

## **Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore**

**Forty-Seventh Session**  
**Geneva, June 5 to 9, 2023**

### **REPORT OF INDIGENOUS EXPERT WORKSHOP ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS**

*Document prepared by the Secretariat*

1. Acknowledging the contribution to the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) made by the Indigenous Expert Workshop held in 2013, as reflected in its Report (WIPO/GRTKF/IC/25/INF/9), and with reference to the recommendation made by the United Nations Permanent Forum on Indigenous Issues (UNPFII) at its Eighteenth Session in 2019, the IGC “requested the WIPO Secretariat to organize, within existing resources, an Indigenous Expert Workshop during the biennium 2020-2021, following similar arrangements *mutatis mutandis* to those as agreed at the Twentieth Session of the Committee under Agenda Item 8”.
2. Due to the Covid-19 pandemic, the WIPO Secretariat was unable to organize an Indigenous Expert Workshop in the biennium 2020-2021.
3. The WIPO Secretariat, in cooperation with the Secretariat of UNPFII, organized an *Indigenous Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (the Workshop), from February 22 to 24, 2023, at WIPO headquarters.
4. Seven indigenous experts, one from each of the seven socio-cultural indigenous regions recognized by the UNPFII, were selected by the WIPO Secretariat and the Secretariat of the

UNPFII to participate in the Workshop. Member States and accredited observers to the IGC were also invited to participate in the Workshop as observers, in accordance with the IGC decision. The indigenous experts elected Ms. Patricia Adjei from Australia and Ms. Rebecka Forsgren from Sweden, respectively, as Chair and Rapporteur of the Workshop.

5. The report of the Workshop, as received on February 26, 2023, is attached as Annex I. The list of the experts is attached as Annex II.

6. *The IGC is invited to take note of this document and the Annexes to it.*

[Annexes follow]

# Indigenous Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions

Geneva, 22 to 24 February, 2023

## WORKSHOP REPORT

1. The *Indigenous Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, was held from February 22 to 24, 2023, at the Headquarters of the World Intellectual Property Organization (WIPO) in Geneva, Switzerland.
2. Seven Indigenous experts, one from each of the seven socio-cultural Indigenous regions recognized by the United Nations Permanent Forum on Indigenous Issues (the “Forum”), were selected by the WIPO Secretariat in consultation with the Forum to participate in the Workshop.
3. The Workshop was organized by WIPO and implements a decision of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), as well as recommendations of the Forum.
4. The Experts were mandated to:
  - (i) Strengthen the capacity of Indigenous Experts to participate in the IGC negotiations and make stronger substantive inputs to the discussions;
  - (ii) Review the draft texts being negotiated by the IGC on genetic resources, traditional knowledge, and traditional cultural expressions; and
  - (iii) Identify and formulate feasible ways of addressing key issues of the negotiations.
5. Ms. Patricia Adjei was elected as Chair and Ms. Rebecka Forsgren as Rapporteur.
6. Observers from nineteen (19) Member States, two (2) Intergovernmental Organizations, and five (5) Non-governmental Organizations were present.
7. The experts considered the following texts:
  - (i) The Protection of Traditional Cultural Expressions: Draft Articles (WIPO/GRTKF/IC/46/5);
  - (ii) The Non-paper Chair’s Text of a Draft International Legal Instrument relating to Intellectual Property and Traditional Knowledge/Traditional Cultural Expressions - First Draft dated February 21, 2023 (hereinafter the Chair’s text on TK and TCEs); and
  - (iii) The Protection Of Traditional Knowledge: Draft Articles (WIPO/GRTKF/IC/46/4), and the Chair’s Text of a Draft International Legal Instrument relating to Intellectual Property, Genetic Resources and Traditional Knowledge associated with Genetic Resources (WIPO/GRTKF/IC/43/5, hereinafter the Chair’s text on GRs).
8. We recall the findings of the former reports made by Indigenous Peoples, such as

- (i) the Technical Review of Key Intellectual Property-Related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions by Professor James Anaya (WIPO/GRTKF/IC/29/INF/10, hereinafter the Technical Review);
- (ii) the Update of the Technical Review of Key Intellectual Property-Related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions within the framework of Indigenous Human Rights (WIPO/GRTKF/IC/46/INF/8, hereinafter the Updated Technical Review); and
- (iii) The Indigenous Expert Workshop on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (WIPO/GRTKF/IC/25/INF/9, hereinafter Indigenous Expert Workshop in 2013).

The comments and observations found in those documents are still relevant and valid.

9. Based on the documents listed above, the experts identified and discussed key legal, policy and technical issues and provided commentary on these key issues, as well as specific text proposals, where warranted.

