection, scope of protection, and exceptions and limitations. At IGC 37, an attempt was made to establish a framework to deal with these critical elements within the working documents. However, there was no agreement due to different approaches within the working documents, including:

- Linking the eligibility criteria to the definitions of TK and TCEs and differentiating the scope of protection based on the diffusion of the knowledge and cultural expressions and the nature of their control and management;
- Establishing specific definitions for protected TK and TCEs which incorporate eligibility criteria for protection;
- A combination of the above approaches.

9. It will be important that, if the IGC is to make substantive progress on TK and TCEs, Member States agree on a common approach, which will enable the IGC to focus on the detailed operative mechanisms and language, including a measures and/or rights based approach.

Preamble/Introduction

10. A preamble does not form part of the legally binding or operative text of a multilateral instrument, though it does aid in interpretation of the operative provisions by providing context to the instrument and to the intent of the drafters. The language is usually reflected as principles whether the instrument is declaratory or legally binding.

11. IGC 37 improved the preamble/introduction section of both the TK and TCEs texts in a coordinated, coherent and holistic way.

12. The IGC could further verify their relevance and reflect on which of the concepts are most directly related to IP, since the IGC's mandate is to reach an agreement on an international legal instrument(s) relating to IP for the balanced and effective protection of TK and TCEs.

Objectives (Article 2 of the TK text and Article 2 of the TCEs text)

13. Objectives are fundamental to the development of the operative text of any instrument as they detail the purpose(s) and intent of the instrument. This could result in simple, direct and efficient wording and bring clarity to the text.

14. The TK text includes four alternatives while the TCEs text includes three alternatives. Alt 1 of both texts seems to follow the same approach. The IGC could consider whether there are areas of possible convergence among different alternatives and formulations.

15. In reviewing these alternatives, it would be useful for Member States to consider the objectives from the perspective of all interests, namely the interests of the beneficiaries, the users and the public, noting that the current alternatives tend to be framed from a single perspective.

16. The IGC may also wish to consider whether it is necessary to address the relationship with the public domain in the objectives.

17. The IGC could also consider rationalizing the texts to avoid redundancies and irrelevancies, in particular with the preamble/Introduction section, and focus on common, concisely-stated core IP-related objectives for the instrument(s). Examples of IP-focused objectives could include, broadly, *inter alia*, the prevention of misappropriation and misuse, the promotion of innovation and creativity, and the prevention of improper or erroneous grant of IP rights.

18. In identifying IP-related objectives, Member States could consider and reflect on the type of harm(s) that an IP instrument(s) on TK and TCEs would seek to address and on the gaps that may currently exist and that ought, from a policy perspective, to be filled.

19. There should also be a distinction between operative language and objectives, as well as a direct correlation between the objectives of protection and the operative/substantive provisions.

Definition of “misappropriation” (Article 1 of the TK text)

20. The TK and TCEs texts both make reference to the concept of “misappropriation”. The TK text carries a proposed definition of misappropriation, whereas the TCEs text does not do so. The concept of misappropriation is also being discussed by the IGC in the context of genetic resources (GRs), although there has so far been no agreement on its meaning or on the need to specifically define it in that context.

21. The IGC may consider whether, in relation to TK and/or TCEs, a definition of misappropriation is necessary, or its meaning could be interpreted in good faith in accord with the ordinary meaning to be given to the term in its context and in light of the objective and purpose of the international legal instrument(s).³

22. I would also like to note that definitions of “misuse”, “unlawful appropriation” and “unauthorized use” are included in the TK text. It might be useful to revisit all these terms once other issues become clearer. These terms are used but not defined in the TCEs text.

Definitions of public domain and publicly available (Article 1 of the TK text and Article 1 of the TCEs text)

23. IGC 27 introduced into the TK and TCEs texts a definition of the term “public domain.” This fundamental 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 and stimulate follow-on innovation and creativity and access to works and inventions once they are no longer protected.

24. There are currently two alternatives related to the use of the term “public domain” in Article 1 of the TCEs text. While the first alternative proposes a definition for the term “public

³ See Article 31 of the Vienna Convention, which provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

domain”, the second one simply refers to the definition of that term in national law. The TK text includes a definition for the term “public domain”, which is similar to the one in the TCEs text, except that the definition of “public domain” in the TCEs text makes reference to “tangible and intangible materials”, whereas the TK text only makes reference to “intangible materials”. The IGC could consider aligning the definitions in both texts.

