



Council of the
European Union

Brussels, 29 September 2016
(OR. en)

12768/16

PI 108

NOTE

From: Presidency

To: Delegations

No. prev. doc.: 11819/1/16 PI 87

Subject: 31st Session of WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) (Geneva, 19-23 September 2016)
- Final EU/Member States' statements

Delegations will find in Annex, for information, the final statements delivered by the EU at the above mentioned WIPO meeting.

Opening Statement

The European Union and its Member States are looking forward to a constructive debate during IGC 31. After a two year pause we now have an opportunity to look again at Traditional Knowledge in the framework of the IGC mandate agreed at the 55th Session of the WIPO Assemblies. We would like to thank the chair for the work he has undertaken in preparing this meeting and the Secretariat for all the support it has provided.

The EU and its Member States believe that if this week's discussions are to be fruitful, our focus must be centred on core issues, as identified in our mandate. Gaining greater understanding on these issues is an essential step without which further progress becomes either impossible or meaningless.

The Chair's issues paper usefully recalls that these core issues are definition of misappropriation, beneficiaries, subject matter, objectives, and what TK subject matter is entitled to protection at an international level, including consideration of exceptions and limitations and the relationship with the public domain. We would like to emphasize the importance of concentrating on each core issue, beginning with how to achieve a common understanding of the objectives.

Our discussions on these core issues -in keeping with the IGC mandate- must take place without prejudging the nature of the outcome as stipulated in the mandate.

We look forward to a substantive debate that furthers mutual understanding of the facts rather than one geared towards reaching any particular type of outcome. We need to find agreement in relation to these basic issues, before discussing the nature of the instrument.

As the EU and its Member States have stated during previous sessions, we believe that a number of different possibilities for the enhanced protection of Traditional Knowledge have already been placed before this IGC such as awareness raising, encouraging use of existing legal frameworks , including the trademark, design, trade secret, geographical indications, and copyright systems, and improving access to those frameworks.

The EU and its Member States would like to note here that in June 2016, the Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure was adopted in the EU.

The Directive harmonises the definition of trade secrets in accordance with existing internationally binding standards.

From a practical perspective using the existing IP structure to protect Traditional Knowledge would appear to offer many advantages, not least the speed with it could be used by potential beneficiaries.

On the question of working methods the EU and its Member States would continue to advocate solid and evidence based discussion that considers real world implications and feasibility in social, economic and legal terms. Effect on stakeholders at large, including the public domain, should be thoroughly examined.

To this end the EU and its Member States supports a Study on national experiences and how these may inform our discussions. The EU has submitted a working document which requests the WIPO secretariat to undertake a study of national experiences and domestic legislation and initiatives recently adopted in relation to the protection of Traditional Knowledge. To inform discussion at the IGC, the study should:

- Analyse domestic legislation and concrete examples of protectable subject matter and subject matter that is not intended to be protected.
- Take into account the variety of measures that can be taken, some of which could be measures based, whilst others could be rights-based.

Thank you.

31st Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)
(Geneva, 19-23 September 2016)

Statement on document WIPO/GRTKF/IC/31/4

Objectives

- The EU and its Member States believe that a common understanding of the objectives and principles we are trying to achieve is necessary. Without a common understanding, progress would be very difficult.
- As stated by the Swiss delegation, we also believe that we should not duplicate matters, such as those that have been dealt with in other instruments such as the CBD and the Nagoya Protocol.
- We believe we should base our work on para (a) and (d).
- In para (a), we support the reference to ‘misuse’ which would cater for a measure based approach.
- In para (d) the EU would like to focus on 'encouraging [tradition based] creation and innovation'.

Article 1/ Subject matter

- The EU and its MS believe the subject matter needs to have a strong link with the ILC.
- We therefore support “maintained” in para (a), as this expresses a continued link with the ILC.
- Further, in relation to the options in (b), we would support that the TK should be directly linked with the cultural and social identity, as this language establishes a strong link between the ILC and TK.
- In para (c) our interest is to ensure that TK which have not been practiced since historical times and have entered into the public domain, are not reclaimed as being the subject matter of this instrument.
- Lastly, we believe that para (a) – (e), which essentially contain the criteria that need to be fulfilled, should be cumulative.