### **Executive summary**

10. The Experts, with input from Indigenous observers, discussed a wide range of issues relating to Traditional Cultural Expressions (TCEs), Traditional Knowledge (TK), and Genetic Resources and Traditional Knowledge Associated with Genetic Resources (GRs). In addition, the Experts reviewed detailed text in WIPO IGC documents, and considered more comprehensive issues. Concerns were raised relating to the rights of Indigenous Peoples that were advanced in prior reports, such as the report of the Indigenous Expert Workshop in 2013, and issues raised by the Indigenous Caucus, which remain unaddressed and unresolved in the latest WIPO IGC texts.

11. Indigenous Peoples all over the world require protection for their Intellectual Property (IP) over their GRs, TK, and TCEs. Gaps exist in the current intellectual property regime whereby the knowledge, innovations, and knowhow (both sacred and secret) regulated under the customary laws and procedures of Indigenous Peoples are not protected and face exploitation, misuse, misappropriation, and theft. The instrument(s) under negotiation at the WIPO IGC should address and provide effective mechanisms to fill these gaps in the existing intellectual property system, recognize the rights of Indigenous Peoples over their IP, and create space for Indigenous Peoples' customary laws to inform national intellectual property regimes.

12. Indigenous Peoples organizations are formally accepted as observers to the WIPO IGC and Indigenous Peoples' representatives have participated in the work of the IGC since its first meeting in 2001. Indigenous Peoples organizations and representatives should continue to be included in the development of the instrument(s), including in Diplomatic Conferences, preparatory meetings for the Diplomatic Conference, and Assemblies that will be established under the future instrument(s), as well as in all future revisions and reviews, studies, expert meetings, and others. The instrument(s) should ensure that Indigenous Peoples are included in the implementation of the instrument(s) on national and international level.

13. A principle thoroughly discussed by the experts is the use of the term "Indigenous Peoples" in the texts. The fact that "peoples" is still in brackets in all the suggested texts is unacceptable. If the final instrument(s) will not use "Indigenous Peoples", capital "i" and capital "p", throughout the instrument(s), then the instrument(s) would contradict internationally

accepted terminology. The need to link the work at WIPO IGC to other processes, mechanisms and UN entities, and harmonize the language with these, was another question discussed during the Workshop.

14. The report is divided as follows: in the first part, key-issues are identified and analyzed. These key issues are beneficiaries, digital technology, exceptions and limitations, and transboundary cooperation.

15. The Experts decided not to submit a text that would serve as an alternative to the existing Draft Articles on the protection of TK and TCEs, or the Chair's texts on GR and on TK and TCEs. We note that multiple versions of texts currently exist, and we would defer this exercise to the Indigenous representatives at the upcoming IGC. Rather, a commentary based on key principles identified was provided that reflect views for all texts under discussion at the WIPO IGC as well as any other future texts discussed.

## **Part 1**

### **Beneficiaries**

#### **Indigenous Peoples**

16. Indigenous Peoples have consistently throughout the IGC process made the point that the correct term is "Indigenous Peoples"<sup>1</sup>, capital "I" and capital "P".

17. The understanding of the term is commonly used in international law and the terminology is standardized and used throughout the United Nations system.<sup>2</sup> The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizes Indigenous Peoples' rights to the intellectual property linked to their traditional knowledge and traditional cultural expressions. In UNDRIP, it is affirmed that Indigenous Peoples are equal to all other peoples, and the terminology is used in other international instruments.<sup>3</sup>

18. Throughout history, Indigenous Peoples have been discriminated against both at the national and international levels. Indigenous Peoples were treated as minority groups with no rights on their own, whether rights to land or rights to their cultures and knowledge.

19. Much work has been done to strengthen the rights of Indigenous Peoples in recent years, and this instrument has a chance to redress the discriminatory nature of the current intellectual property system and establish mechanisms to recognize rights of Indigenous Peoples over their intellectual property at the international level.

20. Member States should not go back to this old mindset, nor should they perpetuate past discrimination. If the final instrument(s) do not include "peoples" it will contradict the understanding of Indigenous Peoples and their rights that the rest of the international society have, as well as contradict the use of the term in other international mechanisms.

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<sup>1</sup> See the report of the Indigenous Expert Workshop in 2013, page 5: "Use of the term "Indigenous Peoples" across all three documents (on TCEs, TK and GRs) should be consistent. Indigenous Peoples and local communities are the beneficiaries of protection."

<sup>2</sup> See for instance Outcome Document of the High-Level Plenary Meeting of the General Assembly known as the World Conference on Indigenous Peoples : resolution / adopted by the General Assembly A/RES/69/2.