25. That said, while the public domain concept is relevant to understanding the interface between IP and TK/TCEs and to the design of a balanced and effective IP-like system of protection for TK and TCEs, the merits of developing and including a specific definition of the “public domain” within the TK and TCEs instruments 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.

26. The concept of “public domain” also links to the understanding of the related concept of “publicly available”⁴. The same definition of this term is included in both TK and TCEs texts.

Definition of use/utilization (Article 1 of the TK text and Article 1 of the TCEs text)

27. Similar definitions of use/utilization are included in the TK and TCEs texts. The definition in the TCEs text was imported from the TK text and it seems unclear whether that definition would really be applicable to TCEs.

28. As pointed out by a delegation during IGC 27, the definition of “Use/Utilization” refers to “use” outside the traditional context. However, the word “use” in Alt 2 of Article 4 of the TCEs text, and in both Articles 5 of the TK and TCEs texts, refers to use by the beneficiaries. In other words, the same word is not used in the same sense in different parts of the texts. The IGC might wish to find a way to avoid any confusion that may arise from this.

Criteria for Eligibility (Article 3 of the TK text and Article 3 of the TCEs text)

29. Both the TK and TCEs texts include one formulation of criteria for eligibility. The definitions of TK and TCEs in the Use of Terms sections also include some language regarding criteria for eligibility. The IGC may wish to consider the appropriate place to deal with the criteria for eligibility.

30. There is also the question as to whether criteria for eligibility are necessary at all, since, in the view of some delegations, in elaborating rights it could be left to the scope of protection and to the exceptions and limitations to define what is ultimately to be protected.

Beneficiaries (Article 4 of the TK text and Article 4 of the TCEs text)

31. Clearly, there is no agreement yet on this issue. Both the TK and TCEs texts include three alternatives.

32. Some delegations feel very strongly that indigenous peoples and local communities should be the sole beneficiaries, while others consider it important, noting the significant divergences in national laws and environments where TK and TCEs can be found, that flexible policy space be provided to take account of these differences. Though there

⁴ This concept is 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/38/INF/7 (Glossary of key terms related to intellectual property and genetic resources, traditional knowledge and traditional cultural expressions)

appears to be broad agreement that the primary beneficiaries should be indigenous peoples and local communities, there are also divergent views regarding the possibility of recognizing other beneficiaries, such as states and nations.

33. Member States may wish to consider the necessity of giving some latitude to national law regarding the definition of beneficiaries, given the different situations regarding TK/TCEs holders throughout the world, which seem to be reflected in the different alternatives.

31. In my view, greater clarity is still needed in the texts as to the relationships between the distinct concepts of (i) beneficiaries, (ii) rights holders and (iii) administrators of rights (dealt with below).

Scope of protection (tiered approach or differentiated protection) (Article 5 of the TK text and Article 5 of the TCEs text)

34. Both the TK and TCEs texts contain three alternatives. Some of these contain elements of the so-called “tiered approach” or “differentiated protection”, whereby different kinds or levels of rights or measures would be available to rights holders depending on the nature and characteristics of the subject matter, the level of control retained by the beneficiaries and its degree of diffusion.

35. The tiered approach proposes differentiated protection along a spectrum from TK/TCEs that are available to the general public to TK/TCEs that are secret, sacred or not known outside the community and controlled by the beneficiaries.⁵

36. This approach suggests that exclusive economic rights could be appropriate for some forms of TK/TCEs (for instance, secret and/or sacred TK/TCEs), whereas a moral rights-based model could, for example, be appropriate for TK/TCEs that are publicly available or widely known but still attributable to specific indigenous peoples and local communities.

37. 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.

38. In the TK context, the differentiated protection in the tiered approach offers an opportunity to respond to the reality of the differences among secret TK, narrowly diffused TK and widely diffused TK, which are defined in the Use of Terms section (Article 1). Member States are strongly encouraged to carefully consider what criteria are appropriate and should be used in the TCEs context, in order to determine the tiers. In doing so, consideration should be given to the practicality and legal implications of the proposed tiers. Also, it should be noted that criteria that may be relevant in the TK context may not necessarily apply in the TCEs context.

