

Non-paper

Chair's Text of a Draft International Legal Instrument relating to Intellectual Property and Traditional Knowledge/Traditional Cultural Expressions

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**Zero Draft
November 29, 2022**

INTRODUCTION

1. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is conducting negotiations on traditional knowledge (TK) and traditional cultural expressions (TCEs) towards reaching agreement on an appropriate legal instrument for their international protection in an intellectual property (IP) sense.¹
2. At IGC 44, after informal consultations, I committed to preparing a Chair's Text on TK and TCEs, advised by an informal advisory body.
3. I have accordingly prepared this zero draft text of an international legal instrument relating to intellectual property and TK/TCEs.
4. I have prepared this draft text solely under my own authority as a contribution to the negotiations on TK/TCEs at the IGC. This draft is without prejudice to any Member States' positions and reflects my views alone. I thank my Vice-Chairs and the members of the advisory body for their valuable advice so far, as well as others whom I have consulted.
5. In the past, until now the IGC has focused its discussion on objectives, subject matter, beneficiaries, scope of protection, limitations and exceptions, and sanctions and remedies. Therefore, the current draft text only addresses those issues. I have a list of other issues for future elaboration. In my view, an international legal instrument on TK/TCEs should not be overly detailed and prescriptive. Future drafts of this text would aim to be less rather than more detailed.
6. In addition, since there is no agreement yet on whether this international legal instrument should be binding or non-binding, I have not used the term "Article" or "Section" as proposed by some Member States. I have included explanatory notes to provide further background and explanations.
7. This draft text is a work in progress. I invite all IGC participants to consider this zero draft text and provide me with feedback on it. Feedback may be sent to me at Chairigclilyclaire@gmail.com.

¹ To this end, the information provided in the "Gap Analyses", contained in documents WIPO/GRTKF/IC/45/6 and WIPO/GRTKF/IC/45/7, is worth noting. The "Gap Analyses" identified the gaps that existed at the international level for the protection of TK and TCEs; 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. These documents also analyzed the concept of "protection" in an IP sense.

OBJECTIVES

The objectives of this instrument are to:

- (a) provide effective and adequate protection of traditional knowledge and traditional cultural expressions;
- (b) prevent the erroneous grant of intellectual property rights over traditional knowledge and traditional cultural expressions; and
- (c) recognize indigenous [peoples] and local communities as holders of traditional knowledge and traditional cultural expressions.

Explanatory notes:

Objectives are often articulated in laws and legal instruments, clarifying the policy and legal context and providing a common direction to the protection established in the legal instrument. The draft policy objectives draw on the common goals expressed within the Committee.

The mandate of the IGC is to arrive at an appropriate IP-like agreement for the protection of TK and TCEs at the international level. The IGC could therefore consider rationalizing and reorganizing the text to avoid redundancies and place a focus on common, concisely stated core IP-related principles and objectives for the instrument.

The Facilitators at IGC 44 drafted objectives in a short and concise manner, which I think are a good basis for consideration, hence I have drawn from their proposed text.

SUBJECT MATTER

1. Traditional knowledge refers to knowledge connected to land and environment, including know-how, skills, innovations, practices, teaching, or learning.
2. Traditional cultural expressions are any forms in which traditional cultural practices and knowledge are expressed, including verbal forms¹, musical forms², expressions by movement³, tangible⁴ or intangible forms of expression, or combinations thereof.
3. Protection shall be extended under this instrument to traditional knowledge and traditional cultural expressions, which are:
 - (a) created, developed, generated, held, used, and maintained collectively by indigenous [peoples] and local communities in accordance with their customary laws and protocols;
 - (b) linked with, and an integral part of, the cultural and social identity and traditional heritage of indigenous [peoples] and local communities; and
 - (c) transmitted between or from generation to generation, whether consecutively or not.

¹ [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

² [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

³ [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.]

⁴ [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, tangible spiritual forms, and sacred places.]

Explanatory notes:

This provision provides a general description of TK and TCEs for the purposes of this legal instrument (in paragraphs 1 and 2) and sets appropriate bounds to the scope of protectable subject matter (in paragraph 3). The IGC moved the definitions of TK and TCEs to the section of "Use of terms", and kept a provision on eligibility criteria. I believe these two elements are interlinked and propose to place them together.

The characteristics of TK and TCEs throughout the world vary greatly; therefore, it is key to identify those high-level and universal characteristics that belong in an international instrument.

I wish to emphasize that there is an interplay between the key issues of the definition of subject matter, the 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, i.e. the balance between private rights and public interests.

International IP standards typically defer to the national level in the determination of the precise scope of protected subject matter. The international level can range between a description in general terms of eligible subject matter, a set of criteria of eligible subject matter, or no definition at all. I believe that the combination of a description of the subject matter and a set of eligibility criteria would better define the protectable subject matter.