<sup>3</sup> See for instance UNEP/CBD/COP/12/5/Add.1 25 June 2014, paragraph F.1 of Decision COP XII/12, "the Conference of the Parties to the Convention on Biological Diversity 1. Decides to use the terminology "Indigenous Peoples and local communities" in future decisions and secondary documents under the Convention, as appropriate;" and UNDRIP, article 31: "Indigenous Peoples have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions".

21. The Experts note that some States are hesitant to use the word “peoples” in this instrument. Some States raise concerns that there are no Indigenous Peoples in their country. Others assert the people within their nation are considered one people and that suggesting a division among the people within the state would be inappropriate. These concerns could, however, be addressed through flexibility on a national level. The Experts are of the view that the unique circumstances of nations should not serve as a justification to deny the rights of Indigenous Peoples globally.

22. In addition to consistently using “Indigenous Peoples”, the wording in all the texts under consideration at the IGC needs to be examined. As of now, all the draft documents use inconsistent terminology with no clear definitions. Indigenous Peoples should be synonymous with the term rights holders, collective owners, holders, users, beneficiaries and stakeholders. This terminology needs to be harmonized and used throughout the instrument(s).

### **Local communities**

23. For the purpose of the instruments under consideration by the WIPO IGC, local communities are those that create, develop, generate, hold, use or maintain TK and TCEs in a collective context. In addition, their knowledge and expressions are linked with their cultural, spiritual, and social identity and traditional heritage, and transmit such knowledge and expressions between or from generation to generation.

24. Where necessary, the texts should distinguish between the rights of local communities and the rights of Indigenous Peoples.

### **Other beneficiaries**

25. This forum is to create international instrument(s) to ensure protection for Indigenous Peoples and local communities over their intellectual property as owners and users, which is not protected in the current intellectual property system(s). Those international instrument(s) are intended to fill gaps in the intellectual property regime for those without protections in the current system. As such, other beneficiaries contemplated in these discussions can seek protections under domestic legislation, as additional groups fall outside the scope of these discussions.

26. The current wording in the Chair’s text on TK and TCEs is a step forward in respecting the rights of Indigenous Peoples and to fill the gap in the current IP-system for Indigenous Peoples to protect their IP.

### **Recommendations**

- **To use the proper terminology when referring to Indigenous Peoples throughout the texts being discussed at the WIPO IGC.**
- **For Indigenous Peoples to be synonymous with the terms rights holders, collective owners, holders, users, beneficiaries and stakeholders. This terminology needs to be harmonized and used throughout the instrument(s).**

## **The intersection between digital technology and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions**

### **Digital advances**

27. Advances in technology are rapidly evolving, and the instrument(s) need to be able to respond to and address future technological advances. With these technical developments, there will likely be an increase in risk of further misuse and misappropriation of TKs and TCEs (which will be elaborated on below) in regard to databases, digital sequencing information (DSI) and artificial intelligence (AI).

28. Registers and databases can play a crucial role, as a means to prevent erroneous grant of intellectual property rights protection. However, Indigenous Peoples have, in the WIPO IGC and in reports, expressed reservations regarding the use of databases, fearing that information in the databases to the public may increase the possibility of TK and TCEs being used without permission of Indigenous Peoples.

29. Databases that contain the TK and TCEs of Indigenous Peoples cannot be solely controlled by national governments but must be created, controlled, and managed by the Indigenous Peoples, and their participation should be voluntary. Indigenous Peoples should have sovereignty over the information in such databases and States should provide intellectual property protection for the information. In the development of databases, additional resources for the Indigenous Peoples need to be added, in order for them to be able to develop, use and access databases.

30. A good example is the text in the non-paper Amended Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources Chair text, as presented during IGC 43, article 11 (d) which contains a practical suggestion for the participation of Indigenous Peoples in the development of the instrument(s).

31. Regarding use of databases generated pursuant to a disclosure requirement, there is a need for effectively safe-guarding mechanisms. Information in the database should, for instance, not be shared in the situation where a patent application is rejected, or when such rejections are challenged in the courts of law. States should be encouraged to develop safeguards to ensure that the data in the databases are secure and/or remain sealed (where disclosed in litigation), to develop governance structures in collaboration with Indigenous Peoples in order to ensure that the information about TK and TCEs within databases is controlled.<sup>4</sup> There are safeguards in other international instruments that could be used as reference.<sup>5</sup>

32. The mere fact that information about TK and TCEs are inserted into a database should mean that it is automatically protected. Databases should not be seen as a means only for defensive protection but also an instrument for positive protection.