39. It is worth recalling that a tiered approach was embodied in the very first versions of the TCEs text, going back to document “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles” (WIPO/GRTKF/IC/9/4). The categories of TCEs in that document were: TCEs of particular spiritual or cultural value or significance; other TCEs (the remainder from the first category, so to speak), and secret TCEs. Member States are encouraged to consult this document as it also contains a commentary explaining the proposed approach on the matter of tiers.

⁵ See document WIPO/GRTKF/IC/17/INF/9 (List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May Be Found).

40. Should the idea of agreeing on the inclusion of other beneficiaries (such as states or nations), but with a different scope of protection, find some support, the rights to be granted to these other beneficiaries would need to be thoroughly considered.

Sanctions, remedies and exercise of rights/application (Article 6 of the TK text and Article 10 of the TCEs text)

41. The TK and TCEs texts contain several different concepts. They only share one concept (Alt 1 in the TK text and Alt 1 in the TCEs text). As this procedural provision would likely be applicable both in the TK and the TCEs contexts, Member States may wish to re-look at both versions, simplify them and see where cross-pollination could improve both texts.

42. In order to simplify, Member States may wish to consider providing a general framework at the international level, leaving the details to national legislation.

Administration of rights/interests (Article 8 of the TK text and Article 6 of the TCEs text)

43. Article 8 of the TK text and Article 6 of the TCEs text deal with how and by whom rights or interests should be administered. This could include, for example, assistance with the management and enforcement of the beneficiaries' rights.

44. There appears to be no agreement on the extent of participation of TK and TCEs holders in the establishment/appointment of the authority.

45. A possible way forward for Member States to consider would be to leave flexibility at the national level to implement arrangements relating to competent authorities, rather than to attempt to establish a "one-size-fits-all" solution at the international level.

Exceptions and limitations (Article 9 of the TK text and Article 7 of the TCEs text)

46. The TK text contains three alternatives, while the TCEs text contains four alternatives. These alternatives follow two approaches:

- to leave flexibility at the national level to fully regulate exceptions and limitations (Alts 1 and 3 of the TK text and Alts 1, 2 and 3 of the TCEs text);
- to provide a framework with lists of general exceptions and specific exceptions for Member States to regulate at the national level (Alt 2 of the TK text and Alt 4 of the TCEs text). General exceptions include elements of the "classic" three-step test, reflected in the Berne Convention, 1971, and moral-rights components (concepts of acknowledgement, non-offensive use and compatibility with fair practice). Specific exceptions cover the kind of exceptions and limitations that should be included/allowed.

47. Based on the possible introduction of a tiered approach to defining the scope of protection, some delegations have wondered 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 and the tiered rights applied to them. Member States may wish to consider this approach.

Term of protection (Article 10 of the TK text and Article 8 of the TCEs text)

48. Regarding term of protection, the TK and TCEs texts follow different approaches.
49. The wording in the TK text seems to be similar to the first paragraph of Option 1 of the TCEs text. Nonetheless, it may be worth noting that it contains a reference to Article 5 (tiered approach), while the TCEs text does not.
50. The TCEs text contains three options: Option 1 provides a term of protection related to the eligibility criteria and provides an indefinite term for moral rights; Option 2 links the term of protection to the continuous enjoyment of the scope of protection; and Option 3 is only concerned with the duration of the economic aspects of TCEs, which are limited in time. Member States may consider whether the options could be merged and whether time limits should be imposed on the period of protection for the economic aspects of TCEs.
51. Member States may also wish to consider a similar approach in the TK text.

Formalities (Article 11 of the TK text and Article 9 of the TCEs text)

52. The TK and TCEs texts share a couple of paragraphs and include some additional elements.
53. The IGC could consider the tiered approach included in Articles 5 in the TK and TCEs texts when discussing formalities. It might be envisaged not to establish formalities for some kinds of TK or TCEs, but to establish some formalities for other kinds of TK and TCEs. Formalities could also differ according to the type of rights to be granted. Once again, it could be recalled that the very first versions of the TCEs text referred to above had posited some form of prior registration and examination for TCEs for which the highest level of protection would be sought but not for other TCEs – see document “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles” (WIPO/GRTKF/IC/9/4).

