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Doctor of Philosophy

**The Protection of Traditional Cultural Expressions –
Seeking International Consensus for a Multilateral Solution**

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Cape Town, 01.04.2023

Carolina Harbs

Signed by candidate

'When we identify where our privilege intersects with somebody else's oppression,
we'll find our opportunities to make real change.'

— Ijeoma Oluo

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ABSTRACT

Traditional Cultural Expressions (TCEs) as part of indigenous cultural heritage have been misappropriated and commercially exploited by western culture for centuries. Existing intellectual property laws, the closest conceptually related legal regimes, fail to protect TCEs because they were not developed with indigenous culture in mind. Despite over twenty years of negotiations at the Intergovernmental Committee on Intellectual Property and Genetic Resources (GR), Traditional Knowledge (TK), and Folklore at the World Intellectual Property Organisation (WIPO IGC), a binding agreement on an appropriate protection mechanism has yet to be found.

Based on the novel hypothesis that the identification of a lowest common denominator forms the most realistic starting point for an agreement, the research question of this thesis asks where consensus exists between the most conflicting positions at the WIPO IGC and how this common ground can be leveraged to conceptualise a legal framework that will form a realistic base for an international agreement. This original approach focuses exclusively on TCEs and establishes a first-of-its-kind analysis of a multilateral law-making procedure.

The methodological approach follows a three-part legal analysis. In the first stage, the current gaps in international law for the protection of TCEs are identified, and the consensus-finding and dispute-resolution mechanisms implemented at the WIPO IGC are evaluated. The second stage contains a legal doctrinal study of domestic approaches of specific parties and selected customary law. The third step contains an analysis and comparison of the different stakeholder positions regarding the draft law currently negotiated at the WIPO IGC. The study focuses on the United States of America, the European Union, South Africa, and the Indigenous Caucus, reflecting the parties whose positions are most at odds.

The analyses yield that, should the current conditions persist, the WIPO IGC will not reach a binding agreement amongst all participating parties. Their approaches and positions are, in part, mutually exclusive, and the negotiation procedure at the IGC is no longer suited for parties with such diametrically opposed political and economic interests. To reach an agreement, the author of this thesis recommends specific changes to the wording of the draft law and the negotiation procedure. Procedurally, the tool of majority voting on pressing matters should be reintroduced, and the number of vetoes on matters of text-drafting should be limited. On a national level, governments should simultaneously draft domestic laws to protect TCEs and support indigenous communities through existing IP tools.

Keywords: Traditional Cultural Expressions; Intellectual Property Law; Multilateral Dispute Resolution; Consensus-Finding; Traditional Knowledge; Intergovernmental Committee on Traditional Knowledge; Genetic Resources and Folklore; World Intellectual Property Organisation

TABLE OF CONTENTS

ABSTRACT	i
TABLE OF CONTENTS.....	ii
LIST OF TABLES.....	ix
CHAPTER ONE.....	1
Introduction	1
I. THE PROBLEM.....	1
II. CORE ISSUES	6
III. SCOPE OF STUDY	8
1. Supporting Research Questions.....	9
2. Selection of analysed parties.....	11
3. Outline of legal analysis.....	13
IV. ASSUMPTIONS AND HYPOTHESIS.....	15
V. RESEARCH GAP	16
VI. METHODOLOGY & CHAPTER OUTLINE	17
VII. KEY OBJECTIVES OF THIS RESEARCH	19
CHAPTER TWO	21
Traditional Cultural Expressions and Policy Objectives of Indigenous Peoples	21
I. WHAT ARE TRADITIONAL CULTURAL EXPRESSIONS AND FOLKLORE?.....	21
II. ILLUSTRATIVE CASE STUDIES ON THE DIVERSITY OF TCES	23
1. Habesha Community vs Alexander Mc Queen: the <i>Kaba</i> gown	23
2. Native Americans vs <i>Washington Redskins</i> :: TCes as Sports Mascots.....	24
3. <i>T'nalak</i> textiles of the T'boli people: Weaving Craftsmanship from the Philippines.....	26
4. The South African Film <i>The Wound (Inxeba)</i>	27
5. <i>Wik Apalech</i> Dancers from Australia: Indigenous Dance Performances:	29

6.	The <i>Deep Forest</i> Album and the development of world music	31
7.	Suyá People of the Amazon and Pintupi People from Australia: Indigenous Ideas about Music	33
8.	Sámi People Culture.....	35
9.	Swahili Speakers vs Disney: Trademarking of the phrase ‘Hakuna Matata’....	37
III.	MAIN POLICY OBJECTIVES OF INDIGENOUS COMMUNITIES	40
CHAPTER THREE.....		43
TCEs and International Law: The Past, the Present, the Future		43
I.	HISTORICAL LEGAL CONTEXT.....	44
II.	CURRENT FORA FOR THE SAFEGUARDING OF TRADITIONAL CULTURE AND FOLKLORE.....	47
1.	UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage	48
2.	UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions.....	49
III.	CURRENT INTERNATIONAL LEGAL INSTRUMENTS AND THEIR LIMITED EFFECT IN PROTECTING TCEs.....	49
1.	Berne Convention.....	50
2.	TRIPS Agreement.....	52
3.	Rome Convention	53
4.	WIPO Performances and Phonograms Treaty.....	54
5.	Bangui Agreement.....	54
6.	Swakopmund Protocol	55
7.	Tunis Model Law.....	56
8.	United Nations Declaration of the Rights of Indigenous Peoples	56
9.	Universal Declaration of Human Rights.....	57
IV.	THE WIPO IGC.....	58
1.	Historical Background & Mandate	58

2.	Procedure	60
3.	Current Status of Negotiations	62
(a)	Latest developments	62
(b)	Re-emerging fundamental issues	63
(c)	Procedural Obstacles.....	65
4.	Legal Key Issues	68
(a)	Unsettled Definition.....	68
(b)	Conflicting Policy Objectives	70
(c)	The Boundaries of the Public Domain	72
(d)	The Limits of Intellectual Property Law	75
(e)	Draft Articles and Core Issues.....	76
V.	MULTILATERAL CONSENSUS BUILDING	77
1.	Meaning of Consensus	78
(a)	Consensus-Finding Methods	78
(b)	Current Consensus-Finding in International Proceedings and the IGC.....	79
2.	Dispute Resolution & Multilateral Negotiations.....	81
(a)	Dispute resolution tools in multilateral negotiations.....	81
(b)	IGC Approach.....	85
3.	General Procedural Options	86
	CHAPTER FOUR	89
	Analysis of Existing National Legislation & Selected Customary Law	89
I.	LEGAL APPROACHES ADOPTED IN THE EUROPEAN UNION	90
1.	Current domestic laws in the EU on the protection of TCEs.....	90
2.	General international positioning of the EU within the WIPO IGC.....	96
II.	LEGAL APPROACHES ADOPTED IN THE UNITED STATES OF AMERICA	96
1.	Historical Context.....	97
2.	Current domestic laws in the US on the protection of TCEs	98

3.	General international positioning of the USA on the Protection of TCEs	104
III.	LEGAL APPROACHES ADOPTED IN SOUTH AFRICA	105
1.	Geographical and Historical Context.....	105
2.	Current Domestic Legislation on the Protection of Indigenous Knowledge in South Africa	106
3.	General International Positioning of South Africa.....	110
IV.	THE ROLE OF CUSTOMARY LAW IN THE PROTECTION OF TCEs	110
1.	Relevance of Customary Law	111
2.	Selected examples of applied customary law in the field of TCEs	113
3.	Obstacles and possibilities for the recognition of customary law	116
4.	The role of Customary Law in the WIPO Draft Articles & IGC Negotiations..	120
V.	SUMMARY OF INDIVIDUAL APPROACHES.....	121
	CHAPTER FIVE	122
	Analysis of Positions on Unsettled Legal Questions	122
I.	METHODOLOGY.....	122
II.	USE OF TERMS.....	124
1.	United States of America.....	126
2.	European Union	126
3.	South Africa.....	127
4.	Indigenous Caucus	127
III.	OBJECTIVES	127
1.	United States of America.....	129
2.	European Union	131
3.	South Africa.....	132
4.	Indigenous Caucus	133
IV.	ELIGIBILITY CRITERIA.....	135
1.	United States of America.....	136

2.	European Union	137
3.	South Africa.....	139
4.	Indigenous Caucus	140
V.	BENEFICIARIES.....	141
1.	United States of America.....	141
2.	European Union	142
3.	South Africa.....	142
4.	Indigenous Caucus	143
VI.	SCOPE OF RIGHTS	143
1.	United States of America.....	147
2.	European Union	147
3.	South Africa.....	148
4.	Indigenous Caucus	149
VII.	EXEPTIONS AND LIMITATIONS	151
1.	United States of America.....	153
2.	European Union	154
3.	South Africa.....	154
4.	Indigenous Caucus	154
VIII.ROLE OF CUSTOMARY LAW	
	155	
1.	United States of America.....	155
2.	European Union	155
3.	South Africa.....	156
4.	Indigenous Caucus	156
IX.	NEGOTIATION PROCESS	157
1.	United States of America.....	157
2.	European Union	158

3.	South Africa.....	158
4.	Indigenous Caucus	159
CHAPTER SIX.....		160
Findings and Discussion.....		160
I.	COMMON GROUND BETWEEN EVALUATED COUNTRIES.....	160
1.	General recommendations of chair and facilitators.....	161
2.	Use of Terms.....	162
3.	Objectives.....	163
4.	Eligibility Criteria	164
5.	Beneficiaries	165
6.	Scope of Rights.....	166
7.	Exceptions & Limitations.....	167
8.	Role of Customary Law.....	168
9.	Negotiation Process	168
10.	Summary and Overview.....	169
11.	Considerations for future work by the Chair	172
II.	PROPOSED SOLUTION.....	173
1.	General Starting Point.....	173
2.	Recommendations for the Extent of Consensus	175
3.	Recommendations for Dispute Resolution Methods	178
4.	Recommendations for the Negotiating Procedure	181
5.	Suggestions for substantive law	183
(a)	Nature of the Instrument.....	183
(b)	Use of Terms.....	184
(c)	Objectives.....	187
(d)	Eligibility Criteria	188
(e)	Beneficiaries	190

(f) Scope of Rights.....	193
(g) Exceptions & Limitations.....	196
(h) Role of Customary Law.....	199
CHAPTER SEVEN	201
Conclusions	201
I. RESEARCH QUESTIONS AND FINDINGS.....	201
1. What are the main procedural obstacles in the current negotiation process at the IGC?	201
2. What consensus-finding and multilateral dispute resolution methods are used at the WIPO IGC?	203
3. What are the current approaches in substantive law taken on a domestic level in South Africa, Europe and the United States, and what are approaches taken by indigenous customary law?	204
4. What are key matters of substantive law that jurisdictions cannot agree on within the WIPO IGC	206
5. What is the common ground on matters of substantive law between the evaluated jurisdictions and the indigenous caucus?	207
6. What is the overall conclusion of the findings presented?.....	209
(a) How could consensus within the WIPO IGC be achieved?	209
(b) How could a potential instrument reflect in substantive law?	211
(c) Will the most effective solution be found in only one instrument for the protection of TCE & TK, as currently planned by the WIPO IGC? Are there other non-legal protection mechanisms that could be established?	215
II. REFLECTION ON ASSUMPTIONS & HYPOTHESIS	217
III. REFLECTIONS ON KEY OBJECTIVES OF THIS RESEARCH.....	218
IV. SUGGESTIONS FOR FUTURE RESEARCH	219
BIBLIOGRAPHY	221
APPENDIX.....	245

LIST OF TABLES

Table 1: The three stages of the legal analysis performed in this thesis	13
Table 2: Evaluation criteria for national legal approaches (Chapter Four).....	14
Table 3: Evaluation criteria for the position analysis regarding specific IGC draft articles (Chapter Five).....	15
Table 4: Overview of countries positions and common ground on core issues.....	171

LIST OF ABBREVIATIONS

ARIPO	African Regional Intellectual Property Organisation
BIA	Bureau of Indian Affairs
CBD	Convention on Biodiversity
CD	Compact Disk
CPPDCE	Convention for the Protection and Promotion of the Diversity of Cultural Expressions
CSICH	Convention for the Safeguarding of the Intangible Cultural Heritage
DRC	Democratic Republic of the Congo
DST	Department of Science and Technology of the South African Government
DTI	Department of Trade and Industry of the South African Government
ECRML	European Charter for Regional or Minority Languages
EoF	Expressions of folklore
EU	European Union
EUIPO	European Union Intellectual Property Office
EUTM	European Union Trademark
FCNM	Framework Convention for the Protection of National Minorities
FPIC	Free prior informed consent
GR	Genetic Resources
IACA	Indian Arts and Crafts Act
IK	Indigenous Knowledge
IKS	Indigenous Knowledge Systems
IP	Intellectual Property

IPLC	Indigenous Peoples and Local Communities
IUCN	International Union for Conservative Nature
LMCs	Group of Like-minded Countries
MFN	Most Favoured Nation
NAGPRA	Native American Graves Protection and Repatriation Act
NHRA	National Heritage Resources Act
NIKSO	National Indigenous Knowledge Systems Office of South Africa
OAU Model Law	African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources
SADC	South African Development Community
STOP Act	Safeguard Tribal Objects of Patrimony Act
TCEs	Traditional Cultural Expressions
TESS	Trademark Electronic Search System
TK	Traditional Knowledge
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the protection of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organisation
USA	United States of America
WIPO	World Intellectual Property Organisation
WIPO IGC	The WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore
WPPT	WIPO Performances and Phonograms Treaty

CHAPTER ONE

Introduction

I. THE PROBLEM

Consider the following scenario: a traditional and sacred lullaby sung by a Malaitan woman on the Solomon Islands gets recorded by an ethnomusicologist for archival purposes. Saved in the United Nations Educational, Scientific and Cultural Organisation (UNESCO) catalogue, it then gets copied without permission, re-mixed and produced into a successful song. Neither the Malaita community nor the singer receives any returns from the profits, and the heritage of the melody does not get attributed correctly either. This case about the creation of the *Deep Forest* album - a compilation of world music, is emblematic of the misappropriation and unlawful exploitation of Traditional Cultural Expressions (TCEs).¹

Instinctively, this case creates a sense of injustice towards the indigenous community. Simultaneously, the question arises as to why the exploitation of traditional culture for the production of a new work is not better regulated. The closest conceptually fitting legal regime is considered to be Intellectual Property (IP) law because TCEs generally have a literary, musical and artistic nature and are 'products of creative intellectual activity.'² However, IP law often falls short in protecting indigenous culture as it was primarily developed to support innovation and the creation of new works according to a western understanding.³ Existing national and international instruments are limited in preventing unwanted exploitation by third parties because conventional IP was not developed with indigenous communities as rights-holders in mind. In most cases, TCEs do not qualify as IP because of their traditional and often

¹ Sherylle Mills 'Indigenous music and the law: An analysis of national and international legislation' (1996) 28 *Yearbook for traditional music* at p. 59.

² Stephanie Spangler 'When Indigenous Communities go Digital: Protecting Traditional Cultural Expressions through Integration of IP and Customary Law' (2009) 27 *Cardozo Arts & Ent. LJ* at p. 713.

³ *Ibid* at p. 715.

spiritual properties, including their perpetuity and informal, collective ownership.⁴ Within copyright, for example, most TCEs exceed the term of protection because of their cross-generational existence. Simultaneously, this long existence often forfeits the originality requirement. In addition, many lack a physical manifestation and an identifiable author because an expression belongs to the community as a whole.⁵ Because of this, TCEs are often believed to be in the public domain and free for third parties to use and commercially exploit without permission from the respective community. This leads to significant protection gaps when it comes to the commercial use of living culture. This conflict forms the mainstay of this thesis, as the legal mechanisms that are available to traditional communities to impose their rights and benefits – both on domestic and international levels – are very limited.

Over the past three decades, the discussions about the protection of indigenous and traditional culture have gained prominence – not only in academia and policy-making but also in the awareness of society.⁶ Especially amongst developing countries, there has been a noticeable increase in frustration over the lack of benefits they could derive from their cultural wealth.⁷ One of the main problems with the protection of such cultural knowledge is that its embodied information can be easily transferred, whereas the underlying meanings, traditions and values usually cannot.⁸ However, it is exactly these values that distinguish traditional knowledge from other forms of knowledge, leading to the dissolution of the tradition.⁹

It is no surprise that the call for legal protection by indigenous stakeholders has become louder, as there has been a noticeable increase in the misappropriation and (unlawful) commercial exploitation of traditional culture. This is a direct consequence of

⁴ Marc Perlman 'Traditional cultural expressions' in *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (2017) at p. 174.

⁵ Daphne Zografos *Intellectual property and traditional cultural expressions* Edward Elgar Publishing (2010) at p. 12.

⁶ Christoph Beat Graber & Mira Burri Nenova *Intellectual property and traditional cultural expressions in a digital environment* Edward Elgar Publishing (2008) at p. xi; Antony Taubman 'Saving the village: conserving jurisprudential diversity in the international protection of traditional knowledge' (2005) *Maskus KE and Reichman JH International Public Goods and Transfer of Technology Under a Globalised Intellectual Property Regime*. Cambridge: Cambridge University Press.

⁷ Marumo L Nkomo 'South Africa's proposed intellectual property law: the need for improved regional cooperation' (2013) 46 *Comparative and International Law Journal of Southern Africa* at p. 259.

⁸ *Ibid* at p. 260.

⁹ *Ibid*.

the accelerating development of technology and globalisation in the 20th century.¹⁰ Through the progressions of digital technology, TCEs have become more accessible than ever before.¹¹ This has increased the market in ‘the developed world for the ‘exotic’, the ‘traditional’ and the ‘natural’.¹² The economic and social value of ‘community-generated artforms’ has grown continuously, whereas the community’s control over them has not.¹³ Advocates for TCE and TK protection claim that ‘knowledge of indigenous peoples is often used in ways that seem unfair, or is improperly employed as the basis of patent or copyright claims by others.’¹⁴ Simultaneously, the significance of the creative influence that folklore¹⁵ can have on modern art is significant. It is an essential part of artistic creativity and development to be influenced by other artists, genres and cultures.¹⁶ This shows, in particular in the genre of World Music, which describes the production of pop music that encompasses local music and folklore.¹⁷

IP Law and clear legal regulation are seen as instruments to create economic incentives to produce new works.¹⁸ At the same time, the basic ideas of the current international IP systems were created during the age of industrialisation in the global north and the colonising of the global south, and therefore ‘developed subsequently in line with the perceived needs of technologically advanced societies’ and not in line with the needs of indigenous people.¹⁹ On the contrary, in most countries, indigenous peoples were either forcefully separated from their community to adapt to the culture of the colonising country, enslaved or killed while ‘western powers had written Indigenous

¹⁰ Taubman op cit note 2 at p. 523.

¹¹ Spangler op cit note 2 at p. 710.

¹² Susy Frankel *Test Tubes for Global Intellectual Property Issues: Small Market Economies* Cambridge University Press (2015) at p. 187.

¹³ Susan Scafidi *Who owns culture?: Appropriation and authenticity in American law* Rutgers University Press (2005) p. 1.

¹⁴ Stephen R Munzer & Kal Raustiala 'The uneasy case for intellectual property rights in traditional knowledge' (2009) 27 *Cardozo Arts & Ent. LJ* at p. 39.

¹⁵ It must be noted that the term ‘folklore’ has a negative connotation to many indigenous communities. As this thesis analyses and compares different forms of cultural heritage and approaches in different jurisdictions with different cultural backgrounds, the broader term ‘folklore’ is sometimes used in its traditional sense to refer to cultures and TCEs in countries that have no colonial history. By no means does it intend to offend any individual, group or community.

¹⁶ See Peter Tschmuck *Creativity and innovation in the music industry* Springer (2006) at p. 227.

¹⁷ Ibid.

¹⁸ Spangler op cit note 2 at p. 715.

¹⁹ WIPO 'Traditional Knowledge and Intellectual Property – Background Brief' available at https://www.wipo.int/pressroom/en/briefs/tk_ip.html, accessed on 31.03.2023.

peoples out of international law'.²⁰ Consequently, indigenous peoples across the world have been suffering cultural loss as well as economic and political oppression for centuries.²¹

The recent economic exploitation of indigenous people's cultures in the 20th century was therefore enabled by historical developments that started much earlier and were hardly ever adjusted, even with the political independence of formerly colonised states or the abolishment of slavery.²² Old colonial power hierarchies often still exist through economic power in today's globalised world, and indigenous people have called 'on nation-states to "decolonize" laws, structures, and institutions that negatively impact them.'²³ The existing IP system has such a negative impact, as there is 'an imbalance in the fairness of how IP protects non-indigenous and indigenous works'.²⁴ That is why indigenous peoples and local communities (IPLCs) are demanding an equivalent level of protection for their intellectual property.

The central aim within the TCEs debate is, therefore, to fill the gaps the long-established IP system leaves open and to balance the rights of those who create cultural expressions and those who want to utilise them. Just how challenging this task is, already shows in the many attempts and accompanying difficulties of defining the subject matter. TCEs, which include tangible as well as intangible expressions, such as tales, songs, dances, ceremonies, designs or handicrafts, are considered to be essential to the formation of cultural and collective identities because they reflect the core values and beliefs that communities are built on.²⁵ They represent not only substantial expressions of indigenous peoples' culture but also of their deepest beliefs, spirituality, world views and even socio-economic identity.²⁶ The term TCEs is often used interchangeably with the terms 'folkloristic expressions' or 'expressions of

²⁰ Brendan Tobin 'The Law Giveth and the Law Taketh Away': The Case for Recognition of Customary Law in International ABS and Traditional Knowledge Governance' (2010) 17 *Policy Matters* at p. 16.

²¹ Ibid at p. 9; S James Anaya *Indigenous peoples in international law* Oxford University Press, USA (2004) , Papaarangi Reid et al 'Colonial histories, racism and health—The experience of Māori and Indigenous peoples' (2019) 172 *Public Health* op cit note 251 at p .2.

²² Reid et al op cit note 21 at p. 2.

²³ Angela Riley 'The Ascension of Indigenous Cultural Property Law' (2022) 121 *Michigan Law Review*

²⁴ Spangler op cit note 2 at p. 712.

²⁵ WIPO *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions: An Overview* (2015) available at

https://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf, accessed on 31.03.2023, at p. 15.

²⁶ Brigitte Vézina 'Traditional Cultural Expressions: Laying Blocks for an International Agreement' (2018) 169 *CIGI Papers*, at p. 1.

folklore' (EoF), and generally comprises all forms of cultural expressions worldwide and not only those of countries with a colonial history. Within international law-making efforts, the working terms TCEs, Genetic Resources (GR) and Traditional Knowledge (TK) are currently the three pillars that are used in attempting to protect and regulate traditional culture.²⁷ The discussion about the most appropriate terminology contributes significantly to the complexity of the process and is outlined in more depth below.²⁸

Although the protection of TCEs on a multilateral level has been discussed in a number of fora,²⁹ no international consensus has been reached up to this day.³⁰ Today, the central negotiation forum for a new international legal instrument is the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore at the World Intellectual Property Organisation (WIPO IGC).³¹ Being one of the specialised agencies of the United Nations (UN), WIPO aims 'to encourage creative activity, to promote the protection of intellectual property throughout the world.'³² Within this mandate, the Intergovernmental Committee seeks to develop a text-based agreement on the international protection of traditional knowledge, genetic resources, and folklore.³³ This agreement is meant to fill the current gaps in the international IP space that leave indigenous culture vulnerable to illicit exploitation of their TCEs. In the related field of Genetic Resources (GR) the negotiations have recently gained momentum, as a diplomatic conference was called for the year 2024, which puts an international agreement within reach. However, the negotiations on TCEs are not nearly as far progressed. The decades-long negotiations have not led to a consensus on TCEs and TK thus far, and the negotiating parties appear to be in a deadlock.

²⁷ A broad discussion of the terminology regarding traditional culture follows in Chapter Two. For an extensive description of the three categories of TCEs, GRs and TK see: WIPO 'Intergovernmental Committee (IGC)' available at <http://www.wipo.int/tk/en/igc/>, accessed on 31.03.2023.

²⁸ The term traditional knowledge is by some used as a collective term for TCEs, GR and TK and by others to describe traditional knowledge in its narrow sense only, see Chapter One, I.

²⁹ See Chapter Three, III. Historical Legal Context.

³⁰ Margo A Bagley 'Toward an Effective Indigenous Knowledge Protection Regime: Case Study of South Africa' (2018) *CIGI Papersat*, at p. 1.

³¹ WIPO 'Intergovernmental Committee (IGC)' available at <http://www.wipo.int/tk/en/igc/>, accessed on 31.03.2023; Vézina op cit note 14 at p. 1.

³² Convention Establishing the World Intellectual Property Organization of 1967, Preamble.

³³ WIPO IP, and GR, TK and TCEs: An Overview op cit note 25.

Through a three-fold legal analysis, this thesis evaluates the origins of this deadlock and develops a novel lowest common denominator approach between the parties within the IGC negotiations that are most at odds. Based on this common ground, it then develops suggestions for a realistic international instrument that fills the gaps existing IP law leaves open. The research follows an original three-dimensional approach: The analysed legal documents include existing international IP conventions as well as the consensus-finding process at the WIPO IGC, domestic laws of selected parties, and positions on the international draft law. Because the WIPO IGC is currently the only organisation which aims to create a multilateral instrument on TCEs, TK, and GR, the analysis of this thesis focuses on the negotiations within this forum.

II. CORE ISSUES

The central problem that this thesis revolves around is the lack of a consensus on a suitable legal protection mechanism for traditional cultures. Despite two decades of negotiations within the WIPO IGC, there is still no international consensus on feasible solutions for the protection of TCEs.³⁴ An analysis of arguments put forward by commentators and legal scholars has yielded a number of central legal and procedural issues that are the source of the slow-moving negotiations. These are being addressed briefly below and analysed in more detail throughout the thesis.

The first issue is created by the very nature of the subject matter, namely TCEs, and the lack of a concrete definition thereof. How these should be defined and how wide or narrow the term should be coined is not agreed upon. Deciding what should and what should not qualify as an expression of folklore forms the basis for all further discussions for new international instruments.³⁵

Secondly, when looking for a legal approach to regulate the use of TCEs, conventional IP law fails to suitably protect traditional culture.³⁶ Given the substantive proximity of TCEs to musical, literary or artistic materials, it is understandable to first turn to existing IP law regimes, particularly copyright law, in order to find a suitable

³⁴ See Chapter Three, I.

³⁵ See Chapter Two, I. and Chapter Three, IV. 2. (a).

³⁶ See Chapter Three, IV. 4. (d).

legal protection mechanism.³⁷ However, various characteristics of TCEs, such as their intangibility, their collective origin and intergenerational transfer, make them incompatible with copyright law, and only certain versions or adaptations are actually protected. In consequence, most TCEs currently fall in the public domain and are free to use for everyone. Thus, the question of whether or not the protection of indigenous expressions should be codified at all affects the boundaries of the public domain as we know it, which leads to fundamental differences in positions. A more detailed elaboration of the incompatibility of IP law and TCEs follows below.³⁸ It is because of these limits of existing IP law that the starting point for an international agreement is the establishment of a *sui generis*³⁹ approach.⁴⁰ While the opinions on the most suitable legislative framework differ, there is broad consensus on the need for culturally appropriate and predictable rules.⁴¹

When it comes to the consensus-finding process that is evaluated in this thesis, a significant obstacle is created by the number of conflicting policy objectives that infuse the negotiations.⁴² The participating parties follow vastly different policy approaches on a domestic level, which is being analysed in Chapter Four, and this often reflects in the international negotiations, which is being analysed in Chapter Five. Of particular importance is the search for a balance between protecting traditional culture on the one side and creative development on the other side. The role of TCEs as economic and cultural assets fortifies the need for conflict resolution even more.

³⁷ Wend Wendland 'Copyrighting Culture? Challenges and opportunities regarding the international protection of traditional cultural expressions' available at http://ip-unit.org/2019/multilateral-matters-3-copyrighting-culture-challenges-and-opportunities-regarding-the-international-protection-of-traditional-cultural-expressions/#_ednref5, accessed on 31.03.2023

³⁸ See Chapter Three IV. 4. (d).

³⁹ Latin for 'of its own kind' and in the legal context referred to new regulation systems that are created to take into account special objectives of a certain subject matter. In this context it refers to a new protection system for TCEs, which is IP similar but designed to take into account the special characteristics of TCEs and the particular needs of their holders.

⁴⁰ Oguamanam, Chidi 'Documentation and Digitization of Traditional Knowledge and Intangible Cultural Heritage: Challenges and Prospects' (2009) in In Toshiyuki Kono, ed., *Intangible Cultural Heritage and Intellectual Property: Cultural Diversity and Sustainable Development* at p. 362 ; Wendland op cit note 37.

⁴¹ RL Okediji 'Negotiating the public domain in an international framework for the production of genetic resources, traditional knowledge and traditional cultural expressions' (2017) *The WIPO intergovernmental committee negotiations: A history*. Routledge; Wendland, Wend 'Intangible Heritage and Intellectual Property: challenges and future prospects' (2004), *Museum International*, Vol.56 at p. 56.

⁴² See Chapter Three, IV. 4. (b).

Last but not least, the procedure of supranational negotiations adds a layer of complexity to the equation.⁴³ While the number of participating parties in multilateral negotiations has increased drastically, the rules of negotiation, dispute resolution, and consensus-finding have not, which leads to a slow-moving dynamic.⁴⁴ In light of coalition building, negotiation tactics, the complexity of related fora and deadlocked situations, it is very unlikely that consensus among all participating parties will be reached at all.

III. SCOPE OF STUDY

To outline the scope of this research, it is important to note that the protection of cultural heritage is generally approached from two angles. The first originates in heritage science and focuses on the preservation and safeguarding of cultural heritage from becoming extinct. The other one is embedded in law and seeks to find legal mechanisms to regulate and codify ownership of said cultural heritage and intellectual property. This thesis follows the second path and contributes to the body of research on the complex process of creating a multilateral instrument for the legal protection of TCEs by addressing the following main research question:

Within the supranational law-making process at the WIPO IGC concerning the legal protection of Traditional Cultural Expressions, where does consensus exist between the most conflicting positions, and how can this common ground be leveraged to conceptualise a legal framework that will form a realistic base for an international agreement?

The potential common ground is being developed through a threefold legal analysis with a focus on four specific parties. The analysis can be divided into three levels: In the first stage, the current gaps in TCE protection within international law are outlined, and the available multilateral dispute resolution tools and consensus-finding methods at the WIPO IGC are evaluated against the relevant theories and common practice.⁴⁵ In the second step, the domestic approaches in each selected jurisdiction as well as selected

⁴³ See Chapter Three, IV. 4. (c).

⁴⁴ Wend Wendland 'Multilateral Matters #11: "Consensus" in Multilateral Negotiations: What does it Mean and Does it Produce Effective, Wise and Durable Agreements?' available at <http://ip-unit.org/2021/multilateral-matters-11-consensus-in-multilateral-negotiations-what-does-it-mean-and-does-it-produce-effective-wise-and-durable-agreements/>, accessed on 31.03.2023.

⁴⁵ See Chapter Three.

customary law, are outlined.⁴⁶ The third stage evaluates international positions voiced at the WIPO IGC.⁴⁷

The analysed parties were selected based on their negotiating positions, which are most clearly in opposition to one another. These opponents are South Africa, as one of the jurisdictions clearly in favour of a comprehensive international instrument, the USA, being one of the countries most opposed towards a new instrument, and the European Union (EU), which positions itself in between the aforementioned. The fourth analysed party is the Indigenous Caucus, which represents indigenous Peoples and local communities (IPLCs) within the negotiations. My approach is based on the assumption that an examination and comparison of the most opposing positions in the negotiation process will produce a minimum set of intersecting concerns and incentives that may pave the way for an effective and successful international instrument.

All of the above seeks to determine a realistic overview of the obstacles and a potential solution to a consensus within the WIPO IGC. The analysis is focused on the negotiations at the WIPO IGC, as it is the only forum with a specialised mandate to find an international solution for the protection of TCEs on a legal basis.

1. Supporting Research Questions

Through carefully researching the following sub-questions, I sought an answer to my overall research question.

- What are the main procedural obstacles in the current negotiation process at the IGC?
- What consensus-finding and multilateral dispute resolutions methods are used at the WIPO IGC?
- What are the current approaches in substantive law taken on a domestic level in South Africa, the EU and the United States and what are approaches taken by indigenous customary law?
- What are key matters of substantive law that jurisdictions cannot agree on within the WIPO IGC?

⁴⁶ See Chapter Four.

⁴⁷ See Chapter Five.

- What is the common ground on matters of substantive law between the evaluated jurisdictions and the indigenous caucus?
- What is the conclusion of the findings of the evaluations above:
 - How could a consensus within the WIPO IGC be achieved?
 - How could a potential instrument reflect in substantive law?
 - Will the most effective solution be found in only one instrument for the protection of TCE & TK, as currently planned by the WIPO IGC? Are there other non-legal protection mechanisms that could be established?

Considering the obstacles of multilateral negotiations that the WIPO IGC is faced with, one cannot simply look at isolated questions of substantive law but must just as much take procedural considerations into account. Acknowledging that the negotiation dynamics suffer from 'geopolitical schisms'⁴⁸ and the lack of a shared momentum for finding an agreement, it becomes clear that the solution requires a holistic approach that looks at the multilateral negotiation reality and available dispute resolution methodology as much as at positions on substantive law.

After evaluating the common ground of the analysed jurisdictions, I use the results to develop suggestions for a new approach. My fundamental hypothesis is that a single treaty text for GR and TK & TCEs respectively with a newly developed *sui generis* framework alone, as it is currently pursued within the mandate of the WIPO IGC, will not be agreeable. Moreover, it would arguably not do justice to the complex interconnection of the respective objects of protection and, in addition to that, undermine their connection to orthodox IP regimes.⁴⁹ My research includes an examination of the extent to which matters of substantive law can and should be codified on a multilateral level and whether consensus can or must be found within the framework of the WIPO IGC.

The proposed outcomes of the research are, firstly, to develop a comprehensive understanding of the origins of what currently appears to be a deadlocked situation and, secondly, to advance knowledge of the current legal policies for the protection of TCEs in the evaluated jurisdictions. Thirdly, based on this knowledge, my aim is to develop

⁴⁸ Chidi Oguamanam 'Tiered or Differentiated Approach to Traditional Knowledge and Traditional Cultural Expressions: The Evolution of a Concept' (2018) *Ottawa Faculty of Law Working Paper* at p. 1.

⁴⁹ An extensive elaboration of the complexity of the legal questions that the WIPO IGC is faced with follows below, see Chapter Three.

common ground on the currently most debated legal questions at the WIPO IGC and to make suggestions for an international legal framework which serves heritage preservation and promotes a stronger cultural understanding worldwide.

2. Selection of analysed parties

This thesis seeks to find common ground between four of the divergent groups within the WIPO IGC. Despite very complex negotiation dynamics, certain tendencies of parties have emerged in the course of the process. To illustrate this, I compare representatives of the most opposing groups: South Africa for the African Group, the EU bloc of countries and the United States of America (USA) for Group B and lastly, the Indigenous Caucus, which represents the interest of several indigenous groups within the IGC.⁵⁰

South Africa represents one of the strongest *demandeur countries*⁵¹; not only do its representatives play an active role in the negotiation process, but they also request a comprehensive protection mechanism and want to empower indigenous communities and their role in the enforcement of the desired rights.⁵² The Indigenous Caucus is the strongest proponent for a sui generis solution and rejects the idea of forcing TCEs into preconceived ideas based on western IP law.⁵³ They especially emphasise the need for indigenous self-determination.

Some commentators have argued that for some countries, the sole reason for participating in the negotiations is to uphold the status quo.⁵⁴ Certain powerful states in the global north geopolitical bloc seem particularly determined to ensure that 'no outcome at the IGC will be a good outcome.'⁵⁵ The reason for this is primarily that most

⁵⁰ Wend Wendland 'Protecting indigenous knowledge: a personal perspective on international negotiations at WIPO' available at https://www.wipo.int/wipo_magazine/en/2019/06/article_0004.html#footnote2, accessed on 31.03.2023.

⁵¹ In international governance law a *demandeur* is generally understood as a party which 'forestall[s] or respond[s] to noncompliance or violation of international commitments, laws, and treaties.' In the context of the WIPO IGC the term describes countries who long for a strong protection mechanism for See: Kenneth W Abbott & Duncan Snidal 'Hard and soft law in international governance' (2000) 54 *International organization*.

⁵² WIPO Report of the 9th IGC Meeting, WIPO/GRTKF/IC/40/39/18 (2019) available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_39/wipo_grtkf_ic_39_18.pdf, accessed on 31.03.2023 at p. 20.

⁵³ WIPO 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders (WIPO Report on Fact-Finding Missions)' available at <https://www.wipo.int/publications/en/details.jsp?id=283&plang=EN>, accessed on 31.03.2023.

⁵⁴ Oguamanam op cite note 48 at p. 3.

⁵⁵ Chidi Oguamanam 'Ramifications of the WIPO IGC for IP and development' in *Protecting Traditional Knowledge* Routledge (2017) .

industrialised states do not want the current patent regime to be altered, which would be the case if a stand-alone treaty on the protection of traditional knowledge, genetic resources and folklore is implemented.⁵⁶ The USA, like many other countries in group B, is one of those states, which makes it an ideal jurisdiction to analyse in contrast to South Africa.⁵⁷ Group B rejects the idea of a binding international instrument for the most part.⁵⁸ Between those two extremes, there are numerous varieties of positions of *demandeur* and *non-demandeur* states, which, for example, agree on the necessity of an international treaty but disagree on one of the numerous substantive law questions, e.g. the question of who the rights-holder should be.⁵⁹ The EU bloc is more aligned with most industrialised states but nonetheless in favour of an international protection framework.

In addition to their different positioning within the negotiation process at the IGC, the selected countries have different legal structures. US and South African Laws are influenced considerably by the Common Law System, while most EU member states are civil law jurisdictions, which can lead to significant differences regarding the application of the law.⁶⁰ Therefore, which legislative model is considered to be the most suitable for the protection of TCEs will be regarded differently as well. The selected jurisdictions also differ in their cultural composition, as the EU only has very few indigenous communities and thus very limited direct exposure to the needs of indigenous peoples.⁶¹ The USA, however, owing to its colonial history, has a rather heterogeneous population and, because of numerous groups of Native Americans, contains a rich body of

⁵⁶ Yonah Seleti *International Architecture of the Protection of Indigenous Knowledge* (2019) at p. 12.

⁵⁷ Nancy Kremers 'Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Is US Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures' (2004) 15 *Fordham Intell. Prop. Media & Ent. LJ* at p. 61.

⁵⁸ As can be taken from various IGC meeting reports.

⁵⁹ See for example India or the Philippines, who want the state (in which the respective indigenous community has their residence) to be the rights-holder of TCEs whereas Bolivia and Ecuador want the communities themselves to take ownership in their TCEs. Taken from Observation of IGC 45 in Geneva, December 2022.

⁶⁰ Natalie Löw *Der Schutz ausübender Künstler bei musikalischen Darbietungen im deutschen und englischen Recht: eine rechtsvergleichende Studie* Universitätsbibliothek Giessen, 2009) at p. 2.

⁶¹ The most widely accepted definition of indigenous peoples describes them as 'those which, having a historical continuity with 'pre-invasion' and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those countries, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identities, as the basis of their continued existence as peoples, in accordance with their own cultural pattern, social institutions and legal systems'. , see: Larry Garber & Courtney M. O'Connor 'The 1984 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities' (1985) 79 *American Journal of International Law*.

indigenous culture, which makes an analysis of their rejection of an international protection regime all the more relevant.

My hypothesis is that a realistic solution for the protection of TCEs can only be found if the common ground on matters of substantive law between the positions of South Africa, the EU, the USA and the indigenous caucus is found. Where these findings cannot be established through the comparison of the selected parties, I expand my analysis by taking other representatives of the respective groups into account, which advance the same or similar positions.

3. Outline of legal analysis

The research approach to evaluate the common ground between the aforementioned parties is based on a three-fold legal analysis. The three stages look at a procedural context, a local context as well as an international context. Each tier is described below, and the respective criteria for evaluation are outlined.

Stage	Subject of Analysis
Procedural Level (Chapter Three)	Assesses the consensus-finding methods and dispute resolution tools at the WIPO IGC against common practice.
Local Level (Chapter Four)	Evaluates specific local context for the selected parties by analysing domestic law and selected customary law.
International Level (Chapter Five)	Evaluates each party’s respective positioning within the WIPO IGC negotiations with regard to specific draft articles.

Table 1: The three stages of the legal analysis performed in this thesis

The first tier of the analysis, which can be found in Chapter three, consists of three separate but related sections. It starts with legal doctrinal research, covering the currently existing international legal instruments in the IP space and their inadequacy and shortcomings in protecting TCEs. This serves to highlight why there is a need for a new international agreement and the search for common ground in the first place. Following this, the chapter presents an outline of the history, current mandate, procedure and status quo of the WIPO IGC. This illustrates the current state of negotiations and how the WIPO IGC seeks to close the gaps in international law. The chapter concludes with an analysis of the consensus-findings process at the WIPO IGC to

understand what the current procedural approach to finding common ground is. This section starts with a definition of the term consensus, a description of what is currently striven for at the WIPO IGC and includes a recommendation for a new definition of the term by me. Following this, methods of alternative dispute resolution and multilateral negotiation are discussed, and the approach chosen by the WIPO IGC is evaluated against dispute resolution theories and common practice.

The second part of the analysis can be found in Chapter Four. On this level, the individual approaches on a domestic level are being analysed.⁶² This is done to get a better understanding of the background of the overall international policies of the respective parties. Specifically, I determine the extent of available legal instruments on a domestic level in South Africa, the USA and the EU. In addition, I provide examples of selected customary law from across the world that regulates TCEs. This serves to show how indigenous knowledge systems (IKS) often have their own approaches to regulating IP and how this could be incorporated into a final international instrument. The analysis of domestic law - in the EU, the US and South Africa follows the same theoretical approach for every jurisdiction. I developed a line of five criteria which determine the nature of the national approach:

Criterion	Relevant Questions
1. Existence	Does the jurisdiction have a legal instrument that is specifically aimed at the protection of TCEs on a national level?
2. Category	If an instrument exists, is it a sui generis instrument specifically created for TCEs, or does it explicitly extend the existing IP system towards IPLCs and TCEs?
3. Alternative	If no such instrument exists, does the existing IP system indirectly protect (parts of) TCEs?
4. Effect	How efficient is the existing system? How is it perceived by legal experts and indigenous people? How does it protect against the unauthorised use/misappropriation of TCEs?
5. Position	Is there a national policy that determines the positioning towards an international instrument for the protection of TCEs?

Table 2: Evaluation criteria for national legal approaches (Chapter Four)

⁶² See Chapter Four.

The third tier of the analysis can be found in Chapter 5. At this stage, the parties’ respective positions on the international draft legislation are being analysed.⁶³ This serves to establish a comprehensive understanding of each party’s specific ideal outcome, which forms the basis of the common ground development in the next tier. The analysis is based on each party’s comments concerning specific draft articles.⁶⁴ The selected sections I am comparing are those that produced the most disagreement in the analysed time frame. These include the draft articles regarding the Use of Terms, Objectives, Eligibility Criteria, Scope of rights, Exceptions and Limitations, Beneficiaries, as well as the role of customary law. In addition, I compare the different negotiating approaches. This analysis was led by the following considerations:

Consideration 1	Has the party commented on the specific draft article?
Consideration 2	If yes, what is the party’s position on the draft article?
Consideration 3	Does this position align with other parties within the IGC?
Consideration 4	Does this position align with their official international positioning?

Table 3: Evaluation criteria for the position analysis regarding specific IGC draft articles (Chapter Five)

IV. ASSUMPTIONS AND HYPOTHESIS

My starting point for a consensus is to find a minimum standard by comparing jurisdictions that are part of or represent opposing negotiating blocks within the IGC.⁶⁵ The IGC currently holds the only workable approach to finding a multilateral solution while at the same time being close to a negotiation deadlock. Only by comparing stakeholders with seemingly irreconcilable incentives and preferred outcomes is it possible to identify a realistic common ground. In this context, a new perspective is needed. My assumption about a feasible outcome is as follows:

Firstly, the process has been lengthy due to parties’ having fundamentally different approaches to the law that is being developed. While some try to remain within the boundaries of the existing IP categories, others are trying to create something new that is aimed at the unique features of TCEs. Reconciling these approaches in substantive law

⁶³ See Chapter Five.
⁶⁴ The Protection of Traditional Cultural Expressions: Draft Articles, Facilitators’ Rev., WIPO/GRTKF/IC/40/4 of 2019 (2019 TCE Draft Articles).
⁶⁵ The EU Bloc of countries comprises the industrialised EU member states, whereas South Africa is part of the African Group, see: Oguamanam op cit note 48 at p. 3.

is a lengthy process because the two systems contain elements that are mutually exclusive.

Secondly, multilateral negotiations are bound by rules of procedure that contribute to the slow-moving progress. This is mainly because the existing negotiation framework and multilateral dispute resolution mechanisms were established at a time when the number of signatories to international conventions was significantly lower.⁶⁶ Thus, the process is no longer fit for the high number of parties negotiating today. This misalignment of political realities and multilateral procedural framework creates a stalling effect that is yet to be addressed.

Thirdly, based on the two assumptions above, my hypothesis is that an agreement, as it is currently striven for, will not produce an instrument that will gain acceptance by all parties involved. Instead, one should consider a combination of approaches that include the introduction of an instrument with a limited number of parties, the extended use of existing IP tools for commercial and newly created TCEs as well as the use of non-legal measures like education programs for users and rights-holders of indigenous culture. It is expected that a combination of the elements above will create a faster and more efficient way of protecting indigenous communities and their culture.

V. RESEARCH GAP

On the international level, there is a broad body of literature on the protection of indigenous knowledge (IK). A remarkable amount of work has been done to analyse the legal protection of TCEs in selected jurisdictions or regions. However, these studies either focus on specific regions or compare jurisdictions with similar geographic and cultural backgrounds.⁶⁷ Little to no research has been done on the protection of expressions of folklore in European countries. Other studies with more holistic

⁶⁶ For example, the first version of the Berne Convention was signed by only ten parties with similar economic interests, see: WIPO 'Contracting Parties to the Berne Convention' available at https://wipolex.wipo.int/en/treaties/ShowResults?start_year=ANY&end_year=ANY&search_what=C&code=ALL&treaty_id=15, accessed on 31.03.2023

⁶⁷ See for example: Chidi Oguamanam 'A Critical Examination of the African Legal Framework for Indigenous Knowledge' (2023) *Journal of African Law*; Enyinna Sodienye Nwauche *The sui generis and intellectual property protection of expressions of folklore in Africa* North-West University (South Africa), Potchefstroom Campus, 2015); Anna Friederike Busch *Protection of Traditional Cultural Expressions in Latin America* Springer (2015); Christoph Antons 'Traditional cultural expressions and their significance for development in a digital environment: examples from Australia and Southeast Asia' (2008) *ElgarOnline*; Eva Gutierrez 'Geographical indicators: a unique European perspective on intellectual property' (2005) 29 *Hastings Int'l & Comp. L. Rev.*

evaluations were carried out over a decade ago and in consequence, did not include recent developments and findings of research conducted in the past ten years.⁶⁸

There are, without question, various positions on the appropriate protection of indigenous knowledge at this point, not least because of the long negotiation process at the WIPO IGC without a concrete outcome. However, all of these approaches discuss the very last stage of the desired outcome: the optimal design of an instrument in the form of substantive law, namely the question of how the desired *sui generis* regime shall be moulded.⁶⁹ Furthermore, most of these studies focus primarily on traditional knowledge in its narrow definition, thus on technical, ecological or medical knowledge and practices related to biodiversity and agriculture.⁷⁰ In-depth research on equivalent solutions for TCEs in their narrow form is still missing.

My research seeks to fill these gaps and contribute to the existing research on international folklore protection. Not only did I analyse approaches taken in jurisdictions that are located in different geographical parts of the world, but I also focused on TCEs as a neglected part of indigenous culture in academic legal research in comparison to the more popular field of traditional knowledge in its narrow sense. In addition, I analysed the IGC process and its legal framework as such to evaluate whether the procedure of multilateral law-making is still fit for today's international political reality.

VI. METHODOLOGY & CHAPTER OUTLINE

⁶⁸ Jana C Schlinkert *Lebendige folkloristische Ausdrucksweisen traditioneller Gemeinschaften: rechtliche Behandlungsmöglichkeiten auf internationaler Ebene* BWV Verlag (2007) ; Siegfried Wiessner 'Rights and status of indigenous peoples: a global comparative and international legal analysis' (1999) 12 *Harv. Hum. Rts. J.* SK Tripathi 'Intellectual property and genetic resources, traditional knowledge and folklore: international, regional and national perspectives, trends and strategies' (2003) 8 *Journal of Intellectual Property Rights*.

⁶⁹ See for example: Vézina op cit note 26; Daphne Zografos *Origin Related Intellectual Property Rights as Best Policy Option for the Protection of Traditional Cultural Expressions* 2008); Oguamanam op cite note 48; Wendland op cit note 37; Coenraad Visser 'Some thoughts on making intellectual property work for traditional knowledge' (2002) 14 *S. Afr. Mercantile LJ*; Molly Torsen 'Intellectual property and traditional cultural expressions: a synopsis of current issues' (2008) 3 *Intercultural Hum. Rts. L. Rev.*; Elmien Wilhelmina J du Plessis & Caroline B Ncube 'Indigenous Knowledge & Intellectual Property' (2016) *Juta*; Michael F Brown *Who owns native culture?* Harvard University Press (2009) ; Graber & Nenova op cit note 6.

⁷⁰ See for example: Oguamanam op cit note 48; Andre Van der Merwe 'The old and the new: a concise overview of the Intellectual Property Laws Amendment Act: feature' (2014) 28 *De Rebus*; Nkomo op cit note 7; Charles A Masango 'Indigenous traditional knowledge protection: prospects in South Africa's intellectual property framework?' (2010) 76 *South African Journal of Libraries and Information Science*; Gutierrez op cit note 67; Aman Gebru 'The Global Protection of Traditional Knowledge: Searching for the Minimum Consensus' (2017) 17 *J. Marshall Rev. Intell. Prop. L.*; Graham Dutfield *Protecting traditional knowledge: pathways to the future* International Centre for Trade and Sustainable Development (ICTSD) (2006) .

The thesis is divided into seven chapters. The vast majority of the work undertaken is based on desktop research. The research is based on the law and materials available as of March 2023.

Chapter Two, which provides an in-depth knowledge concept of TCEs by presenting various case studies from across the world, is primarily based on journal articles, conference reports, government reports, books and dissertations, as well as online sources.

Chapter Three contains the first stage of the legal analysis performed in this thesis and begins with an outline of the current protection gap for TCEs in existing international law. This section is primarily based on legal documents, journal articles, books and dissertations. This is followed by an overview of the status quo at the WIPO IGC and an evaluation of the negotiation procedure in place. This procedural evaluation is set up in a two-fold manner: After first providing an overview of multilateral consensus-finding methods and multilateral dispute resolution tools, the implemented rules of procedure and approaches chosen by the WIPO IGC are being analysed. This section is primarily based on WIPO IGC reports and working documents, online sources, as well as journal articles.

Chapter Four contains the second stage of my analysis and includes a comparative evaluation of current legal approaches taken in the different jurisdictions. The chapter is mainly based on primary sources like national statutes, draft legislation and government policy statements, as well as reports of the sessions of the WIPO IGC. Secondary sources such as books, journal articles, academic theses and newspaper articles are being used as well.

Chapter Five presents the third stage of my analysis and contains a comparison of the different positions on the draft provisions which are currently negotiated at the WIPO IGC. The chapter consists exclusively of WIPO IGC meeting reports and transcripts, as well as documents that were introduced by the different delegations for the respective meetings. The analysed documents published by the IGC are not exhaustive on all the positions analysed in this thesis. This is mainly because parties make statements on selected issues that they deem most important and not on every single issue that is still unresolved. I made enquiries about the existence of general

policy statements that would fill the gaps that the meeting reports leave open. However, these requests were denied, as the requested information is subject to confidentiality, not to be shared with other parties or the public.

Chapter Six presents the findings of my analysis and describes the common ground between the parties regarding each draft provision based on the comparative analysis in Chapter Five. This is complemented by suggestions made by the Chair of the IGC meetings as well as the IGC facilitators, as they represent an essential part of the dispute resolution procedure of the IGC and simultaneously incorporate neutral suggestions of experts in the field. Based on the entire threefold analysis of this thesis, the chapter then presents detailed recommendations for each draft provision and makes several suggestions for an amendment of the consensus-finding procedure.

The entire desktop-research outlined above was complemented by an in-person observation of the 45th IGC Meeting (IGC 45) in Geneva, Switzerland. This included the participation in the plenary sessions as an accredited observer to find out whether my assumptions about the process based on the analysis of transcribed meeting reports could be confirmed in-person.

