

**PRELIMINARY SUBMISSION - MR IAN PATRICK GOSS  
PRODUCTIVITY COMMISSION DRAFT REPORT - ABORIGINAL AND TORRES  
STRAIT ISLANDER ARTS AND CRAFT**

**Introduction**

1. Thank you for the opportunity to comment on the above draft report. I am making this submission as a private individual and the views expressed are mine alone. They are without prejudice to views expressed in my previous positions as the General Manager for IP Policy within IP Australia, head of the Australian delegation to the WIPO Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (folklore) (IGC), or as Chair of this Committee from 2016 to 2022.
2. In writing this submission I also recognise that I am a non-indigenous Australian and respectively apologise for any comments that misinterpret or cause offence to Australia's First Nations Peoples.
3. I would note as this is a lengthy report I have had limited time to review the report and would appreciate the opportunity to make a more substantive submission over the next few weeks, particularly in relation to the ICIP legislation recommendation. Alternatively, I would be happy to engage directly with the Commission at their convenience.

**General Remarks**

4. Overall, I welcome the findings and many of the substantive recommendations, noting that they represent a first step in this challenging policy area. In particular:
  - Recognition of the unique nature of Australia's First Nations culture and its contribution to Australian society.
  - The harms caused by misappropriation/misuse of this cultural heritage not just in terms of loss of economic value but in relation to cultural harms.
  - Proposed introduction of new sui generis legislation relating to First Nations Culture and Intellectual Property (IP).
  - Importantly, the report recognises the challenges in attempting to adapt western IP laws based on individual rights to a cultural perspective based on collective responsibility/custodianship and customary laws and practices. Whilst, also recognising the balance required in terms of supporting access to the intangible and tangible expressions of First Nations culture, based on free prior and informed consent.
  - The need for an overarching strategic policy framework to protect Australia's First Nations Culture.

- Recognition that a major issue relates to the operational divide in terms of a lack of funding to support First Nations communities. In particular, Arts Centres and to support the ability of First Nations communities to monitor and take legal action against misappropriation and misuse of their Traditional Knowledge and Traditional Cultural Expressions. Also, to educate, first nations communities on their rights, the wider business community and the consumer.

### **Initial Specific Comments**

5. I would emphasise that these comments are based on my initial reading of the document and would welcome the Commissions perspective on the views expressed below:

#### ***Narrow Policy Perspective***

6. The Terms of Reference for this work are narrowly defined to only one expression of an indigenous culture - arts and crafts. This is unfortunate as it fails to recognise that these arts and crafts or Traditional Cultural Expressions (TCEs) are a manifestation of an indigenous community's traditional knowledge, which incorporates their belief systems, language and understanding of country. They are intrinsically linked and need to be considered collectively or risk significant limitations and gaps in any future policy framework, with potential for continued misappropriation of First Nations culture, in particular their Traditional Knowledge.

7. Notwithstanding my comment above I believe the draft recognises this. A view reflected in the recommendations to develop:

- a strategic policy framework for protection of First Nations Culture; and
- sui generis laws relating to First Nations Culture and IP.

8. I believe in the final report that the limitation of the Terms of Reference needs to be highlighted at the beginning of the report.

#### ***Strategic Policy Framework***

9. Based on my own work in this area I strongly support the development of an overarching policy framework/strategy to safeguard and protect First Nations Culture. This would guide the development of ICIP legislation and non-regulatory initiatives, including addressing funding and education/awareness issues and consider the establishment of a cultural authority as proposed by Terri Janke.

10. In relation to the development of this strategy I would note that IP laws are legislated at the Federal level and Australia has significant international IP treaty obligations. As such it will be important that relevant federal IP agencies are included in the process.

11. I am assuming that this recommendation incorporates safeguarding of cultural heritage and protection of Traditional Knowledge, Traditional Cultural Expressions and Traditional Knowledge associated with Genetic Resources.

12. In relation to any strategic policy framework in this area I believe that the start point should be the UNDRIP which sets out clear obligations in relation to the rights of Indigenous Peoples. From my perspective the work of the WIPO IGC is directed at operationalising this declaration into hard or legally binding treaties, in particular, Article 31.

