



WIPO Indigenous Panel: Intellectual Property, Traditional Cultural Expressions and the UN Declaration on the Rights of Indigenous Peoples

Presentation by Dr. Mattias Åhrén

Will talk strictly to the present status of negotiations (WIPO/GRTKF/IC/22/4)

- Primarily on Articles 3 (Scope of protection) and 5 (Exceptions and limitations)
- Touch upon Article 2
- Offer some brief general comments to Article 4



Article 2 - Beneficiaries

Main issue: Whether group of beneficiaries include:

1. Only indigenous peoples and local communities
(Who are "local communities"? Must be defined by national law.)
2. In addition certain other entities, such as
 - families/individuals
 - states



Answer: Indigenous peoples (and local communities, provided national legislation to that effect)

- Because:
 - This is WIPO!
 - Central element in any definition of TCEs logically cultural attachment to a group (compare Article 1)
 - Therefore difficult to see how states can be subsidiary holders (Art. 1 need then to define TCEs in terms of "have been" rather than "is" associated with group)
- Some other issues in Article 2
 - "Holders"
 - "Traditional" and "cultural" communities?
 - "Small island states"?



Conclusion Article 2 (combination Option 1 and Option 2 (h))

- Beneficiaries of protection for traditional cultural expressions, as defined in Article 1, are indigenous peoples and local communities, who develop, use, hold and maintain the TCEs. (Option 1)
- [Where traditional cultural expressions are not specifically attributable to or confined to an indigenous people or local community or it is not possible to identify the people or community that generated it, any national entity determined by domestic law.] (Option 2, subpara (h))



Article 3: Scope of Protection

Identified main options:

1. Leave it to national law to determine scope
2. Full implementation or a right to consent for TCE holders
3. Compromise position: Culturally offensive etc. use prohibited, commercial use subject to benefit-sharing



Nagoya Protocol Article 7

- "In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that TK associated with GR that is held by ILCs is accessed with the prior informed consent or approval and involvement of these ILCs..."
- Nagoya Protocol Article 7 does not distinguish between TK not yet shared with a wider public, TK already publicly available/in the public domain, and TK to which third party rights pertain = consent/approval with regard to **all** TK held by ILCs
- ("In accordance with domestic law", "as appropriate" and "involvement" no qualifiers either)



Nagoya Protocol Article 4(2) and (3)

- Nothing in this Protocol shall prevent the Parties from developing and implementing other relevant international agreements, including other specialized access and benefit-sharing agreements, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.
- This Protocol shall be implemented in a mutually supportive manner with other international instruments relevant to this Protocol. Due regard should be paid to useful and relevant ongoing work or practices under such international instruments and relevant international organizations, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.



Nagoya Protocol Article 1

- Appropriate access standards an objective of the Nagoya Protocol
- Conclusion: WIPO IGC in principle prevented from agreeing on limitations on scope – right to consent pertains to all forms of TCEs (Compare UNDRIP Art. 31)
- (Conformity between TK and TCE Instruments)
- Might be difficult in practice to implement a right to consent in all instances



Conclusions - Article 3: Scope of Protection

- Option 1 – Not serious
 - For reasons just mentioned
 - In addition, makes no sense to leave key provision in legally binding instrument optional. If so, we might as well end now and go home
- Option 2 – The elements are included, but the provision should be restructured for greater clarity



New Article 3: Scope of Protection

- States shall ensure that beneficiaries as defined in Article 2 have the right to authorize or prohibit the following in relation to their traditional cultural expressions: [followed by list] (Option 2, Alt. 3)
- When it is not feasible to implement the right to authorize or prohibit continued uses of TCEs, states shall ensure that equitable remuneration is provided to the beneficiaries for the following uses of TCEs [followed by list] (Option 2, Alt. 2)
- Also with regard to uses pursuant to paragraph 2, adequate and effective legal, administrative or policy measures should be provided to: prevent... [followed by list] (Option 2, first para.)
- (Logical order: 1 FPIC 2. BS 3. Derogatory etc. use always forbidden)



Article 4: Management of Rights

- Main issue: Level of state involvement to assist beneficiaries to realize their rights under the instrument
- Sometimes necessary, but should occur only based on genuine request
- Not long term solution. Focus on capacity building allowing indigenous peoples (and local communities) to adequately represent themselves
- (Extremely overcomplicating and long Art. No need to explicitly address main rule, i.e. management of TCEs by indigenous peoples themselves. Only need to address exception, i.e. state support. Can be done in short, simple article)



Article 4: Management of Rights

- "If necessary, and upon request by beneficiary identified by Article 2, the State within which the beneficiary reside can assist in managing the beneficiary's right under this [instrument], for the direct benefit of the beneficiary."



Article 5: Exceptions and limitations

- Main issue: Relationship between TCE Instrument and (a) the public domain, and (b) third party rights (c) reproduction of TCEs for preservation
- But these issues are also addressed in Article 3
 - Confusing that such a key issue is dealt with in two different provisions, leads to unclarity = delete Article 5 and introduce relevant elements contained in Article 5 as a new sub-para in Article 3



Article 5: Exceptions and Limitations

- Relevant elements
 - Use within beneficiary's society
 - Use for preservation purposes (but language need to be more nuances than present draft)
- Non-relevant elements
 - Acknowledgement of beneficiaries, no offensive or derogatory uses (Article 3 already deals with these issues)
 - Exceptions for creation of original work of authorship inspired by TCES, works protected by copyright or signs and symbols protected as trademarks (Art. 3 addresses relationship between the TCE Instrument and the public domain/third party rights)