Chapter Seven concludes the thesis by answering the research questions, reflecting on the assumptions and hypothesis, suggesting ideas for further research and summarising the suggestions for a possible way forward.

VII. KEY OBJECTIVES OF THIS RESEARCH

The first objective of this research is to contribute towards a breakthrough in the search for a multilateral instrument for the protection of TCEs. The negotiations at WIPO and other fora have been taking place for over 60 years. Yet, despite numerous attempts made, so far, no consensus has been reached. Through the introduction of the new approach outlined above, this thesis sought to identify possible solutions for what currently appears to be a truly deadlocked situation in the pursuit of protecting TCEs and indigenous knowledge.

The second objective is to create a system that empowers IPLCs in their self-determination and their right to manage their knowledge systems and TCEs as they deem fit. Due to centuries of colonial oppression, most legal systems existing today do not cater for indigenous communities, and their actual needs are often not met. I want to suggest a system that is all-encompassing and not purely led by economic incentives of non-indigenous entities.

Simultaneously, the third incentive of this thesis is to support creative innovation and development. While it is often believed that development and cultural preservation are mutually exclusive, I do not think this to be true. As Susy Frankel put it: ‘The relationship between innovation and intellectual property is precarious because too much intellectual property can curb innovation, whereas too little intellectual property may create barriers to innovation.’⁷¹ A typical phenomenon in the field of intellectual property law is that regulatory gaps – like the one identified in the area TCEs – lead to legal uncertainty, which can dampen creativity and frustrate new developments. For instance, new musical genres could emerge from the use of old traditional or folkloristic music, as long as the rights-holders are sufficiently respected and reimbursed, and creators do not fear legal repercussions resulting from possible infringement claims.

Lastly, finding a legal protection mechanism for TCEs is directly aimed at effective heritage preservation. Folklore forms an essential part of the self-perception and identification of every cultural group. It shows in almost every aspect of life: practising religious rituals, performing traditional celebrations, demonstrating affiliation or passing on traditions and group-specific history. As such a relevant part of a group’s heritage, the regulation of folkloristic expressions within an appropriate framework will have a tremendous effect on their preservation. With this contribution, I strive to promote a stronger worldwide cultural understanding.

⁷¹ Frankel op cit note 12 at p. 69.

CHAPTER TWO

Traditional Cultural Expressions and Policy Objectives of Indigenous Peoples

This chapter provides in-depth insights into the complexity and diversity of TCEs across the world and describes the central problems that accompany their legal regulation. After outlining the current approaches to a definition and appropriate terminology, a number of different case studies are presented in order to highlight the diverse nature of TCEs. These examples also highlight for each case why existing IP law is not sufficient for the protection against unauthorised use of the respective expression. Following this, the main policy objectives of indigenous peoples are outlined to indicate what a future instrument should place focus on to close existing gaps.

I. WHAT ARE TRADITIONAL CULTURAL EXPRESSIONS AND FOLKLORE?

There are several terms that have already been used to describe the subject matter of this thesis. They range from 'indigenous knowledge', 'traditional knowledge', 'indigenous expressions', and 'indigenous heritage' to 'native culture', 'intangible and tangible cultural heritage' up to the now most commonly used terms of 'traditional cultural expressions' and 'expressions of folklore'.⁷² They all describe the living culture and knowledge of a group which has been passed on from generation to generation and forms part of a community's identity.⁷³ Definitions are plentiful, but all share those three main characteristics relating to a time, space, and social context.⁷⁴ The quintessential element for IPLCs is the role of TCE as a form of self-identification.⁷⁵

⁷² Zografos op cit note 69; du Plessis & Ncube op cit note 69.

⁷³ Nkomo op cit note 7 at p. 261.

⁷⁴ Luminița Olteanu 'Riding on the Coat-Tails of Traditional Cultural Expressions' available at accessed on at p. 7.

⁷⁵ Christian P. Arnesen 'Protection of traditional cultural expressions: an EU perspective' (2014) 9 *Journal of Intellectual Property Law & Practice* p. 390.

At the WIPO IGC, Traditional Cultural Expressions, together with Traditional Knowledge (TK) and Genetic Resources (GR), form the predominantly acknowledged categories for the legal protection of indigenous and traditional culture.⁷⁶ The three fields have been examined as different but related areas. Traditional Knowledge is used by some as the general term for the entire field of TK, Genetic Resources and Traditional Cultural Expressions. However, in its narrow sense, this term only refers to technical knowledge, such as traditional ecological or medical knowledge and practices related to biodiversity and agriculture.⁷⁷ Despite their close relationship and their similarities, from an IP standpoint, it is essential to distinguish TK from TCEs because the respective characteristics raise distinct questions which require different solutions.⁷⁸ As *Hamilton* describes it very pointedly:

‘TK and TCE are not forms of intellectual property protection themselves, but are instead, an international acknowledgement of indigenous knowledge systems. [Accordingly, there is not one ideal intellectual property right that can protect the entire penumbra of TK and TCE. [...] TK and TCE are broad definitions, and it would be difficult to ascertain which intellectual property right would work best for both.’⁷⁹

This thesis primarily addresses the protection and preservation of TCEs as a specific sub-category and focuses on issues related hereto. The working term used at the WIPO IGC refers to TCEs as ‘tangible and intangible forms in which traditional knowledge and cultures are expressed, communicated or manifested.’⁸⁰ They include but are not limited to traditional music, performances, chants, narratives, names and symbols, handicrafts, designs and architectural forms.⁸¹ In this thesis, the term TCEs and EoF are used interchangeably to describe all manifestations of cultural traditions all over the world⁸²,

⁷⁶ WIPO, TCE Overview op cit note 25.

⁷⁷ WIPO *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions / Expressions of Folklore* (2022) available at https://www.wipo.int/edocs/pubdocs/en/tk/785/wipo_pub_785.pdf, accessed on 31.03.2023, at p. 6.

⁷⁸ *Ibid* at p. 27.

⁷⁹ Rachel Hamilton 'For us, by us, protect us: An argument for better intellectual protection of indigenous fashion' (2021) 30 *Southern Law Journal* at p. 2.

⁸⁰ WIPO 'Glossary: Key Terms related to intellectual property and genetic resources, traditional knowledge and traditional cultural expressions' available at <https://www.wipo.int/tk/en/resources/glossary.html#48>, accessed on 31.03.2023, [available at <https://www.wipo.int/tk/en/resources/glossary.html#48>].

⁸¹ Wendland op cit note 37.

⁸² The term folklore is used in its broadest sense, covering all forms and expressions of cultural heritage in different jurisdictions all over the world, including those of western civilisations without indigenous groups.

whereas the term indigenous expressions are used specifically for cultural traditions of indigenous communities.⁸³

II. ILLUSTRATIVE CASE STUDIES ON THE DIVERSITY OF TCES

It is essential to understand just how broad the range of existing TCES is because such broadness contributes to the complexity of the ongoing international negotiations. As *Christoph Antons* put it:

“TCES embrace all aspects of tradition and a very wide range of different traditional cultures ranging from what remains of such so-called “tribal” cultures via the surviving cultures of vanished feudal kingdoms in Southeast Asia (such as the Javanese and Balinese culture) to well established traditional expressions as part of national mainstream cultures.”⁸⁴

For this purpose, this chapter outlines a selection of examples and case studies. They range from tangible to intangible expressions and from legal cases with significant public attention to ones that have barely been mentioned before. In order to highlight the need for an international solution, this section illustrates diverse cases from different jurisdictions across the world.

This section also serves to highlight common concerns that TCE holders share, despite the difference in location, culture, and individual cases. The main reoccurring themes that emerge are unauthorised and uncompensated uses of TCES, misappropriation of TCES, the use of TCES in a product or service by someone outside of the community, the erroneous grant of intellectual property rights over traditional cultural expressions and the conflict of western IP principles with indigenous customs and concepts of ownership.

1. Habesha Community vs Alexander Mc Queen: the *Kaba* gown

In 2017 the British luxury fashion house Alexander McQueen introduced a black velvet jacket with gold embroidery, which was advertised at a price of £4,895. Shortly after, the label was accused of cultural appropriation because the jacket has many distinct similarities to a ceremonial gown from the Horn of Africa.⁸⁵ Hundreds of members of the Habesha community from Eritrea and northern Ethiopia claimed the said jacket was an

⁸³ Indigenous Peoples being defined as ‘original settlers of a given region, in contrast to groups that have settled, occupied or colonized the area more recently’, see: Douglas E Sanders 'Indigenous peoples: Issues of definition' (1999) 8 *International Journal of Cultural Property*.

⁸⁴ Antons op cit note 67 at p. 8.

⁸⁵ Olteanu op cit note 74 at p. 16.

almost exact copy of the *Kaba*, a traditional gown that orthodox Habeshas traditionally wear on their wedding day.⁸⁶ The jackets are distinctive in the way that they have gold embroidered detailing on the collar and the lapels, as well as on a stripe down the front on both sides. The original post by Alexander McQueen did not include credit or acknowledgement that it was inspired by the Habesha community. It simply describes it as a 'black velvet ceremonial jacket with *Zardozi* embroidery and gold bullion embroidered sunflowers.'⁸⁷ *Zardozi*, however, simply describes a type of embroidery technique found in several countries in the middle east, India and Central Asia.⁸⁸ Members of the Habesha community reacted with fury and demanded acknowledgement of their community. This case is a prime example of several of the shared themes, including the misappropriation of the *Kaba* and its use as a product outside of the Habesha Community.

2. Native Americans vs *Washington Redskins*: TCEs as Sports Mascots

Another example of the misappropriation of indigenous expressions and the erroneous granting of IP rights on TCEs is the use of Native American heritage for names and mascots for sports teams. This practice can be found in countries all over the world, yet it mostly occurs in North and South America. It is heavily criticised because the connotations used by sports teams generally suggest racist stereotypes.⁸⁹ The most famous case that created legal battles over centuries was created by the registration of US trademarks by the National Football Team, previously called *Washington Redskins*.⁹⁰ The trademarked logo contained the profile of a Native American man with his traditional head dress. The trademarking of this logo, which appropriated a sacred cultural expression of Native Americans, was met with wide criticism from the larger Native American community in the United States.⁹¹ They claimed that the 'marks depict

⁸⁶ Imogen Blake 'Alexander McQueen is accused of 'cultural appropriation' over a £4,895 black velvet jacket that looks VERY similar to a ceremonial gown from Ethiopia and Eritrea' available at <https://www.dailymail.co.uk/femail/article-4455754/Cultural-appropriation-row-Alexander-McQueen-jacket.html>, accessed on 31.03.2023

⁸⁷ Perez Hilton 'Alexander McQueen Is Being Slammed For Cultural Appropriation Because Of this Jacket!' available at <https://perez Hilton.com/alexander-mcqueen-cultural-appropriation-jacket/>, accessed on 31.03.2023

⁸⁸ Wikipedia 'Zardozi' available at <https://en.wikipedia.org/wiki/Zardozi#References>, accessed on 31.03.2023

⁸⁹ Rosemary J Coombe *The cultural life of intellectual properties: Authorship, appropriation, and the law* Duke University Press (1998) at p. 187.

⁹⁰ *Pro-Football, Inc. v. Harjo*, 415 F.3d 44 (D.C. Cir. 2005) 2005 .

⁹¹ Kimberly Pace 'The Washington Redskins case and the doctrine of disparagement: How politically correct must a trademark be' (1994) 22 *Pepperdine Law Review* at p. 12.

Indians in a racist and degrading fashion and that they perpetuate demeaning stereotypes.⁹² Others even spoke about creating imagery of 'bloodthirsty, warlike savages' when thinking about Native Americans.⁹³

While the registrations incorporated 'TCEs pertaining to the history of Native Americans', the latter was never consulted when the brand was founded.⁹⁴ On the contrary, when the team officially started using the name and logo in 1933, Native Americans attempted to convince the owner of the sports club to change both name and logo through demonstrations, boycotts and protests.⁹⁵ Only after many legal proceedings and nearly a century later, the *Washington Redskins* changed their name in the year 2020 after immense public pressure.⁹⁶ Not only did the registration and long-term use violate sacred cultural goods, but it was aimed at achieving 'specific commercial goals via extensive sales of team merchandise, for example.'⁹⁷ In an estimation from 1992, the logo, which shows a Native American with his traditional headdress alone, was valued at more than US\$ 1 million.⁹⁸ The misappropriation and commercial exploitation of Native American heritage in sports logos is a widespread phenomenon, especially in North and South America. Other examples from the US are the *Kansas City Chiefs* in the National Football League, as well as *Cleveland Indians* and *Atlanta Braves* in the Major League Baseball, and *Chicago Blackhawks* in the National Hockey League. In Canada, the *Edmonton Eskimos* football team also announced a change of their name in 2020 because the term is considered offensive by the *Inuit*, the indigenous people of the Canadian Arctic.⁹⁹ In Brazil and Paraguay, numerous teams are named after the *Guarani* people, who are indigenous to Paraguay, Brazil, Argentina, Uruguay and Bolivia.¹⁰⁰ While they form the largest indigenous group in Brazil, they are considered one of the most vulnerable Indigenous groups in the world.¹⁰¹ Several clubs

⁹² Ibid.

⁹³ Coombe op cit note 89 at p. 187.

⁹⁴ Olteanu op cit note 74 at p. 9.

⁹⁵ Pace op cit note 91 at p. 13.

⁹⁶ Scott McDonald 'Washington Redskins Urged to Lose Name, or Millions in Sponsorships' available at <https://www.newsweek.com/washington-redskins-urged-lose-name-millions-sponsorships-1514894>, accessed on 31.03.2023.

⁹⁷ Olteanu op cit note 74 at p. 9.

⁹⁸ Coombe op cit note 89 at p. 377.

⁹⁹ Callum Trenaman 'Global sport's problem with the appropriation of Indigenous culture' available at <https://edition.cnn.com/2021/01/18/sport/indigenous-culture-in-global-sport-cmd-spt-intl/index.html>, accessed on 31.03.2023.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

do not only use the name of an indigenous tribe but also a caricature of an indigenous person as a mascot.¹⁰²

3. *T'nalak* textiles of the T'boli people: Weaving Craftsmanship from the Philippines

A case that displays the conflict of indigenous ownership concepts with copyright and other western IP law is the one of the T'boli people and their distinct weaving products. The T'boli people are indigenous to the South of the Philippines, and like many indigenous groups in the country, they are known to have their own specific weaving style and a small associated weaving industry.¹⁰³ Products include not only textiles but also sleeping mats and baskets, and all raw materials are sourced from the local area.¹⁰⁴

The T'boli are known for creating the *T'nalak*, which is a textile made entirely from the raw material *abaca*. It usually displays geometric patterns woven in black, white and red colours.¹⁰⁵ The design follows specific concepts and principles that are said to resemble the traditional music of the tribe.¹⁰⁶ The central feature of the process, though, is that the original idea presents itself to the weavers in their dreams.¹⁰⁷ Those scenes are then woven into the *T'nalak*, illustrated with a pattern that is influenced by natural surroundings as well as abstract elements of T'boli culture.¹⁰⁸ Opposed to the idea-expression dichotomy of copyright law, the central aspect of this TCE is that the idea and the expression are one.¹⁰⁹ What is more, the patterns sometimes vest in intergenerational transfers when dreams are being retold by ancestors and consecutively woven into the fabric.¹¹⁰ This makes it very difficult to determine the question of ownership of the artwork.

The entire process of creating the *T'nalak* takes a significant amount of time and follows particular steps dictated by tradition and rituals.¹¹¹ While the weaving is done

¹⁰² *Ibid.*

¹⁰³ Maria Ester Vanguardia 'Dreams for Sale: Traditional Cultural Expressions (TCEs) and Intellectual Property Rights of the Indigenous Pragmatic Group as Exemplified by the Dreamweavers' (2011) 86 *Phil. L.J.* at p. 407.

¹⁰⁴ *Ibid.*

¹⁰⁵ Chester Cabalza *The T'boli: Songs, Stories and Society - A descriptive study on the T'boli language, lifestyle, marriage, political system and religion* (2013) University of the Philippines, at p. 1.

¹⁰⁶ Manolete Mora 'TUNE AND TEXTILE: Interrelatedness in the Music and Weaving Arts of the T'boli, Philippines' (2012) 9 *Humanities Diliman Journal* at p. 1.

¹⁰⁷ Vanguardia op cit note 103 at p. 407.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ Mora op cit note 106.

exclusively by women, the production is considered a family project.¹¹² The *T'nalaks* themselves have a high spiritual value: For a long time, it was forbidden to step on them or to cut them¹¹³, and they were stored safely until given as gifts or displayed for special occasions like childbirth¹¹⁴ or weddings.¹¹⁵ However, these sacred rules have been eased since the *T'nalak* started to become the major source of income for many T'boli families. The finished pieces are either displayed for tourists or sold or shipped abroad. However, the economic value of the *T'nalaks* also shows itself through their use in designs and products by international designers.¹¹⁶ The T'boli people have sought legal protection and acknowledgement of their cultural heritage and property. Specifically, they 'want to be compensated for their contribution to the artwork in the form of licensing agreements, and the exclusion of non-indigenous competitors from the market by preventing unauthentic products from being marketed as made by indigenous people.'¹¹⁷

4. The South African Film *The Wound (Inxeba)*

A recent case from South Africa illustrates how the protection of TCEs can collide with freedom of expression and censorship. It illustrates the conflict between indigenous self-determination and IP law

In 2017, the South African film *The Wound (Inxeba)* was released. The plot is centred around a hidden sexual relationship between two men in the context of the traditional initiation ritual for Xhosa men. The well-established tradition, called *Ulwaluko* in isiXhosa, is a secretive, month-long ceremony for teenage boys and young men who are coming of age.¹¹⁸

The film was highly anticipated because it was believed to be one of the first works that addressed 'aspects of homoeroticism and homosexuality in traditional African

¹¹² Men are in charge of gathering and preparing the material, sourced from the abaca plants; see: Vanguardia op cit note 103 at p. 408.

¹¹³ It was believed cutting the cloth would bring sickness to the weaver or the person cutting it, see: Vanguardia op cit note 103 at p. 409.

¹¹⁴ When used as a prenatal covering, it was believed to contribute to the baby's health, see: Vanguardia op cit note 103 at p. 409.

¹¹⁵ Ibid at p. 409.

¹¹⁶ Ibid at p. 416.

¹¹⁷ Ibid at p. 415.

¹¹⁸ Wikipedia 'Ulwaluko' available at <https://en.wikipedia.org/wiki/Ulwaluko>, accessed on 31.03.2023

communities.¹¹⁹ It had been screened at multiple international film festivals and was selected as the South African entry at the 90th Academy Awards in the category for 'Best Foreign Language Film.'¹²⁰

At the same time, the film has been the subject of controversy and has received a lot of criticism. At the local premiere, violent protests interrupted, and some of the cast and crew received death threats.¹²¹ Xhosa people especially claimed that the film portrayed secretive initiation rituals that qualify as sacred culture.¹²² Some critics claimed that while 'Xhosa people have asked that this one thing be left alone [...], Trengove decided "No. I want this, I shall take it, package it and profit from it."¹²³ Other commentators have argued that the tradition of *Ulwaluko* is not secret and that the criticism was an expression of the homophobic notions of traditional Xhosa culture.¹²⁴ The director himself, John Trengove, is a South African national but not Xhosa. He claimed that he had consulted with Xhosa elders prior to shooting the film.¹²⁵

After months of protests by Xhosa leaders, the South African Film & Publication board changed the original rating.¹²⁶ The film, which was originally restricted to audiences over the age of 16, was given an X18 rating, which classifies the film as pornography and restricts screenings to "designated adult premises".¹²⁷ The producer of the work appealed this decision which led to the decision being overturned by the Gauteng High Court in June 2018.¹²⁸ The court ruled that designation as pornography

¹¹⁹ Flair Donglai Shi 'Of course the gay has to die: Why the liberal white audience doesn't get the wound' available at <https://newbloommag.net/2018/05/07/the-wound-review/>, accessed on 31.03.2023.

¹²⁰ Ibid.

¹²¹ Ariel Sobel 'Court Rules Gay Movie The Wound Can Return to Theaters' available at <https://www.advocate.com/film/2018/3/09/court-rules-gay-movie-wound-can-return-theaters>, accessed on 31.03.2023; Kyle Zeeman 'Where are the cries when Xhosa boys die?- The Wound creators address violent threats' available at <https://www.timeslive.co.za/tshisa-live/tshisa-live/2017-08-21-where-are-the-cries-when-xhosa-boys-die--the-wound-creators-address-violent-threats/>, accessed on 31.03.2023.

¹²² Shi op cit note 119.

¹²³ Lwando Xaso & Zukiswa Pikoli 'Trengove had no right making a movie about us' available at <https://www.iol.co.za/news/opinion/trengove-had-no-right-making-a-movie-about-us-8256194>, accessed on 31.03.2023.

¹²⁴ Bertrand Moullier 'The unkindest cut of all: gay expression, indigenous cultural rights and the fight over The Wound (Inxeba)' available at <https://www2.bfi.org.uk/news-opinion/sight-sound-magazine/features/wound-inxeba-john-trengrove-gay-expression-indigenous-cultural-rights>, accessed on 31.03.2023.

¹²⁵ Ibid.

¹²⁶ *Award: Inxeba (The Wound)*, Case No: 1/2018 2018 (Appeal Tribunal for the Film and Publication Board)

¹²⁷ Christopher Vourlias 'LGBT-Themed 'The Wound' Back in South African Theaters After Court Ruling' available at <https://variety.com/2018/film/news/lgbt-the-wound-south-africa-theaters-court-ruling-1202722571/>, accessed on 31.03.2023.

¹²⁸ Sobel op cit note 121.

could not be confirmed, allowing the film to be screened in South African theatres.¹²⁹ However, the judge also stated that the film was damaging from a cultural perspective because “It contains harmful scenes which could cause tensions within the Xhosa community.”¹³⁰

No matter what one’s viewpoint on this case is, the crucial point here is the missing instrument on the allocation of permits to use cultural material for entertainment purposes. According to the filmmakers, elders of the community had been consulted prior to and during the shooting of the film. The mere fact that many individuals emerged after the film had been finished to claim it was a violation of the sacredness of their culture shows that there was a lack of an official entity that is respected by the community and has the right to give permission on the use or display of certain traditional elements. This case is, therefore, a prime example of the unauthorised use of TCEs in a product which would have benefitted from a regulatory framework.

5. *Wik Apalech* Dancers from Australia: Indigenous Dance Performances:

Another case that highlights a conflict between indigenous self-determination and existing IP principles is one of the *Wik Apalech* Dancers from Australia.

After taking part in the *Laura Quinkan Dance Festival*¹³¹, the *Wik Apalech* dancers from Cape York, Australia, found out that products which displayed their image were being reproduced and sold without their consent.¹³² The festival, which was originally set up as a dance contest, is a celebration of aboriginal dance and music as well as of the respective identities of the aboriginal communities.¹³³ It takes part on sacred land, where IPLCs from about 20 different communities across the Cape York peninsula meet.¹³⁴ The dances presented are not just a display of choreographed products but a

¹²⁹ Sol Werthan 'Examining the Battle Over Inxeba, South Africa’s Provocative Queer Film About Love and Tradition in the Xhosa Community' available at <https://slate.com/human-interest/2018/07/inxeba-xhosa-identity-and-homosexuality-examining-the-battle-over-the-queer-film.html>, accessed on 31.03.2023.

¹³⁰ *Indigenous Film Distribution (Pty) Ltd and Another vs. Film and Publication Board and other 3589/2018* (High Court of South Africa)

¹³¹ Previously called the *Laura Aboriginal Dance Festival*, now being names after the aboriginal term ‘Quinkan’, which describes a spirit person, that is often depicted in rock paintings in northern Queensland, see: Oxford Dictionary "Quinkan" available at <https://www.lexico.com/definition/quinkan>, accessed on 31.03.2023.

¹³² Lindsey Schuler 'Modern age protection: protecting indigenous knowledge through intellectual property law' (2013) 21 *Mich. St. U. Coll. L. Int'l L. Rev.* at p. 764.

¹³³ Rosita Henry 'Dancing into being: The Tjapukai Aboriginal Cultural Park and the Laura Dance Festival' (2000) 11 *The Australian journal of anthropology* at p. 325.

¹³⁴ Laura Quinkan Dance Festival 'Laura Quinkan Dance Festival' available at <https://lauraquinkanfestival.com.au/>, accessed on 31.03.2023.

demonstration of teaching and learning.¹³⁵ About 40% of the performers are children, and many times elders can be witnessed instructing younger dancers.¹³⁶

In 1998 unauthorised photographs were taken of the dance performance of the *Wik Apalech* dancers by a commercial photographer and later sold as merchandise such as photographs, postcards and Compact Disks (CDs).¹³⁷ The dancers were depicted in their traditional dress as worn for the ceremony, wearing body painting and their feathered headdresses.¹³⁸ The dancers did not give their consent to either the taking of photographs or the subsequent sale of the products, which, additionally, were labelled incorrectly.¹³⁹ In fact, to them, it was offensive and a violation of their customary law.

‘Each element of the performance – the song, the dance, the body painting and the feathered headdresses – can only be reproduced and disseminated with the consent of the senior custodians and, in some instances, in the presence of custodians as only certain individuals can authorise reproduction of each element.’¹⁴⁰

Thus, for a ownership of each element of the dance is vested in the clan. Furthermore, because the responsibility for reproduction is placed on individuals of the clan, these individuals face severe consequences even if the distribution is outside of their control. The person could be punished by means of exclusion from participating in the ceremony or even being stabbed in the leg with a spear.¹⁴¹ Another violation of the *Wik* customary law vests in the fact that ‘a person’s image is regarded as an extension of his and her spirit and any reproduction of images should be done in consultation with them’.¹⁴²

This case clearly shows the clash between Australian copyright law¹⁴³ and *Wik* customary law: the photographs being taken of dance performances create a copyrighted work for the photographer or his employer, not for ‘the indigenous people to whom the photographed TCE is meaningful.’¹⁴⁴ At the time, the performers were not

¹³⁵ Henry op cit note 133 at p. 326.

¹³⁶ Ibid.

¹³⁷ Schuler op cit note 132 at p. 764.

¹³⁸ Terri Janke *Minding culture: case studies on intellectual property and traditional cultural expressions* WIPO (2003) at p. 87.

¹³⁹ The CD cover which displayed the photograph, was called “Corroboree – Traditional Aboriginal Song and Dance”. The word “corroboree” in the Cape York context refers to malpa or “play about dances” and to be used in this context, is offensive to the sacredness, see Janke op cit note 138. of the performance. Ibid.

¹⁴⁰ Ibid at p. 88.

¹⁴¹ Ibid.

¹⁴² Ibid at p. 89.

¹⁴³ Australian Copyright Act of 1968 , Section 10 (1).

¹⁴⁴ Molly Torsen Stech 'Attempting to unmask legal uniqueness in indigenous artistic manifestations' (2014) 9 *Journal of Intellectual Property LawPractice* at p. 433.

aware of this and claimed 'they would not have allowed any photography at the performance otherwise they would have reconsidered performing such an important dance at the Festival' if they had known.¹⁴⁵ While the Copyright Act makes provisions for some performers' rights, these only include films and sound recordings and the broadcasting of live performances – not the capturing of still photography.¹⁴⁶ However, when learning about the view of the *Wik Apalech* dancers, it seems that the problem does not vest in details of the Australian Copyright Law, but in the different meanings and value such a photograph has to the parties involved. What is a work with economic value to one is an expression of a sacred ritual to another. To one, it is about ownership of a work. To others, it is about respecting their sacred identity. It becomes evident that in a situation where the core problem vest in different perspectives, a solution requires the confluence of the two.

6. The *Deep Forest* Album and the development of world music

The following case of the *Deep Forest* album and the birth of the genre of *world music* includes several of the reoccurring concerns of IPLCs. The concept of 'world music' was originally created by academics in the early 1960s to find a less weighty alternative for the academic term ethnomusicology, which denotes the study of music by ethnic minorities as well as non-Western music in their social context.¹⁴⁷ Originally, it was supposed to pluralise Western academic institutions by promoting the 'study of non-Western performance practices and repertoires.'¹⁴⁸ In the music economy, however, the term quickly developed an independent meaning and turned into a label with significant marketing potential.¹⁴⁹ It related to a very broad range of music that included not only 'popular music originating in countries outside the normal Anglo-American (and Australian and Canadian) sources'¹⁵⁰ but also music that was previously marketed as 'primitive, exotic, tribal, ethnic, folk [or] traditional'.¹⁵¹ The political rise of neoliberal multiculturalism and the growing interest in exotic and foreign cultures made world

¹⁴⁵ Janke op cit note 138 at p. 89.

¹⁴⁶ Australian Copyright Act, Section 248G.

¹⁴⁷ Steven Feld 'A sweet lullaby for world music' (2000) 12 *Public culture* at p. 147.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ Tony Mitchell 'World music and the popular music industry: an Australian view' (1993) 37 *Ethnomusicology* at p. 310.

¹⁵¹ Feld op cit note 147.

music a popular genre.¹⁵² On the technological side, this development was enabled by the emergence of electronic communication systems and portable recording technologies.¹⁵³ Digital sampling developed, which enabled the permanent storing of sound samples and their manipulation at a later stage.¹⁵⁴

One of the most well-known examples of this kind of manipulation is the 'Deep Forest' album by the French artistes Michael Sanchez and Eric Mouquet. They created an album described as an 'original dance-music hybrid' that used 'field recordings of the delicate songs of the rain forest-dwelling Pygmies'.¹⁵⁵ At a closer look, the samples that were used contained a collection of different indigenous groups from Ghana, the Solomon Islands and African pygmies.¹⁵⁶ The creators claimed to be supported by UNESCO and the musicologists who recorded the samples in the first place.¹⁵⁷ However, the musicologist Hugo Zemp, who recorded the samples for archival purposes at UNESCO long before the album was released, gave his permission based on the communication that different samples were going to be used, but the final product would not be a commercial dance music album.¹⁵⁸ This was particularly upsetting to him because individuals from the Solomon Islands had been reassured that their musical inheritance had been recorded with the sole purpose of its preservation and study.¹⁵⁹ In particular, with regard to the song *Sweet Lullaby*, the opposite was the case. The melody and vocals used for this song were created with the recording sample of a lullaby sung by a young *Baegu*¹⁶⁰ woman from the island of Malaita, which was not referenced as such.¹⁶¹ The music label credited it as its own composition and made enormous profits off the song through several advertisement deals with big brands like Sony TV, Porsche, and Coca-Cola and the selling of more than two million copies of the *Deep Forest*

¹⁵² Roshanak Kheshti 'Touching listening: The aural imaginary in the world music culture industry' (2011) 63 *American Quarterly* at p. 718.

¹⁵³ Mills op cit note 1 at p. 58.

¹⁵⁴ Ibid.

¹⁵⁵ Paul Verma et al 'Album Reviews - Deep Forest' (1993) 105 *Billboard*.

¹⁵⁶ Ibid.

¹⁵⁷ Michael Sanchez & Eric Marquet *Deep Forest* (1992) Sony Music, accessed on 31.03.2023.

¹⁵⁸ Hugo Zemp 'The/An Ethnomusicologist and the Record Business' (1996) 28 *Yearbook for traditional music* at p. 48.

¹⁵⁹ Ibid.

¹⁶⁰ The Baeggu language is indigenous to the people of the North Malaita Island in the Solomon Islands, see: Wikipedia 'Baeggu Language' available at https://en.wikipedia.org/wiki/Baeggu_language, accessed on 31.03.2023

¹⁶¹ Zemp op cit note 158.

album.¹⁶² The sampled musicians did not receive any compensation or credit.¹⁶³ Up to today, the entire *Deep Forest* album is available for purchase on all common music streaming sites,¹⁶⁴ and the artist still performs them at live festivals.¹⁶⁵

This case is emblematic of the core concerns of IPLCs as it covers several of the reoccurring themes. In addition to the misappropriation of a traditional song, it was used in a product outside of the community without authorisation. The copyright for the created work vests in an artist that is not part of the community who still financially benefits from it today, while the community did not even receive an acknowledgement.

The economic value of releases labelled as world music was also demonstrated by the number of collaborations of famous western artists like Paul Simon, who collaborated with South African musicians on his album *Graceland* in 1986 as well as David Byrne, who recorded the album *Rei Momo* with Latin musicians in 1989.¹⁶⁶ Given the economic value of world music in the western world up to today, for certain IPLCs, it has become an important tool for their indigenous self-determination.¹⁶⁷ In Australia, for example, aboriginal people create new indigenous musical networks through independent recordings or popular performance events of indigenous artists.¹⁶⁸

7. Suyá People of the Amazon and Pintupi People from Australia: Indigenous Ideas about Music

The following examples highlight the clash between indigenous customs and existing IP law. A lot of the requirements for copyright protection do not apply to the way music is perceived or created within certain tribes.¹⁶⁹ Two examples of that are provided by the music culture of the Pintupi people from Australia and the Suyá People from North America.

¹⁶² Ibid.

¹⁶³ Mills op cit note 1 at p. 59.

¹⁶⁴ Spotify 'Deep Forest (Version 1992)' available at <https://open.spotify.com/album/0kPRTZsvwVNUgu520Vxduy?si=S9vtQgrfQ5q-6VvZ60h2pQ>, accessed on 31.03.2023.

¹⁶⁵ Timeless Festival 'List of Acts - Deep Forest' available at <https://www.songkick.com/festivals/91431-timeless/id/40573162-timeless-festival-2023>, accessed on 31.03.2023.

¹⁶⁶ Feld op cit note 147.

¹⁶⁷ Chris Gibson "'We sing our home, We dance our land": Indigenous Self-determination and Contemporary Geopolitics in Australian Popular Music' (1998) 16 *Environment & Planning: Society & Space*

¹⁶⁸ Ibid.

¹⁶⁹ For further elaboration on the incompatibility of TCEs and copyright law in Chapter Three IV. 4.

One of the central requirements for copyright ownership is the existence of an identifiable (human) author.¹⁷⁰ According to the Suyá's belief system, a particular kind of song is not created by people but merely transmitted.¹⁷¹ These individuals are called 'person[s] without a spirit' because their spirits have been taken by a witch as a punishment.¹⁷² Their body remains in the Suyá village, whereas their spirit is taken into the plant world or into animal villages.¹⁷³ The animals teach the spirit new songs, and the person without the spirit transfers these songs into the human world.¹⁷⁴ This person is thus not considered the creator of the song but the communicator.¹⁷⁵ The ethnomusicologist Seeger noted that he encountered difficulties when trying to gain permission to record the songs because there simply was no clear 'owner' who could be asked.¹⁷⁶

The Pintupi people of Australia provide other examples of the incompatibility of indigenous music with copyright law. For example, a popular kind of song called *Wanji-Wanji*, also referred to as the travelling song, has been passed on from one generation to the next.¹⁷⁷ No one can tell today who the original author was, and a potential term of protection probably expired long ago.¹⁷⁸ According to international and Australian copyright law, this would place the song in the public domain and leave it free to use by anyone. However, for the Pintupi people, it is a song that creates a strong sense of belonging and is not regarded as free for all to use.¹⁷⁹ In addition to that, they do not regard their songs as a source of material wealth. The purpose of encouraging 'compositional labour through [...] copyright law is fundamentally at odds with traditional Pintupi beliefs.'¹⁸⁰ This is because they believe that a song is not written by a person but captured by his or her soul, which leaves the body during sleep.¹⁸¹ After awakening, the person remembers the song and simply mimics the spirit's

¹⁷⁰ Stech op cit note 144 at p. 421.

¹⁷¹ Anthony Seeger 'Ethnomusicology and music law' (1992) 36 *Ethnomusicology*.

¹⁷² *Ibid.*

¹⁷³ Gerard Béhague 'Review: Why Suya Sing. A Musical Anthropology of an Amazonian People' (1988) .

¹⁷⁴ *Ibid.*

¹⁷⁵ Mills op cit note 1; Seeger op cit note 148 at p. 348.

¹⁷⁶ Seeger op cit note 171 at p. 350.

¹⁷⁷ Myfany Turpin 'Return of a travelling song: Wanji-wanji in the Pintupi region of Central Australia' (2019)

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ Mills op cit note 1 at p. 62.

¹⁸¹ *Ibid.*

discoveries.¹⁸² Thus, there is no author that could be incentivised. Furthermore, the songs of the Pintupi have a number of higher purposes that are not related to monetary aims but rather to religious significance.¹⁸³ They use songs to share knowledge, influence the weather, heal the ill, resolve conflicts or even cause harm. More importantly, they create 'group solidarity and identity'.¹⁸⁴ This shows that the entire system is not built around music as a product whose production is to be incentivised. Rather, it is an entire system of regulating life.

8. Sámi People Culture

The case of clothing of the Sámi¹⁸⁵ people is another example of the misappropriation of TCEs and their use in a product without authorisation by the community. It also exemplifies how the meaning of a TCE goes beyond its' mere purpose. The *Sámi* are indigenous to a large area of land called Sápmi that stretches across the territory of Norway, Sweden, Finland and Russia.¹⁸⁶ Historically, they experienced settlement disputes and oppression in every country that they share territory with.¹⁸⁷ Even though their typical cultural characteristics are complex and region-dependent, their traditional dress, music, and lifestyle are considered to be the biggest indicator of their affiliation.¹⁸⁸ Their culture carries significant economic value, which shows in the marketing of several TCEs.

Sámi ceremony lifestyle has been turned into a marketing tool by the tourism industry in Finland, promoted as a supposedly authentic experiences to tourists.¹⁸⁹ For example, one popular program involves the crossing of the arctic circle, which is

¹⁸² Ibid.

¹⁸³ Myfany Turpin 'Traditional Aboriginal songs: from digital files to living culture' (2018) 42 *Australasian Sound Archive* at p.1.

¹⁸⁴ Ibid.

¹⁸⁵ Also *Saami* or *Sami*. Historically the Sámi people were referred to as *Laps* or *Lapländers*, though this term is considered to be offensive by many, see: Wikipedia 'Sámi People' available at <https://en.wikipedia.org/wiki/S%C3%A1mi>, accessed on 31.03.2023

¹⁸⁶ Patrik Lantto 'Borders, citizenship and change: the case of the Sami people, 1751–2008' (2010) 14 *J Citizenship studies* at p. 543.

¹⁸⁷ As a non-dominant indigenous group in Sweden, Norway, Finland and Russia this showed through offensive terms like 'trolls' or 'dwarfs' in old Norse literature, to the fighting for their territory since long before the modern structure of the named countries were established, up to the attempted eradication of Sámi people in Norway during World War II by the Nazis; see: Hermann Pálsson 'The Sami People in Old Norse Literature' (1999) *Nordlit*, Wikipedia 'Sámi history' (2021) ; Lantto op cit note 186 at p. 543.

¹⁸⁸ Sharon Webb 'Making museums, making people: the representation of the Sámi through material culture' (2006) 5 *Public Archaeology* at p. 167.

¹⁸⁹ Suoma Sami Nuorat 'Protest against the exploitation of Sami culture.' available at <http://boreale.konto.itv.se/rovaniemi.htm>, accessed on 31.03.2023

advertised as an exciting Sámi ceremony.¹⁹⁰ In reality, the arctic-circle 'is an arbitrary set line with no special feature' that has 'no special significance in Sámi mythology or spirituality.'¹⁹¹ In this case, the use of the Sámi name for fake TCEs creates an insulting and misleading display of their culture.

A well-known intangible TCE of the Sámi is the *Yoik*, a form of a traditional song that is characterised by melodic chanting. Music researchers consider it to be one of the oldest musical traditions in Europe.¹⁹² It has similar structures to other indigenous chants but 'utilises scales and vocalisations which are unfamiliar to virtually everyone else in the Western society.'¹⁹³ In the 18th and 19th centuries, the Sámi suffered from cultural assimilation and the *Yoik* was banned by Lutheran missionaries together with other traditions that were considered Shamanism.¹⁹⁴ The *Yoik* nearly suffered extinction, and it was only in the 1960s that Sámi artists actively started to revitalise it.¹⁹⁵ Today it has become a popular element in world music, but some community members claim that the intimate connection with the community gets lost in the process.¹⁹⁶

The most recognisable tangible TCE of Sámi culture is considered to be their traditional dress.¹⁹⁷ The designs, features and decorations are specific to each community and have developed over a long period of time.¹⁹⁸ However, the meaning of the clothing goes beyond mere functionality:

'The use of traditional Sámi clothing is linked to significant moral values, such as an expression of the individual's identity and sense of belonging, but it also has a communicative function (e.g. the

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² John Weinstock 'Yoiking, a Sámi musical expression' available at <https://nordics.info/show/artikel/yoiking#:~:text=Yoik%20is%20the%20native%20Sami,is%20to%20a%20certain%20extent>). accessed on 31.03.2023

¹⁹³ Arnesen op cit note 75 at p. 391.

¹⁹⁴ Weinstock op cit note 192.

¹⁹⁵ Kathryn Burke 'The Sami Yoik' available at <https://www.laits.utexas.edu/sami/diehtu/giella/music/yoiksunna.htm>, accessed on 31.03.2023

¹⁹⁶ Ibid.

¹⁹⁷ Olteanu op cit note 74.

¹⁹⁸ Tuomas Mattila *Needs of the Sámi people for intellectual property protection from the viewpoint of copyright and trademarks – especially with regard to duodjihandicrafts and the Sámi dresses* (2018) Ministry of Education and Culture, Helsinki 2018, available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_ip_tk_yfb_19/wipo_ip_tk_yfb_19_ref_needs_sami_for_ip_protection.pdf, accessed on 31.03.2023, at p. 20.

clothing's details, e.g. if the clothing is turned inside out it is a sign of disapproval) and functions as a cultural communicator.¹⁹⁹

The design acts like a cultural code that other members of the Sámi community can read, and the right to wear it stems from their 'right to their own heritage and tradition' and belongs to them collectively.²⁰⁰ In various parts of Sweden, Norway, and Finland, communities promote their identities by sharing their culture in museums or by selling traditional objects and clothing.²⁰¹ This practice, which happens across many cultural groups, is being undermined by companies which produce traditional attire in low-cost countries to then sell it as 'authentic', by which they violate the traditions of the respective groups.²⁰² To the Sámi people, their traditional expressions have a specific meaning to the preservation of their values.²⁰³ According to them, 'traditional cultural expressions of the Sámi should not be treated with disrespect.'²⁰⁴

9. Swahili Speakers vs Disney: Trademarking of the phrase 'Hakuna Matata'

A new case group that has been cited frequently²⁰⁵ with regard to TCEs concerns the trademarking of foreign language expressions by the Walt Disney Company. These cases are particularly interesting because they are about the commercialisation of intangible indigenous phrases and expressions. Expressions, which are part of a language, have thus far been placed in the public domain, according to conventional IP law. Yet, the protest and outrage grow steadily.

In 1994, the Walt Disney Company released the film *The Lion King* and simultaneously applied to trademark the words 'Hakuna Matata'.²⁰⁶ The phrase means

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Olteanu op cit note 74.

²⁰² Thomas Hylland Eriksen 'Keeping the recipe: Norwegian folk costumes and cultural capital' (2004) *J Focaal*.

²⁰³ Mattila op cit note 198.

²⁰⁴ Ibid.

²⁰⁵ Richard Awopetu 'In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property' (2019) 69 *Emory Law Journal*; Olteanu op cit note 74; Wendland op cit note 37; Ghengis Capital 'Act can't resolve 'hakuna matata' copyright row' available at <https://www.genghis-capital.com/newsfeed/act-cant-resolve-hakuna-matata-copyright-row/>, accessed on 31.03.2023; Lawbite 'The Dangers of Culturally Sensitive Intellectual Property' available at <https://www.lawbite.co.uk/resources/blog/dangers-culturally-sensitive-intellectual-property>, accessed on 31.03.2023.

²⁰⁶ Malaka Gharib 'Swahili Speakers Debate Disney's Trademark of 'Hakuna Matata' For T-Shirts' available at <https://www.npr.org/sections/goatsandsoda/2018/12/14/676703629/swahili-speakers-horrified-by-disneys-trademark-of-hakuna-matata>, accessed on 31.03.2023;

Wikipedia 'Swahili Language' available at https://en.wikipedia.org/wiki/Swahili_language, accessed on 31.03.2023.

'No Worries' in the Swahili language,²⁰⁷ which is an official language in Kenya, Tanzania, Rwanda and Uganda and is spoken in numerous other countries in East Africa.²⁰⁸ The trademark application was filed for use on merchandise and prevented others from using the phrase 'Hakuna Matata' on T-Shirts.²⁰⁹ The trademark was eventually granted by the US Patent and Trademark Office in 2003, 'by which point American audiences probably associated the phrase with [...] a tune sung by an animated meerkat and warthog.'²¹⁰ With the release of the live-action remake of the cartoon blockbuster *The Lion King* in 2019, a new wave of protest arose against this very trademark.²¹¹ A petition that was started in 2018 and gained a large number of supporters within a few weeks has put immense pressure on the Walt Disney Company to remove the trademark on the Swahili phrase.²¹² It resonated with numerous Swahili-speakers and has been signed by over 231.000 people as of June 2021.²¹³ The initiator of the petition states that 'the decision to trademark "Hakuna Matata" is predicated purely on greed and is an insult not only to the spirit of the Swahili people but also, Africa as a whole'.²¹⁴ He claims that Disney should not be allowed to 'trademark something it didn't invent' because 'Hakuna Matata has been used by most Kiswahili-speaking countries'.²¹⁵ Other critics call it 'ethically wrong' or 'disrespectful'²¹⁶ or even 'commercial colonising'.²¹⁷ Others use the trademark as an example to call for East Africans to protect their national heritage' and fight the 'pilferage of African culture.'²¹⁸ Kenyan writer *Ngũgĩ wa Thiong'o*, who is a professor of comparative literature at the School of Humanities at the University of

²⁰⁷ Also kiSwahili or Kiswahili, see: <https://www.britannica.com/topic/Swahili-language>.

²⁰⁸ Sonia Rao 'Disney trademarked 'Hakuna Matata.' A new petition demands the company drop it.' available at <https://www.washingtonpost.com/arts-entertainment/2018/12/19/disney-trademarked-hakuna-matata-new-petition-demands-company-drop-it/>, accessed on 31.03.2023.

²⁰⁹ Gharib op cit note 206.

²¹⁰ Rao op cit note 208.

²¹¹ Kyle Jahner 'No (Legal) Worries for Disney in 'Hakuna Matata' Trademark Row' available at <https://news.bloomberglaw.com/ip-law/no-legal-worries-for-disney-in-hakuna-matata-trademark-row>, accessed on 31.03.2023

²¹² Awopethu op cit note 205 at p. 747.

²¹³ Change.org 'Petition: Disney robs Swahili of "Hakuna Matata"' available at <https://www.change.org/p/the-walt-disney-company-get-disney-to-reverse-their-trademark-of-hakuna-matata>, accessed on 31.03.2023

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Comments of Esther Ngumbi, a Kenyan post-doctoral researcher at the University of Illinois and petition signer Patrick Mbugua, see: 'Petition: Disney robs Swahili of "Hakuna Matata"' op cit note 213 and Gharib op cit note 206.

²¹⁷ Chris Jancelewicz 'Disney trademarks 'hakuna matata,' petition says it's cultural appropriation' available at <https://globalnews.ca/news/4774037/disney-hakuna-matata-petition-lion-king/>, accessed on 31.03.2023

²¹⁸ Cathy Mputhia 'Trademarking 'hakuna matata' a wake up call' available at <https://www.businessdailyafrica.com/lifestyle/pfinance/Trademarking-hakuna-matata-a-wake-up-call/4258410-4867976-wyiem7z/index.html>, accessed on 31.03.2023.

California, felt 'horrified' by Disney's claim on the phrase and said no company should be able to own it.²¹⁹

Disney and other opponents claimed that the case was being blown out of proportion and there would be confusion about 'what the trademark actually entails.'²²⁰ They claimed that the very essence of trademarks would be the appropriation of words for a 'narrow commercial sphere [and] outside that space people are free to use the language as they wish.'²²¹ According to them, trademarks would not require the invention of a new word.²²² Trademarking expressions like 'Good Morning', 'Merry Christmas' or 'Yahoo!' has been common practice 'without impeding the use of these phrases and words in any cultural way,' Disney claimed in a statement.²²³

The case of 'Hakuna Matata' is not the only one in which Disney received criticism for their attempts to commercialise foreign phrases. The animation film *Coco* which was released in 2017 in collaboration with Disney and Pixar, originally held the title *Dia de los Muertos*, named after the Mexican holiday that the movie revolves around.²²⁴ Disney applied for a trademark for the phrase in 2013 but withdrew due to 'backlash from the Latino community, led by Mexican American cartoonist Lalo Alcaraz.'²²⁵ Following this, Pixar decided to hire Alcaraz as a cultural advisor and both the title and the trademark application were dropped.²²⁶

The US Code defines a trademark as 'any word, name, symbol, or device, or any combination thereof used [...] to indicate the source of the goods, even if that source is unknown.'²²⁷ When trademarking a foreign expression, the original source is not indicated at all. On the contrary, it is being distorted. Hence, the underlying goal of trademarks is not met when appropriating foreign cultural expressions and limiting others in their use. At the end of the day, the cases above illustrate that it does not

²¹⁹ Gharib op cit note 206.

²²⁰ Kimiko de Freytas-Tamura 'Hakuna Matata™? Can Disney Actually Trademark That?' available at <https://www.nytimes.com/2018/12/20/world/africa/hakuna-matata-disney-trademark.html>, accessed on 31.03.2023.

²²¹ Phillip Johnson, professor of commercial law at Cardiff Law School in Wales, see: Freytas-Tamura op cit note 197.

²²² Hans Muhlberg 'Hakuna matata—is it really no worries?' (2019) 19 *Without Prejudice*.

²²³ Jahner op cit note 211.

²²⁴ Rao op cit note 208.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ 15 U.S. Code Commerce and Trade, § 1127 of 1926 .

simply come down to legal interpretations but to political fronts and the ongoing debate of cultural appropriation and its limits. While many agree that 'such native phrases, unless derogatory in nature, can undoubtedly be good trademarks', one has to acknowledge that they 'have a regional emotion attached to it.'²²⁸ It must be noted that there is a significant distinction to be made. On the one side, there is the trademarking of common words of one's own language, as a native speaker of that language or as a member of the cultural group that identifies with it (e.g. 'Seasons Greetings', 'Apple', 'Yahoo'). On the other side is the use of phrases or expressions that stem from another language or culture altogether and which are linked to specific cultural connotations or religious manifestations. Some say that the main reason for the outrage and protest by the Swahili community

'could be the disturbing thought of their local phrase being wrongly monopolized by a foreign entity. Once such a trademark is granted, this foreign entity will be free to use the phrase as per its own fancies. The current uproar being received by the local linguistic groups would not have occurred had the trademark application been filed from an individual/group from their native community.'²²⁹

Thus, this case is a typical example of the danger of erroneously granting IP rights on TCEs to someone who is not part of the respective local community.

III. MAIN POLICY OBJECTIVES OF INDIGENOUS COMMUNITIES

Based on the aforementioned examples, it is important to note the main concerns of TCE holders and outline their demands. Given the amount and variety of IPLCs across the world, it is obvious that there is not just one claim that is shared by all. The various positions are based on specific needs and experiences and are as diverse as opinions within any other multi-cultural group.

The reoccurring themes noted from the cases above indicate that there are a number of shared concerns amongst IPLCs, that indicate where protection gaps in international IP law ought to be closed. In particular, IPLCs seek to prevent the misappropriation of certain TCEs and their use outside of their traditional context. This is the case when an expression is detached from its traditional or spiritual meaning and used for another purpose by a third party. Furthermore, IPLCs want to be recognised as

²²⁸ R. K. Dewan & Co 'Disney "Worries" About Its Trademark "Hakuna Matata"' available at <https://www.mondaq.com/india/trademark/792140/disney-worries-about-its-trademark-hakuna-matata>, accessed on 31.03.2023.

²²⁹ Ibid.

owners of their culture and expect third parties to seek authorisation from them before they use EoF in a product. This authorisation is often not sought by users due to the assumption that TCEs are in the public domain and free to use. At the same time, IPLCs want to avoid situations whereby someone outside of their community is granted IP rights on their TCEs, which the currently existing IP regime unfortunately encourages. Lastly, the incompatibility of many indigenous customs and existing international IP law calls for the acknowledgement of indigenous customary law when drafting a new instrument. The relevance of customary law in the IK space is described in detail in Chapter Four.

The broadest and most recent study on policy objectives of IPLCs that has been conducted in this regard was in relation to WIPO's fact-finding missions on the 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders' between 1998 and 1999.²³⁰ The results were a collection of specific demands from different groups across the world. They range from restrictive approaches to keeping all TCEs secret to rather liberal ideas like the extensive marketing of the TCEs by the communities themselves.²³¹ However, regarding the objectives of a legal instrument, two main commonalities have transpired, which can be classified as follows.