13. Canada has taken this approach with their recently legislated Bill C-15. This Bill provides that the Government of Canada must take all measures necessary to ensure that the laws of Canada are consistent with the UNDRIP, and must prepare and implement an action plan to achieve the objectives of the Declaration.

14. I also understand that a Joint Federal Parliamentary Committee will shortly be convened to review Australia's implementation of the UNDRIP.

### ***Introduction of new Indigenous Cultural and Intellectual Property Legislation***

15. I strongly support this draft recommendation. As the draft report clearly finds Australia's current IP regimes and related international treaties do not provide sufficient protection for Indigenous Culture, with misappropriation and other cultural harms prevalent.

16. Importantly, from my perspective this legislation would need to cover all aspects of First Nations culture including Genetic Resources and Associated TK, TK and TCEs.

17. I note a significant number of questions are raised in relation to this recommendation. Questions which require careful consideration. As I indicated in my introduction, I would welcome more time to consider these important questions and would be happy to engage further with the Commission.

18. I would further note that as reflected in the negotiations within the IGC the international work in this area has progressed significantly since the WIPO model laws were developed, including within other national jurisdictions.

19. I would finally suggest that there is merit in establishing a small, short term expert working panel to further consider these complex policy questions and bring forward recommendations for consideration by the Commission. A panel which should have practical experience in this area at a policy, legal and industry level, including knowledge Centres (museums, libraries) and importantly First Nations representatives.

### ***Definition of Authentic Aboriginal and Torres Strait Islander Visual Arts and Crafts.***

20. Critically, the definition of authentic Aboriginal and Torres Strait Islander Visual Arts is fundamental to defining the scope of this draft report. It will also aid in ensuring any future ICIP legislation has legal certainty.

21. I note the proposed definition and that it appears to be supported by a number of First Nations stakeholders. However, I have some concerns that it is inconsistent with descriptions of authentic Aboriginal and Torres Strait Islander Visual Arts and Craft in the draft report. In particular, a connection to a First Nations culture and community. In essence it focuses on the artist and does not include the traditional community whose TK is the inspiration for the work. Knowledge which is often under the custodianship of the community, and which may include secret and sacred knowledge.

22. As I previously indicated to the Committee, from my perspective the visual art and/or craft should at a minimum be (1) produced by a First Nations artist and (2) have a clear link with a First Nations traditional community. In essence it should incorporate an expression of that community's cultural knowledge, noting from my international perspective a traditional visual art and/craft is a manifestation of a traditional community's traditional knowledge. For example you could include in your definition words such as (example only):

*“...it is a unique product of and/or directly linked with the cultural identity and cultural heritage of a specific Aboriginal and/or Torres Strait islanders nation, clan and/or community.”*

23. By adding this clarification, I believe it better balances the interests of the right holders, business, and the consumer. Additionally, it will provide greater legal certainty in relation to any future mandatory labelling approach and future ICIP legislation. Additionally, I am concerned that current definition will not address the issue of misappropriation of a First Nations Traditional Knowledge.

24. Whilst understanding the limits of the Reports Terms of Reference I believe that a more relevant term when discussing traditional visual arts and crafts is Traditional Cultural Expressions (TCEs). This term is becoming more widely used internationally and is consistent with the UNDRIP. I would also note that IGC has almost reached consensus for the definition for TCEs and the criteria for protection of TCEs.

### ***Work of the IGC***

25. I note in the report some commentary regarding the work of this Committee. The report has included a comment from a single participant (observer or delegate??) to the IGC. This view from my perspective does not represent the significant progress made in the work of the committee, particularly since negotiations commenced in 2010. Also, it potentially undermines in the eyes of First Nations Stakeholders and government policy makers the work of this Committee.

26. Multi-lateral treaties are challenging particularly when we are attempting to progress three binding treaties that potentially impact 193 member states and challenge longstanding IP policy positions/treaties across the full spectrum of IP regimes and involve morale and economic rights. As you note in the report there are currently three draft instruments. I would note that Australia was a prime architect of these draft instruments and initiated the breakthrough which resulted in the commencement of text-based negotiations in 2010.