33. With respect to GRs and Associated TK with GRs, the focus in international mechanisms have been on physical access to GRs. Today, with digital sequencing, physical access is no longer a requirement to access GRs. There are fast advances arising from research in biotechnology which enables GRs to be digitally sequenced and disembodied from physical genetic material. There is a risk that tracing the Indigenous Peoples that own the GR and associated TK could be more difficult, and that the requirements for free, prior, and informed

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<sup>4</sup> Report of the Indigenous Expert Workshop in 2013, page 6, and The Updated Technical Review, paragraphs 34-38.

<sup>5</sup> See the Cancun Safeguards (<https://www.un-redd.org/glossary/cancun-safeguards>).

consent (FPIC)<sup>6</sup> could be disregarded.<sup>7</sup> This would then have implications for Indigenous Peoples' rights to own and control resources and to protect, maintain and control associated TK. The instrument(s) should include safeguards to answer to the development of technological advances.<sup>8</sup>

34. Digital Sequence Information (DSI) is a key issue that has been discussed in the Convention of Biodiversity (CBD), and it is recognized that DSI is part of the genetic resource, and standardized rules on DSI are being discussed. The IGC process could benefit from looking at this process in developing future-proofing mechanisms within the instrument(s) to be able to address current and future technological developments and its potential impacts on GRs, TK and TCEs. An idea could also be to add similar wording as that of article 61 in the Patent Cooperation Treaty which makes it possible to amend certain provisions during an Assembly meeting. This could meet the changes that technological developments will bring in the future.

35. Artificial Intelligence (AI) technology is only in its infancy. However, worrying signs are emerging regarding the ease of AI in accessing databases, archives, libraries, the internet and other sources of knowledge to mine data and analyze, compile and process available information. AI is an emerging tool that is being used to infringe on the rights of Indigenous Peoples intellectual property and this has already been displayed. There are already examples of AI-generated designs using TK and TCEs in a derogatory and inappropriate manner. There might be cases where AI is using TK and TCEs by an Indigenous People without consent.<sup>9</sup>

36. Important legal questions will arise in the future on who would be the appropriate respondent in court actions where Indigenous Peoples' and local community's intellectual property was accessed and misappropriated. However, there might also be cases where it proves more difficult for Indigenous Peoples to confront a respondent if TK or TCEs are misused since it's an artificial creator. There is a growing concern that AI will be used to scan available research, databases, and other sources and use the gathered information in ways that is inappropriate, and outside of the control of Indigenous Peoples. Of particular concern is the IGC's recommendations that databases be explored and developed. The IGC will need to tune its mind to developing additional safeguards in relation to databases to address advances in technology.

### **Existing protocols and guidelines**

37. There are some examples of existing protocols and guidelines that refer to the digital space that provide guidance on follow up assessments, FPIC, code of conduct etc. There needs to be an understanding that TK and TCEs that are available online are not free to use, are not meant to be accessible in every circumstance, and do not form part of the public domain.

38. Protocols are a good, ethical way for users engaging with Indigenous Peoples in a respectful way when collaborating on TK and TCEs projects in the digital realm. Protocols reflect customary law practices and should be considered when developing new games, NFTs, Meta verse, blockchain and AI projects. As in the tangible real world, protocols guide users on how to collaborate in a respectful and ethical way with Indigenous Peoples. The same issues apply in the digital space and these protocols need to be adhered to, as the same rights of

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<sup>6</sup> The Technical Review, paragraph 11.

<sup>7</sup> The Updated Technical Review, paragraphs 42, 43 and 50.

<sup>8</sup> The impact of emerging technologies and the potential impact on utilisation of GRs and associated TK is under consideration by other fora, see e.g. the work of the Ad Hoc Technical Expert Group on Digital Sequence Information on Genetic Resources of the Convention on Biological Diversity.

<sup>9</sup> See the work of the enterprise Old Ways new (<https://oldwaysnew.com/news/2021/10/27/unesco-paper-published-anat-stories>) as well as the work of The Initiative for Indigenous Futures (<https://www.indigenous-ai.net/position-paper>).



Indigenous Peoples and the principles regarding interaction and cooperation with Indigenous Peoples, such as the FPIC, still stand in the digital space.