The first concern, referred to as positive protection, relates to the economic interest in TCEs and their commercial use.²³² This is the case when communities are not generally opposed to their culture being commercialised. In fact, their central demand is that they keep control over the extent to which this happens. This concerns both the exclusion of individuals outside of their community from financially profiting off their culture as well as claiming this right for themselves, thus commercially exploiting their culture as they deem right.²³³ An example of this approach can be provided by the *Samí* People from the Arctic and the *T'boli* people from the Philippines.²³⁴

The second objective, known as defensive or negative protection, is about the prevention of certain uses that oppose the values of the TCE holders.²³⁵ Those can

²³⁰ WIPO Report on Fact Finding Missions op cit note 53.

²³¹ Christine Haight Farley 'Protecting folklore of indigenous peoples: Is intellectual property the answer' (1997) 30 *Conn. L. Rev.* at p. 56.

²³² WIPO Report on Fact Finding Missions op cit note 53 at p. 81.

²³³ Vanguardia op cit note 103 at p. 414.

²³⁴ See Chapter Two, II. 3. and Chapter Two, II.7.

²³⁵ WIPO Report on Fact Finding Missions op cit note 53.

include offensive or inappropriate uses like distortion on TCEs, disclosure of sacred materials, promoting false connections or just generally derogatory or libellous uses.²³⁶ An example of this would be the unsolicited photography of the *Wik Apalech* Dancers, which was considered a violation of their spirituality.²³⁷

All concerns and policy objectives share one common denominator: IPLCs want to reclaim control over what happens to their culture and, as such, exercise their right to self-determination.

²³⁶ Zografos op cit note 69 at p. 28.

²³⁷ See Chapter Two, II. 5.

CHAPTER THREE

TCEs and International Law: The Past, the Present, the Future

This chapter seeks to illustrate how existing international IP policy instruments are not equipped to protect TCEs to the necessary extent and leave regulatory gaps that ought to be closed and how the WIPO IGC intends to do this. It forms the first tier and building block of my analysis and highlights why finding consensus is such a complicated and difficult endeavour.

After outlining the historical development of international IP law and the legal TK/TCE protection thus far, a selection of international policy instruments will be analysed based on their current ability to regulate TCEs. This serves to illustrate how the available fora and international legal instruments fail to close the regulatory gaps in protecting TCEs against misappropriation and unauthorised uses of TCEs, as earlier noted.²³⁸ The analysis is focused on international legal instruments in the IP space, and the evaluated instruments were selected based on their international relevance as well as their general policy objectives. In order to evaluate the degree of protection, their substantive law was analysed on its reference to selected terms relating to TCEs.

Following this analysis, the work of the WIPO IGC is illustrated in detail. This includes the historical background and mandate as well as a detailed description of the negotiation procedure, the status quo and current procedural obstacles.²³⁹ This is followed by an in-depth analysis of the most pressing legal issues that the negotiations revolve around.

The last section concludes with an overview of multilateral consensus-building methods. After defining what consensus is and which methods exist to achieve it, the current multilateral dispute resolution tools at the WIPO IGC are described to get a better understanding of the realities of the process.

²³⁸ See Chapter One, II.

²³⁹ See Chapter Three, IV.1-3.

I. HISTORICAL LEGAL CONTEXT

In order to understand today's complex and deadlocked situation of international attempts to find a text-based consensus on the protection of TCEs, one must reflect on the historical development of western IP law in general and the role of indigenous culture in it.

While the broad concept of IP can be traced back to ancient civilisations, the modern intellectual property system emerged in Europe during the 18th century. The first national approaches to IP emerged from Italy, France, the United Kingdom (UK), and Germany.²⁴⁰ With the introduction of printing and the need to protect the rights of authors and publishers, several laws were developed for that aim, including the Statute of Anne in the UK (1710), which is considered to be the first instance of copyright law according to a western notion as we know it today.²⁴¹ Whilst the earliest stories of individual patents go as far back as the 15th century,²⁴² the first significant legal instrument on patents was the Statute of Monopolies which was passed in 1623 in England.²⁴³ It granted inventors a monopoly over their inventions for a period of 14 years while establishing the principle that an invention must be new and useful to be eligible for a patent.²⁴⁴ In the United States, the first patent law was passed in 1790, and the first copyright law was passed in 1792.²⁴⁵

The first international IP treaty²⁴⁶ was the 1883 Paris Convention for the Protection of Industrial Property, which established the framework for international cooperation in the protection of patents, trademarks, and industrial designs.²⁴⁷ It was initially signed by 14 countries, including the United States, and has since been joined by over 170 countries.²⁴⁸ The Berne Convention for the Protection of Literary and Artistic Works was

²⁴⁰ Martin Kretschmer et al 'The history of copyright history: Notes from an emerging discipline' (2010) at p.3.

²⁴¹ *Ibid* at p.7.

²⁴² Frank D Prager 'A History of Intellectual Property from 1545 to 1787' (1944) 26 *J. Pat. Off. Soc'y* at p.1.

²⁴³ *Ibid* at p. 1.

²⁴⁴ *Ibid* at p. 1

²⁴⁵ *Ibid* at p. 49.

²⁴⁶ A detailed analysis of existing international IP treaties follows in the next section.

²⁴⁷ Justin Hughes 'A short history of intellectual property in relation to copyright' (2011) 33 *Cardozo L. Rev.* at p. 1269.

²⁴⁸ *Ibid*.

the first international treaty to address copyright protection. It was signed in Berne, Switzerland, in 1886.²⁴⁹

As this development shows, both national and international laws in the IP space originated in Europe and among European countries. The content of these treaties was based on the economic interest of these countries according to their technological advancement and not drafted with today's globalised world or indigenous peoples in mind. On the contrary, for centuries, the majority of indigenous peoples were denied basic human rights. Due to colonialist regimes and imperialistic, racist policies, they were often considered 'uncivilised' or 'savage'²⁵⁰ and were marginalised and oppressed.²⁵¹ Both national and international IP laws that were developed in the global north at the time, for that reason, did not consider indigenous people or their view on IP. Even after the independence of formerly colonised countries, 'coloniality' has persisted far beyond the formal end of colonial administrations, and severe power imbalances still exist today.²⁵² In fact, the first international convention addressing this was the UN Declaration on the Rights of Indigenous Peoples, which was only adopted in 2007.²⁵³

Within the IP system, the first efforts undertaken to protect the expression of folklore against unlawful exploitation started in the early 1960s. Up to that point, TCEs were generally regarded by western countries as the 'common heritage of humanity' and not restricted in their use.²⁵⁴ Because they often did not qualify as copyrighted works, they were generally unprotected against unauthorised use and misappropriation. With an amendment of the Berne Convention in 1967, newly-independent African countries called for the legal protection of folklore.²⁵⁵ These efforts led to the introduction of

²⁴⁹ Ibid.

²⁵⁰ As shown by the popularity of Human Zoos in the 19th and 20th century, that displayed individuals of marginalised groups and indigenous peoples from colonised countries, mostly without their consent, to establish European and Christian superiority. See: Guido Abbattista & Giulia Iannuzzi 'World expositions as time machines: Two views of the visual construction of time between anthropology and futurama' (2016) ; Ian McLean 'Reinventing the savage' (2012) 26 *Third Text* p. 602.

²⁵¹ Reid et al op cit note 21 at p. 2.

²⁵² Ibid.

²⁵³ United Nations Declaration on the Rights of Indigenous Peoples of 2007 , available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf., accessed on 31.03.2023.

²⁵⁴ Wendland op cit note 37;

Peter Jaszi 'Protecting Traditional Cultural Expressions - some questions for lawmakers' available at https://www.wipo.int/wipo_magazine/en/2017/04/article_0002.html, accessed on 31.03.2023 available at http://www.wipo.int/wipo_magazine/en/2017/04/article_0002.html, accessed on 31.03.2023.

²⁵⁵ Wendland op cit note 37.

Article 15.4 of the Berne convention, which protects unpublished works of unknown authors.²⁵⁶ However, this provision did not lead to the desired protection as it only addressed one of many legal issues that TCEs bring about.²⁵⁷

In 1976 the Tunis Model Law introduced provisions for the special protection of 'expressions of folklore'.²⁵⁸ It offered the first *sui generis* approach and provided a comprehensive legal framework for the protection of TCEs.²⁵⁹ The Tunis Model Law, however, was created for developing countries to assist them with the review of their copyright laws. While some African and Asian states adopted the model law, its overall success was limited, as it is not a binding instrument and was not set out to address industrialised countries as well.²⁶⁰

In 1977, the Bangui Agreement was adopted to establish the Organisation Africaine de la Propriété Intellectuelle (OAPI).²⁶¹ While the agreement is binding for the signatories and contains specific provisions for the protection of expressions of folklore, its reach was limited to the 17, mainly francophone, African member states of the organisation.²⁶²

At the beginning of the 1980s, WIPO and UNESCO introduced a new set of model provisions for national laws.²⁶³ The attempt to turn these model provisions into a treaty in 1996 was fruitless, however, because it was 'deemed premature'.²⁶⁴ Both the Tunis Model Law and the WIPO UNESCO Model Provisions were created to address national jurisdictions and help them revise their domestic copyright legislation 'to facilitate their adhesion to the Berne Convention.'²⁶⁵ The first notable achievements were reached by the WIPO Performances and Phonograms Treaty in 1996,²⁶⁶ later complemented by the

²⁵⁶ Berne Convention for the Protection of Literary and Artistic Works of 1886

²⁵⁷ Von Lewinski op cit note 362 at p. 268; For an in-depth elaboration on all legal key issues that TCE protection is faced with, see Chapter Three, IV. 4.

²⁵⁸ Tunis Model Law on Copyright for Developing Countries of 1976 .

²⁵⁹ Vézina op cit note 26 at p.2.

²⁶⁰ Ibid.

²⁶¹ Bangui Agreement instituting an African Intellectual Property Organization, Act of December 14 of 1977 (amended in 1999) .

²⁶² Zografos op cit note 5 p. 15.

²⁶³ UNESCO WIPO Model Provisions for National Laws On the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions of 1982 (WIPO UNESCO Model Provisions).

²⁶⁴ Wendland op cit note 37, Vézina op cit note 26 at p.2.

²⁶⁵ Zografos op cit note 5 at p. 14.

²⁶⁶ WIPO Performances and Phonograms Treaty 1996 of 2002 .

WIPO Beijing Treaty in 2012, which entered into force in 2020.²⁶⁷ They provide for performances of expressions of folklore to receive the same level of protection as other performances by including them *expressis verbis* in Article 2 of the Treaty.²⁶⁸ According to Article 2 (a) performers are ‘actors, singers, musicians, dancers, and other persons who [...] otherwise perform literary or artistic works or expressions of folklore.’ This was a significant step forward, in particular for intangible TCEs, because many of them are expressed through performances.²⁶⁹ However, this is the only mention of the term ‘expressions of folklore’. This is understandable since the Beijing Treaty is in fact not aimed at the protection of TCEs’. Therefore, these treaties are still far from addressing all the relevant issues, especially considering the wide variety of TCEs and their holders’ concerns.²⁷⁰

After the WIPO-UNESCO World Forum on the Protection of Folklore in 1997, WIPO established a new program concerning various global IP-related issues, including TK, TCEs and GR.²⁷¹ The initial program entailed fact-finding missions, case studies, regional consultations and round-table talks.²⁷² Based on this, WIPO’s member countries then established the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to discuss these matters on a multilateral level.²⁷³ While the initial founding mandate was rather vague, in 2009, the discussions on TCEs evolved to ‘text-based negotiations aimed at reaching an agreement on an international legal instrument that would ensure the effective protection of TCEs.’²⁷⁴ To this day, the IGC is the central forum for the development of a multilateral instrument, whose mandate and current state of negotiation are outlined in further detail below.

II. CURRENT FORA FOR THE SAFEGUARDING OF TRADITIONAL CULTURE AND FOLKLORE

²⁶⁷ WIPO Beijing Treaty of 2012 .

²⁶⁸ WIPO Consolidated Analysis *op cit* note 77 at p. 23.

²⁶⁹ Wendland *op cit* note 37.

²⁷⁰ Vézina *op cit* note 26 at p.2.

²⁷¹ WIPO Consolidated Analysis *op cit* note 77 at p. 23.

²⁷² *Ibid.*

²⁷³ Wendland *op cit* note 37.

²⁷⁴ Vézina *op cit* note 26 at p.3.

The way in which the preservation and protection of cultural heritage have been approached via different international legal instruments can generally be described in a two-tier manner. The one path is of a legal and technical nature and concerns the ownership of cultural property. The goal of this path, to find a multilateral legal instrument for the regulation of such ownership, is the subject matter of this thesis. The other tier is of a more cultural and social nature and concerns the general preservation of traditional culture by means of preventing it from becoming extinct.²⁷⁵ While the legal branch is addressed through the negotiations of the WIPO IGC, the preservation tier is the main task of UNESCO. These two United Nations (UN) specialised agencies work completely independently and with different aims, and the work of UNESCO does not form part of this thesis. Thus, only a brief overview of their work and their two main instruments that affect folklore are presented below for insights into the boundaries of the IGC's work.

1. UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage

The Convention for the Safeguarding of Intangible Cultural Heritage (CSICH) was adopted by the UNESCO General Conference in 2003. It seeks to safeguard intangible cultural heritage and 'to raise awareness at the local, national and international levels of [its] importance and ensuring mutual appreciation thereof.'²⁷⁶ Intangible cultural heritage is defined as 'practices, representations, expressions, knowledge, and skills [...] that communities, groups and, in some cases, individuals recognise as part of their cultural heritage' and which have been 'transmitted from generation to generation.'²⁷⁷ The convention approaches these aims by ensuring that state parties 'take necessary measures to ensure the safeguarding of the intangible cultural heritage present in [their] territory' through appropriate policies and the promotion of education.²⁷⁸ The term 'safeguarding' indicates a much broader scope than mere protection, as suggested measures for member states include 'identification, documentation, research, preservation, protection, promotion, enhancement [...] as well as the revitalisation of the various aspects of such heritage'.²⁷⁹

²⁷⁵ Richard Kurin 'Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: a critical appraisal' (2004) 56 *Museum international* at p. 1.

²⁷⁶ UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage of 2003, at Article 1.

²⁷⁷ UNESCO CSICH, Article 2(1).

²⁷⁸ UNESCO CSICH, Article 15.

²⁷⁹ UNESCO CSICH, Article 2(3).

The first key action on the international level was the establishment of an Intergovernmental Committee for the Safeguarding of the Intangible Heritage, which encourages and monitors the implementation of the convention. In addition to that, UNESCO established the programme 'Masterpieces of the Oral and Intangible Heritage', which proclaims valuable Masterpieces worldwide that are especially deserving of preservation.²⁸⁰ This program is seen as an extension of the World Heritage List, which was limited to tangible monuments and sites.²⁸¹

2. UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions

As a result of long-standing efforts to treat culture as a unique category in international trade, UNESCO introduced the Convention for the Protection and Promotion of the Diversity of Cultural Expressions (CPPDCE). Its main objective is to 'reaffirm the sovereign right of states to adopt cultural policies while ensuring the free movement of ideas and works' and, for that, provide a legally binding international agreement.²⁸² Though its signatories are mostly WTO member states and the very essence of the WTO is the principle of free trade, the CPPDCE represents a 'rejection of the idea that free trade is an end in itself and more important than non-trade values such as culture, which are equally important.'²⁸³ It also does so by recognising that the diversity of cultural expressions is a 'rich asset for individuals and societies, the protection, promotion and maintenance of cultural diversity are an essential requirement for sustainable development for the benefit of present and future generations.'²⁸⁴

III. CURRENT INTERNATIONAL LEGAL INSTRUMENTS AND THEIR LIMITED EFFECT IN PROTECTING TCEs

This section seeks to outline why the existing international legal instruments are currently inadequate for protecting TCEs from unauthorised use and misappropriation. There is currently no binding instrument directly aimed at the regulation of TCEs or TK

²⁸⁰ Kurin op cit note 275 at p. 69.

²⁸¹ Ibid.

²⁸² International Federation of Coalitions for Cultural Diversity *The Campaign for Cultural Diversity: Why it matters to you* (2010) available at https://www.coalitionfrancaise.org/wp-content/uploads/2009/11/IFCCD_brochure_en.pdf, accessed on 31.03.2023, at p. 8.

²⁸³ Nwauche op cit note 67 at p. 287.

²⁸⁴ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005 , Article 2(6).

in the wider sense. Some IP instruments have included certain technical terms or subsections to address regulatory gaps, and some instruments aim for the protection of culture and artistic freedom in general. Others are aimed at protecting the rights of indigenous people on a human rights level but do not address IP-related problems. The following sections present an overview of these gaps.

To evaluate the degree of TCE protection in the instruments below, their substantive law was analysed in terms of its reference to terms like ‘Traditional Cultural Expressions’, ‘TCE’, ‘folklore’, ‘expressions of folklore’, and ‘indigenous culture’. Recognising that most of these instruments have objectives that do not relate directly to TCEs, TK in the wider sense or even indigenous peoples, the analysis captures related terms like ‘unknown author’, ‘performers’, and ‘safeguarding culture’ to assess the degree of indirect protection of TCEs. Other factors are whether an instrument is binding or non-binding, its level of implementation as well as its perception by legal experts.

The list is non-exhaustive and aims to provide a mere overview of the problem, as plenty of work in this area has been done before, and the research focus of this thesis lies elsewhere.²⁸⁵

1. Berne Convention

The Berne Convention on the Protection of Literary and Artistic Works was first introduced in 1886 and is the primary international copyright treaty being administered by WIPO.²⁸⁶ It provides minimum standards for the copyright protection of works and the rights of their authors. It does so by providing ‘creators such as authors, musicians, poets, painters etc., with the means to control how their works are used, by whom, and on what terms.’²⁸⁷

The Berne convention was established with a focus on individual authors and with the quest to promote development and innovation in Europe. When it was first introduced in 1886, the only signatories were Belgium, France, Germany, Haiti, Italy,

²⁸⁵ For more information on the regulatory gaps each instruments leaves, please see referenced sources.

²⁸⁶ Berne Convention for the Protection of Literary and Artistic Works of 1886 .

²⁸⁷ WIPO 'Berne Convention for the Protection of Literary and Artistic Works' available at <https://www.wipo.int/treaties/en/ip/berne/>, accessed on 31.03.2023.

Liberia, Spain, Switzerland, Tunisia, and the United Kingdom.²⁸⁸ It is not surprising that the protection of indigenous culture was not the focus of the protectable subject matter. Thus, the requirements to qualify as a 'work' in terms of Article 2 (1) of the Berne Convention, namely being original and physically manifested, were often not met. Thus, expressions of folklore and indigenous culture were not protected by the convention.²⁸⁹ This changed with the Stockholm Conference in 1967 and an Indian proposal that was brought before the main committee to include expressions of folklore in the list of protected works.²⁹⁰ It led to the insertion of Article 15 (4) (a) of the Berne Convention, which states that:

'(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority who shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.'²⁹¹

In this context, it was decided that expressions of folklore were, by definition, works of unknown authors and that the 'main field of application of this regulation [...] is generally described as folklore.'²⁹² With this insertion, the Berne Convention was the only 'on-point, binding international law' which specifically addressed folklore.²⁹³ However, this approach did not bring about the desired result. This was because out of the 178 signatories, only India made the necessary notification to the Director General in terms of Section 15(4)(b), which would represent the author or community and enforce their rights.²⁹⁴ Section 15(4)(b), therefore, had a limiting effect, as TCE holders do not have the possibility to exercise their rights directly without such representation. In this case, the high standard of domestic sovereignty in the Berne Convention worked against the empowerment of indigenous communities.²⁹⁵

²⁸⁸ Thorvald Solberg *Report of the Delegate of the United States to the International Conference for the Revision of the Berne Copyright Convention, Held at Berlin, Germany, 14.10.-14.11.1908* (1908) Washington, D.C.: Library of Congress, , at p.9.

²⁸⁹ Mills op cit note 1 at p. 76.

²⁹⁰ WIPO *Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967* (1971) Geneva, Vol. I p. 690 and Vol. II, at p. 877.

²⁹¹ Berne Convention for the Protection of Literary and Artistic Works at Article 15(4)(a) of the

²⁹² WIPO Records of IP Conference op cit note 290.

²⁹³ Mills op cit note 1 at 76.

²⁹⁴ Zografos op cit note 69 at p. 40.

²⁹⁵ Mills op cit note 1 at p. 76.

Another indicator of the limits of the Berne Convention in this context was the treatment of works that were considered to be in the public domain. Such works would not fall under Section 15(4) as they are not protected in the first place.²⁹⁶ That effectively means that such works were allocated their public domain status against the will of the indigenous communities that created the work originally, as they were not included in the new subsection. Despite the good efforts, the desired protection for TCEs within the Berne Convention was therefore not achieved.

2. TRIPS Agreement

The Agreement on Trade-Related Aspects of Intellectual Property Rights came into effect in 1995 between all member states of the World Trade Organisation (WTO). It is the most comprehensive multilateral agreement on intellectual property to date and sets a minimum standard for each main area of IP to be provided by each of the member states.²⁹⁷ It concerns IP protection on trade-related matters and offers a higher level of binding through the regulation of domestic enforcement procedures as well as the subjecting disputes between member states regarding TRIPS obligations to the WTO's dispute settlement procedures.²⁹⁸

The minimum standard for copyright and related rights in the TRIPS agreement is set in Article 9(1) by incorporating articles 1-21 of the Berne Convention and then extending the list of works in the provisions that follow. Neither TK nor TCEs or folklore are listed as eligible protected works. It has been argued that TRIPS 'integrated facets of TK through Article (27.3)(b), which called for the protection of plant varieties and patentability or non-patentability of plant and animal inventions'.²⁹⁹ However, this concerns the field of Genetic Resources and TK in a narrow sense and not expressions of folklore. Certain tangible TCEs, like handicrafts or items of indigenous fashion, can be articles of trade and thus qualify as objects that are protected in terms of the agreement.³⁰⁰ However, most typical TCEs whose protection is currently sought will not, as they lack the mentioned copyright criteria.³⁰¹

²⁹⁶ See Chapter Three, I.

²⁹⁷ WTO 'Overview: The TRIPS Agreement' available at https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm#generalprovisions, accessed on 31.03.2023.

²⁹⁸ Ibid.

²⁹⁹ Hamilton op cit note 79 at p. 3.

³⁰⁰ Nwauche op cit note 67 at p. 276.

³⁰¹ See Chapter Three, IV. 2 (c) on Legal Key Issues.

Given the gaps outlined above, there is consensus on the need to extend the protection of TRIPS onto TCEs and TK. However, in discussions within the TRIPS council, it became clear that priority should be given to the ongoing work at WIPO and other relevant and specialised international forums while pursuing work on this matter in a 'parallel and mutually supportive' way.³⁰²

3. Rome Convention

The International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organisations of 1961 (Rome Convention) was the first instrument that established a minimum standard for the rights of performers, producers and broadcasters.³⁰³ It provides related rights to those provided by the Berne Convention but is specifically aimed at performers, producers of phonograms and broadcasting organisations. Its objective is to prevent unauthorised broadcasting and communication to the public³⁰⁴, unauthorised fixation of live performances³⁰⁵ and unauthorised reproduction of a fixation of performances.³⁰⁶

Some commentators have suggested that 'where such performances, broadcasting, communication to the public and fixation involve [...] TCEs, then it is possible to indirectly protect [...] TCEs themselves' through the Rome Convention.³⁰⁷ However, as per Article 3 of the Rome Convention, the rights-holders 'performers' are clearly defined as 'actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works'.³⁰⁸ This reference thus loops back to the wording and protection of the Berne Convention. As the requirements for literary and artistic works in terms of the Berne Convention are not compatible with

³⁰² WTO Council for TRIPS: *The Protection of Traditional Knowledge and Folklore - Summary of issues raised and points made (IP/C/W/370)* (2002) available at https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/W370.pdf, accessed on 31.03.2023.

³⁰³ Viviana Munoz Tellez & Andrew Chege Waitara *A Development Analysis of the proposed WIPO Treaty on the Protection of Broadcasting and Cablecasting Organisation* (2007) South Centre, available at <https://www.econstor.eu/bitstream/10419/232127/1/south-centre-rp-009.pdf>, accessed on 31.03.2023 at p. 17.

³⁰⁴ Article 7(1)(a) of the Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961, entered into force 18 July 1964, UNTS registration No. I-7247 (Rome Convention). of

³⁰⁵ Article 7(1)(b) of the Rome Convention.

³⁰⁶ Article 7(1)(c) of the Rome Convention.

³⁰⁷ Kuek Chee Ying 'Protection of expressions of folklore/traditional cultural expressions: to what extent is copyright law the solution?' (2005) 32 *JMCLat* p. 53.

³⁰⁸ Article 3(a) of the Rome Convention.

most TCEs, the Rome Convention, therefore, does not offer protection for TCE performers either.³⁰⁹

4. WIPO Performances and Phonograms Treaty

The WIPO Performances and Phonograms Treaty (WPPT) was introduced as a response to the rapid expansion of digital technology in the 1990s.³¹⁰ It was signed by the member states of WIPO in 1996 and further deals with the rights of performers and producers of phonograms by expanding their rights in the digital environment.³¹¹ Unlike the Rome Convention, the WPPT defines performers as ‘actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.’³¹² Performers of TCEs are thus *expressis verbis* eligible for protection. The treaty grants performers economic rights in their performances fixed in phonograms (excluding audiovisual fixations, such as motion pictures)³¹³, such as the right of reproduction,³¹⁴ the right of distribution³¹⁵, a commercial renting right,³¹⁶ and the right of making fixed performances available.³¹⁷ At this point, the WPPT provides the most extensive protection for intangible TCEs like dances, stories or songs that are being performed.

However, the focus on performance is simultaneously the limiting factor of the instrument. While songs, tales or plays are protected by the WPPT, other expressions of folklore are not. The exclusion of audio-visual performances creates an additional limit on the scope of protection.³¹⁸ Furthermore, the protection is of an indirect nature, as not the expression itself is protected, but merely the rights of its performers.³¹⁹ While providing a good start, the level of protection offered by the WPPT is still insufficient.

5. Bangui Agreement

³⁰⁹ See Chapter Three, II. 3.

³¹⁰ Tellez op cit note 303.

³¹¹ Ibid.

³¹² Article 2 of the WIPO Performances and Phonograms Treaty 1996

³¹³ WIPO 'Summary of the WIPO Performances and Phonograms Treaty (WPPT) (1996)' available at https://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html, accessed on 31.03.2023

³¹⁴ Ibid at Article 7.

³¹⁵ Ibid at Article 8.

³¹⁶ Ibid at Article 9.

³¹⁷ Ibid at Article 10.

³¹⁸ Ying op cit note 307 at p. 55.

³¹⁹ Nwauche op cit note 67 at p. 265.

The Bangui Agreement established the African IP organisation OAPI and was first adopted in 1977.³²⁰ Its purpose is to ‘promote the effective contribution of intellectual property to the development’ of the signatory states.³²¹ OAPI member states do not have their own IP offices, and the organisation thus acts as a single jurisdiction in which any IP registration is only possible in the regional system.³²²

Though its main direction is very much aligned with existing IP instruments, it contains specific rules that provide for the protection of folklore by adding it to the list of protected subject matter of copyright and related rights.³²³ It thus follows the approach of incorporating folklore into conventional IP categories.

There are only 17 signatories to the Bangui Agreement, however, i.e. member states of OAPI, which are mainly francophone African countries. This limits the applicability of the instrument and does not provide a sufficient base for a broad international instrument.

6. Swakopmund Protocol

The Swakopmund Protocol on the Protection of Traditional Knowledge & Expressions of Folklore (Swakopmund Protocol) was adopted by the Diplomatic Conference of the African Regional Intellectual Property Organization (ARIPO) at Swakopmund in 2010.³²⁴ Its purpose is to ‘protect traditional knowledge holders against any infringement of their rights as recognised by this Protocol [...] and to protect expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context.’³²⁵ The protection for TCEs in the Swakopmund Protocol is quite far-reaching, as they are protected against all acts of misappropriation or unlawful exploitation as long as they fulfil certain protection criteria.³²⁶ The protocol recognises collective ownership of TK and TCEs and equally recognises local and traditional communities as TCE owners as they are trusted with the custody and protection of TCEs in accordance with the

³²⁰ Bangui Agreement instituting an African Intellectual Property Organization, Act of December 14 (2015) (Bangui Agreement).

³²¹ Preamble (1) of the Bangui Agreement.

³²² Inês Tavares 'Bangui Agreement: A Summary of The Essential Changes' available at <https://inventa.com/en/news/article/737/bangui-agreement-a-summary-of-the-essential-changes>, accessed on 31.03.2023.

³²³ Annex VII, Title I & Title II of the Bangui Agreement.

³²⁴ Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore of 2010 .

³²⁵ Ibid at Section 1(1).

³²⁶ Temitope Babatunde Kuti *Towards Effective Multilateral Protection of Traditional Knowledge within the Global Intellectual Property Framework* University of the Western Cape, 2017) at p. 54.

customary laws of their communities.³²⁷ Through that, it shows a keen sensibility for the indigenous self-conception of TCEs and moves away from a western IP / copyright approach. Regional cooperation is an overarching goal, as 'ARIPO and competent national authorities are vested with responsibility for awareness-raising, dispute resolution over concurrent or transboundary claims of local communities of more than one member state over TK and TCEs.'³²⁸

Out of all international instruments, the Swakopmund Protocol probably comes closest to what the WIPO IGC is trying to achieve in an agreement. Despite this progressive approach, however, the Swakopmund Protocol is limited to the same extent as the Bangui Agreement. Since the Swakopmund Protocol is only binding for the members of ARIPO, which are 20 countries from central and southern Africa, its practical use is limited to the legal territory of these states.³²⁹

7. Tunis Model Law

The 1976 Tunis Model Law³³⁰ offers a comprehensive legal framework for the protection of TCEs and contains progressive provisions that explicitly include folklore in the list of protected works, omit the fixation requirement and add an unlimited term of protection.³³¹ It includes provisions for the identification, documentation, and registration of TCEs as well as measures to prevent their unauthorised use, misuse and misappropriation.³³²

However, the model law was created for developing countries to assist them when framing or revising their national copyright legislation while adhering to international conventions.³³³ It is not a binding international agreement, and many countries have not adopted it.

8. United Nations Declaration of the Rights of Indigenous Peoples

³²⁷ Enyinna S Nwauche 'The Swakopmund Protocol and the communal ownership and control of expressions of folklore in Africa' (2014) 17 *The Journal of World Intellectual Property* at p. 198.

³²⁸ Oguamanam op cit note 67 at p. 18.

³²⁹ The current member states of ARIPO are: Botswana, Eswatini, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Sierra Leone, Somalia (not member of the Harare Protocol), the Sudan, the United Republic of Tanzania, Uganda, Zambia and Zimbabwe.

³³⁰ Tunis Model Law on Copyright for Developing Countries .

³³¹ Zographos op cit note 69 at p. 43.

³³² Tunis Model Law on Copyright for Developing Countries .

³³³ Zographos op cit note 69 at p. 42.

When it comes to the basic human rights of indigenous people, the most referred to instrument by IPLCs would currently be the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP). It is the most comprehensive international instrument on the rights of indigenous people, and it was adopted in 2007.³³⁴ It is not an IP instrument per se but makes reference to IP-related issues and is very often referred to by indigenous people as a basis for their self-determination when it comes to TCEs.³³⁵ It is considered significant because indigenous peoples were involved in its drafting, and it 'elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples.'³³⁶

The UNDRIP contains a few sections that address the right of IPLCs to determine the use of TCEs directly and indirectly. Under Article 2, indigenous peoples 'have the right to be free from any kind of discrimination, in the exercise of their rights, in particular, that based on their indigenous origin or identity.'³³⁷ This guarantees a general right to exercise self-determination regarding their cultural property. Article 11 declares the right to 'practise and revitalise [...] cultural traditions and customs', which is aimed at the practising and safeguarding of their cultural heritage.³³⁸ Article 30(1) further grants the 'right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.'³³⁹ This specifically declares IPLCs as rights-holders over their TCEs.

However, UNDRIP is a non-binding declaration. Signatory states are not bound by it, and the implementation of exemplified provisions above is, therefore, completely voluntary. Thus, while the political statement of UNDRIP is progressive and goes in the right direction, the actual legal effect is limited.

9. Universal Declaration of Human Rights

³³⁴ Australian Human Rights Commission 'UN Declaration on the Rights of Indigenous Peoples' available at <https://humanrights.gov.au/our-work/un-declaration-rights-indigenous-peoples-1#:~:text=The%20United%20Nations%20Declaration%20on,the%20rights%20of%20Indigenous%20peoples.>, accessed on 31.03.2023.

³³⁵ See Chapter Two, III.

³³⁶ United Nations - Department of Economic and Social Affairs & Indigenous Peoples 'United Nations Declaration on the Rights of Indigenous Peoples' available at <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>, accessed on 31.03.2023.

³³⁷ United Nations Declaration on the Rights of Indigenous Peoples at Article 2.

³³⁸ Ibid at Article 11.

³³⁹ Ibid at Article 30 (1).

Due to its wide scope of application, the Universal Declaration of Human Rights (UDHR) has become one of ‘the most recognised advocacy tools for the protection of indigenous peoples.’³⁴⁰ Article 27(2) of the Universal Declaration of Human Rights grants everyone the right to ‘the protection of the moral and material interests resulting from any scientific, literary or artistic production of which [they are] the author.’³⁴¹ However, this creates no sufficient base for the desired protection, as most EoF cannot be subsumed under these terms due to their incompatibility with IP law.³⁴² On top of that, the practical use of the UDHR is considered to be limited, as signatory states are only symbolically required to support its principles.³⁴³ The agreement does not provide for access to legal forums and is thus considered practically ineffective.³⁴⁴

IV. THE WIPO IGC

The lack of an appropriate international instrument that addresses the issues left out by the treaties evaluated above is considered a ‘major structural gap in international law.’³⁴⁵ The WIPO IGC was formally established by the WIPO General Assembly in 2000 to close this gap.³⁴⁶ Up to this date, it is considered to be the central forum for the development of a multilateral instrument for the protection of traditional knowledge, genetic resources and folklore.

1. Historical Background & Mandate

In the founding stage, the IGC was merely seen as a forum for discussion.³⁴⁷ The rationales, however, were varied and complex. One aim was to address the, at that time, new features of GR, TK and TCEs as the ‘common heritage of humanity’. Secondly, these new themes were recognised as ‘intellectual assets of new key players in IP policy-

³⁴⁰ Mills op cit note 1 at p. 75.

³⁴¹ Universal Declaration of Human Rights of 1948 .

³⁴² See Chapter One, II. and Chapter Three, IV. 4.(d).

³⁴³ Mills op cit note 1 at p. 75.

³⁴⁴ Ibid.

³⁴⁵ WIPO *The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis* (2018) available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_7.pdf, accessed on 31.03.2023 at p. 10; Jaszi op cit note 254.

³⁴⁶ WIPO *Report of the Twenty-Sixth (12th Extraordinary) Session of the WIPO General Assembly (WO/GA/26/6)* (2000) Geneva, available at https://www.wipo.int/meetings/en/details.jsp?meeting_id=4150, accessed on 31.03.2023.

³⁴⁷ Ibid at p. 4.

making, namely developing countries and indigenous and local communities.³⁴⁸ Thirdly, the IGC was seen as a first approach to the bigger task of WIPO to establish a more progressive IP system which recognises previously disadvantaged, non-western forms of creativity and innovation and is more ‘comprehensive in terms of beneficiaries, and is fully consistent with developmental and environmental goals.’³⁴⁹

It was only in 2009 that the IGC evolved into a formal negotiation body with text-based negotiations and the aim of adopting an international legal instrument.³⁵⁰ The IGC gets mandated by the WIPO General Assembly every two years for a specific biennium. The latest renewal was received at the 62nd session of the WIPO General Assembly in 2021, and the mandate for the IGC got renewed for the 2022/2023 biennium. The mandate is as follows:

‘The Committee will [...] continue to expedite its work, with the objective of finalizing an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs).’³⁵¹

In order to reach such an agreement, the IGC holds formal negotiations in meetings that usually last five working days. Participants of these negotiations are the IGC members (WIPO member states) as well as registered observers, which comprise other intergovernmental organisations as well as various non-governmental organisations (NGOs), especially those representing indigenous communities.³⁵² Each five-day meeting is dedicated to either TK/TCEs or Genetic Resources.³⁵³ The meetings are prepared by the IGC secretariat, which is based in WIPO’s Traditional Knowledge Division.

Although the negotiations have been ‘slow-moving’, they are considered significant: because most exploitation of TCEs happens abroad, the protection that is sought can

³⁴⁸ WIPO *The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (2015) Geneva, available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_2.pdf, accessed on 31.03.2023

³⁴⁹ *Ibid* at p. 2.

³⁵⁰ WIPO, TCE Overview op cit note 25.

³⁵¹ WIPO General Assembly *Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) Decision* (2021) available at <https://www.wipo.int/export/sites/www/tk/en/docs/igc-mandate-2022-2023.pdf>, accessed on 31.03.2023 at p. 1.

³⁵² WIPO, *The WIPO IGC* op cit note 348 at p. 2.

³⁵³ See Workplan of the 2022/2023 Biennium at: WIPO General Assembly *Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)* (2019) available at https://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_51/wo_ga_51_12.pdf, accessed on 31.03.2023.

only be reached on an international level.³⁵⁴ Furthermore, the WIPO IGC is considered to be one of a kind because it possesses a 'bird's eye view on an incredible wealth of information based on experiences and practices from various stakeholders all over the world' as well as a 'broad overview of the issues and a comprehensive understanding of shared concerns and expectations.'³⁵⁵ However, the transformation of this knowledge into an international instrument has yet to happen, and the process is exposed to many complex factors.

2. Procedure

The procedure at the IGC is bound by the WIPO General Rules of Procedure, which were adopted in the first IGC meeting.³⁵⁶ Due to its intergovernmental character, the process is shaped by and limited to norm-setting discussions and the aim for a proposal of international rules for adoption by a diplomatic conference.³⁵⁷ The IGC cannot pass such an international agreement by itself, but it can make recommendations to the WIPO General Assembly. Based on these recommendations, the latter can vote on the convening of a diplomatic conference to pass a new instrument. The members are free to decide what such an instrument or instrument could look like. It could range from a mere recommendation to WIPO members or a non-binding declaration to a formal treaty that would bind countries choosing to ratify it.³⁵⁸ Up to this point, no instrument of any kind has been agreed upon yet, and even the general nature of the instrument is still undecided.

Each meeting follows an overall negotiation topic which is either TCEs/TK or GR. The meetings are moderated by a chair that is elected by the plenary.³⁵⁹ The meeting agenda differs slightly every time, but most meetings are a combination of plenary sessions, contact groups and Ad Hoc expert groups.³⁶⁰ The plenary sessions are open to

³⁵⁴ Wendland op cit note 37.

³⁵⁵ Vézina op cit note 14 at p. 4.

³⁵⁶ WIPO IGC *Rules of Procedure WIPO/GRTKF/IC/1/2* (2001) available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_1/wipo_grtkf_ic_1_2.pdf, accessed on 31.03.2023, at Section II. 4.

³⁵⁷ WIPO, The WIPO IGC op cit note 348 at p. 2.

³⁵⁸ Ibid.

³⁵⁹ WIPO 'General Rules of Procedure of WIPO (as adopted on September 28, 1970, and amended on November 27, 1973, October 5, 1976, October 2, 1979, and July 23, 2022)' available at https://www.wipo.int/policy/en/rules_of_procedure.html, accessed on 31.03.2023, at Rule 9 (1).

³⁶⁰ As can be taken from all analysed meeting reports and transcripts.

all parties as well as accredited observers.³⁶¹ Here, working documents and studies can be introduced, debates on draft articles happen on a larger scale, and the outcome of Ad Hoc and working groups are being presented and discussed.³⁶²

The Ad Hoc expert groups and contact group meetings take place with a smaller number of delegates to discuss details regarding draft articles. According to the latest mandate of the IGC, Ad Hoc expert groups have the task 'to address specific legal, policy or technical issues.'³⁶³ They 'have a balanced regional representation and use an efficient working methodology'.³⁶⁴ Their aim is to find 'consensus on principles and approaches that would inform the negotiations and drafting that will take place in the IGC.'³⁶⁵ The results of these expert sessions are submitted to the plenary for consideration.

The most important working documents are the draft articles.³⁶⁶ There are two versions, one for TCEs and another for TK, which are being discussed in detail at every meeting and consequently updated. In order to streamline the updating of the draft articles, the IGC has established the use of facilitators. Similar to multilateral mediators, the facilitators have the agenda to produce an instrument with a common ground. However, there are no external experts or mediators but country representatives of the participating member states. They are mandated by the member states for one IGC meeting only, though the same individuals have been appointed in several consecutive meetings. After collecting comments from countries and revising the negotiation text, they produce a new version of the draft articles and present them to the plenary. These versions are then up for discussion by the member states again. The facilitators have had a positive impact on the progress of the negotiations since 2010 and have produced suggestions for the draft articles in every session since they were established.³⁶⁷

Overall, the process has moved rather slowly in the past 20 years, and recently the Covid-19 pandemic caused major practical obstacles to the progress of the negotiations. In the years 2020 and 2021, travelling and in-person meetings were not possible. Most

³⁶¹ Observation of IGC 45 in Geneva, December 2022.

³⁶² *Ibid.*

³⁶³ WIPO GA Decision on IGC op cit note 353.

³⁶⁴ *Ibid.*

³⁶⁵ WIPO WIPO Report of the 39th IGC meeting op cit note 52 at p. 14.

³⁶⁶ The Protection of Traditional Cultural Expressions: Draft Articles, Rev. (September 16, 2022) WIPO/GRTKF/IC/45/5 of 2022 .

³⁶⁷ For more information on the work of the facilitators see Chapter Three, VI. 2. (b). on the multilateral dispute resolution approach at the IGC.

of the meetings scheduled for the 2020-2021 biennium had to be postponed.³⁶⁸ Since the beginning of 2022, meetings have resumed, but in a hybrid format. This means that country representatives have the option to travel to Geneva and participate in-person or to participate virtually.

3. Current Status of Negotiations

The IGC negotiations are considered slow-moving, and it does not seem that an instrument on TCEs and TK that is agreeable to all parties will be found soon. So far, the most relevant outcome of the IGC's work has been the introduction of draft articles.³⁶⁹ There is a lot to be said for the work on these draft articles, as they have significantly reduced in size in the past years, which is an indicator that parties are at least moving closer together.

(a) Latest developments

In the case of the negotiations on GR, which are much further progressed than the ones on TCEs and TK, one could even say that an international legal instrument is within reach, as the WIPO General Assembly surprisingly decided to convene a diplomatic conference for 2024.³⁷⁰ Based on the latest Chair's Text on a 'Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources', the diplomatic conference ought to conclude an international legal instrument relating to the above.³⁷¹ While some parties have expressed their concern as to the maturity of the Chair's Text, many are in support, and WIPO has started the process to organise an IGC Special Session as well as a Preparatory meeting in September 2023.³⁷² This development was surprising after years of negotiation and some commentators presume a functional political allyship

³⁶⁸ WIPO 'What is happenig now?' available at <https://www.wipo.int/tk/en/igc/snapshot.html>, accessed on 31.03.2023

³⁶⁹ WIPO, The WIPO IGC op cit note 348 at p. 2.

³⁷⁰ WIPO 'Diplomatic Conference on Intellectual Property and Genetic Resources' available at <https://www.wipo.int/diplomatic-conferences/en/genetic-resources/index.html>, accessed on 31.03.2023.

³⁷¹ WIPO *Assemblies of the Member States of WIPO, 63rd Series of Meetings, List of Decisions - 2022* (2022) available at https://www.wipo.int/export/sites/www/about-wipo/en/assemblies/docs/brochure_a63_list_decisions.pdf, accessed on 31.03.2023 at p. 7.

³⁷² WIPO *Timeline for 2024 Diplomatic Conference on Genetic Resources and Associated Traditional Knowledge* (2023) available at <https://www.wipo.int/export/sites/www/diplomatic-conferences/en/docs/timeline.pdf>, accessed on 31.03.2023.

behind the sudden unity in light of the ongoing war on Ukraine by the Russian Federation.³⁷³ This is because the proposal for the call of a diplomatic conference was combined with the vote on a 'Proposal on assistance and support for Ukraine's innovation and creativity sector and IP system.', which highlights a clear positioning on Ukraine's sovereignty and received a landslide majority vote.³⁷⁴ It is to be expected that this unforeseen development will also speed up the negotiations on TCEs and TK. Though the process in these negotiations is said to not carry the same maturity as the ones on GR, parties in favour of an instrument are motivated to move forward.³⁷⁵ This new momentum can also be observed in the decision of the acting chair of IGC 44 to introduce a Chair's Text on TCEs and TK in November 2022 prior to IGC 45.³⁷⁶ This zero draft was not introduced as an official working document, but it was brought to all parties' attention and officially opened for review and commentary by IGC members.³⁷⁷ Based on discussions at IGC 45 as well as on comments received by the advisory body and IGC participants, the chair published an updated version of said text prior to IGC 46 in February 2023.³⁷⁸ This text, though still not having the status of an official IGC working document, forms a solid basis for further discussions, as it offers a single-text approach without numerous alternatives. It remains to be seen how the parties will respond to it and whether the Chair's Text can form a basis for a diplomatic conference on TK and TCEs as well.³⁷⁹

(b) Re-emerging fundamental issues

³⁷³ Wend Wendland 'Multilateral Matters #14: WIPO Decides to Hold Two Diplomatic Conferences no later than 2024' available at <http://ip-unit.org/2022/multilateral-matters-14-wipo-decides-to-hold-two-diplomatic-conferences-no-later-than-2024/>, accessed on 31.03.2023.

³⁷⁴ WIPO *Proposal on assistance and support for Ukraine's innovation and creativity sector and intellectual property system A/63/8* (2022) Geneva, available at https://www.wipo.int/edocs/mdocs/govbody/en/a_63/a_63_8.pdf, accessed on 31.03.2023

³⁷⁵ Observation of IGC 45 in Geneva, December 2022.

³⁷⁶ Lilyclaire Bellamy *Chair's Text of a Draft International Legal Instrument relating to Intellectual Property and Traditional Knowledge/Traditional Cultural Expressions (Zero Draft)* (2022) available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_45/wipo_grtkf_ic_45_chairs_text.pdf, accessed on 31.03.2023 (2022 Chair's Text on TK/TCEs).

³⁷⁷ During the research visit that was conducted at IGC 45, the author of this thesis was asked to provide feedback on the Chair's Text on TK/TCEs as well. The requested comments were sent to the IGC Secretariat as well as to the acting chair, Ms Lilyclaire Bellamy, shortly after the submission of this thesis in April 2023.

³⁷⁸ Lilyclaire Bellamy *Chair's Text of a Draft International Legal Instrument relating to Intellectual Property and Traditional Knowledge/Traditional Cultural Expressions (First Draft)* (2023) available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_46/wipo_grtkf_ic_46_chairs_text.pdf, accessed on 31.03.2023 (2023 Chair's Text on TK/TCEs).

³⁷⁹ At the time of writing, no such diplomatic conference for a legal instrument on TCEs and TK was planned yet.

Despite the recent progress and the sudden increase in momentum, previously existing obstacles still persist. The reports of the latest meetings still indicate that the different negotiation groups introduced above³⁸⁰ are strongly opposed on most substantive legal questions. In addition to these core issues on substantive law, which are being elaborated further down below,³⁸¹ several re-emerging general topics have been discussed in nearly every IGC meeting up until today.

Starting with the very nature of the instrument, despite over two decades of negotiation, there is no agreement on whether the final instrument should be binding or non-binding. The mandate of the IGC does not prescribe the nature of the outcome, which leads to the parties repeatedly stating their preference.³⁸² These range from a detailed and binding instrument to a rather superficial and non-binding 'soft law', i.e. a declaration or guidelines.³⁸³ For example, while the Group of Like-minded Countries (LMCs), the Asia Pacific Group and the African Group see the only solution in a legally binding instrument, the EU Group and the US delegation prefer a non-binding instrument.³⁸⁴

Another central aspect is the question of whether a rights-based approach or measures-based approach is the most appropriate way forward. A rights-based approach affords beneficiaries rights to their TCEs, which they can enforce themselves through the relevant authority in the country of their jurisdiction. A measures-based approach requires states to provide measures for the protection of TCEs, which are generally wider than rights, as they can be anything from legal, practical civil, administrative or criminal measures.³⁸⁵ It is believed that a measures-based approach affords greater flexibility to jurisdictions at a national level, which promises a higher chance of agreement within IGC as a whole. However, the two approaches are not considered mutually exclusive but can be implemented in a combined way. Interestingly enough, the Draft articles for TCEs and TK are already quite specific and include a combination of rights and measures that are being negotiated, which indicates that a

³⁸⁰ See Chapter One, II. and Chapter Three, IV. 4. (b).

³⁸¹ See Chapter Three, IV. 4. (c).

³⁸² See for example WIPO *Transcript of IGC 45, 5th of December 2022, Opening Session, WIPO GRTKF IC 45 DAY 1 MORNING* (2022) available at https://webcast.wipo.int/video/WIPO_GRTKF_IC_45_2022-12-05_AM_117714, accessed on 31.03.2023

³⁸³ Alan E Boyle 'Some reflections on the relationship of treaties and soft law' (1999) 48 *International & Comparative Law Quarterly* at p. 1.

³⁸⁴ WIPO WIPO Report of the 39th IGC meeting op cit note 49 at pp. 3, 4 & 6.

³⁸⁵ *Ibid* at p. 16.

combination of the two approaches has already found its way into the working documents. However, the parties loop back to the general question of which approach to follow at nearly every IGC meeting.³⁸⁶

Thirdly, a very general issue that keeps emerging is the one regarding the working methodology and negotiation approach. The mandate of the IGC includes the ‘evidence-based approach’, which enables member states to introduce relevant working documents for consideration and discussion by the other parties.³⁸⁷ While this was highly beneficial in the beginning, in the past years, this has led to a decrease in negotiation momentum. A high number of documents are being re-introduced by the same parties at every IGC meeting without actually being followed up by a discussion. This takes up a significant amount of time for the overall meeting agenda.³⁸⁸ Many parties have criticised this approach, while others claim it to be necessary. For example, while the African and Asia Pacific Group stress the need for a timely solution and an acceleration of the process, Group B, the Central European and Baltic States Group (CEBS Group) and the Group of the European Union (EU Group) emphasise the need for further research.³⁸⁹

These general issues re-emerge in every IGC meeting and influence the negotiation process and the status quo significantly. It becomes clear that reaching a consensus on specific legal questions is particularly difficult if fundamental issues, such as those outlined above, persist.

(c) Procedural Obstacles

In practice, the obstacles created by the dynamics of the negotiation process seem to have a significant impact on the deadlocked situation before one even reaches detailed questions of substantive law.

The first obstacle concerns the general norm-building strategy. Most international instruments were built following the ‘bottom-up’ approach, in which national legislation

³⁸⁶ See for example the report of the Ad Hoc Meeting AT IGC 45 in 2022: Anthony Kakooza & Edwina Lewis Co-Chairs’ report on the Ad Hoc Experts Group on TK and TCEs (2022) available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_45/wipo_grtkf_ic_45_co_chairs_report_ad_hoc_experts_group.pdf, accessed on 31.03.2023 at p .1.

³⁸⁷ WIPO GA Report on the IGC 2021 op cit note 351 at p. 1.

³⁸⁸ Observation of IGC 45 in Geneva, December 2022.

³⁸⁹ WIPO WIPO Report of the 39th IGC meeting op cit note 49 at pp. 5 & 6.

is harmonised and transformed into international norms that all can agree on or 'that are regarded as a widespread practice.'³⁹⁰ For the IGC, this approach is not possible. Because there are only a few national regimes with the law on IK systems, and the existing ones are relatively recent and hence provide the countries with only a little experience, there is not enough widespread practice that could serve as a model for an international instrument.³⁹¹ This is why so far, the process was shaped by a 'Top-down' approach. This means that the parties of the IGC have to create a solution from scratch, and national jurisdictions will have to incorporate such into their national law. In this context, a major point of disagreement is how much leeway the member states should be granted when implementing such a 'top-down' instrument.³⁹²

Another fundamental problem emerges from the formation of complex coalitions. In the course of the process, a number of negotiation blocks and tactical alliances have been formed within the IGC.³⁹³ The formed coalitions do not only show geopolitical and ideological undercurrents, which particularly show in a North-South disparity but are also strongly influenced by power dynamics and diametrically opposed incentives.³⁹⁴ In the past 15 years, these respective positions have hardened, which contributed to the slow progress of the negotiations.³⁹⁵ There are geographically based blocs like the African Group, the Group of Latin American and Caribbean Countries (GRULAC) or the Asia Pacific Group, which all decisions, and consult orally as the need arises, as the Group of Like-Minded Countries (LMCs).³⁹⁶ Irrespective of their regional heritage, many developed countries like the United States, Canada, Australia, Switzerland, Japan and South Korea coalesce within *Group B*, while most other global North and industrialised countries form the negotiating *Group A*, which includes the EU bloc of countries.³⁹⁷ Member states of the EU are represented individually as well as through one delegation of the EU. Many countries that stem from the geographical east of Europe have formed the negotiating group of central European countries (CEPS). In addition to that, there is

³⁹⁰ Wend Wendland 'Intellectual Property Norm-Building: Some Reflections on the Interplay between the National and International Dimensions' available at <http://ip-unit.org/2019/multilateral-matters-4-intellectual-property-norm-building-some-reflections-on-the-interplay-between-the-national-and-international-dimensions-2/>, accessed on 31.03.2023.