27. I would also highlight a significant breakthrough was recently achieved in the work of this Committee. As I advised to the Commission previously, as the Chair of the IGC, in 2019 I drafted under my own authority a Chairs Text on Genetic Resources and associated Traditional Knowledge. During the hiatus in formal meetings during COVID I consulted informally with member states and key stakeholders, and the indigenous caucus. This was an attempt to bring this subject matter to a conclusion. This effort bore fruit at the 2022 WIPO General Assembly, with the General Assembly, by consensus, agreeing to convene a Diplomatic Conference to conclude an international legal instrument based on this text. Importantly this outcome shifts the dynamics of the work of the committee which had been limited by a view of many members that nothing should be agreed until everything is agreed.

28. In relation to the Traditional Cultural Expressions text I would also note that significant progress has been made towards reaching consensus on core issues, including definition of the subject matter (TCEs), objectives, eligibility criteria for protection and unpacking the scope of protection. I have included in this submission my Chairs Note to IGC 40 which discusses core issues and incorporates textual proposals relating to these issues for both TK and TCEs, which member states requested I produce. This work remains relevant as this was the last time TK and TCEs were discussed.

30. I would finally note that whilst the TK and TCE texts are still a work in progress that the texts, related papers/studies produced by the Committee and its Secretariat and related data bases, represent a significant body of knowledge in relation to the protection of TK and TCEs. This knowledge includes policy approaches of member states, including domestic legislation and identifies key gaps in relation to current IP protection. This work from my perspective would have significant utility in the development of any future strategic policy framework and resulting ICIP legislation.

### ***Mandatory Labelling Inauthentic Aboriginal and Torres Strait Islander Visual Arts and Crafts***

31. I note the innovative approach to the vexed labelling issue. Also, that First Nations Communities experience of labelling initiatives have been relatively negative. Obviously for any labelling initiative to be successful it will require buy-in from First Nations communities, in particular Art Centres.

32. My initial reaction to the proposal was it was an innovative idea, noting the resistance of First Nations Communities to a labelling scheme. Then I started to consider how it would work in practice, both in legal terms and operationally. Also, how would consumers and businesses relate to such an approach.

33. Whilst I believe the proposed approach has some merit, I would also reflect that the failures of previous authenticity labelling schemes were not the high level policy intent but the implementation of the schemes. A lack of community engagement, funding, and education programs. The question is would addressing these deficiencies result in a better outcome in relation to any authenticity labelling scheme. Clearly it would need to be a simple approach such as the wool mark, which would still enable Art Communities to establish their own distinctive brands/trademarks or even establishing their own Certification Trade Mark.

34. As this is a key recommendation of the draft report I believe there is merit in analysing this issue further and perhaps the Committee could establish another small working group to look at the different approaches with representatives from Arts Centres, consumer groups, related business stakeholders and federal government policy makers, including IP Australia.

Mr Ian Patrick Goss  
29 August 2022

**Attachment:**

WIPO/GRTKF/IC/40 - Chairs Information Note

**Information Note<sup>1</sup>**  
**on Traditional Knowledge/Traditional Cultural Expressions**  
**for IGC 40**

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 2019, IGC 40 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). IGC 40 will also take stock of progress and make a recommendation to the General Assembly, for which I have prepared a separate information note.

2. I would like to recall 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 40 as documents WIPO/GRTKF/IC/40/7 and WIPO/GRTKF/IC/40/8, respectively.

3. To assist participants in their preparations for IGC 40, I have prepared this information note, based on the discussions held at IGC 39. It summarizes the unresolved and cross-cutting issues, as well as some other issues relating to TK/TCEs.

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 40.

5. I would 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.

6. 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 the 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.<sup>2</sup> 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, IGCs 37, 38 and 39 enabled IGC participants to work on both texts at the same time, 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.

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<sup>1</sup> Note from the WIPO Secretariat: The Chair of the IGC, Mr. Ian Goss, has prepared this information note to assist participants in their preparations for IGC 40.