Article 2 / Beneficiaries

- The EU and its MS support that Indigenous and Local Communities (ILC) are a beneficiary.
- We would request to bracket the term 'peoples' throughout the text, for constitutional reasons in the MS.
- We believe that the TK as described in the footnote does not fulfil the necessary criteria as mentioned in article 1.
- In relation to article 2.2, we note that para's (b) – (d) would seem to define TK that falls outside of the definition of article 1. We welcome examples here.
- We believe we could explore article 2.2 (a) further, as there could be cases where ILC wish to designate a national authority. The EU and its MS would however not support a collective rights system, as we envisage a measures-based approach.
- Further, we would like to add 'with the consent of the beneficiaries' in 2.2.

Article 3/Scope

- First of all, the EU and its MS suggest to include another option in the text, which would replace 3.1 - 3.3: (option 2, article 3.1 of the TCE text (WO/GA/47/12, Annex C page 10): "[[Member States]/[Contracting Parties] [should]/[shall] safeguard the economic and moral interests of the beneficiaries concerning their [protected] traditional knowledge, as defined in this [instrument], as appropriate and in accordance with national law, in a reasonable and balanced manner.]”
- This option could give MS the flexibility needed in addressing these issues.
- In relation to the current text in articles 3.1 - 3.3, the EU and its MS believe the dividing lines between the different levels of TK diffusion are unclear, and open to interpretation. It would be difficult to ensure legal certainty in this regard. We are therefore not convinced by the tiered approach as it stands.
- The most logical line is between TK which is confined solely to the ILC, namely TK that is secret, and that which is not.
- In relation to TK that is secret, we believe that we should encourage the prevention of un-authorized disclosure of secret TK.

Thank you

31st Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)
(Geneva, 19-23 September 2016)
Comments on Rev 1

Chair,

On behalf of the EU and its MS I would like to thank the facilitators for the hard work that has gone into this document.

We would like to raise a clarification issue to be tackled ahead of the rev 2 version. We believe we need to have a coherent system of either using options or alternatives throughout the document, this for instance applies regarding different articles, and sometimes it is difficult to know whether they are complementary or real alternatives.

Another general remark relates to the preamble and the use of terms, where we have some questions in relation to the methodology we are following here. We have not discussed the preamble and the use of terms, and therefore the new Alt insertion in the preamble and all insertions in the use of terms should be bracketed. Further, we note that we agreed to focus this week's meeting on the core issues of the mandate.

Objectives

- We support alt 1 as the basis, and as we have stated before, we support a reference to 'misuse'.
- We believe alt 1 should be replacement for the full text.
- We believe we should not duplicate matters, such as those that have been dealt with in other instruments such as the CBD and the Nagoya Protocol, and we therefore do not support 'achieve', in para (c).
- We support concepts mentioned in alt 2, especially the reference to the value of public domain.

Use of terms

- In relation to the definition of ‘TK’: we believe it is better to keep the eligibility criteria in an article.
- We find 'TK alt 2 para 2' too descriptive, it also contains references to the subject matter which we have discussed in the previous IGC meeting, namely Genetic Resources.
- In relation to 'secret / sacred/ narrowly diffused / widely diffused', we welcome a discussion that brings clarity to tiered approach and the categories as provided by the facilitators. We are interested to hear how these definitions would work out in practice.

Article 1/Subject Matter

- The EU and its MS stress that the link between the ILC and the subject matter is extremely important. We therefore would like to include "directly" before "'linked" in the text at the top of the page.
- We would like to point out an omission, we would like to delete the word ‘or’, and the text should thus read ‘social identity and cultural heritage’.
- We find Alt 3 para 2 too descriptive, it also contains references to the subject matter which we have discussed in the previous IGC meeting.

Article 2 / Beneficiaries

- The EU and its MS support that Indigenous and Local Communities (ILC) are a beneficiary. Therefore we would not be able to support other formulations that include nations as a beneficiary, such as 'the agencies' mentioned in 2.1.
- We would like to bracket ‘when applicable’ in alt 1 para 2.2, we also request to delete the related footnote. The TK as described in the footnote does not fulfil the necessary criteria the EU supports in article 1.

Article 3/ Scope

- We support alt 1, and preferably we would like to see this option at the start of the article as it is general and provides a framework which would provide adequate flexibility.
- We do not support a disclosure mechanism in article 3, nor prior informed consent, and mutually agreed terms.
- We would like to reserve our position on the rest of the article.