³⁹¹ *Ibid.*

³⁹² WIPO WIPO Report of the 39th IGC meeting op cit note 52 at p. 4.

³⁹³ Oguamanam op cit note 48 at p. 3.

³⁹⁴ *Ibid* at p. 1.

³⁹⁵ Oguamanam op cit note 55 at p. 3.

³⁹⁶ Oguamanam op cite note 48 at p. 1.

³⁹⁷ *Ibid* at p. 3.

China, which identifies with the LMCs on a contingent basis, and the Russian Federation.³⁹⁸ Two important incentive-based coalitions are represented by the Indigenous Consultative Forum and the Indigenous Caucus, which is an alliance of 'Indigenous Peoples and Interests across geopolitical boundaries.'³⁹⁹ Finally, the plenum is regularly visited and complemented by civil rights organisations which represent particular interests that the IGC mandate seeks to support.⁴⁰⁰

How effectively a respective community or state can enforce its agenda depends on various factors, 'such as [...] the issues at stake and each individual country's interests, priorities, resources, and capacity, but also the role of regional organisations as well as the potential for coalitions.'⁴⁰¹ These factors are directly linked to the complexity of existing fora in which the protection of folklore is being or has been discussed in addition to the WIPO IGC.⁴⁰² This complexity brings about that identical legal questions can form a subject matter in organisations or committees with very different mandates. It is, consequently, not uncommon that delegates who take part in various negotiations pursue a certain outcome which would eventually benefit their position in a different forum.⁴⁰³ Especially during informal consultations among expert delegations at the IGC, stakeholders often identify overlapping issues with other fora and then pre-empt each other in the further course of the negotiation process.⁴⁰⁴ Some other countries participate in the negotiations for the sole purpose of upholding the status quo on international IP and establishing treaties – especially the patent regime.⁴⁰⁵ Discerning analysts have found that the number of powerful and influential actors who are able to leverage several regimes grows with the number of fora which engage with a specific subject matter.⁴⁰⁶ Not only do these dynamics only begin to illustrate the multifaceted

³⁹⁸ *Ibid.*

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

⁴⁰¹ Wend Wendland 'Achieving Positive Outcomes in International Intellectual Property Negotiations' available at <http://ip-unit.org/2018/multilateral-matters-series-achieving-positive-outcomes-in-international-intellectual-property-negotiations/>, accessed on 31.03.2023.

⁴⁰² Vézina *op cit* note 14 at p. 1.

⁴⁰³ See Wendland *op cit* note 32;

Oguamanam *op cit* note 48 at p. 3.

⁴⁰⁴ The subject matter of the disclosure of the source of origin, for example, constitutes a topic in the negotiations about the Design Law Treaty within the WIPO Committee Process as well as in the negotiations of the WIPO IGC, see: Oguamanam *op cit* note 48 at p. 3.

⁴⁰⁵ Oguamanam *op cit* note 48 at p. 2.

⁴⁰⁶ Karen J Alter & Sophie Meunier 'The politics of international regime complexity' (2009) 7 *Perspectives on politics*; Laurence R Helfer 'Regime shifting: the TRIPs agreement and new dynamics of international intellectual property lawmaking' (2004) 29 *Yale J. Int'l L.*

formation of positions and incentives of different stakeholders, but they also contribute to the complex cluster of coalitions and hence create a vicious circle of deadlocked negotiations.

The existence of these clustered groups and their respective complex positions form the very basis of the first assumption of this research: if a common ground is to be reached on a multilateral level, it can only be accomplished through an instrument that respects the greatest intersection of the most opposing positions.

In order to first get a better understanding of the respective positions of the parties, Chapter Four analyses the approaches taken on a domestic level in the jurisdictions of the EU, the USA and South Africa.

4. Legal Key Issues

In addition to the fundamental issues outlined above, there are a number of more specific legal issues that are subject to disagreement. An analysis of commentators and experts in the field has yielded that these issues create numerous challenges that impede the ongoing international negotiations.

The following discussion outlines the most relevant obstacles to a consensus at this point in time, which are the unsettled definition of TCEs, vastly conflicting policy objectives, legal key issues, as well as procedural obstacles. Understanding these key issues is crucial in order to find a consensus for a realistic international solution.

(a) Unsettled Definition

Within the broader understanding of what TCEs are understood to be (as outlined above), the WIPO IGC negotiations are pervaded with conflicts on what the term should entail in detail and how it should be codified. As can be taken from comments submitted by the member states regarding the draft legislation, the vague classification of TCEs is one of the most prominent issues.⁴⁰⁷ As this concerns the very subject matter of the negotiations, the lacking base of agreement constitutes a major obstacle to the progress of the process. In the latest model provisions⁴⁰⁸, TCEs are defined as

⁴⁰⁷ WIPO 'The Protection of Traditional Cultural Expressions/ Expressions of Folklore: Revised Objectives and Principles - Third Commenting Process (December 2009 - May 2010)' (2010) .

⁴⁰⁸ At the time of writing, the latest Draft Articles were the ones published for IGC 46 in February 2023.

'any forms in which traditional culture practices and knowledge are expressed, [appear or are manifested] [the result of intellectual activity, experiences, or insights] by indigenous [peoples], local communities and/or [other beneficiaries] in or from a traditional context, and [may be]/[is] dynamic and evolving and comprise verbal forms, musical forms, expressions by movement, tangible or intangible forms of expression, or combinations thereof.'⁴⁰⁹

Based on this definition, four general categories of TCEs can be identified.⁴¹⁰ The first includes musical expressions, which are primarily songs and instrumental music. The second comprises verbal expressions, such as stories, poetry, riddles, signs and symbols. The third covers expressions by actions, which are dances, plays or rituals. While these three categories all describe intangible expressions, the fourth category entails tangible expressions such as art productions, crafts, architectural forms and musical instruments.⁴¹¹ The four categories offer a first understanding of where consensus could be found. However, a look at the current state of the draft provisions also shows that many elements are not yet agreed upon, as yet. This particularly shows in the number of words in brackets, which indicate issues or specific wording that have found no consensus yet.⁴¹²

What's more, since a new protection approach is being discussed at the IGC negotiations, the categories become even more detailed. The so-called 'tiered approach', which is being elaborated in further detail below, suggests a distinction between the allocation of economic rights and moral rights towards different forms of TCEs, depending on their categorisation as secret, sacred and widely or narrowly diffused.⁴¹³ This adds another layer to the complexity of defining TCEs, as diffusion levels are not easily determined and whether or not a TCE is sacred or secret, for example, depends on the allocation of each respective community.

Given the current deadlock in the negotiation process, it would be a good start to at least find clarity on a subject matter consensus. This could set the ball rolling towards

⁴⁰⁹ The Protection of Traditional Cultural Expressions: Draft Articles, Rev. (December 19, 2022) WIPO/GRTKF/IC/46/5 of 2023 (2023 TCE Draft Articles) at p. 5.

⁴¹⁰ Paul Kuruk *Key Policy Issues on Intellectual Property and Traditional Cultural Expressions* (2017) WIPO, available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_ipk_ge_17/wipo_ipk_ge_17_presentation_3kuruk.pdf, accessed on 31.03.2023 at p. 1.

⁴¹¹ *Ibid.*

⁴¹² 2023 TCE Draft Articles op cit note 409.

⁴¹³ WIPO *Report of the 38th IGC Meeting, WIPO/GRTKF/IC/38/16* (2018) available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_38/wipo_grtkf_ic_38_16.pdf, accessed on 31.03.2023 at p. 16.

more pressing discussion points that are further down the road, hence working against the massive delay of the process.

(b) Conflicting Policy Objectives

The question of the extent to which expressions of folklore should be protected is subject to a range of, sometimes conflicting, policy objectives. Emerging from the positions of the numerous stakeholders involved, the purposes for the protection vary. However, not all of them are agreed upon as leading principles for the negotiation of an international agreement. In fact, the specific purpose for and the extent of TCE protection is one of the unsettled key policy areas of the IGS's mandate.⁴¹⁴ Amongst the driving forces of the search for an international solution are, on the one hand, the exploitation of indigenous expressions and their holders as a result of the rising development of technology, the relevance of TCEs as economic and cultural assets, as well as the preservation of cultural heritage.⁴¹⁵ On the other hand, the promotion of creativity and innovation on the basis of pre-existing TCEs needs to be safeguarded, and multiculturalism, as well as cultural diversity, should be fostered.⁴¹⁶

With the accelerating development of technology in the past decades, there has been a noticeable increase in the commercial exploitation of indigenous expressions.⁴¹⁷ For instance, music which was originally recorded for ethnographic or anthropological purposes is increasingly being adapted, arranged, or publicly performed—often without the knowledge of the performers.⁴¹⁸ Due to easily accessible online music archives, today, anybody with a computer and internet access is able to download and store these recordings and sample or compile them in a new manner.⁴¹⁹ From the prominent case of the *Deep Forest Album*⁴²⁰ to the international hit *Return to Innocence* by the German

⁴¹⁴ Vézina op cit note 14 at p. 4.

⁴¹⁵ WIPO Consolidated Analysis op cit note 77; Wendland op cit note 37; Vézina op cit note 14 at p.4.

⁴¹⁶ Wendland op cit note 37; WIPO Consolidated Analysis op cit note 51.

⁴¹⁷ WIPO Consolidated Analysis op cit note 77 at p. 56.

⁴¹⁸ Felicia Ann Barbara Sandler 'Music of the village in the global marketplace: Self-expression, inspiration, appropriation, or exploitation?' (2002) at p. 58.

⁴¹⁹ Ibid.

⁴²⁰ This case is emblematic for the typical misappropriation of musical TCEs. A lullaby, which was recorded for archival purposes by an ethnomusicologist in Malaita, on the Solomon Islands, was copied from the UNESCO catalogue without permission and then turned re-mixed and produced into a successful song. Not only did the Malaita community not receive any returns of the profit, the heritage of the melody was not attributed correctly either. See: Mills op cit note 1;

band Enigma,⁴²¹ the trademarking of the Swahili phrase 'Hakuna Matata'⁴²² or the well-known *The Lion Sleeps Tonight* melody, the cases that can be cited in relation to misappropriation are numerous.⁴²³ As with most IP-related matters, in the context of today's globalised world, unlawful exploitation becomes particularly problematic on an international level.⁴²⁴ At the same time, the requirements for or the definition of illicit, unauthorised or wrong use of TCEs are not agreed upon.⁴²⁵ It is because of this context that the prevention of misuse and misappropriation is one of the key policy objectives for the protection of folkloristic expressions.

Another objective for the protection of TCEs is their quality as valuable cultural and economic assets. They are considered an economical 'source of livelihood'. They have the potential to contribute to community enterprises, job creation and income generation, not only in the form of intangible expressions like songs and dances but also through cultural tourism or tradition-based innovations, fashion or architecture.⁴²⁶ Certain TCEs can, therefore, directly contribute to the prosperity or economic development of communities since they constitute important knowledge assets.⁴²⁷ The fact that the awareness of these economic resources is only starting to become more apparent now causes the international policy-finding process to gain momentum.⁴²⁸

The use of TCEs as economic and cultural assets is directly linked to the incentive to safeguard and preserve them. The distinctions between individual cultures and communities, which generate their typical characteristics and hence their respective worth, 'are threatened in the face of uniformity brought on by new technologies and the globalisation of culture and commerce.'⁴²⁹ Preservation is thus regarded as a significant

Brigitte Vézina 'Are they in or art they out? Traditional cultural expressions and the public domain—implications for Trade' (2012) *International trade in indigenous cultural heritage: legal and policy issues*. Edward Elgar, Cheltenham.

⁴²¹ Vézina B 'Cultural Institutions and the Documentation of Indigenous Cultural Heritage: Intellectual Property Issues' in: Camille Callison et al *Indigenous notions of ownership and libraries, archives and museums* Walter de Gruyter GmbH & Co KG (2016) .

⁴²² Freytas-Tamura op cit note 197.

⁴²³ For more examples of misappropriation of intangible as well as tangible TCEs see: Janke op cit note 138.

⁴²⁴ Wendland

⁴²⁵ Vézina op cit note 14 at p.4.

⁴²⁶ Ibid.

⁴²⁷ Perlman op cit note 4 at p. 173.

⁴²⁸ Vézina op cit note 14 at p. 4.

⁴²⁹ WIPO Consolidated Analysis op cit note 77 at p. 9.

objective on a superordinate level, as the world's intangible heritage must be protected for it to be utilised by communities and passed down to future generations.⁴³⁰

However, the preservation and safeguarding of culture is not a focused objective of the IGC. This is because, firstly, the aims of preservation are not always aligned with those of legal protection, and secondly, because the safeguarding and preservation of indigenous culture are already sought for through other instruments and fora at UNESCO.⁴³¹ What seems like a mere distinction in terminology is actually a significant borderline for a policy objective. While safeguarding and preservation relate to the 'reviving of disappearing cultural traditions and practices', legal protection concerns the protection of folkloristic expressions against unauthorised use in an IP-like manner.⁴³²

At the same time, indigenous communities are concerned that the process of preserving expressions of folklore, e.g. through documenting and digitising a traditional song, facilitates their illicit exploitation, as it creates access to them in the first place.⁴³³ Simultaneously, not documenting and restricting access to folkloristic expressions operates in conflict with the goal of promoting artistic freedom and nourishing this culture as a source of creativity and development.⁴³⁴ For instance, the process of sampling and compilation outlined above, albeit in an unlawful manner in the abovementioned cases, is typical of the music industry and indispensable for the growth of the present cultural and artistic world. As with any form of IP, the solution lies in the balance of 'control and access, excluding and sharing, competing and collaborating.'⁴³⁵

(c) The Boundaries of the Public Domain

The relationship between the often conflicting objectives illustrated above, represented in the contrast of protecting traditional culture and promoting the appropriate use thereof, needs to be coordinated and balanced carefully.⁴³⁶ This task is at the core of the

⁴³⁰ WIPO *Presentations on National and Regional Experiences with Specific Legislation for the Legal, WIPO/GRTKF/IC/4/INF/2 to 4/INF/5* available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_4/wipo_grtkf_ic_4_inf_2-main1.pdf, accessed on 31.03.2023.

⁴³¹ Like the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and at the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage.

⁴³² Wendland op cit note 37.

⁴³³ Brigitte Vézina 'Traditional Cultures, Indigenous Peoples and Cultural Institutions' (2010) *WIPO Magazine*.

⁴³⁴ WIPO Consolidated Analysis op cit note 77 at p. 9.

⁴³⁵ Chidi Oguamanam & Jeremy de Beer 'A Cross-Regional Research Partnership for Sustainable Development: The Open African Innovation Research (Open Air) Experience' (2017) 8 *OPEN AIR Working Paper* at p. 8.

⁴³⁶ WIPO Consolidated Analysis op cit note 77 at p. 10.

negotiations of the WIPO IGC and ultimately concerns the contours and boundaries of the public domain.⁴³⁷

Before the first attempts to protect TCEs were made, cultural heritage was generally regarded as common property.⁴³⁸ Free for all to use, there were no restrictions limiting the recording, adaption or reproduction of folkloristic expressions unless they did, in exceptional cases, fall under the copyright or other IP laws.⁴³⁹ This led to the creation of new 'contemporary literary and artistic productions' that were inspired by 'pre-existing, underlying cultural heritage.'⁴⁴⁰ While contemporary productions generally qualify as 'new works' and, as a result, fall under the scope of copyright protection, expressions of cultural heritage are, because of their public domain status, generally not protected.⁴⁴¹ This is one of the reasons why the exploitation of TCEs for the creation of new works has been so accessible in the past and why the calls for a new instrument have become louder.

Since the negotiations at the WIPO IGC began, different opinions concerning the most suitable legal solution have emerged. The current trend in general IP policymaking leans towards prioritising open access, stronger exceptions and limitations, and a more extensive public domain.⁴⁴² There is thus no surprise that there are many who proclaim that traditional culture cannot and should not be copyrighted.⁴⁴³ Regulating cultural heritage through IP instruments, so it is argued, would freeze culture instead of contributing to its renewal and survival.⁴⁴⁴ It would allegedly restrict creative and cultural exchange and eventually lead to the diminishing of culture as a whole.⁴⁴⁵ As *Kwame Anthony Appiah* put it: 'Cultures are made of continuities and changes, and the identity of a society can survive through these changes.'⁴⁴⁶ Furthermore, the public domain constitutes a significant source of creativity and innovation, and the contemporary adaptation of cultural expressions not only keeps the respective TCEs and

⁴³⁷ Wendland op cit note 37.

⁴³⁸ Okediji op cit note 26.

⁴³⁹ Perlman op cit note 340 at p. 174.

⁴⁴⁰ WIPO Consolidated Analysis op cit note 51 at p. 13.

⁴⁴¹ Ibid.

⁴⁴² Wendland op cit note 37.

⁴⁴³ Michael F Brown 'Can culture be copyrighted?' (1998) 39 *Current anthropology*.

⁴⁴⁴ Elizabeth Coleman 'The Disneyland of cultural rights to intellectual property: anthropological and philosophical perspectives' (2008) *ElgarOnline*; Brown op cit note 356.

⁴⁴⁵ WIPO Consolidated Analysis op cit note 77 at p. 14.

⁴⁴⁶ Kwame Anthony Appiah 'The case for contamination' available at <https://www.nytimes.com/2006/01/01/magazine/the-case-for-contamination.html>, accessed on 31.03.2023.

their communities alive but enriches the world's culture as a whole.⁴⁴⁷ Leaving TCEs in the public domain would, therefore, better serve the multiple objectives of their protection.⁴⁴⁸

Other stakeholders, in particular TCE holders and practitioners, doubt the positive effect of the public domain status for creation and development as well as for the promotion of cultural diversity.⁴⁴⁹ For example, the indigenous caucus of the IGC stresses their right to self-determination and that certain preconceived ideas of western copyright law do not fit with the nature of TCEs.⁴⁵⁰ Denying protection for all historic cultural expressions for the mere reason that they are not recent enough would not serve cultural preservation.⁴⁵¹ Treating expressions of folklore as forms of IP would not only acknowledge and respect their heritage but also give the communities a chance to utilise them for their own economic development.⁴⁵² Communities could prevent the misappropriation of their TCEs by third parties and thus gain control over uses that they find offensive.⁴⁵³ They argue for the establishment of a system that allows them to 'yield benefits to cultural communities from all creations and innovations that draw upon tradition.'⁴⁵⁴ It is argued that this goes with the *ratio legis* of Article 31 of UNDRIP, which grants indigenous communities the right to 'maintain, control, protect and develop their cultural heritage, and traditional cultural expressions.'⁴⁵⁵

At the WIPO IGC, the positions elaborated above are being voiced by several parties. While Group B and the EU Group support innovation and creativity, the indigenous caucus emphasises that the 'self-determination rights of indigenous peoples could not be balanced against other stakeholders.'⁴⁵⁶ While the former promote a broad understanding of the public domain, the latter proclaim TCEs and TK are not part of the

⁴⁴⁷ Dorothy Noyes 'The judgment of Solomon: global protections for tradition and the problem of community ownership' (2006) 5 *Cultural Analysis*.

⁴⁴⁸ WIPO Consolidated Analysis op cit note 77 at p. 14.

⁴⁴⁹ Ibid at p. 13.

⁴⁵⁰ Ibid at p. 7.

⁴⁵¹ Silke Von Lewinski *Indigenous heritage and intellectual property: genetic resources, traditional knowledge and folklore* Kluwer Law International BV (2008) .

⁴⁵² Tzen Wong & Claudia Fernandini 'Traditional cultural expressions: Preservation and innovation' (2011) *Intellectual Property and Human Development: Current Trends and Future Scenarios* at p. 178.

⁴⁵³ Perlman op cit note 340 at p. 175.

⁴⁵⁴ WIPO Consolidated Analysis op cit note 77 at p. 14.

⁴⁵⁵ Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples .

⁴⁵⁶ Ibid at p. 7.

public domain, and the term should thus be eliminated from the texts.⁴⁵⁷ Proponents of this view also claim that the term ‘public domain’ is a construct of IP law and does not take into consideration private domains established by customary or indigenous laws.⁴⁵⁸

The dilemma outlined above represents the typical balancing act between access to and control of works in intellectual property law.⁴⁵⁹ It leads to the question that forms the very mandate of the WIPO IGC: What is the most appropriate legal solution for the protection of TCEs that best serves all stakeholders and balances all needs involved?⁴⁶⁰

(d) The Limits of Intellectual Property Law

The difficulty of finding a new solution results from the lack of a fitting conventional legal system. Since TCEs are oftentimes literary, musical and artistic expressions that are commonly treated in the realm of copyright law, one would think that this field is the most appropriate mechanism for regulating the use and protection of folkloristic expressions.⁴⁶¹ To a certain extent, this is true. TCEs can be literary and artistic works that are protected by copyright law, such as ‘performances [can be protected] under the WIPO Performances and Phonograms Treaty, hand-woven textiles under industrial design law; and indigenous names, words and symbols under trademarks and geographical indication laws.’⁴⁶² However, for numerous reasons, the rules of conventional IP systems, including copyright laws, are not suitable for the specific characteristics of TCEs. Basic requirements of copyright protection, such as the originality of a work, the existence of an identifiable author (or group of authors), the fixation of an artistic expression or the duration of protection, are in direct contrast with typical TCE features.⁴⁶³ Intangible expressions of folklore, for example, cannot be fixated on by their very nature. TCEs that have been passed down through several generations will outgrow even the longest term of protection imposed by IP laws. Correlating with that, the author of a work or expression is mostly unknown, or communities link the authorship to them as a group.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ WIPO Consolidated Analysis op cit note 77 at p. 13.

⁴⁵⁹ Oguamanam op cit note 25 at p. 376.

⁴⁶⁰ WIPO Consolidated Analysis op cit note 77 at p. 24.

⁴⁶¹ Wendland op cit note 37.

⁴⁶² Kuruk op cit note 323 at p. 2.

⁴⁶³ The incompatibility of TCEs with conventional copyright does not form a detailed part of this thesis, as it has been discussed in length elsewhere, see:

Perlman op cit note 340; Zografos op cit note 5 at p. 12 and p. 45; Farley op cit note 218 at pp. 26.

Torsen at pp. 203f; WIPO Draft Gap Analysis op cit note 316; Stech op cit note 123 at p.2.

Although some commentators still argue that TCEs are adequately protected by existing IP-systems or that the matter could be solved rather easily through the amendment of existing frameworks,⁴⁶⁴ it has become apparent in the course of the WIPO IGC process that this option is not appropriate. The conception of a *sui generis* model is called for to close significant gaps.⁴⁶⁵ However, a promising consensus could be found in combining this newly created *sui generis* model with existing IP instruments, as it is currently striven for on a domestic level in South Africa.

Within the question of how this *sui generis* model should be constructed, experts are faced with a variety of legal and technical challenges. Coming from the general recognition of legislative processes that the most efficient protection is not always reached by a meticulous system of rules, there is still an unsettled question on which matters can be left to existing legislative frameworks and which regulatory gaps actually need and should be filled.⁴⁶⁶ Part of this question is also which issues need regulation on an international level and what can be left to national legislation.⁴⁶⁷

(e) Draft Articles and Core Issues

Within the negotiations, the draft articles are currently the documents that come closest to a negotiated agreement. However, the high number of brackets indicates that the majority of the text is, in fact, not agreed upon yet. The IGC has identified a number of core issues that produce disagreement, which include the sections on 'definitions, beneficiaries, subject matter, objectives, the scope of protection [...], exceptions and limitations and the relationship with the public domain'.⁴⁶⁸ Other highly debated issues are which eligibility criteria should be applied and where the line should be drawn between 'protection' and 'safeguarding'.⁴⁶⁹

⁴⁶⁴ WIPO Consolidated Analysis op cit note 77 at p. 35.

⁴⁶⁵ Caroline Ncube 'Intellectual property protection of traditional knowledge and access to knowledge in South Africa' in *Indigenous Intellectual Property* Edward Elgar Publishing (2015) at p. 543; Mira Burri 'Digital technologies and traditional cultural expressions: A positive look at a difficult relationship' (2010) 17 *International Journal of Cultural Property*; Visser op cit note 69.

⁴⁶⁶ Wendland op cit note 37.

⁴⁶⁷ *Ibid.*

⁴⁶⁸ As outlined by the WIPO IGC mandate, see WIPO GA Decision on IGC op cit note 351 at p. 1.

⁴⁶⁹ Seleti op cit note 56 at p. 10.

For a detailed analysis of the different approaches for safeguarding and protection see Wendland op cit note 37 at p. 101;

Additional topics that yet have to be properly discussed are the formalities, administration of rights, transboundary protection, term of protection or the international protection. The IGC only recently started the in-depth-discussion on these terms at IGC 46 in February 2023.

The most discussed and central section is the one on the scope of rights,⁴⁷⁰ which still misses a lot of clarity today. The IGC has discussed a certain model for this provision called the ‘tiered approach’ or ‘differentiated protection’ for several years. It suggests a distinction between the allocation of economic rights and moral rights towards different forms of TCEs, depending on their categorisation as ‘secret, sacred and widely or narrowly diffused.’⁴⁷¹ It aims for different levels of protection based on the nature of protection, the level of control that was already being exercised by the community and the degree of diffusion of the TK and TCEs.⁴⁷² There is broad consensus amongst the parties on the merit of having a tiered approach, while it is clear that the tiers and the nature of rights have to be revisited and refined.⁴⁷³ While this model is not yet considered mature, it does offer a form of balance and flexibility that the complexity of TCEs requires.⁴⁷⁴

The detailed legal questions with regard to each section of the draft articles are being outlined in more detail in Chapter Five. This is followed by an analysis of each party’s position with regard to these discussions to develop a possible common ground.

V. MULTILATERAL CONSENSUS BUILDING

In order to really develop an agreement on a multilateral level, the process and methodology around consensus-building in this context have to be understood. This section outlines what the term consensus entails and which kind of consensus-finding methods are currently implemented at the IGC. Following this, the most common multilateral dispute resolution tools are introduced, followed by an analysis of the IGC approach. The section concludes with general options for an international agreement to highlight alternatives in case a consensus cannot be reached within the current negotiation set-up.

⁴⁷⁰ There are different viewpoints about the most appropriate form protection approach as to whether ‘Positive Protection’, which enables TCE holders to commercially exploit their own creations or prevent others from doing so, or ‘Negative Protection’ which prevents third parties to gain IP protection over adaptations of TCEs, is the appropriate protection mechanism. See: WIPO Consolidated Analysis op cit note 51.

⁴⁷¹ Ibid at p. 3.

⁴⁷² WIPO Report of the 38th IGC meeting op cit note 413.

⁴⁷³ Kadooza & Lewis, Ad Hoc Meeting Report 2022 op cit note 386.

⁴⁷⁴ Ian Goss *Chair’s Text of a Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources* (2022) available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_43/wipo_grtkf_ic_43_5.pdf, accessed on 31.03.2023. at p. 3; Oguamanam op cit note 48 at p. 16.

The understanding of the consensus-building procedure plays an important role in my overall analysis and my recommendations for common ground, which follows in Chapter Six.

1. Meaning of Consensus

When speaking of consensus, there are many different meanings the term implies. In opposition to a simple majority vote or autocratic decision by one person, consensus is understood as a method of consensual decision-making that can be practised in different ways.⁴⁷⁵ Consensual decision-making is different from a simple majority vote or autocratic decision because the interests of all parties are supposed to be addressed and met.⁴⁷⁶ Interestingly enough, consensus-finding processes have long existed on all continents and can be observed across 'tribes, villages or small communities, [...] political assemblies, international organisations, and expert committees.'⁴⁷⁷ Experts in the field emphasise that the term refers to several different decision-making procedures.⁴⁷⁸ While opinions on the details and wording differ generally, the following can be deduced.

(a) Consensus-Finding Methods

The biggest difference that needs to be understood is the one between consensus and unanimity. While the term unanimity entails that every party agrees with a decision, consensus means that no one disagrees.⁴⁷⁹ Though at first glance, it seems like this distinction is of no consequence, in the negotiating practice, especially in multilateral negotiations, it creates vast differences. Consensus often means that parties do not necessarily agree with a decision but will support it anyway to allow the process to move forward.⁴⁸⁰ This becomes clear when the methods for consensus-finding are broken down even further, as exemplified by *Haug*:

⁴⁷⁵ Christoph Haug *What is consensus and how is it achieved in meetings? Four practices of consensus decision-making* (2015) New York: Cambridge University Press, at p. 1.

⁴⁷⁶ Wendland op cit note 44.

⁴⁷⁷ Philippe Urfalino 'The rule of non-opposition: Opening up decision-making by consensus' (2014) 22 *Journal of Political Philosophy* at p. 321.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ Gustavo Razzetti 'Make good decisions faster: Move from consensus to consent' available at <https://www.fearlessculture.design/blog-posts/make-good-decisions-faster-move-from-consensus-to-consent>, accessed on 31.03.2023

⁴⁸⁰ *Ibid.*

In the so-called 'Basic Consensus', participants are given a slot to explicitly express dissent. By asking the parties a direct question like 'Is anyone against this decision?' dissenters must voice their concerns, or their silence will be counted as agreement.⁴⁸¹ This method is sometimes referred to as the non-opposition rule.⁴⁸² *Urfalino* points out that this procedure is sometimes even used when the official rule is unanimity, as shown in the UN Security Council. Members can be opposed to a decision without wanting to block the collective decision. In these cases, the abstention has 'acquired a specific status - that of non-approving - but not so strong that it is worth a veto'.⁴⁸³ Unanimity then is reflected by the absence of veto, rather than every party being in full disagreement.

The opposite of the basic consensus is the 'acclaimed consensus', in which parties are given the opportunity to express their consent. Through questions like 'Does everyone agree?' the assumption of existing consensus is supposed to be merely confirmed.⁴⁸⁴ A more drastic method is the so-called 'imposed consensus'. In this case the chair, mediator or facilitator of a negotiation will simply declare that consensus has been reached. This is a more extreme method of consensus finding, as dissenters have to forcefully interrupt the procedure if they want to oppose.⁴⁸⁵ What all three methods have in common is that the existence of consensus is being assumed, but there are different ways in which this assumption is being confirmed.

A more complex and arguably fairer procedure is provided by the 'deliberative consensus'. Here, articulating dissent is not only allowed, but actively encouraged to prevent anyone from being silenced or not being heard.⁴⁸⁶ By directly asking participants whether their concerns have been sufficiently addressed, there is less of an assumption of agreement. This 'encouragement of objections serves to counteract institutional pressures by creating an atmosphere of appreciation for each individual's point of view.'⁴⁸⁷

(b) Current Consensus-Finding in International Proceedings and the IGC

⁴⁸¹ Haug op cit note 475.

⁴⁸² *Urfalino* op cit note 477.

⁴⁸³ *Ibid* at p. 332.

⁴⁸⁴ Haug op cit note 475.

⁴⁸⁵ *Ibid*.

⁴⁸⁶ *Ibid*.

⁴⁸⁷ *Ibid*.

Within international negotiations like the one at the WIPO IGC, the approach is usually closest to the deliberate consensus in the way of a 'single undertaking approach' where 'nothing is agreed until everything is agreed'.⁴⁸⁸ This is an indirect result of the General Rules of Procedure of WIPO, which the IGC adopted at the very first session.⁴⁸⁹ Every party can introduce a change to the Draft Articles, and every party can block the deletion of a section.⁴⁹⁰ These veto options are part of the reason why the process has been taking as long as it had and why it seems that an agreement is still far from being reached. Despite there being the option of voting, member states hardly make use of it.⁴⁹¹ It is clear that the IGC could potentially benefit from a more streamlined decision-making process. However, which mechanism would be the most suitable also depends on other, less tangible factors.

Every mechanism comes with advantages and disadvantages that affect different parties in different ways. For example, while majority voting provides every party with an equal vote, a high number of parties will leave the result as 'losers' who did not receive a solution that meets their interests.⁴⁹² This of course entails the risk that the 'losing' countries simply will not ratify the final agreement, which they are free to do due to every nation's sovereignty. Deliberate consensus finding would incorporate everyone's interests and is more attentive to unvoiced dissent, which in theory increases the chances of less powerful parties to be heard.⁴⁹³ In reality, the process is highly sensitive to political power dynamics which could actually lead to less powerful parties not getting their interests represented.⁴⁹⁴ In consequence, this too could lead to a situation in which parties will not ratify the final agreement, because their view is not represented. Historical observations within the UN had shown that many developed and powerful countries started preferring consensus over voting along majority lines when many newly independent nations emerged after the colonial era.⁴⁹⁵ This is because, very often, parties with less political or economic power are not able to participate and therefore remain silent. A majority voting, however, could move more powerful

⁴⁸⁸ Wendland op cit note 44.

⁴⁸⁹ WIPO IGC Rules of Procedure op cit note 356 Section II. 4 on p. 2.

⁴⁹⁰ *Ibid.*

⁴⁹¹ As can be taken from all analysed meeting reports between IGC 37 and IGC 46, in the past five years there was not a single vote on a subject matter question performed within the IGC.

⁴⁹² Wendland op cit note 44.

⁴⁹³ *Ibid.*

⁴⁹⁴ Urfalino op cit note 477 at p. 17.

⁴⁹⁵ *Ibid.*

countries in a minority which is probably why it has vanished from multilateral negotiations with the increasing number of parties.

2. Dispute Resolution & Multilateral Negotiations

This section outlines methods of dispute resolution that are being used to assess common ground in multilateral and bilateral legal negotiations. It then analyses mechanisms that are currently being used at the IGC and inquires whether the existing approach could be improved.

(a) Dispute resolution tools in multilateral negotiations

Among the literature on negotiation methods, there is broad agreement 'that multilateral negotiations⁴⁹⁶ in the international domain present the greatest degree of complexity.'⁴⁹⁷ This is not only because of the high number of parties but also because of intercultural differences, the great variety of interests at stake, a much more complex process, a more indirect form of communication via formal declarations instead of conversation, the number of potential trade-offs, and coalition-building or decision-making through voting.⁴⁹⁸ At the same time, multiparty negotiations are not nearly as well-researched as bilateral negotiations. There are a variety of informal and formalised options in multilateral negotiations for participating parties to reach an agreement. Among the most common ones is the use of appointed individuals that support and structure the negotiation process. Typically this is done by multilateral mediators or facilitators, but it is also common to hand over a significant amount of power to the chair of the meetings.

Mediation is defined as 'third party assistance to two or more interacting parties'⁴⁹⁹ and is considered one of the oldest forms of conflict resolution.⁵⁰⁰ In bilateral or private

⁴⁹⁶ 'Multilateral Negotiation' being defined as 'Any negotiation that is conducted simultaneously by a large number of government entities, usually under the auspices of an international organisation', see: André Auer & Jérôme Racine 'Multilateral Negotiations: From Strategic Considerations to Tactical Recommendations' (1998) *Dostupné z www. iew. unibe. ch/unibe/rechtswissenschaft/dwr/iew/content/e3870/e3985/e4148/e4199/addor_multilateral-negotiations_ger. pdf* [15. 12. 2013], accessed on 31.03.2023.

⁴⁹⁷ Larry Crump 'Multiparty negotiation: what is it?' (2006) 8 *ADR Bulletin* at p. 4.

⁴⁹⁸ *Ibid*; Deborah M. Kolb and Guy-Olivier Faure 'Organization Theory: The Interface of Structure, Culture, Procedures, and Negotiation Processes. In *International Multilateral Negotiation: Approaches to the Management of Complexity*' (1994) .

⁴⁹⁹ Dean G Pruitt & Kenneth Kressel 'Introduction: An overview of mediation research' (1989) *Mediation research: the process and effectiveness of third-party intervention*.

⁵⁰⁰ James A. Wall Jr. & Ann Lynn 'Mediation: A Current Review' Vol. 37 *The Journal of Conflict Resolution* at p. 2.

negotiations, mediators are typically neutral, and they try to get the negotiating parties to reach an agreement by themselves without having to impose a binding decision like an arbitrator or a judge would. In multilateral negotiations, mediators have the same role but typically have to develop different strategies due to the complexity of the process and the multitude of parties. Odell claims that mediating multilateral negotiations includes three dimensions: organisational, intellectual and tactical.⁵⁰¹

While the organisational part is about creating and managing a team of mediators because the negotiations are 'far too complex for any single individual to perform the mediation function effectively alone'⁵⁰², the intellectual part is about gathering the right information, i.e. the parties' actual reservation values or imaging a focal point that will 'create value and become an equilibrium'. The three tactical strategies are described as 'communication, formulation, and manipulation strategies'.⁵⁰³ Communication strategies are mostly aimed at preparing the negotiation in the most comprehensive way. This includes making contact with the parties, identifying issues and interests, supplying missing information while avoiding taking sides, and allowing all parties' objectives to be discussed.⁵⁰⁴ Formulation strategies set the framework for the negotiation. Mediators choose the meeting site and suggest or control the formalities and procedures. They also make substantive proposals and highlight common interests. They can also suggest concessions parties could make.⁵⁰⁵ Manipulation includes a more active role through changing parties' expectations, supplying and filtering information purposefully or rewarding concessions made by parties.⁵⁰⁶

Mediation is considered very effective; however, its effectiveness is usually the highest when the conflict 'is moderate rather than intense, and when the parties are highly motivated to reach a settlement, due to a hurting stalemate'.⁵⁰⁷ It is considered less effective when the parties are not committed to mediation, when there are enough

⁵⁰¹ John S Odell *Mediating multilateral trade negotiations* (2004) at p. 1.

⁵⁰² *Ibid* at p. 3.

⁵⁰³ Odell *op cit* note 501 at p.10.

⁵⁰⁴ *Ibid*.

⁵⁰⁵ Odell *op cit* note 501 at 11.

⁵⁰⁶ *Ibid*.

⁵⁰⁷ Peter Carnivale & Dean Pruitt 'Negotiation and Mediation' (1992) 43 *Annual Reviews Psychology* at p. 562.

resources, when the issues at stake involve general principles and when there is a power imbalance.⁵⁰⁸

Another way to achieve consensus is to pass over some of the power to the chair of the meeting. The chair thus becomes an unofficial mediator of the negotiations for a set period of time. In multilateral conferences and international organisations, negotiations are chaired by supranational officials or member state representatives.⁵⁰⁹ GATT⁵¹⁰ and WTO member states, for example, have given their Director-General the role of overall chair on occasion.⁵¹¹ In other cases, members have given special powers to ‘ministers or ambassadors who temporarily chair ministerial conferences and subsidiary negotiating bodies.’⁵¹² Within GATT and the WTO, the role of the chair as a mediator has been institutionalised.⁵¹³ Instead of having a neutral third party steer the negotiations, it is a person involved in the process with in-depth knowledge of dynamics and details. Compared to other alternative leaders like mediators or facilitators, the chair enjoys a distinct institutionalised power and specific procedural and informational resources:⁵¹⁴ ‘Typically, the chair is engaged to perform functions of agenda management, brokerage, and representation, which answer directly to functional demands in decentralised bargaining.’⁵¹⁵ They have ‘the informal capacity to consult with delegates, seek information about their preferences and reservation values, query their reactions to others’ demands, and try to persuade them to accept demands or compromise solutions’.⁵¹⁶ Within the WTO, the chair even has the option of proposing an informal single negotiating text in their own name.⁵¹⁷

The reason for governments to transfer these tasks of process control to one of the members in the group is to ‘mediate impediments to efficient bargaining’ because the group would otherwise suffer from ‘collective action dilemmas such as agenda instability, parties concealing their true preferences, and free riding.’⁵¹⁸ Even though

⁵⁰⁸ *Ibid* at p. 563.

⁵⁰⁹ Jonas Tallberg *The power of the chair in international bargaining* (2002) at p. 1.

⁵¹⁰ General Agreement on Tariffs and Trade (GATT).

⁵¹¹ John S Odell 'Chairing a WTO negotiation' (2005) 8 *Journal of international economic law* at p.1.

⁵¹² *Ibid*.

⁵¹³ *Ibid*.

⁵¹⁴ Tallberg *op cit* note 509 at p. 8.

⁵¹⁵ *Ibid* at p. 12.

⁵¹⁶ Odell *op cit* note 501 at p. 5.

⁵¹⁷ *Ibid*.

⁵¹⁸ *Ibid*.

there are many alternatives to using the chair as a mediator, the chair method is linked to a prevailing efficiency for addressing the potential problems above.⁵¹⁹ It is assumed that the chair's impact stems from their asymmetric control over the procedure and significantly more information on all the parties' preferences.⁵²⁰

With this in mind, the risk of having a party appointed as chair always entails that the chair is also 'an opportunistic actor with interests of its own [that] may seek to exploit these power resources for private gain as well.'⁵²¹ How the power of the chair is used by the person in it differs greatly depending on the framework. As *Tallberg* highlights:

'The institutional design of the chairmanship conditions the capacity of formal leaders to bias distributive outcomes in their own favour. Whereas rotation of chairmanships in the EU has generated a logrolling dynamic whereby state representatives take turns in exploiting the office for national purposes, supranational chairs in the GATT/WTO and elected state chairs at UN conferences have been confronted with control mechanisms and decision rules that limit the scope for distributional influence.'⁵²²

Next to external mediators or a mediating chair, some organisations make use of facilitators. Facilitators are professionals 'trained to help parties negotiate productively.'⁵²³ The role of a facilitator is relatively new to multilateral negotiations and originally stems from negotiations in businesses or educational facilities.⁵²⁴ While the specific roles vary, facilitators are typically in charge of keeping the conversation going and upholding a standard of open communication.⁵²⁵ The role of a facilitator is not an institutionalised one, which means that the tasks and responsibilities vary depending on the aim of the organisation and can be much wider than those of a mediator.

Another tool that has been used in multilateral negotiations, i.e. in GATT and WTO, is the so-called 'green rooms'. Parties are invited to a private, informal meeting where they can discuss solutions and voice opinions frankly without a written record.⁵²⁶ Sometimes ideas for settlements are suggested, and participants voice their concerns

⁵¹⁹ Tallberg op cit note 509 at p. 15.

⁵²⁰ Odell op cit note 501 at p. 5.

⁵²¹ Tallberg op cit note 509 at p. 15.

⁵²² Jonas Tallberg 'The power of the chair: Formal leadership in international cooperation' (2010) 54 *International Studies Quarterly* p. 243.

⁵²³ Program on Negotiation 'Glossary - facilitator' available at <https://www.pon.harvard.edu/glossary/facilitator/>, accessed on 31.03.2023

⁵²⁴ Alan Cattell 'Understanding Facilitation—Theory and Principles' (2004) *Industrial and Commercial Training*; Christine Hogan 'Facilitating Multicultural Groups: A Practical Guide' (2008) 16 *Human Resource Management International Digest*.

⁵²⁵ Programme on Negotiation op cit note 523.

⁵²⁶ Odell op cit note 501 at p. 6.

very honestly. While this started out as exclusive informal meetings between only the Director General and the most influential ambassadors, it has now been extended to a higher number of parties, including smaller developing countries.⁵²⁷ This procedure has been criticised heavily for its lack of transparency and unequal treatment of the parties. Due to this, any decision made in a green room must be ratified by consensus in the plenary. However, in reality, it is very difficult to change a deal once it is agreed upon in private.⁵²⁸

All the mechanisms outlined above are not exclusive. They can and have been used simultaneously in many multilateral negotiations.

(b) IGC Approach

The WIPO IGC makes use of a combination of different consensus-finding methods. In the past, they actively decided against an external mediator. This is mostly because the negotiations are considered very technical due to the complex subject matter, and many positions are subject to confidentiality.⁵²⁹ The required levels of trust and political willingness are considered too high for someone external to come in and steer the negotiations.⁵³⁰

The IGC does, however make use of facilitators who take up a similar role to that of a mediator, as outlined above. Facilitators get nominated at the beginning of each meeting and are mandated for the duration of that meeting only, though the same person can be re-elected several meetings in a row. They typically do not have any background as mediators, as only participating parties, i.e. country representatives, can be nominated.⁵³¹ This is because it is assumed that someone involved in the process will have more insight into the inner workings of the negotiations and the issues at stake.

Facilitators play an essential role in the consensus-finding process in every meeting. After participating in the plenary session, contact groups, intersession working groups, seminars, specific thematic sessions or Ad Hoc expert groups⁵³², facilitators collect

⁵²⁷ *Ibid.*

⁵²⁸ *Ibid.*

⁵²⁹ As can be taken from the existence of the Ad Hoc Expert Groups and Contact Groups, which are not open to the public.

⁵³⁰ Odell op cit note 501 at p. 6.

⁵³¹ Observation of IGC 45 in Geneva, December 2022.

⁵³² For a description of the procedure see Chapter Three, 2-3.

comments from the different member states.⁵³³ Based on this, they revise the draft articles and introduce an updated negotiating text. Sections that are not agreed upon are indicated in brackets. This text is then presented in the middle of the week so it can be discussed by the parties. They can come up with their own ideas and suggestions for the text, which includes both the drafting of new alternatives or the deletion of sections and alternatives.⁵³⁴ At IGC 44 in September 2022, the facilitators even started including a ‘facilitators alternative’ for each draft provision, which is based on the information they receive in the contact and intersessional working groups.⁵³⁵ The changes proposed by the facilitators are not binding. The revised draft articles are working documents ‘meant to help Member States come to a shared understanding.’⁵³⁶ The instrument of the facilitator has had a positive impact on the negotiations and significantly reduced the length of the draft articles and the number of alternatives within the past years.⁵³⁷

In addition to facilitators, the secretariat and the chair of the meeting also play an important role. According to the WIPO mandate, the secretariat is to support the IGC with information and funding. The gathering of information can take the form of updating studies, identifying gaps and collecting, compiling and making information available. With this work, the secretariat contributes by providing objective information on which the negotiations are built.⁵³⁸ The acting chair can draft texts and suggestions based on their personal opinion for a basis of further discussion. These texts are usually developed in a consultative manner through informal consultations with the parties and therefore reflect elements that parties might not speak openly about in the plenary. The chair’s suggestions usually reflect a balanced middle ground between the extreme positions that some parties cling to.

3. General Procedural Options

⁵³³ Observation of IGC 45 in Geneva, December 2022.

⁵³⁴ Observation of IGC 45 in Geneva, December 2022.

⁵³⁵ WIPO *Transcript of IGC 44, 16th September 2022, Morning Session, WIPO S2T:WIPO GRTKF IC 44 2022-09-16 AM 116632 en* (2022) available at https://webcast.wipo.int/video/WIPO_GRTKF_IC_44_2022-09-16_AM_116632, accessed on 31.03.2023 at p. 5.

⁵³⁶ WIPO *Report of the 37th IGC Meeting, WIPO/GRTKF/IC/37/17* (2018) available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_17.pdf, accessed on 07.05.2022 at p. 49.

⁵³⁷ As can be taken from a comparison of the draft articles over the years.

⁵³⁸ IGC Mandate op cit note 780 at p. 1.

Even though WIPO IGC is aiming for a particular outcome and has followed a specific procedure for the past years, it is important to highlight alternatives that member states can fall back on in case countries fail to find an agreement in the current setting.

One approach could be to make adjustments to the extent of the agreement. For instance, if the participating parties at this point cannot reach a consensus, the number of parties could be reduced. As former Director General of WIPO *Francis Gurry* put it: 'It is easier to make rules and get agreement among a smaller number of states than it is to do so with the whole world.'⁵³⁹ Multilateralism is faced with enormous challenges because the extremely rapid technological change does not go at the same speed as the relatively slow intergovernmental processes.⁵⁴⁰ Similarly, *Wendland* points out: 'Trying to achieve consensus in all countries-all issues negotiations is not working [...], especially in negotiations aimed at agreement among all countries on a detailed and legally binding treaty or convention.'⁵⁴¹ Agreements with a smaller number of parties, or plurilateral agreements, have become more popular in the international policy-making space. Within the WTO, experts have witnessed an increasing trend over time that is characterised by a focus on open and most favoured nation⁵⁴² plurilateral agreements, which are seen as a potential escape from stalemates in negotiations.⁵⁴³

Alternatively, the rules of consensus-finding could be changed. At this point, every country has the right to add alternatives or ask for sections to be reinserted at every IGC meeting. With over 65 participating member states, this contributes significantly to keeping the progress slow, thus enabling 'power-moves' of countries that block a decision as a tactical move. The number of these vetoes could be reduced to a fixed number per meeting, so member states would have to focus on the matters of their

⁵³⁹ WIPO 'Francis Gurry on the challenges for multilateralism in the field of intellectual property' (2016) *WIPO Magazine*.

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Wendland* op cit note 44.

⁵⁴² Most favoured nation (MFN) is a non-discrimination rule in international trade. Each member treats all the other members equally as "most-favoured" trading partners. If a country improves the benefits that it gives to one trading partner, it has to give the same "best" treatment to all the other members so that they all remain "most-favoured", see: World Trade Organization 'Principles of the trading system' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#seebox, accessed on 31.03.2023

⁵⁴³ Rudolf Adlung & Hamid Mamdouh 'Plurilateral trade agreements: An escape route for the WTO?' (2018) 52 *Journal of World Trade* p. 6.

highest priority. The restriction of vetoes has been called for in other multilateral fora as well, where similar dynamics transpire.⁵⁴⁴

Finally, more focus could be put on national governments. While the negotiations at the WIPO IGC continue, countries could already start implementing a mechanism to support indigenous communities and the protection of their TCEs. This could include the partial use of the existing IP systems and providing legal advice thereto or simply the establishment of non-legal measures like databases or archival organisations. Furthermore, countries could fall back on practical mechanisms already in place, such as the multitude of databases provided by WIPO⁵⁴⁵ or national jurisdictions.

⁵⁴⁴ United Nations 'Today's Challenges Require More Effective and Inclusive Global Cooperation, Secretary-General Tells Security Council Debate on Multilateralism' available at <https://press.un.org/en/2022/sc15140.doc.htm>, accessed on 31.03.2023.

⁵⁴⁵ For example WIPO's Global Databases, WIPO Centralized Access to Search and Examination, WIPO Digital Access Service, WIPO Re:Search or the Accessible Books Consortium.

CHAPTER FOUR

Analysis of Existing National Legislation & Selected Customary Law

This chapter provides an overview of the legal background of the analysed parties to get a broader understanding of their overall international policy approach. In order to evaluate this background, the domestic approaches in the EU, the US and South Africa are analysed based on their ability to protect TCEs from misappropriation and unauthorised uses. Since the Indigenous Caucus is not a representative of one jurisdiction, but a collective of indigenous groups within the WIPO IGC, a few examples of indigenous customary law⁵⁴⁶ and practices are evaluated instead. In addition to providing examples of how indigenous customs deal with IP, this also serves to illustrate how the objective of IPLCs to incorporate customary into the final instrument can be accomplished.

The analysis for the jurisdictions is based on the following evaluation criteria:

1. Existence: Does the jurisdiction have a legal instrument that is specifically aimed at the protection of TCEs on a national level?
2. Category: If an instrument exists, is it a sui generis instrument specifically created for TCEs, or does it explicitly extend the existing IP system towards indigenous communities and TCEs?
3. Alternative: Are there other laws outside of the IP system that indirectly protects (parts of) TCEs?
4. Effect: How efficient is the existing system? How is it perceived by legal experts and indigenous people? How does it protect against the unauthorised use and misappropriation of TCEs?

⁵⁴⁶ What this term entails will be outlined in detail in Chapter Four, IV.

5. Position: Is there a national policy that determines the positioning towards an international instrument for the protection of TCEs?

I. LEGAL APPROACHES ADOPTED IN THE EUROPEAN UNION

When looking at the European context, it becomes clear that the EU not only has fewer IPLCs than other parts of the world but also positions typically aligned with the western entities which commercially exploit indigenous cultures. At the same time, the EU encompasses indigenous groups that are subjected to that same exploitation. (e.g. the Basques, Catalans or Sámi).⁵⁴⁷ The need for regulation is, therefore, a given. However, when compared with organisations like WIPO or UNESCO, the effort undertaken by the EU in protecting and safeguarding TCEs directly is comparably low. The following analysis outlines the limits of protection of applicable instruments within the EU legislative framework. After first explaining the limits that result from the EU being a signatory to the Berne Convention, a selection of EU directives are being analysed on their ability to protect TCEs.