Regarding the definition of TCEs, while some delegations believe that an illustrative list of examples would provide certainty and clarity, others believe that the instrument should provide a broad framework, which would enable each country to specify which of its TCEs should be protected. For this draft, I keep specific examples in the footnotes for further consideration, but my inclination would be to remove that detail in future drafts.

The Facilitators at IGC 44 redrafted the eligibility criteria, which I think are a good basis for consideration, hence I have drawn on their work.

BENEFICIARIES

1 The beneficiaries under this instrument are indigenous [peoples] and local communities.

2 A Member State may, under its national law, recognize protection for other beneficiaries.

Explanatory notes:

Paragraph 1 reflects the agreement that indigenous peoples and local communities are the beneficiaries, noting that there remain divergences on the use of the term "peoples".

There is still no agreement on the extent to which the instrument should extend beyond indigenous peoples or local communities to include other potential beneficiaries. Therefore, paragraph 2 leaves to national legislation the option of considering other beneficiaries.

SCOPE OF PROTECTION

Member States shall take legislative, administrative and/or policy measures, as appropriate, in accordance with national law, in a reasonable and balanced manner, and in a manner consistent with [a provision dealing with transboundary cooperation], with the aim of ensuring that:

- (a) Where, with reference to the customary laws and practices of indigenous [peoples] and local communities, access to traditional knowledge and traditional cultural expressions is restricted, including where the traditional knowledge and traditional cultural expressions is or are secret or sacred, beneficiaries have the collective rights:
 - i. to maintain, control, use, develop, authorize or prevent access to and use/utilization of their traditional knowledge and traditional cultural expressions; and receive a fair and equitable share of benefits arising from their use; and
 - ii. of attribution and the right to the use of their traditional knowledge and traditional cultural expressions in a manner that respects the integrity of such traditional knowledge and traditional cultural expressions.
- (b) Where with reference to the customary laws and practices of indigenous [peoples] and local communities, the traditional knowledge or traditional cultural expression is no longer under the control of beneficiaries, but is still distinctively associated with the beneficiaries' cultural identity, the beneficiaries are to:
 - i. receive a fair and equitable share of benefits arising from its use; and
 - ii. have the right of attribution and the right to the use of their traditional knowledge and traditional cultural expressions in a manner that respects the integrity of such traditional knowledge and traditional cultural expressions.

Explanatory notes:

IGC 27 introduced for discussion a tiered approach, where different kinds or levels of rights or measures would be available to rights holders depending on the nature and characteristics of the subject matter and based on how, by whom, why and where it is used.

The tiered approach proposes differentiated protection for the restricted TK or TCEs, including secret or sacred TK or TCEs, and the TK or TCE which is no longer under the control of beneficiaries but is still distinctively associated with the beneficiaries' cultural identity.

I believe that the tiered approach balances the interests and trade-offs, intending to unblock some of the most difficult issues, especially those concerning the nature of the claimed TK/TCEs and current access to them.

EXCEPTIONS AND LIMITATIONS

1 Member States may adopt appropriate limitations and exceptions under national law, provided that the use of traditional knowledge and traditional cultural expressions:

- (a) acknowledges the beneficiaries, where possible;
- (b) is not offensive or derogatory to the beneficiaries;
- (c) is compatible with fair practice;
- (d) does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties; and
- (e) does not conflict with the normal use of traditional knowledge and traditional cultural expressions by the beneficiaries.

2 When there is reasonable apprehension of irreparable harm related to sacred traditional knowledge or traditional cultural expressions, Member States shall not apply exceptions and limitations.

Explanatory notes:

I believe that Member States should have flexibility at the national level to regulate exceptions and limitations, though a framework should be provided at international level.

Paragraph 1 provides for some form of articulation of conditions to be fulfilled, which would be applied at the national level when Member States develop limitations and exceptions. There seems to be an understanding that the test could include elements of acknowledgement, non-offensive use and compatibility with fair practice.

Based on the introduction of a tiered approach to defining the scope of protection, Paragraph 2 provides a special limitation and exception on sacred TK/TCEs.

SANCTIONS AND REMEDIES

Member States shall put in place appropriate, effective, dissuasive, and proportionate legal and/or administrative measures to address violations of the rights contained in this instrument.

Explanatory notes:

This provision provides a general framework at the international level, leaving the details to each Member State to determine appropriate, effective, dissuasive, and proportionate legal and/or administrative measures at the national level.

Issues that may be elaborated in future drafts include:

PREAMBLE

USE OF TERMS

DISCLOSURE REQUIREMENT

ADMINISTRATION OF RIGHTS

DATABASE PROTECTION

TERM OF PROTECTION

FORMALITIES

NON-RETROACTIVITY

RELATIONSHIP WITH OTHER INTERNATIONAL AGREEMENTS

NON-DEROGATION

NATIONAL TREATMENT

TRANSBOUNDARY COOPERATION

REVIEW

ADMINISTRATIVE CLAUSES