<sup>2</sup> I note, however, that IGC 27 (in April 2014), IGC 28 (in July 2014), IGC 37 (in August 2018), IGC 38 (in December 2018) and IGC 39 (in March 2019) worked on cross-cutting issues.

7. Taking into account the discussions at IGC 39, I suggest that IGC 40 focus on the issues of scope of protection and exceptions and limitations. If time allows, objectives and subject matter (of both TK and TCEs) could be reviewed again.

8. While addressing these unresolved issues, 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.

9. The traditional approach in international IP instruments has been to agree on a set of international minimum standards of protection, and, where necessary and appropriate, establish international principles. Many issues can and should be left to national law, therefore: while some of the main IP related policy choices should be made at the international level, much of the “detail” can be left to national legislation.

#### Textual language on certain issues

10. As requested by Member States at IGC 39<sup>3</sup>, I have also prepared some textual language on certain issues, which is included in the Annex to this information note. Noting that the issues of definitions of TK and TCEs, criteria for eligibility, scope of protection and exceptions and limitations are interlinked, the language in the Annex covers all these issues. This language is not a proposal from the Chair or a “Chair’s text” as such, but simply intended to respond to the request made of the Chair at IGC 39 in a manner that hopefully assists the IGC’s deliberations.

#### **Issues for consideration by IGC 40**

##### Scope of protection (Article 5 of the TK text and Article 5 of the TCEs text)

11. The scope of protection seeks to determine which specific acts in respect of TK and/or TCEs ought to be prohibited or prevented and/or which harms to TK and/or TCEs would IP-like instruments on TK and TCEs seek to address. The TK text contains four alternatives, while the TCEs text contains three alternatives.

12. The IGC may wish to clarify the appropriate approach (i.e., a rights-based approach, a measures-based approach or a combination of the two). In a rights-based approach, the beneficiaries would be granted rights which they can manage and enforce; in a measures-based approach, States are enjoined only to provide “measures” for the protection of TK/TCEs, which could include a wide range of legal and practical, civil and criminal options.

13. The IGC may also wish to discuss the level of detail into which the international instrument should delve, and the point at which national law would take over. Indeed, there are here, again, two approaches: one is to give States maximum flexibility to determine the scope of protection through national and domestic implementing legislation and other measures; the other is to be more detailed and prescriptive at the international level to ensure maximum harmonization across domestic regimes. With regard to the latter approach, it should be highlighted that there is significant divergence nationally in how indigenous peoples and local communities’ rights are protected such as formal treaties and specific stand-alone legislation (e.g. Australia’s tiered land rights system).

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<sup>3</sup> See paragraphs 181 and 197 of the IGC 39 Draft Report.



14. A distinction may also be made between economic rights and moral rights. For example, under copyright law, economic rights allow the rights owner to derive financial reward from the use of his or her works by others, while moral rights refer to the right to claim authorship of a work and the right to object to any mutilation or deformation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author's honor or reputation.

15. The IGC has discussed for several years a so-called "tiered approach" (also referred to as "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.

16. The tiered approach proposes differentiated protection along a spectrum from TK/TCEs that are widely diffused/available to the general public to TK/TCEs that are secret, sacred or not known outside the community and controlled by the beneficiaries.<sup>4</sup>

17. 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.

18. 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 in detail.

19. Whilst it is for the IGC to decide, I consider that the differentiated protection in the form of a tiered approach offers an opportunity to reflect the balance referred to in the mandate of the IGC and that is integral to an IP system. The balance referred to is that between the interests of the holders of IP rights, on the one hand, and the general public, including users and re-users of IP, on the other.

20. 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 TK and TCEs contexts, 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, and vice versa.

21. Member States may wish to consider the necessity of the inclusion of the definitions of secret TCEs and sacred TCEs, as there are definitions of secret TK and sacred TK in the TK text.

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<sup>4</sup> See document WIPO/GRTKF/IC/17/INF/9 (List and Brief Technical Explanation of Various Forms in Which Traditional Knowledge May Be Found).

22. 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.

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

23. 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.