1. Current domestic laws in the EU on the protection of TCEs

Within the competencies of the European Union are certain areas in which the EU has legislative powers for regulations and directives that dictate the national legislation of the member states.

Since all member states are signatories, the relevant base instrument for copyright protection in the EU is the Berne Convention, which grants copyright protection when a work can be classified as a literary or artistic work and is original.⁵⁴⁸ The term of protection within the EU member states is 70 years.⁵⁴⁹ Like in every jurisdiction that is a signatory to the Berne Convention, the incompatibility between TCEs and copyright law becomes apparent quickly. For example, when trying to classify the *Yoik* song of the Sámi people⁵⁵⁰, the originality requirement cannot be met because songs have been passed on through generations. Therefore, the 'concept of originality can only be applied to the small changes [the *Yoik*] is bound to undergo through constant evolution,

⁵⁴⁷ Olteanu op cit note 74 at p. 1.

⁵⁴⁸ Article 2 of the Berne Convention for the Protection of Literary and Artistic Works .

⁵⁴⁹ Article 1 of the Directive 2015/2436/EU of the European Parliament and the Council to approximate the laws of the Member States relating to trade marks (EU Directive 2015/2436). of 2015

⁵⁵⁰ See Chapter Chapter Two, II. 8.

development and recreation in the Sámi community', and it is questionable whether these small changes meet the threshold for originality.⁵⁵¹ In addition, Article 2(2) of the Berne Convention contains a fixation requirement, and this excludes intangible TCEs. Another issue is created by the authorship requirement, as the *Yoik* is defined by the process of development by the entire community, so it is impossible to name an individual or a distinct group of authors.⁵⁵² Alternative protection could be provided by neighbouring or related rights, such as the rights of performers, phonogram producers and broadcasting organisations, which are internationally protected by the WIPO Performances and Phonograms Treaty.⁵⁵³ However, as outlined above, the WPPT only protects the performances of TCEs and not TCEs as such, which provides only a limited form of protection.

The EU has passed 13 directives⁵⁵⁴ and two regulations⁵⁵⁵ to harmonise copyright law within the member states.⁵⁵⁶ None of them addresses TCEs or TK directly. Some directives could potentially provide indirect protection for TCEs. The directive on certain permitted uses of orphan works (Orphan Works Directive)⁵⁵⁷, for example, was introduced to address the situation 'where authors or rights-holders of copyright-protected works cannot be identified or located.'⁵⁵⁸ This is the case for many TCEs, as their origin is often unknown due to their multigenerational transfer. Under Article 2(1) of the directive, a work acquires orphan status if 'none of the rights-holders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search'.⁵⁵⁹ For tangible TCEs, this would mean that they qualified as orphan works if their author could not be identified, i.e. because a song has been with a

⁵⁵¹ Arnesen op cit note 75 at p. 392.

⁵⁵² Ibid.

⁵⁵³ See Chapter Three, III. 4.

⁵⁵⁴ InfoSoc Directive (2019); Rental and Lending Directive (2006), Resale Right Directive (2001); Satellite and Cable Directive (1993); Software Directive (2009); Directive on the enforcement of intellectual property right – IPRED (2004); Database Directive (1996); Term Directive (2011); Orphan Works Directive (2012); CRM Directive (2014); Directive implementing the Marrakech Treaty in the EU (2017); DSM Directive (2019); Satellite and Cable II Directive (2019).

⁵⁵⁵ Regulation implementing the Marrakech Treaty in the EU (2017); Portability Regulation (2017).

⁵⁵⁶ European Union 'The EU Copyright Legislation' available at <https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation#:~:text=The%20EU%20copyright%20law%20consists,%2C%20performers%2C%20producers%20and%20broadcasters.,> accessed on 31.03.2023.

⁵⁵⁷ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text with EEA relevance of 2012 .

⁵⁵⁸ Uma Suthersanen & Maria Mercedes Frabboni 'The Orphan Works Directive' in *EU Copyright Law* Edward Elgar Publishing (2021) at p. 1.

⁵⁵⁹ Orphan Works Directive at Article 2.

community for several generations. However, the qualification as an orphan work does provide TCEs with the protection levels copyright otherwise leaves open. On the contrary, the Orphan Rights Directive was created to

‘facilitate the mass digitisation projects going on across Europe by removing some copyright barriers. It created an exception to copyright, so that the digitisation and dissemination of orphan works [...] could be done without necessarily seeking permission from every rights-holder.’⁵⁶⁰

Thus, if TCEs can be categorised as orphan works, users will not have to obtain the permission of the indigenous community that is affiliated with them. In conclusion, the orphan works directive lowers the protection levels for TCEs in the EU.

Another recent directive that was adopted in 2019 is the Directive on copyright and related rights in the Digital Single Market (DSM Directive).⁵⁶¹ Its aim was to update the EU’s copyright law to better reflect the digital age and to create a single digital market within the EU.⁵⁶² Through a series of initiatives, it attempted to facilitate the mass digitalisation of works, including such of the cultural heritage sector.⁵⁶³ While this might have helped the cultural preservation aspect of TCEs, it did not further their legal protection against unauthorised uses. This is because the directive aimed to facilitate the sharing of digital collections by cultural institutions across borders by harmonising exceptions to copyright law within the EU.⁵⁶⁴ According to Article 3. 1 of the DSM Directive, cultural heritage institutions, such as museums, libraries, and archives, shall be granted an exception to copyright to make copies of works that are in their collections in order to preserve them in digital form.⁵⁶⁵ This means that if any TCEs actually did qualify for copyright protection and were in possession of a cultural institution, they could be copied and digitised by the said institution without the consent of the indigenous community. The DSM directive is said to have a clear overlap with the Orphan Works Directive in this regard and thus facilitates the use of TCEs, instead of

⁵⁶⁰ Europeana Pro 'A promise for mass digitisation' available at <https://pro.europeana.eu/post/evaluating-the-orphan-works-directive>, accessed on 31.03.2023

⁵⁶¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC of 2019

⁵⁶² UNESCO 'Copyright in the Digital Single Market (Directive (EU) 2019/790)' available at <https://en.unesco.org/creativity/policy-monitoring-platform/copyright-digital-single-market-directive-eu#:~:text=The%20Directive%20sets%20out%20various,remuneration%20of%20authors%20and%20performers>, accessed on 31.03.2023.

⁵⁶³ Georgetown Law Library 'The E.U.’s Digital Single Market & Digital Strategy' available at <https://guides.ll.georgetown.edu/cyberspace/eu-digital-single-market#:~:text=The%20E.U.'s%20Digital%20Single,technical%20standards%20to%20facilitate%20interoperability>, accessed on 31.03.2023.

⁵⁶⁴ DSM Directive Preamble, (25) – (30).

⁵⁶⁵ DSM Directive, Article 3.1

protecting them against it.⁵⁶⁶ Thus, overall it can be said that EU copyright law does not provide sufficient protection against unauthorised uses of TCEs.

When looking at other parts of European IP law, TCE holders generally have the possibility to register their signs as trademarks within the dual system of the EU. They can either be registered at the national level in their country of residence or on the EU level as a European Union Trademark (EUTM) at the European Union Intellectual Property Office (EUIPO).⁵⁶⁷ Generally, trademark law does not have as many material requirements as copyright law. Eligible for trademark protection would be TCEs in the form of signs, names or words as long as the TCE in question meets the required level of distinctiveness.⁵⁶⁸ However, there are other limitations that make existing trademark law insufficient for the protection of TCEs. Trademarks differ from copyrighted works by being used to prevent the commercial use of the sign by third parties.⁵⁶⁹ For this reason, eligible TCEs must fall within the category of being commercial, which excludes all TCEs with non-commercial uses, such as sacred or secret expressions. In addition to that, a trademark is limited to the specific use it has been registered for (i.e. the sale of a specific good) and requires compulsory use, which means that the registration of a trademark can be challenged if it has not been used in a period of five years.⁵⁷⁰ These limitations illustrate that the commerce background of trademark protection is not compatible with the objectives of the TCE holders, whose interest is not always, or only partly, of commercial nature. Lastly, if trademark protection is sought by indigenous people, they must identify an entity in which the right will be vested. This does not generally preclude TCEs from being registered as trademarks, but it can create an obstacle for communities that reject the idea of individual ownership of a group's name. To some extent, this can be addressed by collective marks, which indicate 'the commercial origin of certain goods and services by informing the consumer that the producer of the goods or the service provider belongs to a certain association and that it

⁵⁶⁶ *Europeana op cit* note 560.

⁵⁶⁷ Regulation (EU) 2017/1001 of the European Parliament and the Council on the European trade mark (EU Regulation 2017/1001) of ; Directive 2015/2436/EU of the European Parliament and the Council to approximate the laws of the Member States relating to trade marks (EU Directive 2015/2436).

⁵⁶⁸ Preamble, Article (9) of the EU Regulation 2017/1001.

⁵⁶⁹ Preamble, Article (13) of the EU Regulation 2017/1001.

⁵⁷⁰ Section 3, Article 18 on the EU Regulation 2017/1001.

has the right to use the mark.⁵⁷¹ However, this would not solve the remaining incompatibilities between trademark protection and TCEs.

Another possible option to protect TCEs in a European context could be provided by EU Quality Schemes. Through a label that guarantees a certain origin, products are protected against 'misuse or imitation of the registered name and guarantee the true origin of the product to your customers'.⁵⁷² According to the Customs Regulation 608/2013,⁵⁷³ protected indications are treated as intellectual property rights. The available schemes are the Protected designations of origin (PDO), Protected geographical indications (PGI) and Geographical Indications (GI). However, these schemes only apply to agricultural products, foodstuffs, wines, and spirits.⁵⁷⁴ Since most TCEs are not the result of agricultural activity, EU Quality Schemes are more appropriate for the protection of GR and TK in its narrow sense.

The same can be said for the Convention of Biological Diversity (CBD), of which the EU is a signatory. The CBD is a convention that focuses on 'the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources'.⁵⁷⁵ Genetic resources form a separate group of the subject matter at the negotiations facilitated by the WIPO IGC and the CBD, therefore does not apply to TCEs.

In conclusion, there are no European laws that are aimed directly at the protection of TCEs. There are, however, certain instruments that address TCEs indirectly through the preservation of culture.

According to the Treaty of the Functioning of the European Union, the EU has the obligation of 'safeguarding cultural heritage of European significance'.⁵⁷⁶ The definition

⁵⁷¹ European Intellectual Property Office 'Certification and Collective Marks' available at accessed on 31.03.2023; Collective Marks are defined by Article 74 of the EU Regulation 2017/1001.

⁵⁷² European Union 'Geographical Indications' available at https://europa.eu/youreurope/business/running-business/intellectual-property/geographical-indications/index_en.htm#:~:text=Geographical%20indications%20protect%20your%20products,as%20certain%20requirements%20are%20met., accessed on 31.03.2023.

⁵⁷³ Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003 of 2013 .

⁵⁷⁴ European Union op cit note 572.

⁵⁷⁵ Article 1 of the Convention on Biological Diversity (CBD) of 1993 .

⁵⁷⁶ Article 167(2) of the Consolidated version of the Treaty on the Functioning of the European Union 2012/C 326/01 of .

of cultural heritage follows a rather practical approach that is in line with the commercial background of IP law. According to a document by the Council of the European Union, cultural heritage is described as a source of sustainable development and defined as a collection of ‘resources inherited from the past’, ‘constantly evolving’ and originating ‘from the interaction between people and places through time’ and thus providing value in a social, cultural and environmental context.⁵⁷⁷ Thus it can be said that the approach of the Council of the European Union ‘focuses on safeguarding cultural heritage because this triggers social and economic benefits’.⁵⁷⁸ The definition of the EU also contains the three elements relating to time, space and a social context that are inherent in the definitions of TCEs.⁵⁷⁹ Therefore, the Treaty of the Functioning of the European Union can be read to indirectly address the preservation of TCEs.

A newer approach to a definition is presented by the Framework Convention on the Value of Cultural Heritage for Society (The Faro Convention)⁵⁸⁰ of the Council of Europe⁵⁸¹. The convention is said to have a ‘bold and unconventional’ definition of cultural heritage because of its ‘people-centred approach.’⁵⁸² It acknowledges that cultural objects are ‘important because of the meanings and uses that people attach to them.’⁵⁸³ Furthermore, the Faro Conventions contain provisions which place the interests of indigenous people over those of general development and commercial interests. While Article 10 recognises the economic value of cultural heritage, Article 3 requires the parties to: ‘take into account the specific character and interests of the cultural heritage when devising economic policies; and ensure that these policies respect the integrity of the cultural heritage without compromising its inherent values.’⁵⁸⁴ If the Faro Convention were to be adopted by all member states, this approach

⁵⁷⁷ Council of the European Union ‘Council conclusions of 21 May 2014, on cultural heritage as a strategic resource for a sustainable Europe,’ (2014) *OJ C 183/36*.

⁵⁷⁸ Olteanu op cit note 74 at p. 10.

⁵⁷⁹ See Chapter Two, I.

⁵⁸⁰ Council of Europe Framework Convention on the Value of Cultural Heritage for Society (2005), Council of Europe Treaty Series No.199 (Faro Convention) of 2005.

⁵⁸¹ The Council of Europe, not to be confused with the European Council or the Council of the European Union, is an international organisation, which comprises 47 countries of Europe. It is not an organ of the European Union, but a separate organisation that shares the same fundamental values. See: The Council of Europe ‘The Council of Europe and the European Union’ available at <https://www.coe.int/en/web/portal/european-union>, accessed on 31.03.2023.

⁵⁸² Graham Fairclough et al ‘The Faro Convention, a New Paradigm for Socially-and Culturally-Sustainable Heritage Action?’ (2014) *J Kynmyppä/Cultureat* p. 11; Olteanu op cit note 74 at p. 10.

⁵⁸³ Stephen Bond & Derek Worthing *Managing built heritage: the role of cultural values and significance* John Wiley & Sons (2016) at p.115.

⁵⁸⁴ Article 10 and 3 of the Faro Convention.

could thus be guiding for a higher protection level of TCEs within IP policy. It could, for example, create 'absolute grounds of refusal of trademarks under EU trademark law, specifically in cases related to EU's public policy'.⁵⁸⁵ However, as a framework instrument of the Council of Europe, the Faro Convention 'does not create specific obligations for action' but merely provides suggestions.⁵⁸⁶ In addition to that, it has yet to be ratified by many member states, including the EU.⁵⁸⁷

In conclusion, in the lack of direct TCE protection or sufficient coverage by existing IP laws or cultural preservation treaties, TCE protection on the EU level falls short and would benefit from a more comprehensive solution.

2. General international positioning of the EU within the WIPO IGC

Although the EU bloc of countries is generally in favour of an international instrument, there is a noteworthy degree of scepticism towards the introduction of a single-text approach.⁵⁸⁸ The strongest reason for this reluctance is the degree of uncertainty that comes with the number of undefined matters of substantive law within the IGC negotiations.⁵⁸⁹ As a result, from the EU perspective, it is not clear at this point what a potential instrument would actually entail.⁵⁹⁰ Furthermore, the complexity of all subject matters being discussed within the IGC seems irreconcilable.⁵⁹¹ In addition, the EU is reluctant to agree to an instrument which alters the current international IP system, especially the patent regime.⁵⁹²

II. LEGAL APPROACHES ADOPTED IN THE UNITED STATES OF AMERICA

This subchapter provides an overview of the domestic legal approach towards the protection of TCEs within the US.

⁵⁸⁵ Olteanu op cit note 74 at p. 10.

⁵⁸⁶ Council of Europe 'Convention on the Value of Cultural Heritage for Society (Faro Convention, 2005)' available at <https://www.coe.int/en/web/culture-and-heritage/faro-convention>, accessed on 31.03.2023

⁵⁸⁷ Council of Europe 'Chart of Signatures and Ratifications of Treaty 199—Council of Europe Framework Convention on the Value of Cultural Heritage for Society.' available at <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=199>, accessed on 31.03.2023

⁵⁸⁸ Seleti op cit note 56 at p. 11.

⁵⁸⁹ As outlined above, see Chapter Two, VI., 2 (c) on legal key issues.

⁵⁹⁰ Ghazala Javed et al 'Protection of Traditional Health Knowledge: International Negotiations, National Priorities and Knowledge Commons' (2020) 6 *Society Culture in South Asia*

⁵⁹¹ Ibid.

⁵⁹² Ibid., see also Seleti op cit note 56 at p. 11.

1. Historical Context

The current US IP regime does not include any provisions that are aimed at the protection of TCEs. Expressions of folklore traditionally fall within the public domain. This is, like in other jurisdictions, partly based on the typical protection requirements of different IP laws.⁵⁹³ However, in the US more than in other countries, historical analysis shows that the overall purpose of IP law was primarily of an economic nature and less to protect (indigenous) art itself.⁵⁹⁴

Copyright law, which is taken as the lead example as it provides rights that are very similar to the rights sought after by IPLCs, was established with the main purpose of promoting development. The Copyright Clause of the United States Constitution grants Congress the power to ‘promote the Progress of [...] useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings’.⁵⁹⁵ Exclusive ownership, according to the drafters of the constitution, was restricted to art forms that were considered ‘useful’ to ‘promote cultural progress’. This wording shows a clear distinction between arts that could benefit development and arts that could not. Ownership over creations was therefore not considered natural but depended on the ‘economically-oriented attitude of the United States towards its Article.’⁵⁹⁶

Even though US courts did not uphold the distinction between ‘useful’ and ‘not useful’ arts, the United States Supreme Court confirmed the economic approach in several cases.⁵⁹⁷ The main goal was seen to ‘stimulate artistic activity for the general public good’, while the fair return for an author’s creative labour is seen as an ‘immediate effect’, yet a secondary goal.⁵⁹⁸ Thus, the main goal was the creation of an economic incentive for individual authors for the greater aim of development. This focus creates a stark contrast to the understanding of most non-western and traditional music, where ‘the concepts of music and material profit [often] remain unconnected.’⁵⁹⁹ Thus, protecting culture and art that has been passed down within a community for

⁵⁹³ See Chapter Three, IV. 4.

⁵⁹⁴ Mills op cit note 1 at p. 61.

⁵⁹⁵ Constitution of the United States of America of 1788 .

⁵⁹⁶ Mills op cit note 1 at p. 61.

⁵⁹⁷ See for example: *Goldstein vs. California* 1973 (U.S.) 412 546 ; *Twentieth Century Music Co. vs. Aiken* 1975 (422) U.S. 151 .

⁵⁹⁸ *Twentieth Century Music Co. vs. Aiken* 422 U.S. at p. 156.

⁵⁹⁹ Mills op cit note 1 at p. 62.

generations that do not hold significant innovation contradicts the underlying aim of US copyright law.

In addition to the above, the lack of protection of indigenous culture in the US is tied to its political history. Like in the majority of countries that have a history of colonialism, the existing legal regimes reflect past injustices. The lack of protection for indigenous art is not surprising when one compares the timeline of the drafting of the constitution and the simultaneous position of Native Americans in US society. The impact of European colonisation on Native American culture was severe: from the forced assimilation of indigenous communities into the culture of colonisers through institutions like 'Indian Schools' to the appropriation of indigenous culture through misrepresentation, unethical research practices and suppression of traditional practices.⁶⁰⁰ Researchers would often disrespect the boundaries of communities when it came to ceremonies or sacred rituals and depict Native Americans with labels such as 'savage' or 'exotic'.⁶⁰¹ Oftentimes, consent from the communities was not given freely but resulted from some form of pressure.⁶⁰² This treatment of Native Americans also reflected in laws from the time. For instance, in the 1787 Constitutional Convention, Native Americans were not considered in the U.S. House of Representatives, and the 'Act for the preservation of peace with Native American tribes from 1800 severely limited the First Amendment rights of indigenous people.⁶⁰³

The situation in the US, therefore, has to be interpreted with this background in mind, as the empowerment of indigenous people is a relatively new concept to US society and thus not fully reflected in the law as of yet.

2. Current domestic laws in the US on the protection of TCEs

The relationship between the US government and Native American tribes is regulated by the U.S. Department of the Interior through the *Bureau of Indian Affairs* (BIA). Its role is seen as 'a partner with tribes to help them achieve their goals for self-determination

⁶⁰⁰ Kay Mathiesen 'A defense of native americans' rights over their traditional cultural expressions' (2012) 75 *The American Archivist* at p. 463.

⁶⁰¹ *Ibid.*

⁶⁰² *Ibid.*

⁶⁰³ John R. Vile 'The First Amendment Encyclopedia' available at <https://www.mtsu.edu/first-amendment/article/1369/native-americans>, accessed on 31.03.2023.

while also maintaining its responsibilities under the Federal-Tribal trust and government-to-government relationships.’⁶⁰⁴

On a domestic level, there are no laws that are aimed at the protection of TCEs specifically. However, the existing IP regime has some provisions that can comprise TCEs as subject matter in certain cases. In addition to that, there is currently a small number of instruments that aim for the protection of traditional knowledge in a broader sense, such as the Alaska’s Silver Hand Program, the USPTO Database of Native American Tribal Insignia or the Indian Arts and Crafts Act of 1990.⁶⁰⁵ Although these instruments are often cited by US Officials to proclaim their interest in protecting indigenous knowledge, their actual potential to fulfil such a purpose is regarded as limited.⁶⁰⁶ The following section analyses the impact of the current US IP regime and the aforementioned pieces of legislation on their level of protection for TCEs.

US Copyright law is regulated by the Copyright Act of 1976, as amended.⁶⁰⁷ It provides positive and defensive protection for works that are original, have an identifiable author and are fixed in a tangible medium.⁶⁰⁸ The term of protection depends on a variety of factors but generally ends 70 years after the author’s death.⁶⁰⁹ TCEs regularly do not fall under this provision, as they mostly have been transferred over many generations, and in consequence, the author is often unknown, the term of protection is expired, and, in the case of intangible TCEs like songs or dances, they are lacking in fixation. Pre-existing works also fail to meet the originality requirement.⁶¹⁰ This goes in accordance with the Berne Convention, of which the US has been a signatory since 1989.⁶¹¹ Even though the Berne Convention creates the option for countries to make provisions for expressions of folklore,⁶¹² with regard to copyright law, most TCEs are still considered to fall within the public domain.⁶¹³ The only way for tangible TCEs to

⁶⁰⁴ U.S. Department of the Interior 'Bureau of Indian Affairs' available at <https://www.bia.gov/bia>, accessed on 31.03.2023.

⁶⁰⁵ Indian Arts and Crafts Act (P.L. 101-644) of the United States of America of 1990 .

⁶⁰⁶ Kremers op cit note 57 at p. 72.

⁶⁰⁷ Copyright Act, 17 U.S.C. §§ 101 et seq. of 1976 , as amended.

⁶⁰⁸ Ibid at Section 102 (a).

⁶⁰⁹ Ibid at section 302 (a).

⁶¹⁰ Awopethu op cit note 205 at p. 770.

⁶¹¹ Berne Convention Implementation Act of 1988 .

⁶¹² See Chapter Two, VI. 2. on the shortcomings of the Berne Convention regarding TCE protection.

⁶¹³ Torsen op cit note 69 at p. 201.

receive copyright protection in the US would be if authors modified pre-existing TCEs into a derivative but new work.⁶¹⁴

For tangible TCEs, the US trademark regime offers a few more, yet also limited, possibilities through a number of instruments other than copyright law. The foundation of US trademark law is the Trademark Act of 1946 (Lanham Act).⁶¹⁵ The Lanham Act protects trademarks by providing ‘a link between the customer and the manufacturer of the goods, and indicates to the customer that a particular good is authentic.’⁶¹⁶ Section 43 (a) prevents others from the use of trademarks or ‘any false designation of origin, false or misleading description[...], or false or misleading representation’.⁶¹⁷ It could thus be used as a source indicator for TCEs, as they do not have the requirement of originality, fixation or an identifiable author.⁶¹⁸ Some even see Section 2 (a) as an implicit right to defensive protection for IPLCs, by preventing non-indigenous identities from obtaining a trademark registration for TCEs.⁶¹⁹ Due to the US following a common law system, there are also a number of court cases that influence how trademark law deals with TCEs. For example, in the case of *Navajo Nation vs. Urban Outfitters*, the Native American tribe brought a case against the fashion retailer for selling goods, including undergarments and drinking flasks, that resembled typical Navajo patterns.⁶²⁰ The tribe’s complaint referred to the Indian Arts and Crafts Act, which prohibits the misrepresentation of Indian arts and crafts products in marketing, and claimed that ‘Urban Outfitters falsely implied that the sold goods were creations by the Navajo Nation’.⁶²¹ They further stated that Urban Outfitters had infringed the tribe’s trademark rights under the Lanham Act, by naming said fashion line ‘Navajo’.⁶²² Urban Outfitters claimed that the term ‘Navajo’ was simply used as a description of a type of clothing and

⁶¹⁴ Awopethu op cit note 205 at p. 771.

⁶¹⁵ Trademark Act of 1946, 15 U.S.C. §§ 1051 et seq. of

⁶¹⁶ Alexander Bussey 'Traditional Cultural Expressions and the US Constitution' (2014) 10 *Buff. Intell. Prop. LJ* at p. 9

⁶¹⁷ Trademark Act of 1946, 15 U.S.C. §§ 1051 et seq. at section 43(a).

⁶¹⁸ Bussey op cit note 616 at p. 20.

⁶¹⁹ Section 2(a) of the Lanham Act / 15 U.S.C. § 1052 on Trademarks Registrable on Principal Register; Concurrent Registration.

⁶²⁰ Nicky Woolf 'Urban Outfitters settles with Navajo Nation after illegally using tribe's name' available at <https://www.theguardian.com/us-news/2016/nov/18/urban-outfitters-navajo-nation-settlement>, accessed on 31.03.2023.

⁶²¹ The Columbia Journal of Law & The Arts 'Navajo Nation and Urban Outfitters Reach Settlement Over Trademark Rights' available at <https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/42>, accessed on 31.03.2023.

⁶²² Ibid.

that most consumers perceived it as a generic description. The case was ultimately settled.⁶²³

Another recent case decided by the US Supreme Court changed the limitations around trademark registration. In *Matal vs. Tam*, Simon Tam, lead singer of the band 'The Slants' sought to register their band name as a trademark, which was rejected by the Patent and Trademark Office due to the term's disparaging character.⁶²⁴ A disparaging mark according to the Lanham Act is one that 'dishonours by comparison with what is inferior, slights, deprecates, degrades, or affects or injures by unjust comparison' and was thus not eligible for registration.⁶²⁵ Tam, however, claimed the all-Asian group was reclaiming the derogatory term as a means to self-empowerment and the disparagement clause was violating their constitutional right to free speech. Following the argument of Tam, the U.S. Supreme Court struck down the federal ban on registering disparaging trademarks. According to the unanimous Court, the Lanham Act provision prohibiting the registration of disparaging trademarks violated the First Amendment, because 'giving offence is a viewpoint'.⁶²⁶ This ruling raises significant questions about minority reclamation practices relating to trademarking and free speech. For IPLCs, this can go both ways. If a community were to register a mark to reclaim a racial slur for themselves, they would now be able to. However, in the many cases where third parties trademarked such derogatory terms, e.g. in the case of the Washington Redskins⁶²⁷, 'it invites stereotyping, misrepresentation, and exploitation.'⁶²⁸

The overall limits of US trademark law are that it can only be used in a commerce context and does not provide moral or defensive rights that prevent others from taking registered TCEs and changing them.⁶²⁹ In addition to that, trademarks have to be

⁶²³ *Navajo Nation v. Urban Outfitters*, No. 12-195 BB/LAM, 2016 U.S. Dist. LEXIS 136563 (D.N.M. Sep. 19, 2016); *ibid.*

⁶²⁴ *Matal v. Tam*, 582 U.S. 218 (2017) (previously known as *Lee v. Tam*).

⁶²⁵ 15 USC § 1052(a).

⁶²⁶ Constitutional Law Reporter 'Matal V Tam: Supreme Court holds disparaging trademark ban violate first amendment' available at [https://constitutionallawreporter.com/2017/06/27/matal-v-tam-2017/#:~:text=In%20Matal%20v%20Tam%20\(formerly,trademarks%20violated%20the%20First%20Amendment](https://constitutionallawreporter.com/2017/06/27/matal-v-tam-2017/#:~:text=In%20Matal%20v%20Tam%20(formerly,trademarks%20violated%20the%20First%20Amendment)., accessed on 31.03.2023.

⁶²⁷ See Chapter Two, II. 2 for the detailed case description.

⁶²⁸ Cody Uyeda 'Considering *Matal v. Tam*: Does Trademarking Derogatory Terms Further Reclamation Practices for Minority Communities?' (2019) 29 *S. Cal. Rev. L. & Soc. Just.* at p. 319.

⁶²⁹ *Ibid.*

registered, and their effect is based on the fact that they are public, which makes them only useful for TCEs that aren't secret or sacred.⁶³⁰

A second legal instrument related to trademarks is the Indian Arts and Crafts Act (*IACA*), which prohibits the misrepresentation of products labelled as 'Indian-made' and is aimed at stopping foreign producers from appropriating unjust portions of profits from Native Americans.⁶³¹ This act was met with a lot of hope because the trade with Indian arts and crafts had become a billion-dollar industry by the year 2000.⁶³² Despite its laudable goal and positive impact, the Act has been criticised by some legal scholars as well as cultural anthropologists because it discriminates against indigenous peoples whose tribal affiliation has not been officially recognised.⁶³³

In addition, there are other non-IP laws that directly or indirectly protect parts of indigenous culture. The Native American Graves Protection and Repatriation Act (NAGPRA) which was passed in 1990, enables the repatriation or transfer of certain Native American cultural items, including 'sacred objects and objects of cultural patrimony' from their collections to lineal descendants as well as Indian tribes, Alaska Native Corporations, and Native Hawaiian organisations.⁶³⁴ This act, therefore, provides indigenous people with the opportunity to repossess TCEs that have been removed from tribal lands and are now in possession of third parties. However, this only applies to tangible TCEs and to the specific case where objects are in possession of someone outside the community but remain in the US.

Next to the NAGPRA, the Archaeological Resources Protection Act of 1979, as amended (ARPA), plays an important role in the protection of Native American cultural items. It 'provides for criminal and civil penalties against those who excavate, remove, damage, or otherwise alter or deface archaeological resources or attempt to do so without a permit.'⁶³⁵ Criminal defendants risk 'a possible criminal fines, imprisonment, order of restitution as well as forfeiture of the archaeological resources, equipment and

⁶³⁰ According to the IPLCs main policy objectives, many TCEs are not meant to be accessible to the public. See Chapter Two, III.

⁶³¹ Jon Keith Parsley 'An Analysis of the Indian Arts and Crafts Act of 1990' (1993) 18 *Am. Indian L. Rev.* at p. 487.

⁶³² Zografos op cit note 69 at p. 234.

⁶³³ Kremers op cit note 57 at p. 81; Gail K Sheffield *The Arbitrary Indian: The Indian Arts and Crafts Act of 1990* University of Oklahoma Press (1997) .

⁶³⁴ Native American Graves Protection & Repatriation Act of 1990 .

⁶³⁵ Sherry Hutt 'The Archaeological Resources Protection Act' (1995) 34 *The Federal Lawyer* at p. 1.

vehicles connected to the violation'.⁶³⁶ Due to the increase in methodological looting of archaeological sites and commercial trade with Native American objects, the enforcement of the rules of ARPA is seen as a possible deterrent for such activity. However, like the NAGPRA, the ARPA only relates to physical objects and articles of trade and is thus limited to such TCEs.

The latest relevant act, which amends the NAGPRA, is the Safeguard Tribal Objects of Patrimony Act (STOP Act) which was approved by Congress in November 2022.⁶³⁷ This act is aimed at preventing the often reoccurring sales of Native American Artifacts abroad, i.e. at auctions.⁶³⁸ As the act prohibits the export of illegally obtained cultural items of Native American origin, it would be effective for the protection of Native American TCEs abroad in states that 'recognise foreign cultural export restrictions'.⁶³⁹ However, many countries do not recognise such limitations and are not obligated to enforce US laws, which makes the STOP Act ineffective in those jurisdictions. Other critics claim that the act is redundant because the NAGPRA and ARPA already prohibit the trade and transfer of tribal objects.⁶⁴⁰

Apart from statutory law, there are also common law doctrines that could be applied, like the passing off doctrine and the misappropriation doctrine. 'Passing off' is a claim for trademark infringement that prevents the goodwill of a trader from misrepresentation.⁶⁴¹ The 'misappropriation doctrine', a common law form of unfair competition, goes further than 'passing off', which is used 'when the defendant has copied or appropriated some commercially valuable item or creation which is not protected by either patent law, copyright law, trademark law, or any other traditional theory of exclusive rights'.⁶⁴² The two doctrines are seen to have formed the basis for the IACA, so their practical application today is limited.⁶⁴³

Another approach to the protection of TCEs could be through the use of GI. They are used to 'identify a good as originating in the territory of a country, or from a region or

⁶³⁶ Roberto Iraola 'The Archaeological Resources Protection Act-Twenty Five Years Later' (2003) 42 *Duq. L. Rev.*

⁶³⁷ Safeguard Tribal Objects of Patrimony Act of 2021 .

⁶³⁸ Aaron Haines 'Will the STOP Act Stop Anything: The Safeguard Tribal Objects of Patrimony Act and Recovering Native American Artifacts from Abroad' (2017) 39 *Cardozo L. Rev.* at p. 1094.

⁶³⁹ *Ibid.*

⁶⁴⁰ *Ibid* at p. 1106.

⁶⁴¹ Zografos *op cit* note 69 at p. 224.

⁶⁴² *Ibid* at p. 227.

⁶⁴³ *Ibid* at p. 228.

locality within that territory, where a given quality, reputation, or other characteristics of the good is essentially attributable to its geographic origin'.⁶⁴⁴ However, as outlined above, GIs hardly apply to TCEs due to their lack of agricultural origin. In addition, GIs are only applied in rare cases in the U.S.⁶⁴⁵

Some commentators say that the existing trademark law is sufficient to protect TCEs, and the creation of a *sui generis* system is not necessary.⁶⁴⁶ Others find the current regime insufficient: *Awopetu*, for instance, states that 'structural deficiencies in the trademark registration system have resulted in these provisions being virtually ineffective at providing defensive protection' as intended by the IACA.⁶⁴⁷ Others suggest the protection of TCEs through trade secrets, especially for those that IPLC want to keep foreclosed.⁶⁴⁸ However, like any instrument in trade law, protection through trade secrets is only available for TCEs with economic value.⁶⁴⁹ Oftentimes, the secret and sacred TCEs are explicitly not those that are to be part of commercial exchange, which is why trade secrets provide only limited assistance.

3. General international positioning of the USA on the Protection of TCEs

The international positioning of the US is shaped by the policy that indigenous knowledge should be determined 'by each country under its national legislation and in accordance with its own sovereignty and laws.'⁶⁵⁰ The negotiation of separate documents, which are structurally similar and are directed towards a treaty-like outcome, is not regarded to be the most appropriate approach.⁶⁵¹ In 2009 the US rejected an international legally binding instrument altogether.⁶⁵² At the same time, the idea of amending national copyright law is being rejected as well, as a statement from the WIPO Consolidated Analysis shows:

'It is virtually impossible to provide 'full' protection for TCEs simply by amending copyright laws, as copyright law by its nature is not appropriate to protect TCEs. Copyright law protects only original

⁶⁴⁴ United States Patent and Trademark Office 'Geographical indications' available at <https://www.uspto.gov/ip-policy/trademark-policy/geographical-indications>, accessed on 31.03.2023.

⁶⁴⁵ Bussey op cit note 616 at p.20.

⁶⁴⁶ Zografos op cit note 69 at p. 134.

⁶⁴⁷ Awopethu op cit note 205 at p. 1.

⁶⁴⁸ Deepa Varadarajan 'A trade secret approach to protecting traditional knowledge' (2011) 36 *Yale J. Int'l L.*

⁶⁴⁹ Bussey op cit note 616 at p. 21.

⁶⁵⁰ Kremers op cit note 57 at p. 61.

⁶⁵¹ Dominic Keating 'The WIPO IGC: A US perspective' in *Protecting Traditional Knowledge* (Routledge) (2017) at p. 269.

⁶⁵² Javed et al. op cit note 590 at p. 105.

expressions, leaving works that have become an intrinsic part of our history and culture to the public domain'.⁶⁵³

In addition, alongside other *non-demandeur* countries such as Japan, Canada and Korea, the US is concerned with the establishment of a new patent regime and a *sui generis* system that would 'provide exclusive rights to owners of traditional knowledge and folklore'.⁶⁵⁴ This position is mainly based on the position that these approaches might dampen creativity and innovation.⁶⁵⁵ Other commentators see the reason for the US's hesitation in not wanting to lose free access to TCEs, like most other developed countries.⁶⁵⁶

III. LEGAL APPROACHES ADOPTED IN SOUTH AFRICA

The following subchapter highlights the domestic legal approach towards protecting TCEs in South Africa.

1. Geographical and Historical Context

The initial situation in South Africa is emblematic of jurisdictions on the African continent. Since most geographical boundaries were established through colonialist structures, which were based on the economic interests of colonial authorities rather than the actual distribution of indigenous communities, various traditional groups can be found in more than one country.⁶⁵⁷ As a result, there is a particularly pressing need to reconcile national legislation and regional protocols.⁶⁵⁸

With the aim to protect TCEs in Africa, the African Regional Intellectual Property Organisation (ARIPO) developed the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (Swakopmund Protocol), which seeks to 'protect Expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context.'⁶⁵⁹ However, South Africa is currently not a

⁶⁵³ WIPO op cit note 51 at p. 44.

⁶⁵⁴ Keating op cit note 651 at p. 265.

⁶⁵⁵ Ibid.

⁶⁵⁶ Javed et al. op cit note 590 at p. 107.

⁶⁵⁷ The indigenous territory of the San, for example, spans across South Africa, Lesotho, eSwatini, Mozambique, Zimbabwe, Botswana, Namibia and Angola, see: IPACC 'Who are the indigenous peoples of Southern Africa?' available at <https://www.ipacc.org.za/en/where-we-work/southern-africa.html>, accessed on 31.03.2023

⁶⁵⁸ Nkomo op cit note 7 at p. 258; Ralph A Austen *Mapping Africa: Problems of Regional Definition and Colonial/National Boundaries* (2001) .

⁶⁵⁹ Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore .

member state of ARIPO or a signatory to the Swakopmund Protocol.⁶⁶⁰ Other related international instruments are the CBD or the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources (OAU Model Law).⁶⁶¹ While these instruments aim for the empowerment of IPLCs, the protection of TCEs is not their focus. However, like the CBD, the OAU Model Law is also directed at Genetic Resources and Traditional Knowledge in their narrow sense and has no binding effect.⁶⁶² Both the CBD and the OAU Model Law are, therefore, unfit to protect TCEs in South Africa.

2. Current Domestic Legislation on the Protection of Indigenous Knowledge in South Africa

Of all the jurisdictions evaluated here, South Africa has the most developed and progressive domestic legal approach for the protection of indigenous culture. However, it is still very new and can thus not be considered mature or time-tested yet. It is mainly shaped by two Acts that follow different approaches and lack thorough implementation.

The Intellectual Property Laws Amendment Act No. 28 of 2013 (IPLAA), which was introduced by the Department of Trade and Industry (DTI), includes extensive amendments to several existing IP statutes.⁶⁶³ Notably, the IPLAA seeks to protect and commercialise different forms of indigenous knowledge through their recognition as species of intellectual property.⁶⁶⁴ Section 3 (d) and 28 A extend copyright protection to traditional and 'indigenous works', which are

'literary, artistic or musical work[s] with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which literary, artistic or musical work is regarded as part of the heritage of such an indigenous community'.⁶⁶⁵

TCEs are thus expressively protected by copyright as indigenous works. The definition is broad enough to encompass many forms of tangible and intangible TCEs while ensuring

⁶⁶⁰ ARIPO 'Member States of the African Regional Intellectual Property Organisation' available at <https://www.aripo.org/member-states/>, accessed on 31.03.2023.

⁶⁶¹ Lee-Ann Tong 'Aligning the South African intellectual property system with traditional knowledge protection' (2017) 12 *Journal of Intellectual Property Law & Practice* p. 181; Chidi Oguamanam 'Understanding African and Like-Minded Countries' Positions at WIPO-IGC' (2020) 60 *IDEA* at p. 392.

⁶⁶² Part I (Objectives) of the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (OAU Model Law) of 2000 .

⁶⁶³ *Inter alia* the Performers' Protection Act 11 of 1967, the Copyright Act 98 of 1978, the Trade Marks Act 194 of 1993 and the Designs Act 195 of 1993, see: van der Merwe op cit note 70 at p. 29.

⁶⁶⁴ Intellectual Property Laws Amendment Bill of 2010 , Introduction.

⁶⁶⁵ IPLAA at Section 3 (d).

that the work has to be associated with the distinct heritage of the community. This excludes the works of individuals that are a member of an indigenous community but created something outside of the cultural spectrum of that group in an individual non-traditional capacity. With the decision to incorporate TCEs as copyright-protected works, the IPLAA differs significantly from the Swakopmund Protocol in that it does not implement a *sui generis* solution as it attempts to fit indigenous knowledge in conventional intellectual property categories.⁶⁶⁶ This approach was heavily criticised during the consultation process by numerous stakeholders, government departments and leading experts in the field.⁶⁶⁷ Thus, while being technically in force, the IPLAA has not been implemented yet.⁶⁶⁸

Following this, the Department of Science and Technology (DST) published the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill 2015 and a revised version thereof in 2016 (IKS Bill 2016).⁶⁶⁹ This seemed to mark a notable change in government strategy because the IKS Bill follows a *sui generis* approach.⁶⁷⁰ After a long process of alterations, the IKS Bill was passed into law as the Protection, Promotion, Development and Management of Indigenous Knowledge Act in August 2019 (IKS ACT 2019).⁶⁷¹ It offers protection to IK by introducing it as a form of property under the Constitution of South Africa 1996.⁶⁷² The implementation of the Act is being accomplished by the National Indigenous Knowledge Systems Office (NIKSO), which was established by Section 5 of the act.⁶⁷³

⁶⁶⁶ DTI Policy Framework for the Protection of Indigenous Traditional Knowledge through the Intellectual Property System and the Intellectual Property Laws Amendment Bill (2008) available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/gazettes/080505trade-propertybill_0.pdf, accessed on 31.03.2023; Nkomo op cit note 7 at p. 267.

⁶⁶⁷ These include the Department of Science and Technology, the Competition Commission, the Association of Law Societies and prominent academics and legal practitioners with expert knowledge of intellectual property law, see: Owen Dean 'The winning choice for traditional culture' available at <https://blogs.sun.ac.za/iplaw/2013/07/20/the-winning-choice-for-traditional-culture/>, accessed on 31.03.2023; Nkomo op cit note 7; van der Merwe op cit note 663 at p. 32; Andre van der Merwe 'South and Southern Africa—recent developments in the legal protection of traditional knowledge and traditional cultural expressions' (2014) 9 *Journal of Intellectual Property Law & Practice* at p. 417; Kuti op cit note 326 at p. 70.

⁶⁶⁸ Bagley op cit note 30 at p. 23.

⁶⁶⁹ DST Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill, 2015 GG 39919 GN 199 of 2016 .

⁶⁷⁰ Bagley op cit note 30 at p. 23.

⁶⁷¹ PMG 'Status of the Bill: Protection, Promotion, Development and Management of Indigenous Knowledge Systems' available at <https://pmg.org.za/bill/635/>, accessed on 31.03.2023.

⁶⁷² Protection, Promotion, Development and Management of Indigenous Knowledge Act (Act No. 6 of 2019; GG 42647 of 19 August 2019) of 2019 (IKS ACT) at Section 9(2).

⁶⁷³ Ibid at Section 5.

Under the IKS Act, TCEs are protected for as long as they meet the eligibility criteria for IK set out in the act and are vested in a designated trustee of the respective indigenous community.⁶⁷⁴ According to Section 11, IK is protected if it

‘(a) has been passed on from generation to generation within an indigenous community; (b) has been developed within an indigenous community; and (c) is associated with the cultural and social identity of that indigenous community’.⁶⁷⁵

In addition, it has to be duly registered with NIKSO⁶⁷⁶. The need for registration is protruding because this requirement does not exist in copyright law, and the IKS Act thus establishes a higher burden for protection than the IPLAA. According to Section 19 NIKSO must keep a register of IK, which it has established with the National IKS Management System (NIKMAS).⁶⁷⁷ Upon the fulfilment of these requirements, Section 13 of the IKS Act confers the exclusive rights to the indigenous community to receive ‘(a) any benefits arising from the commercial use of the IK, (b) be acknowledged as its origin; and (c) limit any unauthorised use of the indigenous knowledge.’⁶⁷⁸ As soon as certain IK does not fulfil the above requirements, it falls into the public domain.⁶⁷⁹

The co-existence of the IPLAA and the IKS Act, rather than simplifying the legal IP landscape in this area, causes much concern among experts. The IKS Act does not displace the IPLAA, as ‘it does not alter or detract from any right in respect of any statute’.⁶⁸⁰ Because of this, any new IK creation or innovation may fall under both laws.⁶⁸¹ Because the IPLAA and the IKS Act were introduced by different governmental entities, which both have competencies on this subject matter but vastly differing views on the most appropriate form of protection, some claim that the two statutes are incompatible.⁶⁸² Others believe that a more holistic protection system can be accomplished by ‘implementing only complementary provisions of the IPLAA [...] than through the [IKS Act] alone.’⁶⁸³ It remains to be seen if this belief is valid. This approach,

⁶⁷⁴ Ibid at Section 11 and 12(1).

⁶⁷⁵ Ibid at Section 11.

⁶⁷⁶ Ibid at Section 9 (1).

⁶⁷⁷ Department of Science and Technology 'About NIKMAS' available at <https://nikrs.dst.gov.za/about>, accessed on 31.03.2023.

⁶⁷⁸ IKS Act at Section 13.

⁶⁷⁹ Ibid at Section 10 (2).

⁶⁸⁰ Ibid at Section 32 (1).

⁶⁸¹ Lee-Ann Tong 'South Africa adopts sui generis indigenous knowledge protection legislation' (2019) *Journal of Intellectual Property Law & Practice* at p. 3.

⁶⁸² Bagley op cit note 30.

⁶⁸³ Ibid; Ushenta Naidoo *A comparative assessment of South Africa's proposed systems to protect traditional knowledge* University of Pretoria, (2019) p. 22.

comprising the combination of both a *sui generis* model and orthodox IP provisions, would, in fact, offer a wide protection mechanism that best serves the complex nature of TCEs. However, as long as the interlocking of the two Acts is not defined in more detail, this will remain a theoretical concept.

Despite having the most progressive approach in legislating TCEs, the numerous legislative reform initiatives lead to various conflicting laws. It is because of this conflict that there is currently no clear and effective solution for the protection of indigenous knowledge on a national level in South Africa. According to the most recent intellectual property policy document produced by the DTI's International Trade and Economic Development Division, special focus will be placed on the strengthening of inter-agency cooperation regarding the protection of indigenous knowledge.⁶⁸⁴

While the IKS Act offers a form of positive protection for IPLCs, South Africa also offers some form of defensive protection through the South African Heritage Resources Agency (SAHRA).⁶⁸⁵ It is a statutory organisation established 'as the national administrative body responsible for the protection of South Africa's cultural heritage' as per the National Heritage Resources Act, No 25 of 1999 (NHRA).⁶⁸⁶ Generally, the NHRA 'protects the national estate and requires permits to be issued by heritage authorities for different uses of the national estate'.⁶⁸⁷ The national estate is defined as 'resources of South Africa which are of cultural significance or other special value for the present community and for future generations' and is further described with a list of examples of sites and objects that are eligible for protection.⁶⁸⁸ Even though the list only refers to tangible objects and sites, the wide definition in the Subsection 1 can be read as to include intangible expressions as well. Thus, TCS 'are part of the national estate and third parties can access and use the national estate with the permission of the heritage resources agencies'.⁶⁸⁹ This SAHRA, therefore, creates a database and defensive protection mechanisms for TCEs.

⁶⁸⁴ DTI *Intellectual Property Policy of the Republic of South Africa Phase I* (2018) available at https://www.gov.za/sites/default/files/gcis_document/201808/ippolicy2018-phasei.pdf, accessed on 31.03.2023, Section 8.1 at p. 45.

⁶⁸⁵ South African Heritage Resources Agency 'About SAHRA' available at <https://www.sahra.org.za/about/>, accessed on 31.03.2023.

⁶⁸⁶ *Ibid*; National Heritage Resources Act, No 25 of 1999 of (NHRA).

⁶⁸⁷ Nwauche *op cit* note 67 at p. 136.

⁶⁸⁸ NHRA at Section 3 (1) & (2) .

⁶⁸⁹ Nwauche *op cit* note 67 at p. 136.

3. General International Positioning of South Africa

With regard to the international strategy concerning the protection of indigenous culture, the position of the South African government is not detailed but clearly in favour of the holistic protection regime. The most recent intellectual property policy document produced by the DTI's International Trade and Economic Development Division states that a special focus will be put on the WIPO IGC.⁶⁹⁰ On top of that, indigenous knowledge and copyright-related issues are seen as the central focus of the monitoring and evaluation processes.⁶⁹¹ It is the assumption of this thesis that the international approach will be held in accordance with the more recent legislative developments on a national level and thereby promoting a *sui generis* solution in combination with orthodox IP instruments. What this solution will look like in detail and what the ideal drafting outcome would entail on a substantive level is being evaluated further below.

IV. THE ROLE OF CUSTOMARY LAW IN THE PROTECTION OF TCEs

When analysing the most opposing positions in the IGC negotiations, it is important to consider not only individual formal jurisdictions but also the caucus representing the variety of IPLCs. As briefly outlined above, the overarching and shared demand of indigenous peoples is self-determination over their traditional cultural expressions.⁶⁹² As with any multicultural group, there is no central legal claim that all groups share. This is because every community has different needs resulting from specific experiences. However, one reoccurring demand is the consideration of customary law.⁶⁹³ Communities often have their own regulatory instruments for the protection of TCEs, which can be found in their own informal system of rules. Because customary law is deeply interwoven with the community's belief system, more consideration of it when dealing with the question of how to protect TCEs is an important element for their level of self-determination. This is why it has been suggested by commentators that a third approach to protecting expressions of folklore could be found in the 'recognition of informal regimes and customary law', in addition to conventional IP and a *sui generis*

⁶⁹⁰ DTI op cit note 684 at section 7.2.1.2, at p. 36.

⁶⁹¹ Ibid at section 8.1 at p. 551.

⁶⁹² See Chapter Two, III. on the policy objectives of IPLCs.

⁶⁹³ WIPO Report on Fact Finding Missions op cit note 53 at p. 57.

system.⁶⁹⁴ In the following section, the relevance of customary law for the protection of TCEs as well as its relationship to formal IP systems, is being outlined.

1. Relevance of Customary Law

Customary law can be generally defined by practices and beliefs that are so vital and intrinsic to a social and economic system that they are accepted as obligatory rules of conduct and legal requirements.⁶⁹⁵ In short, traditions that are treated as laws because of the wide acceptance by the community that holds them. A key element of living customary law is furthermore that it is dynamic, constantly evolving and adaptable.⁶⁹⁶ The consideration of customary law is important to TCE holders for several reasons.

Firstly, customary law determines many aspects of their day-to-day life, often even more so than the jurisdiction of the state they reside in. In most African countries, the majority of the population 'conduct their personal activities in accordance with and subject to customary law'.⁶⁹⁷ This is because indigenous peoples formed societies long before colonial regimes were established and later transformed into the jurisdictions that exist today.⁶⁹⁸ Today, most national legal systems on the African continent are pluralistic and consist of a variety of pre-colonial and post-colonial sources that include religious law and customary law, parallel to common law, civil law, and legislation.⁶⁹⁹ A similar relevance of customary law can be found all across the world. Even though the specific law changes with each community, its value for guiding daily life is of high significance across the globe.⁷⁰⁰

⁶⁹⁴ Ibid.

⁶⁹⁵ Also consuetudinary law" (from the Latin, *consuetudo*: custom). To be distinguished from the term 'customary international law', which describes governing relations between and aspects of international law that are based on custom. See: WIPO *Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues* (2013), at p. 2; B. Garner *Black's Law Dictionary, 7th ed.* St Paul, Minnesota, West Publishing Company (1999) .

⁶⁹⁶ Brendan; Tobin & Emily Taylor 'Across the Great Divide: A Case Study of Complementarity and Conflict Between Customary Law and TK Protection Legislation in Peru' (2009) *Initiative for the Prevention of Biopiracy*.

⁶⁹⁷ Muna Ndulo 'African customary law, customs, and women's rights' (2011) 18 *Indiana Journal of Global Legal Studies* at p. 87.

⁶⁹⁸ Peter Onyango *African customary law: an introduction* African Books Collective (2013) at p. 30.

⁶⁹⁹ Ndulo op cit note 697.