### **Recommendations**

- **To ensure that the future instrument(s) are able to respond to the development of future technology and that the instrument(s) include provisions that make them up to date with current technological development and future development.**
- **To ensure the full and effective participation of Indigenous Peoples in developing any innovative measures to prevent impact and protect TK and TCEs.**
- **To bear in mind that progressively, based on the progress of technology, code of ethics could be developed in connection to the instrument(s).**
- **To ensure that guidelines and protocols should also be used in the digital space.**
- **To reflect the rights of Indigenous Peoples throughout the instrument(s), including the principle of free, prior and informed consent.**

### **Exceptions and limitations**

39. Both the Chair's text on GRs, and on TK and TCEs suggest that it be left to Member States to determine the exceptions and limitations. This is problematic, as it opens for the possibility for States to decide that certain TK and TCEs are not to be subject to protection at all. Any potential exception or limitation should be defined and concretely formulated in the instruments, and compliance with human rights law should be ensured. While recognizing and respecting that there are differences between states and Indigenous Peoples, there is a risk that the lack of uniformity could lead to the instrument(s) being undermined if minimum standards are not put in place.

40. The limitations on use of TCEs and TK should be determined by Indigenous Peoples or in consultations and in adherence to FPIC. Otherwise, there is a risk that the conditions under which TK and TCEs are excluded from intellectual property protection run counter Indigenous Peoples' right to self-determination and the principle of FPIC. Indigenous Peoples' TK and TCEs should never be used in violation of their laws, traditions and customs. FPIC must therefore be obtained before drafting exceptions and limitations referring to the use of Indigenous Peoples' TK and TCEs.

41. Reasons for exception(s) and limitations in the current text of the draft instrument(s) currently include availing knowledge for study, education, non-commercial uses, museums, and libraries. Museums, universities and others that fall under the exceptions in copyright law might not use the TK or the TCEs commercially but still benefit from the TK or TCEs, even TK and TCEs that are used without FPIC. Unless there is FPIC from the relevant Indigenous People the knowledge or expressions should not be used.

42. One exception that is sometimes mentioned is the use of TK and TCEs in research. Indigenous Peoples often support scientific research, and often contribute to research in different fields of knowledge. But firstly, research using TK and TCEs should only be carried out with the FPIC of the relevant Indigenous Peoples. And secondly, when that research has been carried out, the TK and TCEs should be returned to the Indigenous People, together with information about what the TK was used for. The risk is that reference to the Indigenous Peoples owning the TK falls out, if researchers only "build on" others work. Data about the TK or the TCEs should only be stored with the knowledge and control of the Indigenous Peoples.

### **Recommendations**

- **To take out all the exceptions and limitations from this instrument**
- **In the alternative, if the instrument(s) will include exceptions and limitations, the instrument(s) should contain minimal standards of free, prior and informed**

**consent, while leaving it flexible enough for States to adjust to their own unique circumstances with the full and effective participation of Indigenous Peoples.**

### **Transboundary cooperation**

43. Many Indigenous Peoples reside in more than one State. As such, States and affected Indigenous Peoples will need to cooperate on trans-boundary matters. Indigenous Peoples have provided suggestions to resolve these types of issue before, such as during the Indigenous Expert Workshop in 2013, by suggesting to set up a regional Indigenous body to effectively deal with the GRs, TK and TCEs that are found and/or used within the territory of more than one State. Those States must cooperate, in full partnership with Indigenous Peoples, by measures that use Indigenous Peoples' laws and protocols.<sup>10</sup> Resources should be added in support of such Indigenous bodies, as well as for projects and activities of transboundary nature.

44. A specific transboundary issue that needs attention is TK and TCEs held in museums and in private collections. Museums and private collections have TK and TCEs that can be sensitive to display, or might not even be appropriate to display at all. There could also be TK and TCEs in their collections that should be returned to Indigenous Peoples. Those in possession of Indigenous Peoples' TK and TCEs should, at a minimum, obtain the free, prior and informed consent from Indigenous Peoples when displaying TK and TCEs, especially when these are of sacred nature, as well as share information to Indigenous Peoples about items in the collections.

45. States should take action against the unethical collection and storage of TK and TCEs by promoting transboundary cooperation between museums, private collections and Indigenous Peoples, and to add resources in order to enable cooperation.

### **Recommendations**

- **To ensure that there are minimal standards regarding transboundary cooperation in the final instrument(s).**
- **To encourage States to cooperate with those Indigenous Peoples that have governance structures their own for transborder cooperation.**

## **Part 2**

### **Commentary on the Protection of GRs, TK, and TCEs**

46. The following textual proposals are on the Chair's text on TK and TCEs, but the comments providing explanations to the textual suggestions are general and reflect the views of the participants of the Indigenous Expert Workshop. These views apply equally to the Chair's text on GRs.

47. The aim of negotiations at the IGC is to fill gaps in the intellectual property regime where GRs, TK and TCEs of Indigenous Peoples fall outside the current regime and are presently without sufficient protections in the current system.