24. 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.

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

25. 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.

26. As the IGC has noted before, protection of TK and TCEs should not be undertaken for its own sake, as an end in itself, but as a tool for achieving the goals and aspirations of relevant peoples and communities, and for promoting national, regional and international policy objectives. The way in which an international legal instrument(s) is shaped and defined will depend to a large extent on the objectives it is intended to serve. A key initial step, therefore, of the development of any international legal instrument(s) for the protection of TK/TCEs is to determine relevant policy objectives.

27. Both the TK and TCEs texts include three alternatives.

28. The IGC should consider rationalizing the texts to 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 unauthorized and/or uncompensated uses of TK and TCEs, and the prevention of erroneous grant of IP rights.

29. 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, in my view, the current alternatives tend to be framed from a single perspective.

30. Some Member States proposed to recognize “the need to protect, preserve and enhance the public domain”. The IGC may also wish to consider whether it is necessary to address the relationship with the public domain in the objectives. In particular, Member States may wish to consider if this issue could be dealt with in the preamble rather than as a specific objective, noting that the “public domain” is an inherent part of an IP system.

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

31. During IGC 39, eligibility criteria for protection for TK and TCE were rationalized and consensus is nearing, with the exception of issues relating to the inclusion of a temporal criteria. However, a possible compromise position is developing in this area. In addition, a link has been established with the subject matter through the development of a general definition of the subject matter, TK and TCE, in the list of terms. Whilst these definitions are not agreed they are again nearing a consensus position.

32. If time permits at IGC 40, members may wish to attempt to reach a consensus position on eligibility criteria for protection and related subject matter definitions.

**Other issues**

*Preamble/Introduction*

33. A preamble does not form part of the 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 in the form of principles irrespective of whether the instrument is declaratory or legally binding upon those that ratify or accede to it.

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

35. 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.

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

36. The TK and TCEs texts both make reference to a 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.

37. 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 accordance 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).<sup>5</sup>

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<sup>5</sup> See Article 31 of the Vienna Convention on the Law of the Treaties, 1969, 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”.

38. I would also like to note that definitions of “misuse”, “unlawful appropriation” and “unauthorized use” are included in Article 1 of the TK text. Article 2 of both the TK and TCEs texts include footnotes defining “unauthorized uses” and “uncompensated uses”. It might be useful to revisit all these terms once other issues become clearer.

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

39. 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.

40. 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 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.

41. 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.

42. The concept of “public domain” also links to the understanding of the related concept of “publicly available”<sup>6</sup>. 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)*

43. 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.

44. 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.

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

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

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<sup>6</sup> 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)

46. 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 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.

47. 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.

48. 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).

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

49. 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 take another look at both versions, simplify them and see where cross-pollination could improve both texts.

50. 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)*

51. 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.

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

53. 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.

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

54. Regarding term of protection, the TK and TCEs texts follow different approaches.

55. 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.

56. 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.

57. 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)*

58. The TK and TCEs texts share a couple of paragraphs and include some additional elements.

59. 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)*

60. 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.

61. 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.

62. 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)*

63. 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)*

64. 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)*

65. 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.

66. I also note that the Consolidated Document Relating to Intellectual Property and Genetic Resources (document WIPO/GRTKF/IC/40/6) 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)*

67. 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.

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

68. The draft TK text and the Consolidated Document Relating to Intellectual Property and Genetic Resources (document WIPO/GRTKF/IC/40/6) 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)*

69. 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.

## **Other useful resources**

70. 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 40, such as:

- WIPO/GRTKF/IC/40/7, The Protection of Traditional Knowledge: Updated Draft Gap Analysis, [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=434760](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=434760);
- WIPO/GRTKF/IC/40/8, The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis, [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=434759](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=434759);
- 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, [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=149213](https://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,  
[https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=147152](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=147152);
- Regional, National, Local and Community Experiences,  
[https://www.wipo.int/tk/en/resources/tk\\_experiences.html](https://www.wipo.int/tk/en/resources/tk_experiences.html);
- Lectures and presentations on the selected topics,  
[https://www.wipo.int/tk/en/resources/tk\\_experiences.html#4](https://www.wipo.int/tk/en/resources/tk_experiences.html#4).