⁷⁰⁰ Katrina Cuskelly 'Customs and Constitutions: State recognition of customary law around the world' (2011) *IUCN: Bangkok* at p. 2.

Secondly, a lot of these informal law systems already have rules for the protection of the community's IP. Even though customary law is typically associated with laws concerning marriage, inheritance or traditional authority,⁷⁰¹ indigenous knowledge systems also often have their own protection mechanisms that one would most likely allocate to commercial law and IP in formal law regimes. These often include exclusive rights similar to those of modern IP systems.⁷⁰² And even though TCE holders consider their 'informal regimes to be different from the formal IP-systems administered by WIPO, [they are considered] just as effective in protecting the local innovator in his or her local context.'⁷⁰³ In consequence, many communities live under both formal IP systems, which have been implemented by the jurisdictions they reside in, as well as informal IP systems that prevail in their communities.⁷⁰⁴ This is particularly relevant because oftentimes, formal IP systems are practically inaccessible to indigenous communities. One of the outcomes of WIPOs' fact-finding missions⁷⁰⁵ was that indigenous knowledge holders cannot always rely on formal IP systems in practice, as they require processes that are governmentally administered, codified and document intensive.⁷⁰⁶ Due to the nature of intangible TCEs, the requirement of written records can rarely be met.⁷⁰⁷

Thirdly, customary law should play a bigger role in the protection of TCEs because it stems from the same cultural values as the expressions that indigenous peoples are seeking to protect. Customary law originates in the social, spiritual, economic and political values expressed by the individuals of a community.⁷⁰⁸ As such, it is closer to the subject matter of protection than any national or international formal IP system. Thus, the consideration of it next to a *sui generis* system and formal IP, is considered to offer the most holistic protection approach.⁷⁰⁹ Because customary law is pre-existing and rooted in the community in the same way as TCEs, it contributes a direct and experienced perspective. These findings have also influenced other international law-

⁷⁰¹ Ndulo op cit note 697 at p. 88.

⁷⁰² WIPO Report on Fact Finding Missions op cit note 53 at p. 58.

⁷⁰³ Ibid.

⁷⁰⁴ WIPO Report on Fact Finding Missions op cit note 53 at p. 57.

⁷⁰⁵ See Chapter Two, III. Main Policy Objectives for Indigenous Communities for more information on the fact finding missions of the World Intellectual Property Organisation.

⁷⁰⁶ WIPO Report on Fact Finding Missions op cit note 53 at p. 57.

⁷⁰⁷ Ibid.

⁷⁰⁸ Brendan Tobin *Indigenous peoples, customary law and human rights-Why living law matters* Routledge (2014) at p. 78.

⁷⁰⁹ WIPO op cit note 695 at p. 8.

making processes outside of WIPO. The Conference of the Parties of the CBD has suggested that TK should be protected through a combination of approaches that also include customary law next to *sui generis* systems and existing intellectual property systems.⁷¹⁰

These considerations are the reason why TCE holders have ‘stressed that respect and recognition of customary law are integral to the appropriate protection of TCEs, TK and related GRs, against misuse and misappropriation by others.’⁷¹¹ What is more, many indigenous people do not trust western IP systems and see them as a ‘new form of colonisation’.⁷¹² According to the principle of locality, the aim should therefore be ‘to resolve any disputes over the acquisition and use of indigenous peoples’ heritage according to the customary laws of the indigenous peoples concerned.’⁷¹³

2. Selected examples of applied customary law in the field of TCEs

Examples of existing customary law that protects expressions of folklore are plentiful and diverse. The recognition and promotion of living customary law are increasingly becoming a part of national policies aimed at the protection of indigenous culture.⁷¹⁴ The following examples seek to illustrate the similarities between western and formal IP systems and how they can be used as a baseline for a new *sui generis* system.

In the US, there are several federal laws that take customary law into account. The IACA uses customary law to determine whether a person is a tribal member and thus a rights-holder in terms of the Act.⁷¹⁵ The NAGPRA, which requires federal agencies and museums to repatriate Native American human remains or cultural items to the culturally affiliated tribe, determines the right of possession of the museum or gallery

⁷¹⁰ Convention on Biodiversity COP 6 Decision VI/10 (2002) *Convention on Biodiversity*, available at <https://www.cbd.int/decisions/cop/?m=cop-06>, accessed on 31.03.2023.

⁷¹¹ WIPO op cit note 695 at p. 5.

⁷¹² Tobin op cit note 708 at p. 157.

⁷¹³ E.A. Daes *Defending Indigenous Peoples’ Heritage, Protecting Knowledge: Traditional Resource Rights in the New Millennium* (2000) Union of British Columbian Indian Chiefs, available at https://d3n8a8pro7vhmx.cloudfront.net/ubcic/pages/1447/attachments/original/1485894887/Protecting_Knowledge_Keynote.pdf?1485894887, accessed on 31.03.2023; WIPO IGC IGC Sixth Session: Revised Version of *Traditional Knowledge: Policy and Legal Options* (2004) World Intellectual Property Organisation, available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_6/wipo_grtkf_ic_6_4_rev.pdf, accessed on 31.03.2023 at p. 14.

⁷¹⁴ WIPO op cit note 695 at p. 9.

⁷¹⁵ Presentation by Sue Noe, Native American Rights Fund, see: WIPO Transcript of IGC 45 op cit note 382 at p. 61.

according to relevant tribal law.⁷¹⁶ The STOP Act looks at the respective tribes' own laws to define cultural patrimony that has been illegally obtained.⁷¹⁷

In New Zealand, a widespread set of customs and norms, called *Tikanga*, determine the way of being and values of many indigenous people.⁷¹⁸ Though as such, it is not considered as 'law' in the narrow sense, it intersects with the legal system.⁷¹⁹ Through the body of case law that has been developed over time, *Tikanga* has been recognised many times over. As can be taken from a decision on a well-known appeal case, it has been and will continue to be recognised in the development of the common law of Aotearoa/New Zealand in cases where it is relevant. It also forms part of New Zealand law as a result of being incorporated into statutes and regulations.⁷²⁰

In parts of Canada, certain tribes have ways of licensing songs to others and exchanging them with other tribes. Members of the First Nations in British Columbia reported that licensing mostly happens through intermarriage between different tribes.⁷²¹ This is because the 'right' to a song is linked to names and resource allocation, which can be combined and transferred through a marriage.⁷²² Members of a tribe from Saskatoon reported that songs could be 'gifted' to other tribes through a performance without giving the other tribe the right to appropriate the song thereafter.⁷²³ This shows that even though the details of ownership rights and their transfer are different to formal IP law, the basic concepts exist in their customary law just as much. In the case of a conflict, the tribes use their own dispute resolution methods and compromise either as individuals or as a tribe collective.⁷²⁴

⁷¹⁶ Native American Graves Protection & Repatriation Act .

⁷¹⁷ Presentation by Sue Noe, op cit note 715.

⁷¹⁸ Hirini Moko Mead *Tikanga Maori (revised edition): Living by Maori values* Huia publishers (2016) at p.13.

⁷¹⁹ Ibid at p.17.

⁷²⁰ *Peterr Hugh Mcgregor Ellis vs The King (SC 49/2019) [2022] NZSC 115 2022* (Supreme Court of New Zealand) at para 19.

⁷²¹ First Nations peoples are the original Indigenous peoples of the territories now known as Canada and are considered distinct from the Inuit and the Métis. They largely occupied regions south of the Arctic. Innumerable generations of Indigenous peoples have lived in the Saskatoon region for thousands of years. See: City of Saskatoon 'History of First Nations and Saskatoon' available at <https://www.saskatoon.ca/community-culture-heritage/cultural-diversity/indigenous-initiatives/treaty-6-territory-homeland-metis/history-first-nations-and-saskatoon>, accessed on 31.03.2023.

⁷²² WIPO Report on Fact Finding Missions op cit note 53 at p. 60.

⁷²³ Ibid.

⁷²⁴ Ibid.

An even more complex set of regulations can be found in the customary law of the Blood Tribe in Canada, especially with regard to tangible TCEs.⁷²⁵ There are numerous laws that regulate the rights and obligations relating to the creation of 'traditional designs and the rights to their subsequent reproduction, adaptation and public display.'⁷²⁶ The set of rules is very detailed and governs the following subjects: rights-holders, possible subject matter, a differentiated scope of exclusive rights depending on the level of sacredness and secrecy of the design and licensing and transfer.⁷²⁷ The customs also provide for rules on the enforcement of all these rights.⁷²⁸ In case of disputes, customary law provides for settlement rules.⁷²⁹ One example of this set of rules is the regulation of sacred *tipi* designs. They are limited in number and passed on through generations.⁷³⁰ New designs can only be created through visions or dreams, and replicas are only permitted if the first *tipi* has been destroyed.⁷³¹ Only the rights-holder is allowed to use the design, and the rights can only be transferred through a particular ceremony.⁷³²

A similar system can be found in some aboriginal tribes of Australia. In several cases relating to carpet designs, indigenous works were copied by big carpet manufacturers and consecutively produced abroad and imported to Australia.⁷³³ Here they would be sold as 'authentic' indigenous artwork without the artist's knowledge or permission.⁷³⁴ Under aboriginal law, the exclusive right to regulate the use of pre-existing designs of a clan vests in the traditional owners.⁷³⁵ As a collective, they are the 'custodians of the images' and determine if and how an artwork can be reproduced.⁷³⁶ In the stated cases, not only did the courts find that customary law provides clear provisions regarding the

⁷²⁵ The Blood Tribe or Kainai Nation is a First Nation based in southern Alberta, Canada. See: The Canadian Encyclopedia 'Kainai Nation (Blood Tribe)' available at <https://www.thecanadianencyclopedia.ca/en/article/kainai-nation-blood-tribe>, accessed on 31.03.2023

⁷²⁶ WIPO Report on Fact Finding Missions op cit note 53 at p. 58.

⁷²⁷ Ibid.

⁷²⁸ Ibid.

⁷²⁹ Ibid.

⁷³⁰ Ibid.

⁷³¹ The Canadian Encyclopedia 'Tipis and Spirituality' available at <https://www.thecanadianencyclopedia.ca/en/article/tipi>, accessed on 31.03.2023.

⁷³² Ibid.

⁷³³ See for example *Milpurruru and Others v Indofurn Pty Ltd and Others* 1993 (130) ALR 659 ; *Milpurruru, Payunka, Marika & Others v Indofurn Pty Ltd* 1994 (30) IPR 209 ; *Milpurruru v. Indofurn (Pty) Ltd.* 1995 (30) IPR 209 .

⁷³⁴ Ibid.

⁷³⁵ Janke op cit note 138 at p. 14.

⁷³⁶ Ibid.

question of authorship, but they also saw the interface between customary law and formal Australian IP law, despite the different approaches to the idea of ownership.⁷³⁷

According to the Pacific Regional Framework, a collective set of rules agreed upon by indigenous forum leaders of Pacific islands, customary law and practice is a fixed component of the very nature of TCEs.⁷³⁸ The owners of TCEs are defined as

'(a) the group, clan or community of people or (b) the individual who is recognised by a group, clan or community of people as the individual in whom the custody or protection of the TK or expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community.'⁷³⁹

Thus, without regarding customary law, one would not be able to even find out who the rights-owner of a specific TCE is. Furthermore, the set of rules also provides for conflict resolution methods in the case that owners cannot be identified or a dispute about the ownership arises.⁷⁴⁰ In these instances, the disagreements are to be resolved 'according to customary law and practice or such other means as are agreed to by the parties.'⁷⁴¹ These provisions show clearly that the role of customary law in the interpretation of living folklore is significant.

3. Obstacles and possibilities for the recognition of customary law

Coming from the broad body of customary law and acknowledging how it is interlocking with traditional culture, it is necessary to explore how its acceptance and recognition can be increased. This section specifically explores if and how traditional law could be acknowledged by third parties, both nationally and internationally, and what the current obstacles are. Despite a growing awareness of the importance of customary law, the recognition of it is still facing many barriers. To begin with, many countries still hesitate with the state recognition of customary law. Even in pluralistic jurisdictions, in which customary law is officially incorporated into the legal system, its application is mostly limited to certain legal fields that relate to personal and family life, and often there is conflict with statutory regimes.⁷⁴² Some commentators explain the hesitation with

⁷³⁷ WIPO Report on Fact Finding Missions op cit note 53 at p. 65.

⁷³⁸ Pacific Islands Forum 'The Framework for Pacific Regionalism' (2014) at p.2.

⁷³⁹ The Pacific Community 'Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture' (2002) ; WIPO Customary Law Overview op cit note 695 at p. 12.

⁷⁴⁰ WIPO Customary Law Overview op cit note 695 at p. 14.

⁷⁴¹ Ibid.

⁷⁴² Cuskelly op cit note 700 at p. 2.

customary law posing a challenge to a nation's sovereignty.⁷⁴³ *Cuskelly* sees another reason for hesitation in the historical lack of acceptance of customary law as a valid body of law by scholars, which reduces the chance of recognition by policymakers.⁷⁴⁴ Outside of the discussion about the protection of TCEs and TK, customary law faces a lot of criticism internationally because it is often associated with human rights violations that are linked to harmful traditional practices and discrimination.⁷⁴⁵ There is a big and ongoing debate between human rights activists and traditionalists on whether or not customary law can be compatible with modern international human rights conventions and national constitutions.⁷⁴⁶ It is, therefore, very likely that a general hesitation towards customary law in the discussion on TCE and TK stems from its reputation in other legal fields.

Within the aim of protecting TCEs and TK, one has to focus on customary frameworks that concern the regulation of such and separate them from customary law that rules other areas. At the same time, when it comes to the recognition of TCE and IP-related customary law, one can learn from the way other fields have been incorporated into formal national legislation and how that has translated into international law.⁷⁴⁷ Generally speaking, the possibilities to recognise customary law are plentiful and go beyond the obvious assumptions. Policymakers, both internationally and nationally, are faced with various options and complex demands at the same time. Stakeholders have called for measures on both ends of the spectrum: while some wish for the recognition of customary law as binding law for anyone outside of their community, others refuse the recognition of it completely.⁷⁴⁸

⁷⁴³ Peter; Ørebech & Fred Bosselman 'The linkage between sustainable development and customary law' in J Orebech P, Bosselman, F, Bjarup, J, Callies, D, and et al. (eds), *The Role of Customary Law in Sustainable Development* New York, Cambridge University Press (2005) .

⁷⁴⁴ Cuskelly op cit note 700 at p. 2.

⁷⁴⁵ See for example Newman Wadesango et al 'Violation of women's rights by harmful traditional practices' (2011) 13 *The Anthropologist*; International Planned Parenthood Federation 'Harmful traditional practices affecting women and girls' available at https://www.ippf.org/sites/default/files/harmful_traditional_practices.pdf, accessed on 31.03.2023; Zhyldyz Aitbaeva et al 'Certain Problems of Customary Legal Norms in Family Institutions and Marriage Relations' (2021) 11 *Open Journal of Political Science*.

⁷⁴⁶ Ndulo op cit note 697 at p. 89.

⁷⁴⁷ WIPO *Customary Law and Traditional Knowledge* (2016) Geneva, *World Intellectual Property Organisation*, available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_7.pdf, accessed on 31.03.2023, at p. 2.

⁷⁴⁸ WIPO *Customary Law Overview* op cit note 695 at p. 20.

On a national level, the most basic form would be constitutional recognition. A study by the International Union for Conservation of Nature (IUCN) that examined 190 constitutions across the world found that more than 60% contained provisions for the recognition of customary law.⁷⁴⁹ However, some states also recognise or incorporate customary law in their domestic policy and statutes without constitutional provisions, e.g. through the doctrine of Native Title, which recognises the rights of indigenous peoples without a constitutional acknowledgement of customary law.⁷⁵⁰ Next to constitutional and statutory recognition, common law countries also have the option of judicial recognition, in which courts can decide based upon customary law within certain boundaries.⁷⁵¹ Lastly, customary law can also be referred to in the execution of administration.⁷⁵²

When it comes to recognition through statute, commentators have stated that there is a wide spectrum of possibilities between the direct application of customary law to third parties and no recognition at all.⁷⁵³ Ranging from the full and direct application as law, or the partial application of customary law elements as substantive law over the use of customary law for the interpretation and application of laws, to promoting customary law within communities or simply promoting respect for traditional law outside of indigenous communities through non-legal measures.⁷⁵⁴ For example, in a decision of the Supreme Court of Canada, indigenous law was recognised as pre-existing and ‘presumed to survive the assertion of sovereignty’ and was incorporated into Canada’s common law as rights.⁷⁵⁵ Another case of the application of pre-existing customary law can be found in the OAE Model Law on the protection of the rights of local communities and breeders and their access to biological resources:

⁷⁴⁹ Cuskelly op cit note 700 at p. v.

⁷⁵⁰ Implemented in countries like Australia, Canada, New Zealand, South Africa and the United States of America. Among these countries, only South Africa has broad recognition of customary law. See: Cuskelly op cit note 700 at p. 3.

⁷⁵¹ WIPO op cit note 695 at p. 18.

⁷⁵² *Ibid.*

⁷⁵³ *Ibid* at p. 20.

⁷⁵⁴ *Ibid.*

⁷⁵⁵ *Mitchell v MNR* 2001 (1) S.C.R. 911 .

'The State recognises and protects the community rights that are specified in Article 16 as they are enshrined and protected under the norms, practices and customary law found in, and recognised by, the concerned local and indigenous communities, whether such law is written or not.'⁷⁵⁶

This section recognises not only the legal effect of customary law but extends it beyond its traditional circle.⁷⁵⁷ If the direct application is not an option, a popular alternative is seen in recognition of customary law based on a separate legal instrument which acknowledges the existence of traditional law and uses it for the interpretation of related legal systems. Through the Native Title Doctrine, the 'nature and incidents [...] must be ascertained as a matter of fact by reference to those laws and customs' and focus is put on the relationship between formal law and customary law.⁷⁵⁸

A different approach is seen in the implementation of *sui generis* systems, which are based on customary law and practices and go in accordance with their values.⁷⁵⁹ There are many additional measures for implementing customary law in relation to existing IP systems, *sui generis* systems and ADR procedures that have been discussed at length elsewhere and, in consequence, does not form part of this thesis.⁷⁶⁰ This overview seeks to point out that the desired participation of indigenous people and the respect for their customary law is not a new concept and has been attempted successfully already.

Internationally, the recognition of customary law has been part of a range of legal agreements and instruments in various legal fields. The Convention on Biological Diversity calls for the protection and encouragement of the 'customary use of biological resources in accordance with traditional cultural practices.'⁷⁶¹ It furthermore encourages respect for indigenous knowledge and traditional knowledge holders.⁷⁶² In some instruments, customary law is not referred to as *expressis verbis* but through the

⁷⁵⁶ African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (OAU Model Law), Section 17 on the application of the Law on Community Rights.

⁷⁵⁷ WIPO op cit note 695 at p. 16.

⁷⁵⁸ *Mabo and Others v. Queensland (No. 2)* 1992 (175) CLR 1. F.C. 92/014 ; *Mabo and others v. Queensland (No. 2)* 1992 HCA 23 ; *Bulun Bulun v. R&T Textiles Pty Ltd* 1998 (41) IPR 513 .

⁷⁵⁹ An often-quoted model example for this is the *sui generis* regime for the protection of traditional knowledge in Peru, which was one of the first *sui generis* systems for the protection of TK and involved active participation of indigenous people. See: Brendan Tobin *Speaking in tongues: indigenous participation in the development of a sui generis regime to protect traditional knowledge in Peru* IIED (2001) at p. 8.

⁷⁶⁰ See amongst others: Brendan Michael Tobin *Why Customary Law Matters: The Role of Customary Law in the Protection of Indigenous Peoples' Human Rights* Citeseer, 2011); Ørebeck and F Bosselman op cit note 743; Cuskelly op cit note 700; Janke op cit note 138; WIPO op cit note 695; Mills op cit note 1.

⁷⁶¹ Convention on Biological Diversity (CBD) at Section 10 (c).

⁷⁶² *Ibid* at Section 8 (j).

respect for a cultural perspective in general.⁷⁶³ Many international human rights agreements refer to indigenous rights concerning natural resource governance. Article 15 of the Indigenous and Tribal Peoples Convention calls for the safeguarding of the ‘rights of the peoples concerned to the natural resources pertaining to their lands, [which] include the right of these peoples to participate in the use, management and conservation of these resources.’⁷⁶⁴ A similar approach can be found in Article 26 of UNDRIP, which not only mentions the right to the lands, territories and resources but call for states to ‘give legal recognition and protection’ to them.⁷⁶⁵ The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity (Nagoya Protocol) states that parties must ‘take into consideration indigenous and local communities’ customary laws, community protocols, and procedures when exercising domestic law that relates to the sustainable use of biodiversity and conservation.⁷⁶⁶ The most recent international instrument, and so far the only one that specifically addresses the protection of TK and TCEs, is the Swakopmund Protocol. It makes specific reference to customary law in several provisions that relate to, *inter alia*, the protection criteria for expressions of folklore⁷⁶⁷, beneficiaries⁷⁶⁸, limits of measures⁷⁶⁹, regional protection⁷⁷⁰ or dispute settlement.⁷⁷¹

4. The role of Customary Law in the WIPO Draft Articles & IGC Negotiations

Within the negotiations at the WIPO IGC, the role of customary law is not agreed upon yet. Thus, to which extent and in which context customary law should be taken into account remains an open question. The positions of the different groups on the extent of customary law are being analysed in more detail in the next chapter, which concerns the various positions on unsettled legal questions.⁷⁷² In the current Draft Articles on the

⁷⁶³ See for example the preambles of the multilateral environmental treaties Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1975 ; Convention on Migratory Species of 1983 ; Convention on Wetlands of International Importance especially as Waterfowl Habitat of 1975 .

⁷⁶⁴ The Indigenous and Tribal Peoples Convention (No. 169) of 1989 at Article 15.

⁷⁶⁵ United Nations Declaration on the Rights of Indigenous Peoples at Article 26 (3).

⁷⁶⁶ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity of 2010 at Article 9.

⁷⁶⁷ Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore at Section 16.

⁷⁶⁸ *Ibid* at Section 18.

⁷⁶⁹ *Ibid* at Section 20.

⁷⁷⁰ *Ibid* at Section 24.

⁷⁷¹ *Ibid* at Rule 21.

⁷⁷² See Chapter Five, VIII.

Protection of Traditional Cultural Expressions, customary law is mentioned 12 times in total within the draft provisions for protection criteria, the scope of protection and exceptions and limitations.⁷⁷³ However, all of the references are within brackets, which indicates that there is no consensus on the inclusion of customary law yet.⁷⁷⁴

V. SUMMARY OF INDIVIDUAL APPROACHES

This chapter covered the second tier of the legal analysis of this thesis. It illustrated the differences in domestic approaches towards the protection of IK and TCEs and how they are overall an indicator for the positioning at the WIPO IGC negotiations. While the EU and the US follow a rather reserved and conservative domestic approach, South Africa has one of the most progressive legal systems for the protection of indigenous knowledge. The presented selection of customary law illustrates that there are many alternative approaches to regulating TCEs to western IP law and that a future international instrument should make room for such indigenous customs and practices to acknowledge the policy objectives of indigenous peoples.

⁷⁷³ 2023 TCE Draft Articles op cit note 409.

⁷⁷⁴ See Chapter Three, IV. 2.

CHAPTER FIVE

Analysis of Positions on Unsettled Legal Questions

The following chapter contains the third tier of the legal analysis of this thesis. With the background of the different domestic approaches, it evaluates each party's respective positioning within the WIPO IGC negotiations with regard to specific draft articles. This serves to establish a comprehensive understanding of each party's specific ideal outcome for an international legal instrument. These positions form the basis for the synthesis of the common ground, which follows in Chapter Six.⁷⁷⁵ The selected sections I am comparing are those that produced the most disagreement in the analysed time frame. These include the draft articles regarding the Use of Terms, Objectives, Eligibility Criteria, Scope of rights, Exceptions and Limitations, Beneficiaries, the role of customary law as well as the different negotiating approaches.

I. METHODOLOGY

In order to determine the positions of the different parties, the following documents were analysed: starting with the WIPO IGC reports from the 37th to the 41st meeting⁷⁷⁶, the transcripts of the 44th, the 45th and the 46th meeting⁷⁷⁷, the numerous updates on Draft Articles on TCEs and TK, as well as documents being introduced by the different delegations in the respective sessions, that are published by WIPO after the meetings.⁷⁷⁸ The chosen timeframe for the analysed documents is based on the aim to gather enough data for a well-founded analysis while avoiding including outdated information, i.e. because parties have moved on from previously held positions. Based on this, I decided that a five-year period provided a good balance and started with IGC 37 in 2018.

⁷⁷⁵ See Chapter Six, I.

⁷⁷⁶ The 41st IGC report was the latest publicly available report on TCEs/TK at the time of the publication of this thesis. The meetings IGC 42 & IGC 43 were about GR and not about TCEs & TK.

⁷⁷⁷ Due to a decision of the WIPO General Assembly in June 2022 to discontinue written reports of each IGC meeting, the IGC secretariat suspended the meeting reports from the 44th meeting onwards and replaced them with recordings and transcripts of the meetings, available at <https://webcast.wipo.int/home>.

⁷⁷⁸ For a collection of all documents that were published by WIPO accompanying IGC meetings see: WIPO 'Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) - Meetings by topic' available at https://www.wipo.int/meetings/en/topic.jsp?group_id=110, accessed on 31.03.2023.

The Draft Articles constantly change according to the ongoing progress of the negotiations.⁷⁷⁹ In consequence, the following analysis is based on different versions of the draft articles, depending on the comments made by the parties between the 37th and the 46th IGC meeting. The changes in the Draft Articles affect the order of the sections as much as the individual wording of headings and text. The respective versions that are referenced are therefore indicated accordingly.

The selection of the analysed issues is based on the listing in the latest IGC mandate as core issues⁷⁸⁰ and the number of mentions within the text. Specifically, the number of references within the meeting reports was taken as an indication of the importance of the issues. From IGC 37 to IGC 45, the most references were made in relation to the articles on the ‘Use of Terms’, ‘Objectives’, ‘Eligibility Criteria’, ‘Scope of Rights’, ‘Beneficiaries’ as well as ‘Exceptions and Limitations.’ Other draft articles that were not or only rarely mentioned are only addressed here if they were classified as core issues by the mandate. The lack of mention certainly does not indicate consensus on the matter. However, this thesis is limited to publicly available statements and, therefore, issues raised in such. Additionally, it must be noted that not every party makes statements on every provision or every unsettled issue.

Each subchapter starts with a brief description of the provision in question, followed by an analysis of each party’s respective positions on it. This analysis was led by the following considerations:

Consideration 1: Has the party commented on the specific draft article?

Consideration 2: If yes, what is the party’s position on the draft article?

Consideration 3: Does this position align with other parties within the IGC?

Consideration 4: Does this position align with their official international positioning?

⁷⁷⁹ At the time of writing the latest available Draft Articles on TCEs and TK were published at IGC 46 in February 2023.

⁷⁸⁰ The current mandate lists the following issues, inter alia, as most relevant: ‘definitions, beneficiaries, subject matter, objectives, scope of protection, and what TK/TCEs are entitled to protection at an international level, including consideration of exceptions and limitations and the relationship with the public domain.’ See WIPO IGC Mandate 2021 op cit note 351.

Regarding the positions of the different parties, two general forms of statements can be found in the meeting reports. The first are statements that refer specifically to TCEs and positions related hereto. The second is broader statements relating to TK in its wider sense. In the following analysis, statements regarding TCEs *expressis verbis* were predominantly used. Where these were not available, statements referring to TK in the wider sense were used, as they give a broad indication of general issues relating to both TCEs and TK.

To give an overview of the current state of negotiations, each section below includes the latest version of the respective provision of the draft articles in question. However, the analysed positions of the parties stem from comments over a stretch of five years, which is why they often refer to previous versions of the text. This is being indicated each time to avoid confusion over the divergence in phrasing.

II. USE OF TERMS

In legal instruments, the ‘Use of Terms’ Section contains definitions for the most important terms of the instrument. This section is essential to enable everyone to interpret the instrument in the same way. In the 2019⁷⁸¹, 2022⁷⁸² and 2023 TCE Draft Articles on TCEs and TK, the ‘Use of Terms’ provision can be found in Article 1. In the 2018⁷⁸³ Draft Articles, it was regulated in Article 2. Currently, the entire article, as well as single words or alternatives, are still in brackets, which means that these parts are currently not agreed upon.

The current text reads as follows:

[ARTICLE 1 - USE OF TERMS

For the purposes of this instrument:

Traditional Cultural Expressions are any forms in which traditional culture practices and knowledge are expressed, [appear or are manifested] [the result of intellectual activity, experiences, or insights] by indigenous [peoples], local communities and/or [other beneficiaries] in or from a traditional context, and [may be]/[is] dynamic and evolving and comprise verbal forms **FN1**, musical forms **FN2**, expressions by movement **FN3**, tangible or intangible forms of expression **FN4**, or combinations thereof.

⁷⁸¹ 2019 TCE Draft Articles op cit note 64 Article 1 ‘Use of Terms’.

⁷⁸² The Protection of Traditional Cultural Expressions: Draft Articles, Rev. (September 16, 2022) WIPO/GRTKF/IC/45/5 (2022 TCE Draft Articles).

⁷⁸³ The Protection of Traditional Cultural Expressions: Draft Articles, Facilitators’ Rev., WIPO/GRTKF/IC/37/5 of 2018 (2018 TCE Draft Articles).

[Publicly available means [subject matter]/[traditional knowledge] that [has lost its distinctive association with any indigenous community and that as such] has become generic or stock knowledge, notwithstanding that its historic origin may be known to the public.]

[ALT

Publicly available means traditional cultural expressions that are used outside of the practices of indigenous peoples and local communities in which they originated, notwithstanding that their historic origin may be known to the public.]

[["Use"]/["Utilization"] means

- (a) where the traditional cultural expression is included in a product:
 - (i) the manufacturing, importing, offering for sale, selling, stocking or [using] the product [beyond the traditional context]; or
 - (ii) being in possession of the product for the purposes of offering it for sale, selling it or [using] it [beyond the traditional context].
- (b) where the traditional cultural expression is included in a process:
 - (i) making use of the process beyond the traditional context; or
 - (ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process; or
- (c) the use of traditional cultural expression in research and development leading to profit-making or commercial purposes.]]

Facilitators' Alt

[["Use"]/["utilization"] means

- (a) where the traditional cultural expression is included in a product, or where a product has been developed or obtained on the basis of a traditional cultural expression, the manufacturing, importing, offering for sale, selling, stocking or exploiting the product.
- (b) where the traditional cultural expression is included in a process [or] where a process has been developed or obtained on the basis of a traditional cultural expression: exploiting of the process; or carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process;
- (c) where the traditional cultural expression is included as part of commercial or non-commercial research and development.⁷⁸⁴

FN1 [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

FN2 [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

FN3 [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 unfixe.]

FN4 [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

⁷⁸⁴ 2023 TCE Draft Articles on cit note 409.

1. United States of America

The comments regarding the Use of Terms section made by the US all concern the definition of the term ‘Traditional Cultural Expressions’.

The first statement refers to the 2018 draft articles, in which the definition of TCEs still included the alternative ‘creative or spiritual’.⁷⁸⁵ They wished this alternative to be deleted and to be replaced with ‘artistic and literary.’⁷⁸⁶ According to the US, the ‘concept of spirituality as the kind of genesis for important TCEs’ had already been expressed in preamble 4 and 7, and focus should rather be placed on protecting ‘a form of expression rather than the source of that expression.’⁷⁸⁷ This indicates that the US valued the spiritual aspect of TCEs less and furthermore reduced it to specific TCEs.

The second comment refers to the specification of the definition. The US wanted to incorporate eligibility criteria from Article 3 into the definition of TCEs.⁷⁸⁸ An explanation for this was not given. It could be concluded that such inclusion would serve to specify and narrow down the definition, serving to exclude certain TCEs from falling under the instrument from the outset.

The third position concerns the following phrase that is now fully deleted from the text but was still included in the 2018 text: ‘...that are the unique product of and/or directly linked with and the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities’. After the word ‘directly’ had been deleted from a previous version of the draft articles, the US wished to reinsert it as it questioned the practicality of establishing an interest for a group without a close relationship or a direct link.⁷⁸⁹ It could be deduced that, according to the US, a mere link to the cultural identity is not enough, it has to be ‘direct’. It would appear that the US would like to keep the definition as narrow as possible and to reduce the number of potential rights-holders.

2. European Union

⁷⁸⁵ 2018 TCE Draft Articles op cit note 783.

⁷⁸⁶ WIPO Report of the 37th IGC Meeting op cit note 536 at p. 48.

⁷⁸⁷ Ibid.

⁷⁸⁸ Ibid.

⁷⁸⁹ Ibid.

The EU stated that there was a misalignment between Article 5 and the Use of Terms in Article 1. They claimed that certain definitions in Article 1 that were related to the operation of Article 5 had been deleted.⁷⁹⁰ In addition, a new paragraph had been added, which contained undefined terms. It did not elaborate on which paragraph this was. The EU claimed this addition to be problematic because the IGC had not discussed the matter of 'Use of terms' elaborately.⁷⁹¹ These statements do not infer much about the EU's position on the content of Article 1. With regard to the process, it can be said that the EU delegation wants to avoid the misalignment of different articles and the change of text before matters have been discussed thoroughly.

3. South Africa

The delegation of South Africa did not make any statements on the content of Article 1 in the analysed documents. However, they noted that some definitions referred to the same entity.⁷⁹² This is not a comment on substantive law but on the phrasing and how it is currently lacking in meaning because certain definitions contain the word that is being defined, hence creating an empty, circular definition.

4. Indigenous Caucus

The Indigenous Caucus stated that the definitions incorporated the tiered approach, which it met with interest.⁷⁹³ It declared concern about the insertion of the word 'protected' before TK (and TCEs) because they consider all TK (TCE) to be sacred.⁷⁹⁴ They also aligned themselves with the Delegation of Nigeria, which stated that 'the idea of having 'protected' TK was pre-emptive' because the IGC was obsolete if there were 'protected' TK/TCEs.⁷⁹⁵

III. OBJECTIVES

The objectives describe the broad goals for a legal instrument and outline the general subject matter without containing specific rights and obligations. They provide the link

⁷⁹⁰ WIPO Report of the 38th IGC meeting op cit note 413 at p. 46.

⁷⁹¹ *Ibid.*

⁷⁹² WIPO Report of the 37th IGC meeting op cit note 536 at p. 54.

⁷⁹³ *Ibid* at p. 53.

⁷⁹⁴ *Ibid.*

⁷⁹⁵ *Ibid* at p. 30.

between objectives and substantive provisions.⁷⁹⁶ The objectives usually serve as an aid in interpreting the instrument, which is why member states are particularly eager to see their views represented. In the IGC context, objectives are meant to signpost.

In the 2023 Draft Articles for TCE as well as TK, the provisions on objectives can be found in Article 2, in the 2018 Draft Articles in Article 1. Similarly to the article on 'Use of Terms', most of the text, except the footnotes, is still in brackets.

The latest draft article reads as follows:

[ARTICLE 2 - OBJECTIVES

Facilitators' Alternative

The objectives of this instrument are to:

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

[Alt 1

The objective of this instrument is to provide effective, balanced and adequate protection relating to intellectual property against:

- a. unauthorised⁷⁹⁷ and/or uncompensated⁷⁹⁸ uses of traditional cultural expressions; and
- b. the erroneous grant of intellectual property rights over traditional cultural expressions,

[while supporting the appropriate use of traditional cultural expressions].]

[Alt 2

The objective of this instrument is to support the appropriate use and effective, balanced and adequate protection of traditional cultural expressions within the intellectual property system, in accordance with national law, recognising the rights of [indigenous [peoples] and local communities] [beneficiaries].]

[Alt 3

The objective of this instrument is to support the appropriate use and protection of traditional cultural expressions within the intellectual property system, in accordance with national law, respecting the interests of indigenous peoples and local communities to:

⁷⁹⁶ WIPO Secretariat *IGC 46: Informal Information Session - Presentation by the Secretariat (2023)* available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_46/wipo_grtkf_ic_46_presentation_iis.pdf, accessed on 31.03.2023 at slide 21.

⁷⁹⁷ Unauthorised uses comprise inter alia misappropriation, misuse and unlawful uses of traditional cultural expressions.

⁷⁹⁸ Uncompensated uses include the failure to provide monetary or non-monetary benefits.

- (a) prevent the misappropriation, misuse, and unauthorised use of their traditional cultural expressions[, while making the most of the existing intellectual property system];
- (b) encourage and protect creation and innovation, whether or not commercialized, recognising the value of public domain and the need to protect, preserve and enhance the public domain; and
- (c) prevent the erroneous grant or assertion of intellectual property rights over traditional cultural expressions.
- (d) promote the appropriate use of traditional cultural expression for sustainable, community-based development where so desired by indigenous peoples and local communities.]]

FN 5 Unauthorised uses comprise inter alia misappropriation, misuse and unlawful uses of traditional cultural expressions.

FN 6 Uncompensated uses include the failure to provide monetary or non-monetary benefits.’⁷⁹⁹

1. United States of America

At IGC 37, the US criticised the inclusion of an alternative that regulated the notion of equitable compensation and sharing of benefits. It stated that this ‘was a relatively novel concept for TCEs [which was] clearly drawn from instruments focused on GRs.’⁸⁰⁰ The alternative in question, which has now been deleted from the draft articles, read as follows:

‘Alt 1 This instrument should aim to:

1.1 Provide beneficiaries with the means to:

[...] (c) promote the equitable compensation/sharing of benefits arising from their use with free prior informed consent or approval and involvement/fair and equitable compensation, as necessary;’⁸⁰¹

The US stated that this ‘raised many complex issues in the area of TCE, e.g. the question of “regional folklore”, where more than one territory had a TCE’.⁸⁰² They emphasised these ‘cross-border issues’ and wanted to learn more about overlapping claims in regional and national experiences and suggested bracketing all of Alt 1, paragraph 1.1(c) until a common understanding on that core issue was reached.⁸⁰³ This statement shows that the US had doubts about the extension of rights of TCE holders for a potential access

⁷⁹⁹ 2022 TCE Draft Articles op cit note 782, Article2 ‘Objectives’.

⁸⁰⁰ WIPO Report of the 37th IGC meeting op cit note 536 at p. 19.

⁸⁰¹ 2018 TCE Draft Articles op cit note 783, Alt 1, paragraph 1.1(c).

⁸⁰² WIPO Report of the 37th IGC meeting op cit note 536 at p. 19.

⁸⁰³ Ibid.

and benefit sharing system, as can be found in the Nagoya Protocol⁸⁰⁴ and as it is being discussed for Genetic Resources within the IGC.

In addition, the US stated that it wished to see a positive statement of objectives, as exemplified by Alt 3 of the 2018 Draft Articles and now (nearly identical) in Alt 2 of the 2023 text. This alternative is very short and concise and does not list any detailed objectives. Within the same alternative in the TK Draft Articles, the US suggested that “recognising the rights” be replaced with “respecting the values” because it ‘was a universal formulation that could apply to both the rights-based and the measures-based approach.’ In IGC 44, the delegation continued this approach and also suggested replacing the word ‘rights’ with ‘interests’.⁸⁰⁵ From these statements, it could be concluded that the US delegation favours a measures-based approach over a rights-based approach. The suggested phrasing also indicates that they would prefer not to include the word ‘rights’ in the objectives. In addition to that, the US remarked that ‘local communities’ currently do not enjoy specific rights, and the text should thus be reduced to the term ‘indigenous peoples’, which are protected under UNDRIP.⁸⁰⁶ It could be concluded that this serves the aim of keeping the term of beneficiaries as narrow as possible.

In the 39th IGC meeting, the US remarked that it found value in elements of both Alt 2 and Alt 3 of the 2018 TCE Draft Articles and furthermore suggested including another alternative with a new element that read as follows:

‘The objective of this instrument is to support the appropriate use and protection of traditional cultural expressions within the intellectual property system, in accordance with national law, respecting the interests of Indigenous peoples and local communities to

- (a) prevent the misappropriation, misuse and unauthorised use of their traditional cultural expressions;
- (b) encourage and protect creation and innovation, whether or not commercialized, recognising the value of the public domain and the need to protect, preserve and enhance the public domain;
- (c) prevent the erroneous grant or assertion of intellectual property rights over traditional cultural expressions; and

⁸⁰⁴ Nagoya Protocol op cit note 766.

⁸⁰⁵ WIPO *Transcript of IGC 44, 12th of September 2022, Afternoon Session, WIPO S2T:WIPO GRTKF IC 44 2022-09-12 PM 116589 en* (2022) available at https://webcast.wipo.int/video/WIPO_GRTKF_IC_44_2022-09-12_PM_116589, accessed on 31.03.2023 at p. 24.

⁸⁰⁶ *Ibid* at p. 23.

(d) promote the appropriate use of traditional cultural expressions for sustainable, community-based development, where so desired by indigenous peoples and local communities.⁸⁰⁷

The new element was stated to be the support for community-based development, as described in paragraph (c). Even though the inclusion of another alternative was met with a lot of criticism by other parties and the Chair of the committee for not serving the goal of narrowing gaps, this alternative was included as Alt 3 in the 2019 TCE Draft articles.⁸⁰⁸ The inclusion of a new element aimed at indigenous community development reflects the main view of the US to support development and innovation, which it appears to prioritise over the spiritual or cultural self-determination of IPLCs.

Procedurally, it is worth noting that the suggestion to include an alternative happened right after a contact group meeting on the topic of objectives. The contact group has the task of narrowing down and specifying alternatives. Thus, it could be concluded from this suggestion that the US is not interested in concluding the negotiations and narrowing the gaps, as suggested by many of the other parties.⁸⁰⁹

2. European Union

At IGC 37, the EU delegation supported ‘the idea of a ‘clear, short and positive text.’⁸¹⁰ In addition, it welcomed the approach to ‘reduce the number of objectives to produce a clearer, streamlined language.’⁸¹¹ However, it too found Alt 1 and the references to prior informed consent, ‘benefit-sharing and the concept of misappropriation’ in paragraph 1.1. (c) problematic, which has now been deleted from the 2019 text.⁸¹²

It generally supported both Alt 2 and 3 of the 2018 TCE Draft Articles. With regard to the suggestions of the US to insert a new alternative which is now displayed as Alt 3 in the 2019 TCE Draft Articles, it stated that it had ‘concerns about the concept of misappropriation in objective (a)’, because ‘listing misappropriation, misuse, and unauthorised’ use was problematic, though the delegation did not elaborate on why this was the case.⁸¹³ It generally supported objective (b) while encouraging a discussion of

⁸⁰⁷ WIPO Report of the 39th IGC meeting op cit note 52 at p. 26.

⁸⁰⁸ Ibid.

⁸⁰⁹ See for example the delegation of South Africa in the report of IGC 38, the delegation of Niger in the report of IGC 39 at p.28, the delegation of Nigeria in the report of IGC 40 at p. 19, the delegation of Uganda in the report of IGC 40 at p.21 or even the IGC Chair in the report of IGC 38 at p. 26.

⁸¹⁰ WIPO Report of the 37th IGC meeting op cit note 536 at p. 19.

⁸¹¹ Ibid.

⁸¹² 2018 TCE Draft Articles op cit note 783, Article 2, Alt 1, paragraph 1.1(c).

⁸¹³ WIPO Report of the 37th IGC meeting op cit note 536 at p. 51.

the element ‘whether or not commercialised’, and objective (c) was not seen as problematic.⁸¹⁴ Overall, the EU wished to keep Alt 3 of the 2018 Draft Articles (now displayed as Alt 2 in the 2023 Draft Articles) because it contained more positive language but ‘the exact meaning of “appropriate use” could be further explored.’ In this, it saw a better way to ‘pave consensus on that issue.’⁸¹⁵ It also stated that there was a ‘significant conceptual divide’ between Alt 2 and the other alternatives, which prevented them from being merged.⁸¹⁶ However, it generally stated a preference for reducing the number of alternatives and said that the consensus in the contact group was to merge ‘what had been previously in Alt 1, Alt 3 and Alt 4 in one single alternative.’⁸¹⁷

At the 39th meeting, the EU delegation participated in the contact group on objectives.⁸¹⁸ In alignment with the delegation of Switzerland, it criticised the US for introducing a new alternative because it went against the methodological approach of the IGC.⁸¹⁹ The work of contact groups had to be presented in the plenary, which could then be used by the facilitators for revisions of the draft articles.⁸²⁰ It was not for individual delegations to propose alternatives.⁸²¹

The support for Alt 2 shows a preference for a positive yet limited phrasing of the objectives that do not include too many specifics on what should be promoted or prevented. This can be interpreted as the goal to limit the extent of the instrument’s effective area. Like the US, the EU also rejects a potential access and benefit-sharing system for TCEs, as exemplified by GR regulation.

3. South Africa

The South African delegation put special emphasis on the historical context of the exploitation of TCEs due to ‘centuries of domination and marginalization’.⁸²² It stated that it saw a similar power dynamic unfold within the negotiations of the IGC. Because the oppression of indigenous groups was too recent, it did not see any precedent for the protection of TCEs. It is because of this that the aim of the IGC should be to ‘redress past

⁸¹⁴ *Ibid.*

⁸¹⁵ *Ibid.*

⁸¹⁶ WIPO Report of the 39th IGC meeting op cit note 52 at p. 27.

⁸¹⁷ *Ibid.*

⁸¹⁸ *Ibid.*

⁸¹⁹ *Ibid.*

⁸²⁰ *Ibid* at p.26.

⁸²¹ *Ibid.*

⁸²² WIPO Report of the 37th IGC meeting op cit note 536 at p. 53.

injustices.⁸²³ It emphasised that the Chair had encouraged flexibility to move forward and away from previous, historically established positions. It further encouraged the consideration of the needs of IPLCs.⁸²⁴ In this context, it also remarked that the 2021 IGC Mandate named a particular approach that should be considered.⁸²⁵ This refers to the ‘evidence-based approach’, which includes the use of numerous working documents, studies of national experiences and the output of expert groups in order to reach an agreement.⁸²⁶

With regard to the brief Alt 3 (Alt 2 in 2023 Draft Articles), which was preferred by both the US and EU, the South African delegation questioned its ability to include all the parties’ positions.⁸²⁷ It addressed the parties insisting on this alternative and asked them to refrain from ‘invoking other sections to be placed in there’ in order to help the IGC create a version that serves all.⁸²⁸ This should also cover ‘the mischief to redress’ in order to enable compensation for IPLCs.⁸²⁹ It reiterated this position at the 44th meeting.⁸³⁰

Additionally, the SA delegation remarked that many objectives suffered from redundancies which needed to be addressed. These included Alt 2 and Alt 4(c), which both ‘referred to the prevention of the granting of erroneous IP rights’.⁸³¹ It acknowledged the progress that the IGC had made since the year 2009 by reducing the number of pages on objectives from seven pages to one page.⁸³²

4. Indigenous Caucus

At the 37th meeting, the IC aligned itself with the delegations of South Africa and Nigeria on the issue of general principles.⁸³³ However, Nigeria did not make any additional statements with regard to the objectives of the instrument. The position of the IC can therefore be assumed to be identical to what the South African delegation stated in the 37th meeting. In addition, it stated that ‘Indigenous peoples often did not believe that TK

⁸²³ *Ibid.*

⁸²⁴ *Ibid* at p. 54.

⁸²⁵ *Ibid* at p. 53.

⁸²⁶ IGC Mandate 2021 op cit note 638 at p. 1.

⁸²⁷ WIPO Report of the 37th IGC meeting op cit note 536 at p. 53.

⁸²⁸ *Ibid.*

⁸²⁹ *Ibid* at p. 54.

⁸³⁰ Transcript of IGC 44, 12.9.22 (PM) op cit note 805 at p. 29.

⁸³¹ WIPO Report of the 37th IGC meeting op cit note 536 at p.18.

⁸³² *Ibid.*

⁸³³ *Ibid* at p. 31.

was just a product of creativity or innovation or of the mind.’⁸³⁴ It would appear that Alt 3 (b) of the 2019 TCE Draft Articles does not reflect the nature of TCEs from the perspective of the indigenous caucus.

At IGC 39, the IC stated that it was concerned with the mentioning of the public domain because ‘TK and TCEs were not part of the public domain and all references to the public domain should be eliminated from the texts.’⁸³⁵ It emphasised that the ‘focus of the instrument was to protect something that currently did not enjoy adequate protection, i.e. TK and TCEs, not the public domain.’⁸³⁶ These statements are another indicator for the rejection of Alt 3 (b) of the 2019 TCE Draft Articles.

At IGC 44, the IC emphasised that the outcome will be a framework convention that leaves room at the national level. It specifically objected to Alt 3 of the 2022 TCE Draft Articles, because it had ‘measures that go beyond the scope of this particular forum, for example, what the appropriate use for TCEs should be.’⁸³⁷

With regard to the term ‘local communities’, the IC surprisingly aligned itself with the US delegation and stated that the term is very open-ended and might apply to ‘just about everybody’.⁸³⁸ It elaborated that the term originally stemmed from the development of the CBD, where it was developed within a specific context. At the time, before the development of UNDRIP, every nation classified and defined holders of TK differently. To encompass all possible holders, the term ‘indigenous people and local communities’ was developed, however, with the suffix ‘living a traditional lifestyle, and independent on the sustainable use of biological diversity’.⁸³⁹ Therefore it was not an open-ended term in this context but a definition of a group that was meant to be protected by the CBD irrespective of whether they were indigenous or not, as many communities and minorities were under threat at the time.⁸⁴⁰ This explanation indicates that the IC would see merit in clarifying the definition.

⁸³⁴ *Ibid* at p. 32.

⁸³⁵ WIPO Report of the 39th IGC meeting op cit note 52 at p. 7.

⁸³⁶ *Ibid* at p. 40.

⁸³⁷ Transcript of IGC 44, 12.9.22 (PM) op cit note 805 at p. 15.

⁸³⁸ WIPO *Transcript of IGC 44, 14th of September 2022, Morning Session, WIPO S2T:WIPO GRTKF IC 44 2022-09-14 AM 116599 en* (2022) available at https://webcast.wipo.int/video/WIPO_GRTKF_IC_44_2022-09-14_AM_116599, accessed on 31.03.2023 (Transcript of IGC 44, 14.9.2022 (AM)) at p. 12.

⁸³⁹ *Ibid*.

⁸⁴⁰ *Ibid*.

IV. ELIGIBILITY CRITERIA

In international instruments, the section on eligibility criteria lists the requirements for something to fall within the scope of regulation of that instrument. It determines exactly which part of the general subject matter set out in the Use of Terms⁸⁴¹ is to be protected through criteria of eligibility. Within the TCE Draft Articles, this section lists the criteria for something to qualify as protected TCE. In the WIPO IGC, there has been a lot of back and forth as to where eligibility criteria should be placed within the instrument. Possible options next to simply listing them in one article were to place them within the definitions, the scope of protection or exceptions and limitations.⁸⁴² One of the most debated criteria is a temporal requirement for TCEs. This temporal element, not to be confused with the term of protection⁸⁴³, would require TCEs to have a certain minimum age to qualify as protected subject matter.

In both the latest TCE & TK Draft Articles, eligibility criteria are placed in Article 3. Article 3 of the 2023 TCE Draft Articles reads as follows:

‘[ARTICLE 3 - PROTECTION CRITERIA/ELIGIBILITY CRITERIA

Facilitators’ Alternative

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

- (a) created, generated, received by, or revealed to, indigenous [peoples], local communities and developed, held, used, and maintained collectively by them [in accordance with their customary laws and protocols];
- (b) linked with, and is an integral part of, the cultural and social identity and traditional heritage of indigenous peoples, local communities; and
- (c) transmitted within a generation or from generation to generation, whether consecutively or not.

[3.2 A Member State/Contracting Party may, under its national law, specify additional criteria for protection for traditional cultural expressions that are linked with, and is an integral part of, the cultural and social identity and heritage of a nation or group within their jurisdiction.]

[Alt 1

3.1 Subject to Article 3.2, protection shall be extended under this instrument to traditional cultural expressions which are:

⁸⁴¹ WIPO Secretariat op cit note 796 at slide 22.

⁸⁴² WIPO Report of the 37th IGC meeting op cit note 536 at p. 28.

⁸⁴³ 2023 TCE Draft Articles op cit note 409, Article 8.

(a) created, generated, received, or revealed, by indigenous [peoples], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively by them [in accordance with their customary laws and protocols];

(b) linked with, and are an integral part of, the cultural and social identity and traditional heritage of indigenous [peoples], local communities and/or [other beneficiaries]; and

(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 cultural expressions for a reasonable term as determined by the Member State/Contracting Party.]