48. The instrument(s) should specifically reference substantive elements and principles contained in other relevant international agreements and instruments, such as the Nagoya Protocol. There are other international agreements that treat the rights of Indigenous Peoples, that deal with GRs, TK and TCEs, but there is a need for a response to how the rights of Indigenous Peoples are protected within the intellectual property system.

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<sup>10</sup> See the report of the Indigenous Expert Workshop in 2013, pages 4 and 6 .

49. Apart from referring to other instruments, minimum rights standards must be implemented in the final instrument(s) negotiated at the WIPO IGC. The instrument(s) should contain a non-derogation clause ensuring that nothing in the instrument may be construed as diminishing or extinguishing that Indigenous Peoples have now or may acquire in the future.

50. As the text refers to UNDRIP, the rights therein should be reflected throughout the text, such as the right of free, prior and informed consent. the collective nature of TK and TCEs should be reflected upon (e.g. in art 3 disclosure requirements in Chair's GRs text).

51. The Chair's text on GRs should provide sufficient protection in cases where Indigenous Peoples' GRs and TK associated with GRs that have already been taken and made publicly available without consent or authorization, and avoid providing protection to those who have misappropriated such GRs and associated TK. In this regard, a requirement to disclose the origin of the TK/TCEs that are used in an application, and not simply the source, could remedy this issue.

52. The commentary below covers both Chair's texts on GRs and TK and TCEs:

## **PREAMBLE**

53. The experts welcomed the paragraph in both Chair's texts on GRs and on TK and TCEs specifically referencing the UNDRIP and proposed that "Recognizing and reaffirming" be used instead of "Acknowledging". The paragraph should recognize and reaffirm both the obligations and minimum standards contained in the UNDRIP as well as Member States' commitment to achieving the ends of the UNDRIP.

54. One of the early points of consensus in the WIPO IGC is the need to respect continuing customary use, development, exchange and transmission of GRs, TK and TCEs by, within and between Indigenous Peoples and local communities, even when intellectual property rights have been granted over products, processes or creations based on such resources, knowledge, or expressions. This principle needs to be reflected in both the preamble and the operational text of the instrument(s).

55. Recognition of the concept of traditional knowledge systems of Indigenous Peoples that give rise to vibrant, novel and diverse expressions and applications of genetic resources is a positive step that must be retained and included in the instrument(s).

## **USE OF TERMS**

56. In order to future-proof the instrument(s) and ensure that any future technological developments that affect GRs, TK, and TCEs are covered, the definition of "Use" / "Utilization" should include the application of digital technologies, such as Artificial Intelligence, machine learning, non-fungible tokens (NFTs), virtual reality / augmented reality, blockchain, and the metaverse, and how they relate to databases, archives, and exceptions and limitations.

## **OBJECTIVES**

57. The objectives of the instrument(s) must relate to both positive and defensive protection and address both misappropriation and misuse of TK and TCEs. In particular, the Chair's text on GRs must clarify that the objective of the instrument is to contribute to the protection of GRs and associated TK within the intellectual property system by enhancing the efficacy, transparency and quality of the patent system and preventing patents from being granted erroneously. The objectives of the instrument(s) on TK and TCEs should aim to effectively,

adequately, and proportionately protect TK and TCEs from unauthorized and inappropriate use and to prevent erroneous grant or assertion of intellectual property rights over TK and TCEs.

## **SUBJECT MATTER**

58. It is not necessary to provide an illustrative enumeration or listing of the types of knowledge and expressions may be considered TK and TCEs. Rather, the focus should be on the criteria for TK and TCEs to qualify for protection under the instrument(s). In particular, protection should be extended to TK and TCEs which are created, developed, generated, held, used or maintained in a collective context by Indigenous Peoples and local communities, linked with or an integral part of their cultural, spiritual and traditional heritage, and transmitted between or from generation to generation, whether consecutively or not.

## **BENEFICIARIES**

59. The beneficiaries of the instrument(s) are Indigenous Peoples and local communities. The delimitation of the concept of local communities should refer back to the criteria under subject matter. Local communities under the instrument(s) are only those communities that create, develop, generate, hold, use or maintain TK and TCEs in a collective context, linked with or an integral part of their cultural, spiritual and traditional heritage, and transmitted between or from generation to generation, whether consecutively or not.

60. While the strong preference of the experts is that there be no other beneficiaries beyond Indigenous Peoples and local communities, they recognized that allowing flexibility for Member States to recognize other beneficiaries under national law may be a good compromise to address pronounced divergence in views. However, the recognition of other beneficiaries at the national level should be in consultation with Indigenous Peoples and local communities and with the consent of Indigenous Peoples. This safeguard avoids the risk of negating protections for Indigenous Peoples and local communities by vesting authority for the TK and TCEs to other entities.