## Annex

### CHAIR'S TEXTUAL LANGUAGE - TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS TEXT - KEY ARTICLES

#### Introductory Remarks

1. In developing textual proposals relating to the scope of protection and exceptions and limitations as requested by members I have taken a broader focus. This reflects that these articles, as highlighted by members, are clearly linked to the objectives of the instrument and subject matter, including definitions and eligibility criteria. As such, I have developed a framework for each subject matter which incorporates a single proposal for the framework elements: List of Terms - Subject Matter, Objectives, Protectable Subject Matter, including eligibility criteria, Scope of Protection and Exceptions and Limitations. **These textual proposals are without prejudice to Member States positions reflected in the consolidated working documents. They have been produced to aid discussions during IGC 40 and have no status.**

2. In relation to the scope of protection, I have attempted to further refine the tiered approach to support further deliberations in this area. In addition, in my textual language, I have avoided the use of the terms “secret” and “sacred”. Instead, I have tried to maintain a linkage with the eligibility criteria with a focus on the association or linkage with an indigenous people or local community/beneficiary and the level of control maintained by the indigenous people or local community/beneficiary. However, I recognize that this approach may not fully address indigenous stakeholders’ concerns regarding the protection of sacred TK/TCEs. The Committee is encouraged to consider this issue further.

3. In considering Exceptions and Limitations, it was clear that the alternate positions within the IGC’s draft negotiating texts on TK and TCEs<sup>1</sup> reflect different perspectives. One perspective is focused on protecting the public domain and the interests of users, such as research and cultural institutions and those engaged in innovation and creativity. The other perspective is that the beneficiaries who want the right to control access and use of their TK and TCEs, including ensuring that any use takes account of their customary laws and practices. In addition, whilst recognizing the value of research and cultural institutions, beneficiaries are concerned that any exceptions or limitations in this area would reinforce the historical cultural harms resulting from the acquisition of their TK and TCEs without their free and prior informed consent.

4. There is also a conceptual and legal divide in relation to how indigenous people’s belief systems, customary laws and practices interact with western cultural norms and laws. From their perspective, the very conception of “ownership” in the conventional IP system is incompatible with notions of responsibility and custodianship under customary laws and systems. This conceptual divide is especially evident in relation to TCEs and copyright as identified in the recently updated WIPO Gap Analysis on TCEs (document WIPO/GRTKF/IC/40/8). In particular, the originality requirement and protection of adaptations or derivative works.

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<sup>1</sup> WIPO/GRTKF/IC/40/4 and WIPO/GRTKF/IC/40/5.

5. The issues identified above manifest themselves in the specific limitations and exceptions proposed in the working document. In attempting to draft a single proposal on exceptions and limitations I have rationalised the general exceptions but consider that the specific exceptions require broader conceptual discussion within the IGC in an attempt to rationalise the different perspectives referred to above. In this broader discussion, members may wish to consider if the general exceptions are sufficient and there is no requirement to detail specific exceptions.

## **TRADITIONAL KNOWLEDGE**

### **LIST OF TERMS - ARTICLE 1<sup>2</sup>**

**Traditional Knowledge** refers to knowledge originating from indigenous people(s) and local communities and/or [other beneficiaries] that may be dynamic and evolving and is the result of intellectual activity, experiences, spiritual means, or insights in or from a traditional context, which may be connected to land and environment, including know-how, skills, innovations, practices, teaching, or learning.

### **OBJECTIVES - ARTICLE 2**

The objective of this instrument is to provide effective and balanced protection of traditional knowledge against:

- a. unauthorized<sup>3</sup> and/or uncompensated<sup>4</sup> uses; and
- b. the erroneous grant of intellectual property rights.