[Alt 2

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

(a) created, generated, received, or revealed, by indigenous [peoples], local communities and/or [other beneficiaries] and developed, held, used, and maintained collectively by them [in accordance with their customary laws and protocols];

(b) linked with, are an integral part of, and are distinctively associated with the cultural and social identity and traditional heritage of indigenous [peoples], local communities and/or [other beneficiaries]; and

(c) transmitted between or from generation to generation, whether consecutively or not for a term not less than fifty years or five generations.]]⁸⁴⁴

1. United States of America

At the 37th meeting, the US stated that eligibility criteria are an important tool to determine which TCEs are protected within a rather broad definition of all existing TCEs.⁸⁴⁵ This was a response to the question raised in a Chair's information note on whether or not eligibility criteria were necessary.⁸⁴⁶ In the 2018 Draft Articles, the delegation preferred Alt 2 because it included a broad definition, 'subject to limitations, set forth in the clarifying criteria in paragraphs (a), (b), (c) and (d) [which was] helpful to bring clarity and certainty to a topic that otherwise suffered from uncertainty.'⁸⁴⁷ The Alt 2 in question was similar to the Alt 2 of the 2019 text, except for two additional paragraphs that read as follows:

'Alt 2 The subject matter of [protection]/[this instrument] is traditional cultural expressions:

...

(d) that have been used for a term as has been determined by each [Member State]/ [Contracting Party] but not less than 50 years/or a period of five generation; and

⁸⁴⁴ 2023 TCE Draft Articles op cit note 409, Article 3 'Eligibility Criteria'.

⁸⁴⁵ WIPO Report of the 37th IGC meeting op cit note 536 at p. 29.

⁸⁴⁶ WIPO IGC *Chair's Information Note on Traditional Knowledge / Traditional Cultural Expressions for IGC 40* (2019) available at https://www.wipo.int/meetings/en/details.jsp?meeting_id=50424, accessed on 31.03.2023.

⁸⁴⁷ WIPO Report of the 37th IGC meeting op cit note 536 at p. 29.

(e) that are the result of creative and literary or artistic intellectual activity.’⁸⁴⁸

The US emphasised that it wished the temporal dimension in Alt 2 (d) to be kept in the text.⁸⁴⁹ With respect to subparagraph (e) in the TK text, it wanted to add the phrase “or for a period of five generations” after “50 years” and requested the same for the TCE text.⁸⁵⁰ This was repeated three times throughout the meetings.⁸⁵¹ These comments all concern the highly debated temporal requirement, which would exclude all TCEs from protection that are younger than 50 years. It would appear that the introduction of this requirement and the persistence on its retention indicates the objective of the US delegation to limit the number of potential rights-holders, as TCEs that are too ‘young’ would not qualify and could thus be used freely by third parties.

With regard to the TK text, the delegation also remarked that Alt 2 (b) & (c) in the 2019 TK Draft Articles ‘might have a certain disadvantage resulting in identifying beneficiaries for TCEs that were not specifically attributable to a particular indigenous community.’⁸⁵² This remark also suggests that the US had an interest in keeping the eligible group as specific as possible to reduce the number of possible beneficiaries/claims holders. In the 44th IGC meeting, the US delegation remarked that there is ‘at least some support for a definition of the public domain’ within Article 3.⁸⁵³ This highlights the importance that the US sees in the public domain, as it sees a specific need to define it in the instrument.

2. European Union

The EU delegation put special emphasis on the preference for eligibility criteria to be included in a separate article (Article 3) by mentioning this three times in the 37th meeting alone⁸⁵⁴ and expressing its appreciation for retaining eligibility criteria listed separately in Article 3 twice in the 38th meeting.⁸⁵⁵ This position refers to the development outlined above that eligibility criteria were found in several places in the instrument. The question here was, therefore, whether or not these criteria need a

⁸⁴⁸ 2018 TCE Draft Articles op cit note 783, Article 3, Alt 2.

⁸⁴⁹ WIPO Report of the 37th IGC meeting op cit note 536 at p. 48.

⁸⁵⁰ WIPO Report of the 38th IGC meeting op cit note 413 at p. 51.

⁸⁵¹ *Ibid* at pp. 42 & 51.

⁸⁵² WIPO Report of the 37th IGC meeting op cit note 536 at p. 48.

⁸⁵³ Transcript of IGC 44, 14.9.2022 (AM) op cit note 838 at p. 12.

⁸⁵⁴ *Ibid* at pp. 31, 46 & 51.

⁸⁵⁵ WIPO Report of the 38th IGC meeting op cit note 413 at p. 41.

separate provision or can be taken from other parts of the text. At the same time, the EU acknowledged and supported that the facilitators aimed to merge definitions and eligibility criteria ‘and to try to reduce duplications, overlaps and redundancies.’⁸⁵⁶ It generally supported this attempt. However, the EU demanded that its preferred alternative should not be deleted in the process.⁸⁵⁷

In the 37th meeting, the EU delegation stated that it supported Alt 1 of the 2018 TCE text ‘as a general approach’. This alternative just included the following sentence: ‘Alt 1 This instrument applies to traditional cultural expressions’, which is very wide and does not give an indication of the preference of specific eligibility criteria.⁸⁵⁸ It also supported Alt 2 ‘as a general approach in both [TCE & TK] texts.’⁸⁵⁹ Alt 2 in the 2018 TCE Draft Articles lists five detailed criteria that can now be found in a reduced version in all alternatives of the 2023 TCE Draft Articles. However, the EU left comments on details of the informal sessions.⁸⁶⁰ This indicates that the EU delegation showed support for the criteria in Alt 2 as they went forward from the 2018 TCE Draft Articles to the 2019 TCE Draft Articles.

At IGC 38, the EU appreciated the criteria (b) “transmitted in a collective context”⁸⁶¹ This refers to a statement made by the facilitators about Rev. 1 (First revisions of the Draft Articles).⁸⁶² The facilitators acknowledged the collective transmission even though ‘not all knowledge was created collectively, neither was it always maintained or developed collectively’⁸⁶³ The EU thus clearly stated support for the requirement of a collective context for eligibility.

In addition to that, the EU was appreciative that ‘paragraph (e), i.e. the temporary element’ had been retained.⁸⁶⁴ By this, they mean the requirement for a TCE to be at least 50 years old to qualify for protection, now regulated in Article 3, Alt. 1, 3.2 of the 2023 TCE Draft Articles. This implies that the EU delegation is in support of the temporal requirement and would like to exclude TCEs from protection if they have only been

⁸⁵⁶ WIPO Report of the 37th IGC meeting op cit note 536 at p. 51.

⁸⁵⁷ *Ibid.*

⁸⁵⁸ 2018 TCE Draft Articles op cit note 783, Article 3, Alt 1.

⁸⁵⁹ WIPO Report of the 37th IGC meeting op cit note 536 at p. 31.

⁸⁶⁰ *Ibid.*

⁸⁶¹ WIPO Report of the 38th IGC meeting op cit note 413 at p. 41.

⁸⁶² *Ibid* at p.39.

⁸⁶³ *Ibid.*

⁸⁶⁴ *Ibid* at p. 41.

created within the past 50 years. The EU here supports a position similar to the US to exclude TCEs that are too young and hence reduce the number of possible rights-holders.

The delegation further requested ‘to provide additional clarity to what was considered “traditional [...], and to clarify the relationship with the current IP framework’.⁸⁶⁵ This implies a demand for a more detailed definition of the word ‘traditional’ as well as a clear description of the relationship with other IP laws and instruments.

With regard to Alt 3, which includes a reference to the beneficiaries in Article 4, the EU delegation asked for more specific wording because Article 4 contained more than one alternative.⁸⁶⁶ This shows a preference for a more concrete reference to beneficiaries, as it was supportive of specifying them. It understood that the IGC could continue the work on clarifying the subject matter.

At IGC 40, the EU delegation stated that progress had been made in the Ad Hoc expert groups prior to IGC 39, as well as in the contact groups. It stated that it looked forward to future discussions based on ‘Rev. 2 documents emerging from IGC 39 (documents WIPO/GRTKF/IC/40/4 and WIPO/GRTKF/IC/40/5)’ which is referring to the 2019 Draft Articles for TCE and TK.⁸⁶⁷ This comment implies general cooperation and agreement with the status quo of the draft articles and a good basis for further development. With regard to the process, the EU delegation furthermore stated that ‘transparency and inclusiveness remained a necessity.’⁸⁶⁸ This is an indicator for the delegation to promote a fair and equal procedure.

3. South Africa

The delegation of South Africa stated a clear preference for the eligibility criteria to be listed in a separate article in order to avoid redundancies with Article 1. It shares this position with the EU and US.

⁸⁶⁵ *Ibid.*

⁸⁶⁶ *Ibid.*

⁸⁶⁷ *WIPO Report of the 40th IGC Meeting, WIPO/GRTKF/IC/40/20 Prov. 2 (2019)* available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_41/wipo_grtkf_ic_41_40_20_prov_2.pdf, accessed on 31.03.2023 at p. 7.

⁸⁶⁸ *Ibid.*

Generally, however, it proposed to keep the criteria at a minimum level because ‘having a long shopping list of criteria would make it burdensome and legally uncertain.’⁸⁶⁹ It gave an example of the South African IKS Act, which included only the three criteria: ‘transmission from generation to generation, link to a social and cultural identity, and “used, maintained and developed”’.⁸⁷⁰ It can be concluded that the delegation of South Africa sought to reduce the number of eligibility criteria to make it easier for potential claim-holders to qualify for protection.

With regard to the temporal requirement, it aligned itself with the African Group and the Tulalip Tribe, who stated that TK was not dependant on a specific duration of existence but on its insertion into a ‘traditional way of being.’⁸⁷¹ On top of that, a temporal requirement would lead to the following conundrum:

‘The problem with any kind of term was that during that term there would be no protection. In the proposals like the tiered approach, he wondered what would happen during the 125 or 50 years when TK was not protected. If it was not protected, it was likely to become diffused, and if it became diffused, it would receive less protection under the tiered approach.’⁸⁷²

The alignment with these positions indicates that the delegation of South Africa is against a temporal requirement.

4. Indigenous Caucus

The IC questioned whether a separate article for the eligibility criteria might be necessary, as the criteria can also be found in the scope of protection.⁸⁷³ Within the current Article 3, they saw Alt 2 as highly problematic.⁸⁷⁴ One of the main reasons for that is the temporal requirement of a minimum of 50 years. The delegation claimed that this was a ‘negotiating dead end. Requiring 50 years before TK and TCEs could be protected would result in the lack of protection of TK and TCEs during that period.’⁸⁷⁵ In addition to that, it did not reflect the nature of TCEs: ‘Indigenous elders might get their knowledge overnight in a dream. [...] What made TK traditional was not how recent or old it was, but how it fits in the cultural and traditional contexts.’⁸⁷⁶ Therefore it appealed to the IGC to move beyond the temporal requirement ‘and make a set of

⁸⁶⁹ WIPO Report of the 38th IGC meeting op cit note 413 at p. 24.

⁸⁷⁰ See Chapter Four, III. 2. See also Section 11 of the IKS Act of 2019 of South Africa.

⁸⁷¹ WIPO Report of the 38th IGC meeting op cit note 413 at p. 43.

⁸⁷² Ibid.

⁸⁷³ Ibid at p. 8.

⁸⁷⁴ WIPO Report of the 39th IGC meeting op cit note 52 at p. 42.

⁸⁷⁵ WIPO Report of the 38th IGC meeting op cit note 413 at p. 8.

⁸⁷⁶ WIPO Report of the 37th IGC meeting op cit note 536 at p. 31.

instruments that could fit with the subject matter.⁸⁷⁷ This is an indicator of an objective to move away from eligibility criteria that are typically associated with copyright law and to rather create an instrument that respects the particular nature of TCEs.

In addition, the IC aligned itself with the Delegations of Nigeria and South Africa. Next to other issues that the IC also raised, the Delegation of Nigeria suggested that eligibility criteria should remain within Article 3 instead of moving them from section to section. It also stated that it saw the outcome of the work of the IGC as a ‘framework instrument that would leave robust policy space at the national level.’

V. BENEFICIARIES

The section on beneficiaries regulates who would be the rights-holders of measures that are part of the instrument. In the context of TK & TCEs, the predominant discussion is on the question of whether only IPLCs should be beneficiaries or whether there should be flexible policy space to enable the recognition of other beneficiaries, like states and nations.⁸⁷⁸ Beneficiaries are regulated in Article 4 in both texts. Article 4 of the 2023 TCE Draft Articles reads as follows:

‘[ARTICLE 4 - BENEFICIARIES

[Alt 1

Beneficiaries of protection under this instrument are indigenous [peoples] and local communities who hold, express, create, maintain, use, and develop [protected] traditional cultural expressions.]

Facilitators’ Alternative

4.1 The beneficiaries under this instrument are:

(a) indigenous peoples and local communities, and

(b) where applicable and as determined under national law, other right holders of traditional cultural expressions meeting the criteria set out in Article 3.

1.2 Member States/Contracting Parties may provide for national authorities to have a role in the administration of benefits relating to the implementation of this instrument in accordance with national law.]⁸⁷⁹

1. United States of America

⁸⁷⁷ Ibid.

⁸⁷⁸ WIPO Secretariat op cit note 796 at slide 23.

⁸⁷⁹ 2023 TCE Draft Articles op cit note 409, Article 4 Beneficiaries.

In the 37th meeting, the US stated that it supported the first alternative. Alt 1 in the 2018 TCE Draft Articles can now be found as Alt 2 in the 2019 TCE Draft Articles. In consequence, the US delegation prefers Alt 2 of Article 4.⁸⁸⁰ The delegation claimed its preference for this alternative because it ‘would fit comfortably with the concept of the beneficiaries in IP systems, being society at large, with the advantages of promoting creativity and innovation.’⁸⁸¹ This refers to a comment by the delegation of Switzerland, which stated that there are basically two possible interpretations of beneficiaries, the first being the same as rights-holders which would only include IPLCs and the second one being much broader, including all ‘persons or entities who would be benefitting from the provisions in the instruments in general’.⁸⁸² With regard to the preservation and safeguarding of TCEs, the latter would be society at large and users of TCEs.⁸⁸³ It would appear that the US wants to keep the term for beneficiaries as broad and close to the interpretation of IP law as possible.

With regard to the other alternatives, the delegation stated that the wording ‘other beneficiaries as may be determined under national law’ might result in creating beneficiaries for TCEs that were not specifically attributable to a specific community.⁸⁸⁴ It could be concluded that the US does not want too much leeway for member states to determine beneficiaries. At the same time, the statement is contradictory to their first statement, which promotes a rather broad understanding of the term beneficiaries.

2. European Union

The EU delegation also expressed their preference for Alt 1 of the 2018 TCE Draft Articles (now listed as ALT 1 of the 2023 TCE Draft Articles) and stated that with the other alternatives, the eligibility criteria in Article 3 could not be met.⁸⁸⁵ It preferred the limitation of beneficiaries to IPLSs and requested this scope not be extended to nations or states.⁸⁸⁶

3. South Africa

⁸⁸⁰ In the 37th meeting, the US stated that it supported the first alternative, which can now be found as Alt 2 in the 2019 TCE Draft Articles. In the 38th meeting it confirmed its preference for Alt 2 of the 2019 TCE Draft Articles, see WIPO Report of the 38th IGC meeting op cit note 413 at p. 42.

⁸⁸¹ WIPO Report of the 37th IGC meeting op cit note 536 at p. 24.

⁸⁸² Ibid.

⁸⁸³ Ibid.

⁸⁸⁴ WIPO Report of the 37th IGC meeting op cit note 536 at p. 24.

⁸⁸⁵ Ibid at p. 23.

⁸⁸⁶ Ibid at p. 51.

With regard to TK, the delegation of South Africa called for the IGC to recognise ‘all genuine beneficiaries’.⁸⁸⁷ As an example, it referred to the Traditional Knowledge Digital Library (TKDL) in India, which was used ‘in patent offices in Europe, America, Japan and many others’ and highlights the ‘the role of the state in the protection and promotion under the development of TK.’⁸⁸⁸ It supported a definition that also allowed users of TK in certain contexts to qualify as beneficiaries because it saw the aim of the negotiations in recognising different rights involved in the protection and ‘moving away from rigid positions’.⁸⁸⁹ It can be concluded that South Africa infers a rather wide approach to the definition of beneficiaries.

4. Indigenous Caucus

The IC criticised that the word ‘peoples’ was in brackets because it had long been established that ‘indigenous peoples were peoples’ through the adoption of UNDRIP by the UN in 2007.⁸⁹⁰ It supported the inclusion of nations or states as beneficiaries but needed some clarification on the terms ‘policy space for other beneficiaries’ and ‘administration of rights’ that had been raised by other parties.⁸⁹¹

VI. SCOPE OF RIGHTS

The section on the scope of rights/scope of protection serves to outline exactly what claims holders are entitled to. They define the boundaries and content of the rights included in the instrument. Within the IGC, the so-called ‘tiered approach’ or ‘differentiated protection’ is discussed as a model to provide different levels of protection based on the nature of protection, the level of control that was already being exercised by the community, and the degree of diffusion of the TK and TCEs.⁸⁹² This is supposed to create a balance between ‘the protection of TK and TCEs and the notion of public domain.’⁸⁹³ It proposes a distinction between the allocation of economic rights and moral rights towards different forms of TCEs, based on the categories ‘secret, sacred and widely or narrowly diffused.’⁸⁹⁴ The scope of protection can be found in Article 5 in

⁸⁸⁷ *Ibid* at p. 54.

⁸⁸⁸ *Ibid*.

⁸⁸⁹ *Ibid*.

⁸⁹⁰ *Ibid* at p. 26.

⁸⁹¹ *Ibid*.

⁸⁹² WIPO Report of the 38th IGC meeting *op cit* note 413 at p. 16.

⁸⁹³ *Ibid* at p. 15.

⁸⁹⁴ Goss *op cit* note 474 at p. 3.

the draft articles for both TCEs and TK. It is one of the most debated articles whereby the parties disagree significantly, which manifests in the length of the draft text and the number of alternatives and options. Article 5 of the 2023 TCE Draft Articles reads as follows:

[ARTICLE 5 - SCOPE OF [PROTECTION]/[SAFEGUARDING]

[Facilitators' Alternative

Member States/Contracting Parties shall take legislative, administrative and/or policy measures, as appropriate and in accordance with national law in a reasonable and balanced manner, to provide that:

- (a) Where, with reference to the customary laws or practices of indigenous peoples, local communities, or beneficiaries, access to traditional cultural expressions is restricted or the traditional cultural expressions are closely held, including where the traditional cultural expressions are secret or sacred, beneficiaries have exclusive collective rights:
 - (i) to maintain, control, use, develop, authorise or prevent access to and use/utilization of their traditional cultural expressions; and receive a fair and equitable share of benefits arising from their use; and
 - (ii) of attribution and the right to the use of their traditional cultural expressions in a manner that respects the integrity of such traditional cultural expressions.
- (b) Where, with reference to the customary laws and practices of indigenous [peoples], local communities or beneficiaries, the traditional cultural expressions are not restricted accessed or closely held, beneficiaries are to:
 - (i) receive a fair and equitable share of benefits arising from its use; and
 - (ii) have the right of attribution and the right to the use of their traditional cultural expressions in a manner that respects the integrity of such traditional cultural expressions.
- (c) In other cases where it appears that a traditional cultural expression will be used, but it is unclear if it is associated with a particular indigenous peoples, local community or beneficiary
 - (i) before the traditional cultural expression is used, an attempt should be made to determine whether there are indigenous peoples, local communities or beneficiaries who are able to speak for that traditional cultural expression, and
 - (ii) if identified, consultation should occur with those indigenous peoples, local communities or beneficiaries.]

[Alt 1

5.1 [Member States]/[Contracting Parties] [should]/[shall] safeguard the economic and moral interests of the beneficiaries concerning their [protected] traditional cultural expressions, as defined in this [instrument], as appropriate and in accordance with national law, [taking into consideration exceptions and limitations, as defined in Article 7,] in a reasonable and balanced manner.

5.2 Protection under this instrument does not extend to traditional cultural expressions that are widely known or used outside the community of the beneficiaries as defined in this [instrument], [for a reasonable period of time], in the public domain, or protected by an intellectual property right.]

[Alt 2

5.1 Member States [should/shall] take legislative, administrative and/or policy measures, as appropriate, in accordance with national law, in a reasonable and balanced manner, and in a manner consistent with Article 14, with the aim of ensuring that:

(a) Where with reference to the customary laws and practices of indigenous [peoples] and local communities/beneficiaries, access to traditional cultural expressions is restricted, including where the traditional cultural expressions are secret or sacred:

(a) Beneficiaries have the exclusive and collective right to maintain, control, use, develop, authorise or prevent access to and use/utilization of their traditional cultural expressions; and receive a fair and equitable share of benefits arising from their use.

(b) 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 with reference to the customary laws and practices of indigenous [peoples] and local communities/beneficiaries, the traditional cultural expressions are no longer under the exclusive control of beneficiaries, but are still distinctively associated with the beneficiaries' cultural identity:

(a) Beneficiaries receive a fair and equitable share of benefits arising from their use; and

(b) Beneficiaries have the moral right of attribution and the right to the use of their traditional cultural expressions in a manner that respects the integrity of such traditional cultural expressions.

5.2 [For traditional cultural expressions that are being utilized without the prior informed consent and/or not in accord with customary laws and practices of indigenous [peoples] and local communities, indigenous [peoples] and local communities or other beneficiaries, as applicable, shall have the possibility to request from the relevant national authorities protection provided for in paragraph 5.1(a), 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 unauthorised utilization.]]

[Alt 3

5.1 Where the [protected] traditional cultural expression is [sacred], [secret] or [otherwise known only] [closely held] within indigenous [peoples] or local communities, Member States should/shall:

(a) provide legal, policy and/or administrative measures, as appropriate and in accordance with national law that allow beneficiaries to:

i. [create,] maintain, control and develop said [protected] traditional cultural expressions;

ii. [discourage] prevent the unauthorised disclosure and fixation and prevent the unlawful use of secret [protected] traditional cultural expressions;

iii.[authorise or deny the access to and use/[utilization] of said [protected] traditional cultural expressions based on free, prior and informed consent or approval and involvement and mutually agreed terms;]

iv.protect against any [false or misleading] uses of [protected] traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries; and

v.[prevent] prohibit use or modification which distorts or mutilates a [protected] traditional cultural expression or that otherwise diminishes its cultural significance to the beneficiary.

(b) encourage users [to]:

i. attribute said [protected] traditional cultural expressions to the beneficiaries;

ii. use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the [protected] traditional cultural expressions]; and

iii.use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the [protected] traditional cultural expressions.

5.2 [Where the [protected] traditional cultural expression is [still] [held], [maintained], used [and]/[or] developed by indigenous [peoples] or local communities, and is/are publicly available [but neither widely known, [sacred], nor [secret]], Member States should/shall encourage that users]/[provide legal, policy and/or administrative measures, as appropriate and in accordance with national law to encourage users [to]]:

(a)attribute and acknowledge the beneficiaries as the source of the [protected] traditional cultural expressions, unless the beneficiaries decide otherwise, or the [protected] traditional cultural expressions is not attributable to a specific indigenous people or local community[; and][.]

(b) use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the [protected] traditional cultural expressions;

(c)[use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the [protected] traditional cultural expressions[; and][.]

(d)[refrain from any [false or misleading uses] of [protected] traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries.]

5.3[Where the [protected] traditional cultural expressions is/are [publicly available, widely known [and in the public domain]] [not covered under Paragraphs 1 or 2], [and]/or protected under national law, Member States should/shall encourage users of said [protected] traditional cultural expressions [to], in accordance with national law:

(a)attribute said [protected] traditional cultural expressions to the beneficiaries;

(b)use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiary [as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the [protected] traditional cultural expressions;

(c)[protect against any [false or misleading] uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries[;]] [and]

(d)where applicable, deposit any user fee into the fund constituted by such Member State.]]]'⁸⁹⁵

1. United States of America

The US delegation made only two direct comments with regard to Article 5 in the analysed documents. After the report of the facilitators on how the draft articles had been edited in the 40th meeting, and Alt 3 had been deleted, it expressed its disappointment about the deletion of Alt 3, Option 1 (as can, in consequence, still be found in the 2019 TCE Draft Articles).⁸⁹⁶ It expressed a preference for this specific option because it contained ‘important elements [...], including one option relating to false and misleading uses of TCEs, which was the subject of a very productive ongoing work stream within the IGC’ as well as the protection of ‘the integrity of TCEs.’⁸⁹⁷ Even though the facilitators had asked the parties not to request reinsertions, the US requested exactly that for Alt 3.⁸⁹⁸ It is the longest and most extensive alternative within Article 5, and includes a number of detailed regulations to be implemented by the member states for each of the three tiers. These suggested rules are phrased very specifically and do not leave a lot of leeway in drafting for the member states.

As a reason for the reinsertion request, the US stated that it saw important elements in this alternative that others did not contain, especially the one stated above. However, Alt.2, 5.2. also contained the element to protect against ‘false or misleading uses’, and Alt. 2, 5.3 contains a provision ‘to protect the integrity’ of TCEs. The request can also be interpreted as a preference for a detailed and lengthy provision that does not leave much flexibility for member states. It could also be seen as an attempt to slow down the negotiation process, which has been suggested by other member states repeatedly.⁸⁹⁹

2. European Union

In the 37th meeting, the EU suggested a study about national experiences that includes, amongst other things, ‘the variety of measures that could be taken, some of which could

⁸⁹⁵ 2023 TCE Draft Articles op cit note 409, Article 5 Scope of Rights.

⁸⁹⁶ WIPO Report of the 40th IGC meeting op cit note 867 at p. 18.

⁸⁹⁷ Ibid at pp. 16 & 20.

⁸⁹⁸ Ibid at pp. 16 & 18.

⁸⁹⁹ See for example the delegation of South Africa who questions whether reinserting an alternative constitutes ‘narrowing gaps’ as per the mandate of the IGC, WIPO Report of the 40th IGC meeting op cit note 867 at p. 18; or the delegation of Niger which claimed that the US ‘continued to increase the differences’ WIPO Report of the 39th IGC meeting op cit note 52 at p. 28; or the delegation India refusing a proposal by the US because it was ‘delaying the IGC process’ WIPO Report of the 40th IGC meeting op cit note 867 at p. 26.

be measures-based, while others could be rights-based'.⁹⁰⁰ This statement refers to the discussion on the nature of the rights that should be granted by the instruments.⁹⁰¹ The suggestion indicates an openness for both approaches to be included in the article for the scope of rights. However, the delegation then went on to state that it supported the measures-based approach and 'was not ready to go along with any close associations with the rights-based approach'.⁹⁰² In this context, it also stated that 'using the word "right" in the preamble was problematic'.⁹⁰³

At IGC 38, the EU delegation questioned whether the definitions for the terms 'sacred', 'secret', 'narrowly diffused' and 'widely diffused' should be included in the text or not. It aligned itself with other parties that 'felt that [the tiers] should be left to the national legislation and that it was not the intent of the instrument to cover those definitions'.⁹⁰⁴

In the 39th meeting, the EU simply stated that some progress had been made on several issues, including on the scope of protection. This indicates a general agreement with the work of the facilitators and that the negotiations are moving in the right direction.⁹⁰⁵

3. South Africa

In the 38th meeting, the South African delegation expressed concern 'over the rationale for splitting two very important articles (subject matter and scope of protection[because they are] linked and interdependent.'⁹⁰⁶

In addition to this, the South African delegation mainly criticised the introduction of new proposals and alternatives and requested for the chair to ensure that the right procedures were followed during the 39th meeting. This is an indirect critique of the US delegation, which wished to reinsert an alternative to Article 5 that had previously been

⁹⁰⁰ WIPO Report of the 37th IGC meeting op cit note 536 at p. 17.

⁹⁰¹ WIPO Secretariat op cit note 780 at slide 24.

⁹⁰² WIPO Report of the 37th IGC meeting op cit note 536 at p. 51.

⁹⁰³ Ibid.

⁹⁰⁴ WIPO Report of the 38th IGC meeting op cit note 413 at p. 28.

⁹⁰⁵ WIPO Report of the 39th IGC meeting op cit note 52 at p. 6.

⁹⁰⁶ WIPO Report of the 38th IGC meeting op cit note 413 at p. 24.

deleted by the facilitators.⁹⁰⁷ This indirect critique was followed up by a direct request for clarification towards the US delegation in the 40th meeting as to why they introduced more than two options.⁹⁰⁸

With regard to the TK text, the delegation of South Africa positioned itself against the use of the word ‘safeguarding’ because it ‘related to heritage and cultural work’ and not to IP.⁹⁰⁹ It criticised the use of the word ‘protected’ in Alt 1 and expressed a clear preference for Alt 3, claiming it could serve as ‘the common denominator that could speak to both TK and TCEs.’⁹¹⁰ Furthermore, it supported a minimum standard approach that left details to national legislation.⁹¹¹

4. Indigenous Caucus

The IC is the only party that commented on Article 5 extensively throughout several meeting reports.

With regard to specific wording, the IC saw no reason for the ‘proposed change to include “record and archive” because these were matters dealt with by UNESCO.’⁹¹² Therefore, ‘safeguarding, recording and archiving had no place at all in any of those instruments.’⁹¹³ With regard to the wording in the TK text, it expressed concern with the prefix ‘protected’ because it indicated a ‘prejudgment that some TK was protected and some were not.’⁹¹⁴ In addition to that, it was generally not opposed to the rights-based approach and invited the IGC to participate in other international fora that had incorporated it.⁹¹⁵

The main remark by the IC throughout most meetings was aimed at all parties to move away from IP-like structures when drafting Article 5. In particular, it stressed that ‘indigenous peoples’ understanding of balance[...] differed from that reflected in the current copyright system’.⁹¹⁶ This showed particularly in the tiered approach. While it

⁹⁰⁷ WIPO Report of the 39th IGC meeting op cit note 52 at p. 27.

⁹⁰⁸ WIPO Report of the 40th IGC meeting op cit note 867 at p. 18.

⁹⁰⁹ WIPO Report of the 37th IGC meeting op cit note 536 at p. 22.

⁹¹⁰ *Ibid.*

⁹¹¹ *Ibid.*

⁹¹² *Ibid* at p. 31.

⁹¹³ *Ibid.*

⁹¹⁴ *Ibid* at p. 60.

⁹¹⁵ *Ibid* at p. 71.

⁹¹⁶ *Ibid* at pp. 9 & 31.

generally supported the more nuanced concept,⁹¹⁷ the IC claimed that it worked against the fundamental rights of IPLCs:⁹¹⁸

‘What mattered was not how widely available TK and TCEs were, but their sacred nature, violations of their spiritual and cultural beliefs, and the harms that they suffered from, as they defined and experienced them. Any tiered approach had to respect indigenous peoples’ laws, traditions and customs, as set out in Article 31 of UNDRIP. They had the right to petition for the return of their secret, sacred, spiritual and other culturally sensitive TK and TCEs. TK and TCEs did not exist primarily as a means to serve the IP system – their purpose was to holistically serve political, economic, cultural, ritual, ceremonial, spiritual, sacred and other purposes of indigenous peoples. The legitimacy and lawfulness of the IGC process depended on the FPIC of indigenous peoples.’⁹¹⁹

In addition to the above, the tiered approach should only be discussed with the free prior informed consent (FPIC) of indigenous peoples, and it did not accommodate the intention of indigenous people sufficiently.⁹²⁰ The IC claimed that the significant missing element was ‘the “owners” decision as to whether or not a TK or TCE should be shared. That was a decision that indigenous peoples made within their own peoples.’⁹²¹ In this context, the delegation also requested member states ‘to stop assigning themselves functions to collect, store and facilitate the transfer of their TK or TCEs without their FPIC.’⁹²² It heavily emphasised that the new standard should be based on the preference of IPLC, based on the process of asking IPLCs about the origins of the TCEs and TK, ‘who had generated that knowledge and maintained it over many millennia or time immemorial [and] what they wanted to have done with [it].’⁹²³

Furthermore, the tiered approach should also enable the recovery of TK & TCEs. In the past, many TCEs were taken from IPLCs without their FPIC. ‘When a TK was not intended to be shared but had been diffused without the indigenous peoples’ consent, the instrument had to establish a mechanism to regain control over such knowledge.’⁹²⁴ Thus, The IC welcomed the inclusion of paragraph (d) and stated that the included concept was essential to making the tiered approach going forward.⁹²⁵ ‘It was the beginning of finding a solution to the problem of TK diffused without the agreement of

⁹¹⁷ Ibid at p. 30.

⁹¹⁸ Ibid at p. 31.

⁹¹⁹ Ibid.

⁹²⁰ WIPO Report of the 37th IGC meeting op cit note 536 at p. 71.

⁹²¹ WIPO Report of the 38th IGC meeting op cit note 413 at p. 53 & 58.

⁹²² WIPO Report of the 37th IGC meeting op cit note 536 at p. 31.

⁹²³ Ibid.

⁹²⁴ WIPO Report of the 38th IGC meeting op cit note 413 at p. 54.

⁹²⁵ Ibid at p. 40.

its peoples. The IGC still had to work on the language, but it was a step in the right direction.’⁹²⁶

Finally, the IC requested binding and effective mechanisms to be included in the tiered approach to enable TCE protection based on certain criteria ‘regardless of the degree of control or degree of diffusion.’⁹²⁷

VII. EXCEPTIONS AND LIMITATIONS

Exceptions and limitations are a law-making tool that stems from copyright law. They set boundaries for the scope of protection by listing specific examples in which the protection and exclusive rights listed in Article 5 do not apply. This serves to maintain a balance between rights-holders and the users of protected works.⁹²⁸ Within the IGC negotiations, the main questions are whether exceptions and limitations should be included at all, and if they should, whether they should leave flexibility for the member states or suggest detailed ideas.⁹²⁹ In the 2023 TCE Draft Articles, the provision on exceptions and limitations can be found in Article 7 and in the Draft Articles for TK in Article 9. The article in the TCE text is still very long and includes three alternatives in addition to many words in brackets, which indicates a high level of disagreement amongst the parties. This is partly because exceptions and limitations had not been the centre of negotiations until the 40th IGC meeting.⁹³⁰ In consequence, most parties have not made extensive statements on the topic, if at all. Article 7 of the 2023 TCE Draft Articles reads as follows:

[ARTICLE 7 - EXCEPTIONS AND LIMITATIONS

[Facilitators’ Alt

7.1 Member States/Contracting Parties may adopt appropriate exceptions and limitations, in consultation with the beneficiaries where applicable, provided that they do not unreasonably prejudice the legitimate interests of the beneficiaries, taking account of the legitimate interests of third parties.

7.2 Any exceptions or limitations adopted by Member States/Contracting Parties should not conflict with the normal use, or use under customary laws, of traditional cultural expressions by the beneficiaries]

⁹²⁶ Ibid at p. 54 & 58.

⁹²⁷ WIPO Report of the 40th IGC meeting op cit note 867 at p. 8.

⁹²⁸ WIPO 'Limitations and exceptions' available at <https://www.wipo.int/copyright/en/limitations/>, accessed on 31.03.2023.

⁹²⁹ WIPO Secretariat op cit note 796 at slide 25.

⁹³⁰ WIPO Report of the 39th IGC meeting op cit note 52 at p. 51.

[Alt 1

In complying with the obligations set forth in this instrument, Member States [may in special cases,] [should] adopt justifiable exceptions and limitations necessary to protect the public interest, in consultation with the beneficiaries, where applicable, provided such exceptions and limitations shall not unreasonably conflict with the rights of beneficiaries, [and the customary law of indigenous [peoples] and local communities,] nor unduly prejudice the implementation of this instrument.]

[Alt 2

In implementing this instrument, Member States [may] [should] adopt exceptions and limitations as may be determined under national legislation including incorporated customary law.

1. To the extent that any act would be permitted under national law for works protected by copyright, signs and symbols protected by trademark law, or subject matter otherwise protected by intellectual property law, such acts [shall/should] not be prohibited by the protection of TCEs.

2. Regardless of whether such acts are already permitted under paragraph (1), Member States [shall/should] [may] have exceptions[, such as] for:

(a) learning teaching and research;

(b) preservation, display, research, and presentation in archives, libraries, museums or other cultural institutions;

(c) the creation of literary, artistic, or creative works inspired by, based on, or borrowed from traditional cultural expressions.

3. A Member State may provide for exceptions and limitations [other than] [in addition to] those permitted under paragraph (2).

4. A Member State shall/should provide for exceptions and limitations in cases of incidental use/utilization/inclusion of a [protected] traditional cultural expression in another work or another subject matter, or in cases where the user had no knowledge or reasonable grounds to know that the traditional cultural expression is protected.]

[Alt 3

General Exceptions

7.1 [[Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations and exceptions under national law [in consultation with the beneficiaries] [with the involvement of beneficiaries][, provided that the use of [protected] traditional cultural expressions:

(a) [acknowledges the beneficiaries, where possible;]

(b) [is not offensive or derogatory to the beneficiaries;]

(c) [is compatible with fair use/dealing/practice;] or

(d) [does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.]]

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

Specific Exceptions

7.3 [[Subject to the limitations in Paragraph 1,]/[In addition,] [Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations or exceptions, in accordance with national law or, as appropriate, of the [holders]/[owners] of the original work:

(a) [for learning, teaching and research, in accordance with nationally established protocols, except when it results in profit-making or commercial purposes;]

(b) [for preservation, [display], research and presentation in archives, libraries, museums or other cultural institutions recognised by national law, for non-commercial cultural heritage or other purposes in the public interest;]

(c) [for the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]

[This provision [should]/[shall] not apply to [protected] traditional cultural expressions described in Article 5.1.]]

7.4 [Regardless of whether such acts are already permitted under Paragraph 1, the following [should]/[shall] be permitted:

(a)[the use of traditional cultural expressions in cultural institutions recognised under the appropriate national law, archives, libraries and museums, for non-commercial cultural heritage or other purposes in the public interest, including for preservation, [display], research and presentation;]

(b)the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]

(c)[the use/utilization of a traditional cultural expression [legally] derived from sources other than the beneficiaries; and]

(d)[the use/utilization of a traditional cultural expression known [through lawful means] outside of the beneficiaries' community.]]

7.5 [[Except for the protection of secret traditional cultural expressions against disclosure], to the extent that any act would be permitted under the national law, for works protected by [intellectual property rights [including]]/[copyright, or signs and symbols protected by trademark, or inventions protected by patents or utility models and designs protected by industrial design rights, such act [should]/[shall] not be prohibited by the protection of traditional cultural expressions].]]⁹³¹

1. United States of America

The most recent statement of the US included a preference for Alt 2, which includes a combination of general and specific exceptions.⁹³² With respect to the TK text, it commented on Article 9.3, paragraph (d), which contains the following exception: '(d) [the creation of an original work of authorship inspired by traditional knowledge]'. The US claimed that this was a particularly important exception and requested the brackets to be removed because it 'had been in the international community for approximately twice as long as the discussions in WIPO.'⁹³³ The wording in this alternative stems from copyright law and is aimed at the promotion and creation of new works. It is interesting

⁹³¹ 2023 TCE Draft Articles op cit note 409, Article 7 Exceptions & Limitations.

⁹³² Observation of IGC 45 in Geneva, December 2022.

⁹³³ WIPO Report of the 40th IGC meeting op cit note 867 at p. 8.

that the US wants to include this alternative in particular, as the creation of works inspired by TK has led to unlawful exploitation of TK & TCEs that the IGC is trying to prevent. At the same time, not even the Berne Convention or the WIPO Copyright Treaty, which regulates copyright law on the international level, include an exception like this. It is assumed that the US prefers this alternative because it would enable artists to create works based on TK and hence support innovation and development, hence maintaining the status quo.

2. European Union

The EU is aligned with the US in that they stated support for Alt 2 in the most recent IGC meeting with a special focus on specific instruments.⁹³⁴ They preferred this alternative because it would create a necessary ceiling for the instrument.

3. South Africa

In the 38th meeting, the delegation of South Africa remarked that it ‘supported a simplified exceptions and limitations clause.’⁹³⁵ It would appear that this indicates a preference for a provision like Alt 1 or 3 to give member states greater flexibility when drafting their laws. In fact, in the latest meeting on TCEs, it stated that it felt most comfortable with Alt 1.

4. Indigenous Caucus

According to the IC, exceptions and limitations ‘had to be extremely narrow and conform to indigenous customary laws and concerns’.⁹³⁶ The provision should be based on the determination and FPIC of indigenous peoples.⁹³⁷ In consequence, the IC generally supported that exceptions and limitations to be determined at the national level because there was ‘no one-size-fits-all solution.’⁹³⁸ This approach indicates the aim to keep the scope of Article 5 as wide as possible to enable the greatest possible extent of protection for TCEs.

⁹³⁴ Observation of IGC 45 in Geneva, December 2022.

⁹³⁵ WIPO Report of the 38th IGC meeting op cit note 413 at p. 54.

⁹³⁶ WIPO Report of the 40th IGC meeting op cit note 867 at p. 20; see also Transcript of the IGC 45, 5.12.2022 (AM) op cit note 382.

⁹³⁷ WIPO Report of the 40th IGC meeting op cit note 867 at p. 58.

⁹³⁸ Ibid at p. 54.

VIII. ROLE OF CUSTOMARY LAW

The main question surrounding customary law within the IGC is whether or not it should influence the international instrument as well as national laws that build upon such an instrument.

There is currently no specific provision on the role of customary law within the TCE & TK Draft articles. However, the term ‘customary law(s)’ is mentioned 12 times within the TCE Draft Articles. The articles that contain these references are Article 3 on eligibility criteria, Article 5 on the scope of protection and Article 7 on exceptions and limitations. In Article 3, the wording ‘in accordance with their customary laws and protocols’ can be found in all three alternatives but is in brackets in all of them. In Article 5, the addition ‘as appropriate and in accordance with [...] customary laws’ is only included in one out of the three alternatives, which is in brackets. Article 7 includes references to customary law in two out of three alternatives, of which both are in brackets. This shows that the role of customary law is not agreed upon, and consensus has not been reached.

The number of statements on customary law in the analysed documents is very limited. This is because between IGC 37 and IGC 45, the focus was put on objectives, eligibility criteria, beneficiaries, the scope of rights and exceptions and limitations. The role of customary law was only discussed in detail from IGC 46 onwards.

1. United States of America

The delegation of the US has expressed that there still is a lot of unclarity around what the reference to customary law means. Within the Scope of Protection, for example, it mentioned that it is unclear what the reference in Alt 5.2 actually entails.⁹³⁹ Similar comments were made regarding the Facilitators' Alt 7.2 on Exceptions and Limitations.⁹⁴⁰ At first glance, this is a neutral statement as it only seeks clarification. However, it can be noticed that there were no words of general support or acceptance of the inclusion of customary law, as could be seen from other parties.

2. European Union

⁹³⁹ WIPO Transcript of IGC 46, 28th of February 2023, Evening Session, WIPO_GRTKF_IC_46_2023-02-28_PM_118455 (2023) available at https://webcast.wipo.int/video/WIPO_GRTKF_IC_46_2023-02-28_PM_118455, accessed on 31.03.2023 at p.20.

⁹⁴⁰ Ibid at p. 38.

The delegation of the EU has expressed reservations about the inclusion of the term ‘customary law’ in the text. Specifically, it stated that within Article 5 on the scope of protection, ‘the decisive reference to customary laws and practices of IPLC should be reconsidered in defining the tiers as it creates uncertainty as to which category of TK is protected.’⁹⁴¹ Thus, the EU states a similar preference as the US, which is a tendency against the inclusion of references to customary law.

3. South Africa

The delegation of South Africa has given no statement on the role of customary law in the analysed documents. Given its general international positioning as a *demandeur* and the fact that it has broadly incorporated customary law into its national legislation,⁹⁴² it can be assumed that the delegation supports the reference to customary law in the text.

4. Indigenous Caucus

The indigenous caucus is the only delegation which has commented repetitively on the role of customary law throughout all analysed documents, clearly stating the importance for it to be reflected. It claims that ‘customary laws were fundamental for indigenous peoples and had to be considered when drafting’ an international instrument.⁹⁴³ With regard to definitions in the TK text, it stated that they had to ‘take into account the political, cultural, spiritual, ceremonial and other aspects of indigenous peoples’ social norms’.⁹⁴⁴ In addition to that, their ‘laws, traditions and jurisdiction had to be fully recognised and respected.’⁹⁴⁵ With regard to the updated working document, the ‘2016 technical review of key IP-related issues of the draft instruments’⁹⁴⁶ stated that it had to be determined how the concepts of ‘balancing’ and ‘public domain’ might ‘conflict with indigenous peoples’ human rights and customary laws’.⁹⁴⁷ At IGC 46, it expressively stated a preference for a subsection that makes reference to customary law.⁹⁴⁸ These

⁹⁴¹ *Ibid* at p. 14.

⁹⁴² See Chapter Four, IV. 3.

⁹⁴³ WIPO Report of the 37th IGC meeting op cit note 536 at p. 71.

⁹⁴⁴ WIPO Report of the 39th IGC meeting op cit note 52 at p. 51.

⁹⁴⁵ *Ibid*.

⁹⁴⁶ Technical review of key IP-related issues of the draft instruments (2016), WIPO/GRTKF/IC/29/INF/10.

⁹⁴⁷ WIPO Report of the 40th IGC meeting op cit note 867 at p. 8.

⁹⁴⁸ WIPO *Transcript of IGC 46, 28th of February 2023, Morning Session, WIPO_GRTKF_IC_46_2023-02-28_AM_118450* (2023) available at https://webcast.wipo.int/video/WIPO_GRTKF_IC_46_2023-02-28_AM_118450, accessed on 31.03.2023 at p. 11.

statements indicate that the indigenous caucus wants to see customary law represented in the instrument.

IX. NEGOTIATION PROCESS

This subchapter serves to highlight the different negotiating approaches the delegations take during the IGC negotiations. The mandate of the IGC includes the ‘evidence-based approach’, which enables member states to introduce relevant working documents for consideration and discussion by the other parties. This has proven to take up a significant amount of time of the overall meeting agenda, and parties have expressed diverging opinions on it. While some have repeatedly stressed the need for a timely solution and an acceleration of the process, others emphasise the need for further research. Thus, a special focus is put on the number of studies being introduced by each party throughout the meeting as part of the evidence-based approach. This helps to understand just how different the overall procedural strategies are among the parties.

1. United States of America

In the analysed timeframe, the US delegation introduced a number of different studies, including the ‘Proposal for the Terms of Reference for a Study on Existing Sui Generis Systems for the Protection of Traditional Knowledge’⁹⁴⁹, the ‘Identifying Examples of Traditional Knowledge to Stimulate a Discussion of what should be Protectable Subject Matter and what is not intended to be Protected’⁹⁵⁰ and the ‘Joint Recommendation on the Use of Databases for the Defensive Protection of Genetic Resources and Traditional Knowledge Associated with Genetic Resources’⁹⁵¹ which it introduced together with the delegations of Canada, Japan, Norway and the Republic of Korea. It stated that ‘conducting and updating studies that included domestic legislation’ was part of the IGC’s mandate.⁹⁵² It also claimed it ‘would help Member States reach a common understanding of protectable subject matter’ and that the evidence-based approach would ‘help the IGC move forward in its work.’⁹⁵³ It reintroduced these documents at

⁹⁴⁹ Introduced in the version WIPO/GRTKF/IC/37/16.

⁹⁵⁰ Introduced in the version WIPO/GRTKF/IC/38/14.

⁹⁵¹ Introduced in the version WIPO/GRTKF/IC/40/16; see also ‘Joint Recommendation on Genetic Resources and Associated Traditional Knowledge’ WIPO/GRTKF/IC/40/15.

⁹⁵² WIPO Report of the 37th IGC meeting op cit note 536 at p. 41.

⁹⁵³ WIPO Report of the 38th IGC meeting op cit note 413 at p. 35.

IGC 44.⁹⁵⁴ These suggestions indicate a preference for gathering more knowledge and evidence as a basis for discussions on the text of the draft articles instead of working on the existing text.

2. European Union

The EU delegation introduced a similar number of suggestions for the gathering of evidence and intelligence. It repeatedly stated that it welcomes the evidence-based approach at the centre of the IGCs methodology.⁹⁵⁵ For this purpose, it introduced several studies repeatedly over the course of the analysed meetings, e.g. the 'EU Proposal for a study on Traditional Cultural Expressions'⁹⁵⁶ or the Proposal for the Terms of Reference for a Study on Traditional Knowledge⁹⁵⁷.

3. South Africa

The delegation of South Africa repeatedly expressed its concern about the introduction of various studies. In the 38th meeting, it aligned itself with the delegations of Egypt as well as Morocco, which stated 'that any proposal at that stage could only take the IGC away from its objective and only add to the amount of work to be done.'⁹⁵⁸ The delegation of Egypt stated that 'the IGC did not have enough time to study and discuss all of those proposals.'⁹⁵⁹ The delegation of South Africa added that it found the proposal made by the US and Japan 'very confusing' because similar studies had been done before.⁹⁶⁰ It requested the findings of the previous studies be made available before proposing new surveys.⁹⁶¹ In the 39th meeting, it perpetuated this position by claiming the 'IGC had been talking about the same thing over and over again.'⁹⁶² In the 40th

⁹⁵⁴ WIPO Transcript of IGC 44, 13th of September 2022, Morning Session, WIPO S2T:WIPO GRTKF IC 44 2022-09-13 AM 116596 en (2022) available at https://webcast.wipo.int/video/WIPO_GRTKF_IC_44_2022-09-13_AM_116596, accessed on 31.03.2023 (Transcript of the 44th session, 13.9.2022 (AM)), at p. 2.

⁹⁵⁵ WIPO Report of the 37th IGC meeting op cit note 536 at p. 7; WIPO Report of the 38th IGC meeting op cit note 413 at p. 7; WIPO Report of the 39th IGC meeting op cit note 52 at p. 6; WIPO Report of the 40th IGC meeting op cit note 867 at p. 8.

⁹⁵⁶ Introduced in the versions: WIPO/GRTKF/IC/33/6 ; WIPO/GRTKF/IC/37/11 and WIPO/GRTKF/IC/39/17, the latter also being introduced in IGC 44.

see: WIPO Transcript of IGC 44, 12th of September 2022, Opening Session, WIPO S2T:WIPO GRTKF IC 44 2022-09-12 AM 116574 en (2022) available at https://webcast.wipo.int/video/WIPO_GRTKF_IC_44_2022-09-12_AM_116574, accessed on 31.03.2023(Transcript of IGC44, 12.9.2022, Opening session) at p. 11.

⁹⁵⁷ Introduced in the versions: WIPO/GRTKF/IC/32/9; WIPO/GRTKF/IC/37/10.

⁹⁵⁸ WIPO Report of the 38th IGC meeting op cit note 413 at p. 33.

⁹⁵⁹ Ibid at p. 33.

⁹⁶⁰ Ibid at p. 34.

⁹⁶¹ Ibid.

⁹⁶² WIPO Report of the 39th IGC meeting op cit note 52 at p. 34

meeting, it reiterated that the IGC ‘needed to look at the effective use of its time’ and did not support the submission of studies that had been discussed before.⁹⁶³ These statements indicate that the delegation of South Africa would prefer to work on the existing text in the draft articles instead of conducting studies for new content.

4. Indigenous Caucus

The indigenous caucus did not make a statement regarding the negotiation process in the analysed documents. Based on the fact that it did not repeatedly introduce studies and focused on text-based discussions, it can be assumed that it aligns with South Africa in this regard.

⁹⁶³ WIPO Report of the 40th IGC meeting op cit note 867 at p. 23.

CHAPTER SIX

Findings and Discussion

This chapter presents the findings of the analysis below and presents recommendations for a possible international agreement.

Building on the previous two chapters that covered the domestic and international positioning towards a multilateral legal instrument on the protection of TCEs, this chapter develops a common ground between the analysed parties. The common ground is further refined by suggestions that were made by the facilitators as well as the Chairpersons of different IGC meetings, as these represent an integral part of the consensus-finding methodology at the WIPO IGC.

The chapter then concludes by making specific recommendations for each draft article / legal issue analysed in Chapter Five, as well as for the multilateral consensus-finding procedure in place at the WIPO IGC.

I. COMMON GROUND BETWEEN EVALUATED COUNTRIES

The following section describes the common ground of positions currently held at the WIPO IGC. This common ground is developed in a two-fold manner. First, the positions on different draft articles and negotiation issues, as outlined in Chapter Five, are being synthesized into the lowest common denominator. Following this, the bottom line of consensus, as currently suggested by the chair and the facilitators, is being described.

The analysis of the statements on specific provisions within the WIPO IGC meeting reports has not always yielded extensive or detailed information on a potential common ground. This is mainly because not every country gives statements on every issue in question, and more often than not, statements made in the plenary are rather superficial and do not include motives or incentives. A lot of the detailed positions presented by different countries are discussed in contact groups or Ad Hoc expert meetings that are

not open to the public. However, some conclusions can be drawn from the limited scope presented here.

Since a lot of work has been done at the IGC towards finding consensus and updating draft articles, the results of this work cannot be left out of the overall analysis. Through the work of facilitators and the chairs⁹⁶⁴ of the sessions, neutral and well-balanced suggestions already exist to incorporate the needs of the different parties. Some of these are outlined in this subchapter to form an understanding of what could be agreed upon already or is suggested by experts that work closest with the parties.