Transitional measures (Article 12 of the TK text and Article 11 of the TCEs text)

54. Article 12.1 of the TK text and Article 11.1 of the TCEs text seem to reflect consensus that the instrument should apply to all TK/TCEs which, at the moment of entry into force, fulfill the criteria of protection. The drafting of these paragraphs is not identical in both texts. Member States may wish to examine the wording in more detail and opt for the clearer expression of where agreement lies.
55. On the question of the acquired rights of third parties, Article 12.2 of the TK text presents three options, and Article 11.2 of the TCEs text includes two options. More discussion is needed to reconcile the different views. This could be achieved by redrafting the text into a clearer and simpler expression of this important concept.
56. Member States might wish to look at both texts side by side and make the changes that they consider appropriate.

Relationship with other international agreements (Articles 13 and 14 of the TK text and Article 12 of the TCEs text)

57. Both texts share similar concepts. Nonetheless, the TK text includes a non-derogation clause as a separate article (Article 14) while a similar clause is included in the article on relationship with other international agreements (Article 12) in the TCEs text.

Member States may wish to consider the placement of such a clause, as well as the adoption of the same wording in both texts, to avoid confusion.

National treatment (Article 15 of the TK text and Article 13 of the TCEs text)

58. Regarding national treatment, the TK text, which includes three alternatives, and the TCEs text differ significantly. Member States may wish to look at both texts and make appropriate changes to ensure consistency.

Transboundary cooperation (Article 16 of the TK text and Article 14 of the TCEs text)

59. This provision deals with the important issue of TK/TCEs that are shared across national borders. Although the language is more or less similar at first glance, there are some variations in terminology, which Member States might wish to pay close attention to in order to find the most suitable formulation in both texts.

60. I also note that the draft GRs text makes reference to customary laws and protocols. Member States might reflect on whether such a reference would be suitable or useful in the TK and TCEs context.

Capacity-building and awareness raising (Article 15 of the TCEs text)

61. Both the TCEs and GRs texts include provisions on capacity building and awareness raising. Member States might wish to consider including a provision on capacity building in the TK text as well, or, at least, adopt a uniform approach to this issue.

Issues Unique and Specific to the TK Text

Definition of “traditional knowledge” (Article 1 of the TK text)

62. While Article 3 of the TK text provides that the instrument applies to TK, a definition of TK is provided for in Article 1 on Use of Terms.

63. The definition includes some elements of the eligibility criteria (see paragraphs 27 and 28 above). As already mentioned, Member States may wish to consider the appropriate place(s) to deal with the definition of TK and the criteria of eligibility to avoid repetition.

Databases and complementary/defensive protection (Article 5BIS of the TK text)

64. The draft TK and GRs texts deal with the possibility of establishing databases and other complementary/defensive measures. It could be useful to take a look at the relevant articles in the GRs text. Member States may wish to 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 their 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? What would be the benefits and risks of facilitating and encouraging the development of publicly accessible databases?

Disclosure requirements (Article 7 of the TK text)

65. Proposed disclosure requirements have been extensively discussed during IGCs 35 and 36, and in previous sessions addressing the subject of GRs, noting that the GRs

discussions also cover “associated TK”. Member States have not yet reached a shared view on this and continue to address this question.

Issues Unique and Specific to the TCEs Text

Definition of “traditional cultural expressions” (Article 1 of the TCEs text)

66. It should be noted that while Article 3 of the TCEs text provides that the instrument applies to TCEs, a definition of this term is provided for in Article 1 on Use of Terms, as in the TK text.

67. The definition sets out substantive eligibility criteria (see paragraphs 27 and 28 above) that specify which of the TCEs that fall under the definition in Article 1 would be protectable. As mentioned above, Member States may wish to consider the appropriate place(s) to deal with the definition of TCEs and criteria of eligibility to avoid repetition.

68. Examples of different forms of TCEs are included in the definition of TCEs as footnotes. Member States might wish to consider the necessity of having such examples.

Other useful resources

69. 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 38, such as:

- WIPO/GRTKF/IC/38/6, The Protection of Traditional Knowledge: Updated Draft Gap Analysis, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=411448;
 - WIPO/GRTKF/IC/38/7, The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=410365;
 - 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;
 - Lectures and presentations on the selected topics, http://www.wipo.int/tk/en/resources/tk_experiences.html#4.
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