### **PROTECTABLE SUBJECT MATTER - ARTICLE 3**

3.1 Protection shall be extended under this instrument to traditional knowledge which is:

- a. created, generated, received or revealed, by indigenous people[s], local communities and/or [other beneficiaries], and developed, held, used and maintained collectively, in accordance with their customary laws and protocols;
- b. an integral part of the cultural identity and traditional heritage of indigenous people[s] and local communities, and/or [other beneficiaries]; and

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<sup>2</sup> The article number corresponds with the number of the relevant article in document WIPO/GRTKF/IC/40/4.

<sup>3</sup> Unauthorized uses comprise inter alia misappropriation, misuse, including false, misleading, or offensive uses, and unlawful uses of traditional knowledge.

<sup>4</sup> Uncompensated uses include the failure to provide monetary or non-monetary benefits.

- c. transmitted between or from generation to generation, whether consecutively or not.

3.2 [A Member State/Contracting Party may under its national law, condition protection on the prior existence of the traditional knowledge for a reasonable term as determined by the Member State/Contracting Party.]

## **SCOPE OF PROTECTION - ARTICLE 5**

5.1 Subject to the criteria for protection defined in paragraphs 3.1 and 3.2, Member States [should/shall] protect the rights and interests of beneficiaries concerning their traditional knowledge, in a reasonable and balanced manner, within the conditions set out below.

- a. Where the traditional knowledge is under the exclusive control of beneficiaries and distinctively associated with the beneficiaries' cultural identity, Member States shall take legislative, administrative and/or policy measures, as appropriate, with the aim of ensuring that:
  - i. Beneficiaries have the exclusive right to, control, use, develop, authorize or prevent access to and use of their traditional knowledge; and to receive a fair and equitable share of benefits arising from its use.
  - ii. Beneficiaries have the moral right of attribution and the moral right to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge.
- b. Where the traditional knowledge is no longer under the exclusive control of beneficiaries, but is still distinctively associated with the beneficiaries' cultural identity, Member States [should/shall] take legislative, administrative and/or policy measures, as appropriate, with the aim of ensuring that:
  - i. Beneficiaries receive a fair and equitable share of benefits arising from its use; and
  - ii. Beneficiaries have the moral right of attribution and the moral right to the use of their traditional knowledge in a manner that respects the integrity of such traditional knowledge.
- c. For traditional knowledge that is being utilized without the prior informed consent and/or not in accord with the customary laws and practices of an indigenous peoples or local community, the indigenous peoples and local communities or other beneficiaries, as applicable, may request from the relevant national authorities protection provided for in paragraph (a) or (b), taking into account all relevant circumstances, such as: historical facts, indigenous and customary laws, national and international laws, and evidence of cultural harms that could result from such unauthorized diffusion.

5.2 Protection under this instrument does not extend to TK that is widely known and that no longer is distinctively associated with an indigenous people or local community.

## **EXCEPTIONS AND LIMITATIONS - ARTICLE 9**

9.1 [Member States]/[Contracting Parties] may adopt appropriate limitations and exceptions under national law, provided that the use of traditional knowledge:

- a. does not unreasonably prejudice the legitimate interests and rights of the beneficiaries;
- b. acknowledges the beneficiaries, where possible;
- c. is not offensive or derogatory to the beneficiaries;
- d. is compatible with fair practice; and
- e. does not conflict with the normal utilization of the traditional knowledge by the beneficiaries.

9.2 When there is reasonable apprehension of irreparable harm related to sacred traditional knowledge, [Member States]/[Contracting Parties] shall not establish exceptions and limitations.

## TRADITIONAL CULTURAL EXPRESSIONS

### LIST OF TERMS - ARTICLE 1<sup>5</sup>

**Traditional Cultural Expressions** are any forms in which traditional culture, practices and knowledge are expressed, [appear or are manifested]. They are the result of intellectual activity, [experiences, spiritual means or insights] by indigenous people[s], local communities and/or [other beneficiaries] in or from a traditional context. They may be dynamic and evolving and comprise verbal forms<sup>6</sup>, musical forms<sup>7</sup>, expressions by movement<sup>8</sup>, tangible<sup>9</sup> or intangible forms of expression, or combinations thereof.