## **SCOPE OF PROTECTION**

61. This is an operational paragraph that must include respect for the continuing customary use, development, exchange and transmission of GRs, TK and TCEs by, within and between Indigenous Peoples and local communities, even when intellectual property rights have been granted over products, processes or creations based on such resources, knowledge, or expressions.

62. Indigenous Peoples' laws and customary laws and practices have legal value of their own. Thus, such laws should be complied with, and not simply referred to, when developing legislative, administrative and/or policy measures.

63. The ability of Indigenous Peoples to continue to utilize their TCEs and TK is an important concept that is acknowledged in the TCE and TK instrument. However, we note that no similar provision is included in the GR text. Due to the fact that the GR instrument seeks to solidify the right of a person or corporation to exclude all others from the benefit of a patent, it is extremely important that this instrument does not derogate the right of Indigenous Peoples' right to own, use, modify and transmit its GRs and TK associated with GR within their collectives.

## **EXCEPTIONS AND LIMITATIONS**

64. The experts were of the opinion that there should be no exceptions and limitations to the protection provided in the instrument(s) for GRs, TK, and TCEs. However, in case the section is

retained, it is important to specify that exceptions and limitations shall only be adopted in consultation with Indigenous Peoples and local communities and with the free, prior and informed consent of Indigenous Peoples.

65. Furthermore, exceptions and limitations should only be adopted in extraordinary circumstances, and the use of the TK or TCEs should expire at the same time as the public interest expires and be returned to the Indigenous Peoples. In all cases, Indigenous Peoples and local communities shall be compensated for all uses of their TK or TCEs. However, beyond the issue of compensation, it should be recognized that it is the loss of control through exceptions and limitations that is a grave concern for Indigenous Peoples, and that regaining control over the GRs, TK or TCEs is in many cases more important.

### **SANCTIONS AND REMEDIES**

66. Sanctions and remedies should be accessible, restorative, provide for restitution, reflect sanctions under Indigenous Peoples' law and customary law, and include criminal sanctions. The full and effective participation of Indigenous Peoples in developing legal or administrative measures needs to be reflected in this article.

67. Accessibility for Indigenous Peoples is important, given the cross-border nature of most litigation involving misappropriation and misuse of GRs, TK, and TCEs. Indigenous Peoples will require standing to initiate disputes and supportive measures, including access to financial and technical assistance and the establishment of a fair, independent, impartial, open, and transparent process, to recognize, adjudicate, and enforce the rights of Indigenous Peoples.

### **FORMALITIES**

68. The general rule is that there shall be no formalities for protection of TK and TCEs. The onus to comply with formalities shall not be imposed on Indigenous Peoples. If, in exceptional cases, there are formalities adopted, resources should be made available to support Indigenous Peoples in complying with any formalities.

### **ADMINISTRATION OF RIGHTS**

69. Indigenous competent authorities should also be included in the administration of rights, alongside the recognition that administration should also be in accordance with Indigenous Peoples' laws and customary law. Member States should be encouraged to involve Indigenous Peoples in the administration. There are examples of Member States that already have Indigenous representation in the national intellectual property offices or Indigenous advisory bodies, and others are looking to do the same.

70. Additional resources will be needed in most, if not all, countries where Indigenous Peoples reside in order to make this a reality. There will be a need for resources in the form of legal and technical assistance, capacity building, awareness raising, among others. This is important, as many Indigenous Peoples need special measures to enable them to gain access to their rights.

71. An article on awareness raising and capacity building should be added to ensure that Indigenous Peoples and local communities are aware of the contents of the instruments and are able to enforce their rights. This provision should also cover awareness raising and capacity building for the competent authorities, intellectual property office, and other relevant offices in order for them to gain a better understanding of Indigenous Peoples and local communities, the nature of TK and TCE, and to better equip them to fulfill the objectives of and ensure compliance with the instrument(s).

## **DISCLOSURE REQUIREMENT**

72. Applicants shall be required to disclose the Indigenous Peoples or local community that is the origin of the GR, TK, or TCE used/utilized, provide evidence that FPIC has been obtained, and that benefit sharing arrangements are in place. In case of non-compliance with the disclosure requirement or any other provision of the instrument(s), the application shall not be processed. Post-grant sanctions shall be provided, including revocation.

73. In assessing if FPIC has been duly obtained, there should be verification that the consent comes from the Indigenous Peoples' own authoritative bodies. The rule of the final instrument(s) should be that GRs, TK, and TCEs should not be used without consent. This section on disclosure, in particular paragraph 3, raises concerns as it seems to give intellectual property offices the possibility to still give intellectual property protection to applicants without any proof of consent to use the TK or TCE that are part of their application.