Thank you

31st Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)
(Geneva, 19-23 September 2016)
Proposal for the terms of reference for a study (31/9)

Chair,

The EU and its Member States firmly believe that our work must be guided by solid evidence on the implications and feasibility in social, economic and legal terms. Therefore we support studies in general as an appropriate methodology for our work.

We would like to thank you for giving us the opportunity to introduce our proposal to request the Secretariat to undertake a study of national experiences and domestic legislation and initiatives in relation to protection of TK. The study should in particular cover the period of the last 5 – 10 years. The study should help to inform our discussions on TK, following the evidence based approach in compliance with para (d) of the IGC mandate.

The study should build on existing material and other studies already conducted by the Secretariat in relation to TK. We would like to note that the gap analysis conducted in 2008 sought to identify gaps, whereas our aim is to provide an overview of recently adopted regimes designed to protect TK and therefore complement the work of the gap analysis, with a view to anchor our work in an evidence based approach.

The main focus of the study should be to analyse existing domestic/national legislation and initiatives on TK applied in the Member States of WIPO or regional areas; some of which could be measures based, whilst others could be rights-based. The study should also include concrete examples of protected subject matter.

On one hand, the study should review recently adopted national and regional IPR regimes such as IP laws, regulations, measures and procedures, by which the TK can be protected. Here it would be useful to know what the role of trademark, design, copyright, trade secrets or GI legislation in connection with TK is.

On the other hand, other alternative recently adopted IPR or other regimes should be considered. It would be interesting to know how key definitions such as TK, 'traditional', 'misappropriation', scope and beneficiaries have been defined; whether these alternative regimes are sufficient to ensure adequate protection for TK and proved to be useful in protection of TK. The question of legal certainty for all stakeholders under these regimes should be examined.

Last, but not least, the study should address the issue of existing databases, such as those created for the purpose of keeping TK for other generations. The shared experience with the databases provided in the study could shed some light also on their practical impact on patent procedures.

Thank you.

31st Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)
(Geneva, 19-23 September 2016)
Comments on Rev2

Chair,

On behalf of the EU and its Member States I would like to thank the facilitators for the second Revision of the document. We appreciate all the hard work and efforts that have gone into developing this new version, taking into account the interventions made.

From the outset, the EU would like to support an approach which ensures the integrity of all the proposals voiced during this and previous sessions.

The EU and its Member States believe that a common understanding of the objectives and principles we are trying to achieve is necessary. Without a common understanding, it is difficult to achieve progress. Again, we should not duplicate other instruments, therefore we do not support alt 1 para (c). The EU and its MS support Alt2, and the reference to ‘misuse’ which would cater for a measure based approach. Further, we support the reference to the value of public domain as mentioned in alt 3.

In relation to the subject matter, the EU and its MS believe the subject matter needs to have a strong link with the ILC, and therefore support ‘directly linked’.

In relation to beneficiaries we support that Indigenous and Local Communities (ILC) are a beneficiary, and therefore we support alt 1. We are not in a position to support formulations that include nations as a beneficiary.

We support Alt 1 in article 3 on the scope. This could give MS the flexibility needed in addressing these issues. In relation to alt 2 and alt 3, the EU and its MS believe the dividing lines between the different levels of TK diffusion are still unclear, and open to interpretation.

Chair,

We very much appreciated the information provided by some states that have recently enacted legislation or are in the process of developing legislation with regard to traditional knowledge. It was interesting to hear that some are based on rights while others highlighted the use of databases. These examples help to inform our debate in a way that discussions based on theory alone cannot.

We look forward to more detailed and informative discussions based on how these systems relate to the core issues included in the document. This would be of particular relevance when it comes to the different levels of diffusion as currently contained in the list of terms. We need to understand better how these definitions work out in practice, taking into account the interests of all stakeholders.

The study proposal by the EU and its Member States on national experiences and domestic legislation and initiatives recently adopted in relation to the protection of Traditional Knowledge, as contained in document WIPO/GRTKF/IC/31/9, is intended to inform our discussions. Without concrete evidence and examples we will not be able to move forward in a meaningful way. This approach would also be in line with the 2016/2017 IGC mandate which provides for a multitrack approach to our work, without prejudging the nature of the outcome.

We would like to thank the delegations from the CEBS, US, Canada, Japan, Republic of Korea and the Tulalip Tribes for their support. We listened with great interest to the proposal made by the Tulalip Tribes and look forward to continuing discussions on this and other proposals that could enrich the terms of reference of our study, taking into account its current scope.

Thank you chair.