### OBJECTIVES - ARTICLE 2

The objective of this instrument is to provide effective and balanced protection of traditional cultural expressions against:

- a. Unauthorized<sup>10</sup> and/or uncompensated<sup>11</sup> uses; and
- b. The erroneous grant of intellectual property rights.

### PROTECTABLE SUBJECT MATTER - ARTICLE 3

3.1 Protection shall be extended under this instrument to traditional cultural expressions, which are:

- a. Created, generated, received, or revealed, by indigenous people[s], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively, in accordance with their customary laws and protocols;
- b. An integral part of the cultural identity and traditional heritage of indigenous people[s] and local communities, and/or [other beneficiaries]; and
- c. Transmitted between or from generation to generation, whether consecutively or not.

<sup>5</sup> The article number corresponds with the number of the relevant article in document WIPO/GRTKF/IC/40/5.

<sup>6</sup> [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

<sup>7</sup> [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

<sup>8</sup> [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.]

<sup>9</sup> [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

<sup>10</sup> Unauthorized uses comprise, *inter alia*, misappropriation, misuse, including false, misleading, or offensive uses, and unlawful uses of traditional cultural expressions.

<sup>11</sup> Uncompensated uses include the failure to provide monetary or non-monetary benefits.

3.2 [A Member State/Contracting Party may under its national law, condition protection on the prior existence of a traditional cultural expression for a reasonable term as determined by the Member State/Contracting Party.]

## **SCOPE OF PROTECTION - ARTICLE 5**

5.1 Subject to the criteria for protection defined in paragraphs 3.1 and 3.2, Member States [should/shall] protect the rights and interests of beneficiaries concerning their traditional cultural expressions, in a reasonable and balanced manner, as set out below.

- a. Where a traditional cultural expression is under the exclusive control of beneficiaries and distinctively associated with the beneficiaries' cultural identity, Member States [should/shall] take legislative, administrative and/or policy measures, as appropriate, with the aim of ensuring that:
  - i. Beneficiaries have the exclusive right to control, use, develop, authorize or prevent access to, and use of, their traditional cultural expressions, and to receive a fair and equitable share of benefits arising from its use.
  - ii. Beneficiaries have the moral right of attribution and the moral right to the use of their traditional cultural expressions in a manner that respects the integrity of such traditional cultural expressions.
- b. Where a traditional cultural expression is no longer under the exclusive control of beneficiaries, but is still distinctively associated with the beneficiaries' cultural identity, Member States [should/shall] take legislative, administrative and/or policy measures, as appropriate, with the aim of ensuring that:
  - i. Beneficiaries have the moral right of attribution and the moral right to the use of their traditional cultural expressions in a manner that respects the integrity of such traditional cultural expressions.
- c. Member States [should/shall] take legislative, administrative and/or policy measures, as appropriate, with the aim of ensuring that traditional cultural expressions are protected against any false or misleading uses, in relation to goods and services that suggest endorsement by or linkage with the beneficiaries.
- d. For traditional cultural expressions that are being utilized without the prior informed consent and/or not in accord with the customary laws and practices of an indigenous peoples or local community, the indigenous peoples and local communities or other beneficiaries, as applicable, may request from the relevant national authorities protection provided for in paragraph (a), (b) or (c), taking into account all relevant circumstances, such as: historical facts, indigenous and customary laws, national and international laws, and evidence of cultural harms that could result from such unauthorized diffusion.

5.2 Protection under this instrument does not extend to traditional cultural expressions that are widely known and that are no longer distinctively associated with an indigenous people or local community.

## **EXCEPTIONS AND LIMITATIONS - ARTICLE 7**

7.1 [Member States]/[Contracting Parties] may adopt appropriate limitations and exceptions under national law provided that the use of traditional cultural expressions:

- a. does not unreasonably prejudice the legitimate interests and rights of the beneficiaries;
- b. acknowledges the beneficiaries, where possible;
- c. is not offensive or derogatory to the beneficiaries;
- d. is compatible with fair practice; and
- e. does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries.

7.2 When there is reasonable apprehension of irreparable harm related to sacred traditional cultural expressions, [Member States]/[Contracting Parties] shall not establish exceptions and limitations.

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