## **DATABASES**

74. Databases serve two functions: both defensive and positive protection. There should be clarity that inclusion of GRs, TK, and TCEs in databases automatically provides positive protection, recognizing that those who create, develop, generate, hold, use or maintain such resources, knowledge and expressions in a collective context are the rights holders. Language should be added about safeguarding the information in these databases, as well as reference to Indigenous Peoples' sovereignty over the data in these databases. The section should use "Indigenous Peoples and local communities" rather than "relevant stakeholders".

75. Continued access of Indigenous Peoples and local communities to the databases should be ensured and support should be provided for Indigenous Peoples to have the capacity and resources to build their own databases that intellectual property offices can log on to for the purpose of prior art searches.

## **NON-RETROACTIVITY**

76. Language should be added that States are encouraged to repatriate GR, TK, and TCEs which have been misappropriated, with the full and effective participation of Indigenous Peoples, consistent with the right to repatriation contained in Article 12 of the UNDRIP.

77. For traditional knowledge that is being utilized without the prior informed consent or not in accord with Indigenous laws and customary laws and practices, Indigenous Peoples and local communities shall have the possibility to request protection of economic and moral rights, 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 utilization. [adapted from Alt 2 Paragraph 5.2 in page 12 of the Annex of WIPO/GRTKF/IC/46/4]

## **RELATIONSHIP WITH OTHER INTERNATIONAL AGREEMENTS**

78. This instrument shall address any gaps, where they exist, with other relevant international mechanisms, and shall be implemented in mutually supportive ways with other relevant international agreements and treaties.

79. Implementation of this instrument shall be consistent with the UNDRIP and other human rights instruments and nothing herein may be construed as limiting, diminishing, or extinguishing the rights of Indigenous Peoples.

## **NATIONAL TREATMENT**

80. Each Member State shall accord to beneficiaries that are nationals of other Member States treatment no less favorable than it accords to beneficiaries that are its own nationals with regard to the protection provided for under this instrument. However, this general provision should be circumscribed where constitutional provisions exist for Indigenous peoples, or where other rights contained in treaties, agreements, and other constructive arrangements require a priority of rights for Indigenous Peoples within a State.

## **TRANSBOUNDARY COOPERATION**

81. Transboundary cooperation shall ensure the full and effective participation of Indigenous Peoples and recognize the role of transboundary Indigenous institutions or bodies, such as the Saami Parliament, the Andean Parliament, and others.

## **REVIEW**

82. This should include the concept of periodic reviews and provide examples of the types of issues that shall be covered by the review, such as repatriation, adaptation, modification, inclusion of other areas of IP, derivatives, and addressing other issues arising from the application of new and emerging technologies, including Artificial Intelligence, machine learning, non-fungible tokens (NFTs), virtual reality / augmented reality, blockchain, and the metaverse. The review process should ensure the full and effective participation of Indigenous Peoples.

## **ASSEMBLY**

83. The assembly shall support participation of Indigenous Peoples and local communities by, inter alia, adopting a simplified accreditation and registration process, adopting modus operandi that allows interventions on the floor and in technical bodies and contact groups, establishing a fund to support participation, a standing agenda item on Indigenous Peoples' and local community issues, an Indigenous Peoples and local communities panel, and the appointment of an Indigenous fellow within the WIPO Secretariat.

## **REVISION**

84. A provision on amendment of certain provisions of the treaty by the Assembly should be added, to ensure that the instrument(s) can address the issues reviewed in a timely manner.

[Annex II follows]

LIST OF INDIGENOUS INVITED EXPERTS FROM THE SEVEN GEO-CULTURAL REGIONS  
OF THE UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES

(in the alphabetical order of the geo-cultural regions)

AFRICA

Lucy Mulenkei (Ms.)- Maasai from Kenya

ARTIC

Rebecka Forsgren (Ms.) - Saami from Sweden

ASIA

Jennifer Tauli Corpuz (Ms.)- Kankana-ey Igorot from the Philippines

EASTERN EUROPEAN COUNTRIES EEC RF CAT

Polina Shulbaeva (Ms.) - Selkup, a Taiga Peoples from the Russian Federation

LATIN AMERICA

Rodrigo de la Cruz (Mr.) – Kichwa Kayambi from Ecuador

NORTH AMERICA

Stuart Wuttke (Mr.) – Ojibway-Cree from Canada

PACIFIC

Patricia Adjei (Ms.) - Wuthathi, Mabuiag Islander and Ghanaian from Australia

[End of Annex II and of document]