1. General recommendations of chair and facilitators

With regard to the current status of negotiations, the acting chair of the 40th meeting stated that significant progress had been made with the text over the biennium. He claimed that a clearer single framework was developing that linked subject matter, objectives, eligibility requirements for protection and scope of protection.⁹⁶⁵ He particularly remarked that a key element that led to significant momentum was the IGC's ability to focus on its work without renegotiating its program or the process.⁹⁶⁶ The chair also highlighted the importance of the ad-hoc small contact groups. Despite them being doubted by some with regard to their transparency and inclusiveness, he claimed these doubts are being outweighed by the benefits of shaping the focus of the IGC meetings and providing opportunities to develop consensus positions on key issues, which in most instances have been reflected in the consolidated working documents'.⁹⁶⁷

In order to narrow gaps and create a clearer mandate, the chair of the 40th meeting suggested focusing on reducing the alternatives and shortening the text. For that, he suggested a number of tools, e.g. cross regional writing teams, smaller intersessional

⁹⁶⁴ In the 40th session, the acting chair introduced two documents with his personal opinion based on the previous sessions. The two information notes included an overview of the current negotiations, key questions to consider and recommendations for future work. Furthermore, he suggested specific recommendation on the respective articles with regard to TK and TCEs. In addition to that, he made a number of statements within the 40th session. See:

WIPO IGC Information Note for IGC 40 - Discussions under Agenda Item 7 - "Taking stock of progress and making a recommendation to the general assembly" (2019) available at https://www.wipo.int/meetings/en/details.jsp?meeting_id=50424, accessed on 31.03.2023. (WIPO IGC Information Note on IGC 40);

Chair's Information Note on TK/TCEs op cit note 846; and WIPO Report of the 40th IGC meeting op cit note 867.

⁹⁶⁵ WIPO Report of the 40th IGC meeting op cit note 867 at p. 35; WIPO IGC Information Note on IGC 40 op cit note 964 at p. 6.

⁹⁶⁶ WIPO IGC Information Note on IGC 40 op cit note 964 at p. 2.

⁹⁶⁷ Ibid at p. 3.

working groups of experts that can produce consensus on core issues or the development of a Chair's Text that creates a working document for a potential diplomatic conference.⁹⁶⁸ Overall he stated that the greatest challenge the IGC had to overcome is to find a balance between indigenous belief systems, customary laws and practices, and the role of IP policies and laws.⁹⁶⁹

The acting chair of the IGC 44 took these considerations to a further level and developed a zero draft for a Chair's Text on TK and TCEs.⁹⁷⁰ This text is not an official working document of the IGC yet, so it does not have the same status as the Draft Articles, but it offers suggestions for a compromise in a more streamlined manner, as it does not include any alternatives in brackets. It also merges the draft articles for TK and TCEs into one document.⁹⁷¹ The latest version of the Chair's Text on TK and TCEs is commented on later in this chapter, where I make specific recommendations for individual provisions.

2. Use of Terms

The opinions on the article on the use of terms within the parties differ greatly. Though this provision defines a few different terms used in the draft articles, most comments refer to the definition of TCEs. While the two opposite ends stand for either a wide or very narrow understanding of TCEs, the common ground is that the article still needs work. The provision needs clear phrasing without circular definitions or misalignment with other articles. There is agreement that the provision on the use of terms has not been discussed sufficiently to produce an adequate outcome. There is also broad agreement with the tiered approach from all sides. However, the details of the tiers are not agreed upon.

In an information note of the 40th meeting, the chair stated the text had been significantly refined.⁹⁷² In particular, general definitions for TK and TCEs have been developed and are nearing a point of consensus. The chair also made a few comments and suggestions regarding different terms. For instance, while recognising the importance of the public domain for a balanced IP system, he questioned the merit of

⁹⁶⁸ *Ibid.*

⁹⁶⁹ WIPO Report of the 40th IGC meeting op cit note 867 at p. 36.

⁹⁷⁰ 2022 Chair's Text on TK/TCEs op cit note 378.

⁹⁷¹ *Ibid.*

⁹⁷² WIPO IGC Information Note on IGC 40 op cit note 964 at p. 6.

developing and including a definition of the term within the IGC.⁹⁷³ The definitions of the word ‘Use/Utilization’ were not applied consistently within the text, which led to confusion.⁹⁷⁴ He recommended finding a solution for this. Overall he stated that ‘a link had been established with the subject matter and eligibility criteria through the development of a general definition of [...] TK and TCE. Whilst these definitions are not agreed upon, they are again nearing a consensus position.’⁹⁷⁵

The facilitators commented that these new definitions were those suggested by the contact group on Article 1 in line with two aims: providing general and global definitions with a clear understanding and excluding references to criteria for eligibility.⁹⁷⁶ All references to eligibility criteria had been placed in Article 3 to eliminate the duplication found in previous articles 1 and 3 and to allow a clearer definition for the purpose of Article 1.⁹⁷⁷ This led to terms like ‘dynamic and evolving’ to describe TCEs and TK being moved from Article 3 to Article 1.⁹⁷⁸

3. Objectives

With regard to the objectives, the parties made more specific indications of which alternatives they preferred. While most rejected Alt 3 (b), most parties stated a preference for Alt 2, though not in the exact current phrasing. Alt 2 is the shortest alternative of the currently suggested, and it reflects a minimum standard approach. The focus is put on the needs of TCE users, while it does contain a reference to the rights of IPLCs. Though not all the parties favoured it, most found it acceptable, provided it received a few changes. Similar to the article on the Use of Terms, parties want to clear the language from redundancies. Overall, all parties seem to be able to agree to a combination of the rights approach and measures-based approach, which would mean the possibility of creating both legal and administrative measures for the protection of TCEs.

The chair of IGC 40 stated that policy objectives had not been agreed upon but had been further refined.⁹⁷⁹ He highlighted the importance of the objectives, as ‘they

⁹⁷³ Chair’s Information Note on TK/TCE op cit note 846 at p. 6.

⁹⁷⁴ *Ibid.*

⁹⁷⁵ WIPO IGC Information Note on IGC 40 op cit note 964 at p. 6.

⁹⁷⁶ WIPO Report of the 39th IGC meeting op cit note 52 at p. 37.

⁹⁷⁷ *Ibid.*

⁹⁷⁸ *Ibid.* at p. 38.

⁹⁷⁹ WIPO IGC Information Note on IGC 40 op cit note 964 at p. 5.

determine the way in which an international legal instrument is shaped'.⁹⁸⁰ In the context of TCE and TK, the aim is 'to achieve the goals and aspirations of relevant peoples and communities, and for promoting national, regional and international policy objectives'.⁹⁸¹ He therefore suggested focusing on clear and concise core IP-related objectives like 'protecting TK/TCEs against unauthorised and/or uncompensated uses, and preventing the granting of erroneous IP rights over TK/TCEs'.⁹⁸² The chair also noted that in the current text, the alternatives tend to be phrased from a single perspective, while in the final text, the objectives should include all perspectives.⁹⁸³ He also suggested including the relationship with the public domain in the preamble rather than in the objectives, as it is currently suggested, as the public domain 'is an inherent part of an IP system.'⁹⁸⁴

4. Eligibility Criteria

The article on eligibility criteria produces a lot of disagreement among the parties, especially with regard to the temporal requirement that some parties deem mandatory and others consider a non-starter. Thus, Common Ground only exists on a low level. There is agreement on the requirement of a separate article for eligibility criteria, so the definition of TCEs and the criteria for eligibility are separate. This serves the purpose that the definition can be broad while leaving room for national jurisdictions. Simultaneously, the eligibility criteria can then be more specific and hold a strong purpose. There is a consensus that duplications between the two articles should be avoided. Streamlining the text of both Article 3 and Article 1 is a goal that all share, in part so that the boundaries to the existing IP system can be made clear.

The chair of IGC 40 stated that they are nearing consensus, with the exception of issues relating to the inclusion of a temporal criteria.⁹⁸⁵ He mentioned a 'possible comprise position' that is developing but did not give any detail on it.⁹⁸⁶ The facilitators stated that the main task was to formulate a clear distinction between the use of terms in Article 1 and the eligibility criteria in Article 3. They emphasised that 'it would not be

⁹⁸⁰ Chair's Information Note on TK/TCE op cit note 846 at p. 4.

⁹⁸¹ *Ibid.*

⁹⁸² WIPO IGC Information Note on IGC 40 op cit note 964 at p. 4.

⁹⁸³ *Ibid.*

⁹⁸⁴ *Ibid.* at p. 5.

⁹⁸⁵ WIPO IGC Information Note on IGC 40 op cit note 964 at p. 5.

⁹⁸⁶ *Ibid.*

possible to have one simple definition that could include the key descriptors as well as the qualifiers or eligibility criteria in a satisfactory manner.’⁹⁸⁷ Though specific terms could serve both articles, they were aiming to avoid duplications and redundancies between the two provisions and place the eligibility criteria only in Article 3.⁹⁸⁸ Article 1 was meant to provide a broad and universal definition that would encompass everything that member states recognise as TCEs and TK. While it was not the intention to extend protection automatically ‘to every matter that could possibly be under the definition,’ the aim was to ‘create a big tent or umbrella that would include all matters currently within the contemplation of all Member States’.⁹⁸⁹ Article 3 on eligibility criteria would then serve to narrow down TCEs and TK that are actually protected under the instrument.⁹⁹⁰

With regard to the specific criteria, the facilitators suggested four elements, of which three already enjoyed consensus. The three matters that were agreed upon were written down in subparagraphs

‘(a), which focused on the matter of creating, receiving, generating TK or TCEs; subparagraph (b), which linked the TK and TCEs with the cultural and social identity of IPLCs; and paragraph (c), which focused on the manner of transmission from generation to generation.’⁹⁹¹

The fourth element, which did not enjoy consensus, is the temporal element. This is the criterion introduced above,⁹⁹² which would require TCEs or TK to exist for a certain period of time, like 50 years, 30 years or five generations, in order to be protected by the instrument.⁹⁹³ While most parties reject this idea because ‘time dimensions were not an intrinsic part of TK or TCEs’, some are very insistent that it should be included.⁹⁹⁴ In consequence, the facilitators created a second alternative despite the efforts to create a single provision.⁹⁹⁵

5. Beneficiaries

The possible options for beneficiaries range from a narrow understanding of beneficiaries only being IPLCs or a wide concept being governments or society at large.

⁹⁸⁷ WIPO Report of the 39th IGC meeting op cit note 52 at p. 24.

⁹⁸⁸ *Ibid.*

⁹⁸⁹ *Ibid.*

⁹⁹⁰ *Ibid.*

⁹⁹¹ *Ibid.*

⁹⁹² See Chapter Five, IV.

⁹⁹³ WIPO Report of the 39th IGC meeting op cit note 52 at p. 24.

⁹⁹⁴ *Ibid.*

⁹⁹⁵ *Ibid.* at p. 38.

While the majority of the parties are in support of a broad understanding of beneficiaries and in support of Alt 2 of the 2019 draft articles, some want to restrict the term to IPLCs only. Thus, the minimum standard is currently limited to IPLCs, although a broader definition could probably be possible as long as the terms were defined clearly. That being said, a real common ground can currently not be described.

The Chair of IGC 40 highlighted the wide extent of disagreement on the term ‘beneficiaries’ because while most agree on IPLCs as primary beneficiaries, many would like to include other beneficiaries as well.⁹⁹⁶ He also suggested finding more clarity around the concepts of ‘beneficiaries’, ‘rights-holders’ and ‘administrators of rights’. In addition, he suggested leaving more leeway for national governments to find solutions tailored to their respective situations.⁹⁹⁷

6. Scope of Rights

General common ground can be described in the shared support for the tiered approach, which forms the core of the article's concept for the scope of rights. According to the latest reports, the most favourable alternative is Alt 3, though it still has many different phrasing options and needs to be specified further. The options on the criteria for the tiered approach are highly debated, ranging from a very vaguely phrased minimal approach to a very detailed concept of different levels of diffusion and specific linked rights. There is general agreement on the viewpoint that the rights-based approach and the measures-based approach are not mutually exclusive and that the parties can follow a combination of both.⁹⁹⁸ The lowest common denominator would be a minimum standard approach that leaves room for national legislation to create more detailed policies.

In the information note on IGC 40, the chair stated that the tiered approach would help refine Article 5 and that the different tiers should be considered carefully.⁹⁹⁹ He especially mentioned that the criteria for the tiers within TCEs and TK might differ, which should be considered when drafting the texts.¹⁰⁰⁰ Furthermore, the level of detail of the instrument should be decided on, meaning that parties have to find a solution

⁹⁹⁶ Chair's Information Note on TK/TCE op cit note 846 at p. 7.

⁹⁹⁷ *Ibid.*

⁹⁹⁸ Observation of IGC 45 in Geneva, December 2022.

⁹⁹⁹ WIPO IGC Information Note on IGC 40 op cit note 964 at p. 6.

¹⁰⁰⁰ Chair's Information Note on TK/TCE op cit note 846 at p. 3.

between the two extremes of maximum flexibility at the national level or maximum international harmonisation.¹⁰⁰¹ In fact, the chair claimed that ‘there has been a continued shift towards framework documents which establish a set of standards (minimum/maximum) or mechanisms which provide flexibility for implementation at the domestic level.’¹⁰⁰²

In addition to the tiered approach, the parties should clarify whether they prefer a measures-based approach, a rights-based approach or a combination of both and the extent to which economic and moral rights should be included.¹⁰⁰³ This intervention refers to the ongoing discussion on which approach would be the most appropriate, despite an existing draft text with very specific wording. Because of this, the negotiations keep coming back to what I would call a more conceptual debate without discussing the specific draft articles. While it seems that delegates have vastly different interpretations of what these terms specifically mean,¹⁰⁰⁴ there is broad agreement that these two approaches are not mutually exclusive and can complement each other. The majority of the examined parties seem to be in favour of the measures-based approach, which would enable states to create both legal as well as administrative measures for the protection of TCEs.

With regard to Article 5 the facilitators only commented on the TK text, but the comments have relevance to their assessment of the TCE text as well. Within the tiered approach, the term “narrowly diffused” had been replaced by “no longer under the exclusive control of beneficiaries but is still distinctively associated with the beneficiaries” to clarify the meaning of that category.¹⁰⁰⁵ This shows that the facilitators are in favour of creating the tiers in a way that avoids misinterpretation.

7. Exceptions & Limitations

With regard to exceptions and limitations, the common ground is very low. Considering that some parties prefer a very detailed provision and others refuse the inclusion of exceptions and limitations altogether, it is unsure whether such a provision will be included at all. Being a concept that stems from copyright law, it is not a given that such

¹⁰⁰¹ Ibid.

¹⁰⁰² WIPO IGC Information Note on IGC 40 op cit note 964 at p. 6.

¹⁰⁰³ Chair’s Information Note on TK/TCE op cit note 846 at p. 2.

¹⁰⁰⁴ Kakooza & Lewis Ad Hoc Meeting Report 2022 op cit note 386.

¹⁰⁰⁵ WIPO Report of the 40th IGC meeting op cit note 867 at p. 19.

a provision will be included in a new, *sui generis* instrument for the protection of TCEs. At the same time, many *demandeurs* regard it as a crucial tool to regulate the access and balance the interests of owners and users.

The Chair of IGC 40 pointed out that the draft articles contained two general approaches: one leaves maximum flexibility to member states to determine their exceptions and limitations on a domestic level (Alts 1, 2, 3 of TCE text), and the other one provides a list with general exceptions and limitations (i.e. the Berne Three Step Test or moral rights components) that can be implemented at the national level (Alt 4 of the TCE text).¹⁰⁰⁶ He also pointed out that some parties suggested having the exceptions and limitations also follow the tiered approach and noted that the parties might wish to consider this.¹⁰⁰⁷

8. Role of Customary Law

With only one IGC meeting within the analysed documents that focused on the role of customary law, the development of common ground is limited by the small number of available statements. However, the report of the latest Ad Hoc Meeting, which was held prior to IGC 46, indicates that ‘there was consensus in the group that Customary law has a place in the texts and should be allowed to co-exist with written law rather than being usurped or overshadowed by the latter’¹⁰⁰⁸. According to the report, the parties agreed that

‘the text should provide for minimum standards as to how TK/TCEs can be accessed by outsiders in conformity with existing customary laws. Although non-community members cannot be expected to know the existing customs of every community, the language of the text should offer guidance on some form of due diligence or legal compliance over customary norms in enabling access to TK and TCEs, with procedural certainty in such language.’

This shows that the role of customary laws had not been discussed much prior to IGC 46, but the parties generally agreed to incorporate it into the instrument.

9. Negotiation Process

With regard to the negotiation process, two extremes are currently represented within the IGC. One side keeps introducing new working documents to extend the pool of

¹⁰⁰⁶ Chair’s Information Note on TK/TCE op cit note 846 at p. 3.

¹⁰⁰⁷ Ibid.

¹⁰⁰⁸ Anthony Kakooza & Edwina Lewis *The Report of the Co-Chairs: Edwina Lewis and Anthony Kakooza – Ad hoc Experts Group on TK and TCEs. Drawn from the meeting of Sunday 26th February 2023* (2023) available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_46/wipo_grtkf_ic_46_report_ad_hoc_expert_group.pdf, accessed on 31.03.2023 (Ad Hoc Meeting Report 2023).

information that the negotiations are based on. The other side emphasises that all the previously introduced documents should be studied before introducing new ones in order to not delay the process further. There is, therefore, no common ground for future meetings regarding the manifestation of the evidence-based approach, as a compromise between the two sides above is not possible.

10. Summary and Overview

The following table provides an overview of the countries' positions on each draft article based on the analysis in Chapter Five. It also summarises the common ground for each issue. This serves to highlight how different the approaches of the different parties towards different legal questions are and why finding common ground is such a complex endeavour.

	Use of Terms	Objectives	Eligibility Criteria	Scope of Rights	Exceptions & Limitations	Beneficiaries	Role of Customary Law	Negotiation Process
United States	<p>Comments only concern the definition of TCEs: -Do not value the spiritual aspect of TCEs. Want a <u>direct link</u> to the cultural identity -Reduce it to important TCEs / -- Narrower definition preferred</p>	<p>-Prefers measures.-based approach -Prefers short and concise phrasing without specific objectives (Alt 2 2019) -Extension of negotiation process through adding alternatives -Rejects potential access & benefit sharing system for TCEs as currently being discussed for genetic resources.</p>	<p>-Eligibility Criteria are absolutely necessary and should not be too broad -Eligible group as specific as possible - Temporal element at least 50 years old -Alt 2 (b) & (C) might have the disadvantage of leading to beneficiaries that are not attributable to a particular community</p>	<p>-Preference for Alt 3 -Sees element on 'false or misleading uses' as important workstream -Wants to keep the longest alternative</p>	<p>-Alt 2, General and Specific exceptions wanted -For TK: Wants to take brackets of alternative that enables authors to do work based on TK, which is basically the status quo</p>	<p>-Preference for Alt 2 2019 -Broad understanding of beneficiaries, society at large</p>	n.a.	<p>Preference for the gathering of more knowledge and evidence as a basis for discussions on the text of the draft articles instead of working on the existing text.</p>
European Union	<p>No specific position on content. Criticises misalignment between Article 1 and Article 5. Use of Terms have not been discussed thoroughly, Definitions are missing.</p>	<p>-Rejects potential access & benefit sharing system for TCEs -Supports clear and short text preference for Alt 2 2019) -Sees a conceptual divide from other alternatives -Further clarification of 'appropriate use' needed -reducing the number of alternatives</p>	<p>-Separate Article Required -Support for Criteria in Alt 2 -Pro 'collective context' as a requirement -Temporal element at least 50 years old ---- Further clarification of traditional -Further clarification of IP regime -Further clarification for reference to beneficiaries -General cooperation with 2019 draft articles</p>	<p>-Supports measures-based approach -Definitions of tiers should be left to national law -General agreement with the work of facilitators</p>	<p>Alt 2, general and specific exceptions needed, the ceiling for the instrument</p>	<p>-Alt 2 2019, however narrower understanding of beneficiaries, only IPLC</p>	n. a.	<p>-Repeatedly states that it welcomes the evidence-based approach at the centre of the IGCs methodology</p>
South Africa	<p>Critique of circular definitions and unclear language.</p>	<p>-IGC must redress past injustices -Focus on evidence-based approach -Questions the ability of short Alt 2 2019 to meet everyone's needs -Mischief to redress is missing</p>	<p>-Separate Article -Reduce the number of eligibility criteria to make it easier for potential claimsholders to qualify for protection. -Against temporal requirement, the focus</p>	<p>-Concern about splitting subject matter & scope of protection, -Criticised phrasing 'protected' and 'safeguarding', -Preference for Alt 3, -Critique on the</p>	<p>-Support for simplified exceptions and limitations clause, → Indication for Alt 1 or 3</p>	<p>-TK: All genuine beneficiaries (e.g. TK library in India) → wider approach</p>	n. a.	<p>-Reiterates that the IGC needs to look at the effective use of its time -Does not support the submission of studies that had been discussed before. - Prefers to work on the</p>

	Use of Terms	Objectives	Eligibility Criteria	Scope of Rights	Exceptions & Limitations	Beneficiaries	Role of Customary Law	Negotiation Process
		-Acknowledges progress of IGC -Many objectives suffer from redundancies	should be 'traditional way of being'	introduction of more alternatives and options -Pro minimum standard approach that leaves details to national legislation				existing text in the draft articles instead of conducting studies for new content.
Indigenous Caucus	All TCEs are sacred, not just specific ones. -Against the phrasing 'protected' TCE because it implies that there were already mechanisms to protect TCEs. -Met the tiered approach with interest.	-Aligned with SA -No support of public domain or creation and innovation, -Rejects Alt 3 (b)	-Temporal Requirement is negotiating dead end, does not reflect the nature of TCE -Robust policy space at national level	-Phrasing with 'safeguarding, recording and archiving' has no place, 'protected' is unfitting prefix -Generally likes tiered approach, but current version violates indigenous rights and doesn't respect indigenous FPIC (degree of diffusion should not be relevant) -Welcomes paragraph (d) and recovery of TCEs -Move away from IP like structures	-Extremely narrow and based on FPIC of indigenous peoples -According to customary law and concerns of IPLC -Should be on national level, no one-size-fits-all solution	-Supports the inclusion of nations or states as beneficiaries but asks for clarification on the terms 'policy space for other beneficiaries' and 'administration of rights'	Wants to see customary law represented in the instrument and highlights the importance of its role.	n.a.
Common Ground	-Better, clearer language. No misalignment or circular definitions. -General agreement with the tiered approach, but not with details of it.	-Measures-based approach -Rejection of Alt 3 (b), -Possibility of Alt 2 (though not in current phrasing) -Clear language from redundancies	-Separate Article for Eligibility Criteria (middle ground between too broad and too specific) -Definition of 'traditional' still needs work -Policy space at the national level	-Potentially Alt 3, depending on the phrasing -General agreement with a tiered approach, but adjusted criteria -Minimum standard approach that leaves room for national legislation	-No common ground can be described.	-Broad understanding of beneficiaries possible, as long as terms are defined -Narrower definition is definitely possible	It has a place in the text and should be considered.	-Analyse existing documents -No common ground for future process

Table 4: Overview of countries positions and common ground on core issues

11. Considerations for future work by the Chair

Within the considerations for future work, the two main outcomes are bound by the WIPO General assembly to decide whether to continue negotiations or to convene a diplomatic conference.¹⁰⁰⁹ Within this, the Chair of the IGC 40 made a few suggestions about the way forward.

The first approach would be to continue negotiations on the existing draft articles as before, with the aim of reaching a consensus on core issues during the next biennium and creating an instrument that covers all issues at once. As possible tools for this method, he suggested:¹⁰¹⁰

- (1) 'Revision of the working texts by intersessional working groups of experts, a small, formal cross-regional writing team of experts working during IGC sessions or through the development of Chair's texts.
- (2) A timeline for key decisions to ensure negotiations are not open-ended.
- (3) Establishment of small, informal ad hoc working groups to present proposals on core issues to support consensus building, noting the clear intent of this work would be to advance and not to delay negotiations.¹⁰¹¹

The second approach would be to agree on an instrument soon, based on the now-existing positions.¹⁰¹² This would be done through political decision-making within a diplomatic conference, similar to how it was done in the negotiations on GR.¹⁰¹³

The third suggestion was to take a multi-step approach to the negotiations, which creates a base instrument with only a few core concepts that allow later additions on other issues. The initial focus could either be on topics 'where the negotiations are more mature or at a stage for political decision-making, for example, protection in relation to TK and TCEs that are distinctively associated with and under the exclusive control of beneficiaries'¹⁰¹⁴ or on the less controversial issues 'such as moral rights relating to recognition and attribution, whilst negotiations continue on the scope of any economic rights.'¹⁰¹⁵ To ensure that all parties' interests are protected, the base instrument would have an 'in-built mechanism for continued work on outstanding issues' and establish a

¹⁰⁰⁹ WIPO IGC Information Note on IGC 40 op cit note 964 at p. 2.

¹⁰¹⁰ Chair's Information Note on TK/TCE op cit note 846 at p. 7.

¹⁰¹¹ Ibid at p. 8.

¹⁰¹² Ibid.

¹⁰¹³ Within the negotiations on GR, the negotiations received a sudden change in direction and momentum, when a diplomatic conference was called in July 2022, see: Wendland op cit note 373.

¹⁰¹⁴ WIPO IGC Information Note on IGC 40 op cit note 964 at p. 6.

¹⁰¹⁵ Chair's Information Note on TK/TCE op cit note 846 at p. 8.

set of principles and objectives.¹⁰¹⁶ Any further progress on outstanding issues could be captured step-by-step in protocols for the instrument. The chair claimed that this approach 'would enable work to be progressed incrementally in manageable packages based on opportunities for reaching consensus.'¹⁰¹⁷ Additionally, states could develop defensive non-legal measures like databases.¹⁰¹⁸

Overall the Chair emphasised that the parties have to agree on whether the instrument should provide minimum and maximum standards or simply provide a policy framework. He reiterated that in international IP instruments, the traditional approach is

'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.'¹⁰¹⁹

II. PROPOSED SOLUTION

Finding a way out of the thicket of deadlocked negotiations that have been going on for over a decade and are pervaded by opposing political fronts and economic interests is not an easy task. Many experts involved in the proceedings have been working on bringing the parties closer together for a long time and were hindered by the small concessions member states were willing to make and the laggard transformation of small agreements into text. While there will arguably be no one perfect solution that will satisfy all parties, based on the findings reported above, I shall now provide suggestions for a way forward to get closer to an agreement on the protection of TCEs.

1. General Starting Point

As a general starting point, I suggest that all participating parties try to reflect individually on why the IGC negotiations were started in the first place. Studying numerous meeting reports has brought forward that most parties are stuck in a position shaped by economic and political interests without a view of the bigger picture. It would

¹⁰¹⁶ WIPO IGC Information Note on IGC 40 op cit note 964 at p. 7.

¹⁰¹⁷ Ibid.

¹⁰¹⁸ WIPO Report of the 40th IGC meeting op cit note 867 at p. 35.

¹⁰¹⁹ WIPO IGC Information Note on IGC 40 op cit note 964 at p. 7.

therefore be highly beneficial if each party would, in preparation for IGC meetings, reflect on the origin and the aim of the negotiations.

The instrument in question is supposed to be new and fill protection gaps that the existing IP system left open.¹⁰²⁰ Thus, clinging to old ideas and structures when drafting a new instrument is not going to bring about the desired result. In my view, many *non-demandeur* parties must step away from the idea of creating some kind of Copyright 2.0 for indigenous culture because deadlocks keep emerging as soon as ideas start moving too far away from copyright concepts.¹⁰²¹ Of course, any new instrument must not obstruct the overall role of the IP system to promote and support innovation and creativity, but I put forward that this role can be upheld while simultaneously creating something completely new that might make small changes to the overall system. It is possible to foster innovation while also remunerating the people that the knowledge originally stems from. It is possible to promote creativity and simultaneously acknowledge the culture that brought about the original idea. It is possible to protect the public domain without creating an arbitrary cut-off time that determines whether or not something is protected. It is essential to create something new that actually fills the gaps that copyright leaves open. Otherwise, the entire negotiation process that has been going on for more than a decade would be superfluous.

In my view, it is particularly important to recognise and remember that these negotiations are not taking place on a level playing field. Because the proceedings are so politically, historically, and emotionally charged, it is crucial to remember and recognise where these dynamics originated. The current international IP system is not based on agreements where today's parties are equal in power and influence, and everyone's interests are represented in a balanced manner. The basic ideas of copyright or patent law as we know them today mainly originated in jurisdictions of the global north and early industrialised nations.¹⁰²² They were developed in a time of technical inventiveness and industrialisation and worked very well for that environment and the

¹⁰²⁰ As outlined in Chapter Three, I - III.

¹⁰²¹ As can be especially witnessed in the negotiations around the Eligibility Criteria, Scope of Rights and Exceptions and Limitations, as outlined in Chapter Five, IV. – VI.

¹⁰²² See for example the Statute of Anne from 1710, which was the first copyright statute in Great Britain, and later formed the basis of many Copyright Laws in the Commonwealth as well as the United States of America or the Berne Convention, first adopted in the year 1886.

needs of these states.¹⁰²³ In the subsequent spread of these concepts around the globe through the colonising of the global south and the displacement of local laws, the interests of indigenous peoples and their approach to ownership, development and creativity were not incorporated in IP laws that followed.¹⁰²⁴ In fact, with colonialism came marginalisation and economic oppression of indigenous peoples, which still exists today, despite the formal end of most colonial administrations.¹⁰²⁵ That is why IPLCs are demanding an equivalent level of protection for their intellectual property.

Clinging to the existing IP systems and a western interpretation of the public domain and prioritising it over the needs of IPLCs is reinforcing the idea that, somehow interests of developed countries and economies are more important than those of indigenous peoples across the world. Therefore, in order to get closer to a fair allocation of rights, the new instrument should grant minorities the rights they have been denied systematically for centuries. In order to achieve this, member states should show more flexibility when it comes to reimagining established IP concepts like time limits or the public domain. As the Chair of the IGC emphasised at the 40th meeting, one of the core objectives of the IGC is the ‘transfer and dissemination of knowledge and economic development for the mutual benefit of all stakeholders.’¹⁰²⁶ In this context the ‘benefit of all stakeholders’ must truly mean ‘all’, including those who previously did not benefit at all. This should be the minimum standard all countries and democracies strive for in their quest to promote equality and fairness as core values, especially in a modern globalised world in the 21st century.

Overall, it is argued here that it is crucial for all parties to come to the table and truly work towards finding a solution. As long as parties make no concessions and refuse to move from their initial positions, it will be impossible to come to an agreement at all. This means that parties should try and focus on what they have in common and what a compromise could look like.

2. Recommendations for the Extent of Consensus

¹⁰²³ WIPO 'Traditional Knowledge and Intellectual Property – Background Brief' op cit note 19.

¹⁰²⁴ George Nicholas 'Indigenous cultural heritage in the age of technological reproducibility: Towards a postcolonial ethic of the public domain' (2014) *Dynamic fair dealing: Creating Canadian culture online* at p. 8.

¹⁰²⁵ As outlined in Chapter One, I.

¹⁰²⁶ WIPO Report of the 40th IGC meeting op cit note 867 at p. 36.

With regard to the level of agreement countries should pursue, I suggest a change in the definition of what ‘consensus’ means at the IGC.¹⁰²⁷ Finding an efficient process that is equally fair to all parties is not easy. However, the typical approach in multilateral negotiations, and at the IGC, aims for agreement on every issue. However, this is not realistic. *Wendland* convincingly suggested that multilateral negotiations, in general, should relax the consensus definition and reduce the number of participating parties. According to him, the deliberate consensus model is outmoded and no longer fit for purpose due to the growing number of parties, the complexity of negotiated matters as well as the speed and exponentiality of technological development and the enormity of global challenges.¹⁰²⁸

This suggestion seems appropriate with regard to the IGC because the unsuitability of the process transpired clearly in the meeting reports as well as during my observation of IGC 45. Within the IGC, the chances of agreement on every issue are slim to none because the positions of the parties are frequently diametrically opposed, and the political agendas and economic power of the parties involved diverge drastically. In addition, the very subject matter concerns the empowerment of previously disadvantaged and oppressed peoples, and for many parties, the negotiations are built on the goal of breaking up colonialist legal structures. Thus, these issues are not merely economic but highly political and indeed emotionally charged, which is why an agreement on all issues is highly unlikely.

For this reason, I suggest reintroducing majority voting as an option to bring forward the discussion on provisions. Voting is included in the WIPO Rules of procedure but is rarely to never exercised in today’s negotiations.¹⁰²⁹ I suggest using this tool on all matters that create a stalemate in the negotiations. If there are specific key debates that currently transpire in a ‘back-and-forth’ dynamic, i.e. including a definition of the public domain in text or including a temporal element as an eligibility criterion, the acting chair could call for a vote on including this specific element into the text. If the majority is in favour, the element in question shall be included, and if they are opposed to it, it shall not. According to Rule 35 of the WIPO Rules of procedure, a simple majority will be

¹⁰²⁷ The current form of consensus striven for at the WIPO IGC is explained in detail in Chapter Three, V. 1.

¹⁰²⁸ *Wendland* op cit note 44.

¹⁰²⁹ As outlined in Chapter Three, V. 1. (b).

sufficient for a decision.¹⁰³⁰ The facilitators can then take the voting outcome and incorporate this into the draft articles. Outvoted elements should be deleted from all remaining articles. This approach would enable the negotiations to move past elements that have been subject to reoccurring, identical discussions throughout several meetings and would allow them to focus on sections that have not been discussed yet. Of course, this approach would entail the risk that countries, whose positions were lost in the voting process, would simply not ratify the final agreement. They would be free to do so, due to every nation's sovereignty. However, the same risk exists for countries whose positions did not make it into the Draft Articles due to unvoiced dissent or political pressure in consensus negotiations.

In order to avoid elements being reintroduced to the text that had already been deleted,¹⁰³¹ other consensus forms could be used for accepting the revised draft text at the end of each IGC meeting. After the final presentation of the updated draft articles by the facilitators, the chair should, in the way of an 'acclaimed consensus' or even 'imposed consensus' ask whether all parties agree with the updated version of the draft articles and, based on the previous votes, assume that they do. The version will then form a new working document, and changes that go back to previous versions will not be possible. This could be a good way of maintaining the progress that has been made at the meeting.

Moreover, the number of vetoes within the negotiations should be reduced. At the moment, every individual party can object to any change in the text – leading to changes made by the facilitators being reversed. This practice should be restricted through a limited number of vetoes per party or negotiating block. For example, every negotiating block could only get three vetoes in the beginning, so all parties can focus on what their most important priorities are. This number could then go down with every following drafting round so that parties would then have only two vetoes and finally only one veto left. Limiting the number of options is most certainly going to bring about the parties' true priorities and create new momentum. This 'Top Three Approach' would lead to a more streamlined procedure with equal representation of the different interests.

¹⁰³⁰ WIPO Rules of Procedure op cit note 356 at Rule 35.

¹⁰³¹ An example for this is the use of the word 'safeguarding' that had already been deleted from the text because it referred to the preservation aspect of TCEs that is already covered by existing instruments. However, some parties keep introducing the term, hence moving the negotiations back to a point that the majority had already agreed to conclude.

Lastly, if these reforms in consensus-finding methods will not yield any result, an alternative would be to reduce the number of parties that a consensus is possible. Given the fact that there are parties who will most likely not agree to a binding instrument anyway, at some point, it would be a waste of time to try and get everyone to agree, as long as some cannot or will not. Thus, once the draft articles get closer to a mature text that meets the requirements of the majority of parties, the negotiations could be concluded by reducing the signatories to those who agree to the existing text at a certain set time. This kind of time pressure would also force parties to reflect on what their best alternative to their preferred outcome is.

3. Recommendations for Dispute Resolution Methods

The use of the chair and the facilitator has worked rather well and steadily produced results over the past twenty years by shortening the negotiating text and coming ever closer to a negotiated agreement.¹⁰³² However, the approach used for drafting the negotiating text can be improved to move the process along with increased momentum.

Specifically, leaving everything that is not agreed upon in brackets might be the most democratic approach, but it can play an enormous role in slowing down the process. In other international negotiations, similar procedures were called a 'cautious approach' and have actually contributed to exacerbating a deadlock.¹⁰³³ This is because seeing sections written down, even in brackets, creates an impression of text 'already won' and deleting these sections afterwards feels like losing these 'wins' to some parties, which makes them more hesitant to let go and the negotiations progress rather slow.¹⁰³⁴

In consequence, it could be beneficial for the negotiating process if the IGC considered a small reform of the drafting procedure of the text. Once there is a certain level of agreement, the chair or a different neutral party should be able to introduce a draft text without any alternatives in brackets. The content for this text could be based on the alternative with a majority that has been voted on before. In order to prevent minorities from being overpowered in these votes, each negotiating group only gets one vote. Alternatively, the text could be based on the 'facilitators alternatives', which they started introducing to the draft articles in IGC 44. Either way, a text with only one

¹⁰³² As outlined in Chapter Three, III. 2.

¹⁰³³ Odell op cit note 501 at p. 14.

¹⁰³⁴ Ibid.

alternative per provision would create a new basis for a draft text that is much closer to an agreement. Member states could then comment on the provisions but would not be allowed to suggest alternatives that had been in the draft articles before the vote.

A similar approach was taken in the IGC negotiations on GR and associated TK in July 2022, in which the negotiation progress was a lot more mature than with TCEs. Here, a single 'Chair's Text' was introduced that did not contain multiple alternatives but only one version of each article.¹⁰³⁵ It was drafted by the chair alone, without prior voting of the parties. On the basis of this text, the parties then decided, by vote, that a diplomatic conference to be held in 2024 shall be called. Coming from this, the power of a one-version text should not be underestimated. In the negotiations on TK and TCEs, a similar development can be witnessed with the introduction of the 2022 Chair's Text on TK/TCEs, which aims for a more streamlined approach. This text was first introduced in November 2022, but only as a non-paper and not as a formally introduced IGC document. At the time of writing, the latest version of this text was a first draft, open for commentary by the parties.¹⁰³⁶

In addition to the above, one could place more responsibility on the leaders of the member states. Each diplomat could be handed the task of anticipating one or two issues that the opposing group will bring up. Based on this, each diplomat has to develop a solution on how these issues can be addressed without combining these with other issues or topics. Such broad thinking would lead to a better understanding of each other's viewpoints and a process that makes parties move closer together.¹⁰³⁷ This kind of strong leadership, through intelligent foresight, can help narrow gaps before a meeting even starts. *Odell* also suggests that high-ranking diplomats could contribute to a faster agreement if they instructed their ambassadors to close more gaps before the actual conference, 'giving authority to make concessions earlier rather than holding back as many concessions until the last moment.'¹⁰³⁸ Lastly, diplomats can display strong

¹⁰³⁵ Goss, Chair's Text on GR op cit note 474.

¹⁰³⁶ See 2023 Chair's Text on TK/TCEs op cit note 378.

¹⁰³⁷ Programme on Negotiation - Harvard Law School 'What is International Mediation?' available at <https://www.pon.harvard.edu/freemium/international-negotiations-cross-cultural-communication-skills-for-international-business-executives/>, accessed on 31.03.2023.

¹⁰³⁸ *Odell* op cit note 511 at p. 426.

leadership by focusing on a common 'superordinate goal'¹⁰³⁹ and by becoming aware of the concerns of others.¹⁰⁴⁰

Auer and Racine suggest implementing techniques of 'principled negotiation' by *Ury and Fisher* in multilateral settings.¹⁰⁴¹ These techniques were originally used in the context of bilateral negotiations. They are built on the idea of focusing on the negotiating process instead of solely focusing on the outcome. Through a set of negotiating rules, parties are supposed to avoid impasses and find an agreement that accommodates all parties. The rules are as follows: addressing relationship and substance independently, focusing on interest instead of positions, inventing options for mutual gain, using neutral and jointly chosen decision criteria, and finally, assessing alternatives to a negotiated agreement. While it might be difficult to strictly adhere to all of these rules in a complex multilateral setting, considering them would arguably create a new approach that could steer the negotiations away from banter about superficial wording and closer to what parties really want. The competencies of the chair or the facilitator could be extended in a way that they can draw up a framework based on these rules before an IGC meeting. The meeting could then be held with the rules as indicators for the direction of the negotiation.

In this context, it could also be an option to introduce an external mediator to assist the facilitator with their tasks and, beyond that, interact with the parties in a tactical manner but on neutral ground. Having a third party that is not representing one of the participating member states would come with several benefits. Neutral third parties are often trusted more by the majority of participants because they do not have their own agenda. They can focus better on negotiation dynamics because they are not emotionally involved, and they can form an objective goal based on their knowledge of every party's official position as well as underlying interests. With the implementation of the facilitators, the IGC decided against the use of an external mediator. This can probably be linked to the subject matter containing a lot of sensitive and confidential information, which is only meant to be shared with the parties.¹⁰⁴² However, seeing how effective

¹⁰³⁹Jeffrey Ruben 'Small Group Theory: Forming Group Consensus Through Group Processes' (1994) *International Multilateral Negotiation: Approaches to the Management of Complexity* at p. 136.

¹⁰⁴⁰ Odell op cit note 511 at p.14.

¹⁰⁴¹ Auer & Racine op cit note 496 at p. 3.

¹⁰⁴² As can be taken from the existence of Ad Hoc Expert Groups and Contact Groups, that are not open to the public.

mediators are in other international proceedings, it might be worthwhile to try them out, as they are usually bound by confidentiality agreements.

4. Recommendations for the Negotiating Procedure

Based on the analysis of several meeting reports and the observation of the IGC meeting in December 2022, I am also able to suggest strategies for the actual negotiation procedure. The procedure is member states-based, which means that all parties have to agree to any changes made to the process. I therefore suggest that a party that aligns itself neutrally between *demandeurs* and *non-demandeurs*, brings forward suggestions like those outlined below, with the objective of streamlining the process and creating more efficiency.

My first recommendation is to improve the rules and responsibilities of the IGC in a more straightforward manner. This would include setting clearer boundaries between the roles of individual parties and facilitators. For instance, introducing new suggestions to the text and the overall drafting process should be left to the facilitators, while parties should focus on strong leadership by finding compromises with other parties and focusing on an overall goal. Should parties make drafting efforts without being asked to do so, these suggestions should not be included in the text to make sure the parties stay focused on their actual tasks.¹⁰⁴³

In addition, the procedure around the evidence-based approach should be reformed. A number of parties have been reintroducing studies in every meeting, and they suggested gathering more intelligence on specific questions. While the evidence-based approach is part of the mandate of the IGC and should be upheld and respected, it is important that it is used in a way that brings about results. The repetitive introduction of the exact same documents and studies does not serve this goal, especially if they get rejected by the plenum every single time. On the contrary – it leads to the IGC being flooded with paperwork which hinders its ability to focus on pressing concerns. Some documents are being reintroduced in every meeting in the exact same, or nearly identical, version despite other parties having previously requested a change to the

¹⁰⁴³ This would reduce the instances in which the negotiation process is slowed down by such drafting efforts by parties, as exemplified by Chapter Five, IX.

content.¹⁰⁴⁴ This contributes to wasting time and valuable resources, which is particularly upsetting when a number of participants depend on donations to participate in the negotiations at all.¹⁰⁴⁵ The evidence-based approach should therefore limit parties in continuously reintroducing old studies or documents in identical form. If a study proposal or a discussion gets rejected by the plenum, it should only be reintroduced if it contains a significant change or addition to the concept that other parties find more agreeable. If the same study or discussion paper gets rejected three times in a row, parties should be prohibited from introducing it again. All of this, however, must not prevent member states from conducting studies on their own time and on their own budget. Should a party, after three rejections, be convinced that their proposal is still essential and worthwhile, they should execute it themselves and present conclusions drawn from the intelligence gathered. The outcome should be made public within a certain time frame after the introduction of the project, so it can actually be used for editing the draft articles.

In addition to the above, negotiations should move away from general conceptual debates as negotiations on the specific wording of the draft articles are already in motion. The negotiations have long been at a stage at which discussions are factually text-based. Yet, parties keep coming back to a very broad and conceptual discussion, i.e. on whether the IGC should follow a rights-based or measures-based approach, while many parties have divergent understandings of what these terms actually mean.¹⁰⁴⁶ In my view, these kinds of discussions are superfluous when both rights and measures are already included in the draft articles and discussed as such. The meta-discussion on what would constitute the right approach has long been passed and should not be discussed in detail any more. I therefore suggest that the IGC adopts a new rule which differentiates negotiation stages between a concept stage and a text stage. Once parties

¹⁰⁴⁴ See for example the document *WIPO Traditional Cultural Expressions: A Discussion Paper, Document of the 40th Session of the IGC* (2019) Geneva, available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/wipo_grtkf_ic_40_13_rev.pdf, accessed on 31.03.2023, reintroduced last at IGC 45 as WIPO/GRTKF/IC/45/12 in identical form, despite many delegations having criticised some of the examples in said paper.

¹⁰⁴⁵ At IGC 45, it took nearly the entire morning session of the 7th of December, to reintroduce studies that have introduced many times before, see: *WIPO Transcript of IGC 45, 7th of December 2022, Morning Session, WIPO GRTKF IC 45 DAY 2 MORNING* (2022) available at https://webcast.wipo.int/video/WIPO_GRTKF_IC_45_2022-12-06_AM_117741, accessed on 31.03.2023, pp. 3 ff.

¹⁰⁴⁶ As can be taken from the positions on Objectives and Scope of Protection, as described in Chapter Five, III. & V. See also the Ad-Hoc Meeting prior to IGC 45, Kakooza & Lewis Ad Hoc Meeting Report 2022 op cit note 386 at p. 1.

are in the middle of specific text-based negotiations, going back to vague concept discussions should not be permitted. For provisions that have not been discussed yet, parties should negotiate prior to discussing specific wording and which concept route they would like to take. This would include very clear presentations on what different approaches mean in detail and what they would look like in practice. Once this is decided, the negotiation moves on to the specific text. This streamlined process would also prevent the situation that can currently be witnessed at the IGC, whereby parties have very different interpretations of the same concepts.

Lastly, the overall duration of the negotiation process could be limited by a set timeline. Within the negotiations on GR, a ministerial conference to be held by 2024 was called surprisingly in July 2022. Diplomatic or ministerial conferences are held for the purpose of negotiating, adopting or revising multilateral instruments.¹⁰⁴⁷ For the negotiations on GR, this is a significant step up from the negotiations within just the IGC because it will most likely lead to a treaty by 2024. Once the negotiations on TK & TCEs reach a point of more maturity, a diplomatic conference could be called as well, which would put pressure on the parties to finalise an agreement.

5. Suggestions for substantive law

The following subchapter presents specific recommendations for the overall nature of the instrument and each of the provisions that were analysed in Chapter Five. In this context, reference is being made to the latest Chair's Text on TK/TCE¹⁰⁴⁸, as it represents a suggested compromise between the parties and, though not an official working document, offers a realistic option for a final text. Overall I recommend

(a) Nature of the Instrument

The nature of the instrument is not predefined and, as per the mandate of the IGC, can become anything from a non-binding declaration to a binding treaty.¹⁰⁴⁹ Up until today, no agreement has been found on this matter. A general tendency can be described, however, where *demandeurs* would prefer the establishment of a binding treaty while *non-demandeurs* prefer a soft-law instrument. Since there is no middle ground between

¹⁰⁴⁷ Wendland op cit note 1013.

¹⁰⁴⁸ At the time of writing, this was the first draft of the Chair's Text on TK/TCEs, prepared for IGC 46 in February 2023. See Chapter Three, IV. 3. (a) for further elaboration.

¹⁰⁴⁹ As outlined in Chapter Three, IV. 2.

the two, a decision for one or the other has to be made. I argue that only the establishment of a binding instrument will close the gaps the IGC is seeking to close. There are a number of non-binding instruments for the protection of indigenous culture already,¹⁰⁵⁰ yet more often than not, they have a merely symbolic character and no actual effect. Countries are not obligated to ratify and implement them, which is why effective legal protection frameworks for indigenous culture are missing in most parts of the world today. What's more, whenever IPLCs quote one of these instruments, i.e. the UNDRIP, *non-demandeurs* usually emphasise that it does, in fact, not grant any rights.¹⁰⁵¹ In order to address this shortcoming, I recommend the adoption of a binding treaty with a minimum standard approach that leaves member states flexibility to implement laws according to their legal system and local particularities.

Whether or not the instrument should be binding could be subject to a vote. The IGC Chair could call for a decision on the nature of the instrument as an official point of order in one of the upcoming IGC meetings. This would arguably also help to give the process new momentum. This is because the specifics of substantive law, i.e. the protection level or detail in provisions, highly depend on the final nature of the instrument. A soft-law solution generally allows for a lot more detail and high protection levels because the instrument is practically inconsequential. A binding instrument would have to be a lot less detailed and provide only minimum standards in order to get the highest possible number of parties to agree. Agreeing to a binding instrument in the plenum would thus directly make the drafting process more efficient, as the parties had a much narrower scope of options to focus on.

Lastly, parties that are not in favour of a binding instrument could withdraw from the negotiations, as they will not be ratifying it in any case. This could arguably also lead to more focused and efficient discussions, as the vast majority of the participating parties would then have a shared goal.

(b) Use of Terms

¹⁰⁵⁰ For example the Tunis Model Law or UNDRIP, as outlined in Chapter Three, I.

¹⁰⁵¹ Observation of IGC 45 in Geneva, December 2022.

Both the facilitator and chair at IGC 40 have stated that the provision on the use of terms has been significantly refined and was on a good path to provide general and global definitions.¹⁰⁵² While this is true, some suggestions remain. The current draft article includes three terms to be defined: traditional cultural expressions, publicly available and use/utilization.¹⁰⁵³

With regard to TCEs, it must be made clear how wide the term is and what kind of subject matter the instrument aims to protect. It is of high importance that the definition remains broad. The goal must be to include all such expressions that exist across the globe and might deserve protection. As outlined above,¹⁰⁵⁴ TCEs appear in the most diverse forms and can thus not be limited to a narrow and stereotypical understanding. Thus it is crucial that the definition in the use of terms remains as wide as possible to avoid excluding certain TCEs from being recognised as such. While many parties are worried that this could lead to an instrument with an unmanageable and undesirably wide area of application, this will later be rectified by the criteria for eligibility as well as exceptions and limitations. But eligibility criteria and exceptions and limitations should be left to Articles 3 and 7 to create a clear, systematic and coherent instrument without duplications or circular definitions.

The term 'Use/Utilization' should be used consistently throughout the entire instrument, which is currently not the case. I suggest focusing on the term 'Utilisation' as it represents the broader expression that encompasses both the mere use but also the commercial exploitation of TCEs. It is particularly important to capture this aspect as it is one of the main issues that TCE holders are trying to prevent or at least regulate.¹⁰⁵⁵ In addition to that, it would create coherence with other international instruments in the TK space, where this term was chosen as well.¹⁰⁵⁶

The term 'publicly available' is an approach to define the public domain. I suggest refraining from this entirely. This inclusion is not based on common ground and is not essential for the interpretation of the instrument either. In the 40th meeting, the facilitator questioned whether it is necessary and/or helpful to develop and include a

¹⁰⁵² WIPO IGC Information Note on IGC 40 op cit note 964 at p. 2.

¹⁰⁵³ 2023 TCE Draft Articles op cit note 409.

¹⁰⁵⁴ As outlined in Chapter Four, III. 2; see also Section 10 (2) of the South African IKS Act.

¹⁰⁵⁵ As outlined in Chapter Two, III.

¹⁰⁵⁶ See for example the Nagoya Protocol, op cit note 766.

definition of the public domain within the IGC while recognising ‘the importance of the public domain for a balanced IP system.’¹⁰⁵⁷ This statement overlaps significantly with my view that while the balance of the IP system and the existence of a public domain are crucial, the IGC should focus on their goal to create a new instrument that aims for the protection of TCEs. Focusing on developing a definition of something as complex and long-standing as the public domain is not within the mandate of the WIPO IGC, nor does it form part of any other IP convention. I do not see the merit in investing resources into developing such a definition in this context. The boundaries of the public domain should be determined with the establishment of clear eligibility criteria. This could be done indirectly or expressly as exemplified by the IKS Act in South Africa,¹⁰⁵⁸ by adding a subsection to the section on ‘Eligibility Criteria’ or ‘Term of Protection’ phrased:

‘If TCEs fail to meet the eligibility criteria as set out by Article 3, they fall into the public domain from the date of proven ineligibility.’

Within the first draft of the 2023 Chair’s Text on TK/TCE, the section on ‘Use of Terms’ was drastically shortened and only included a definition of the term ‘Use/Utilization’. The definitions of TCEs and TK were moved and are now included in the article on eligibility criteria, which has been renamed ‘Subject Matter’. This is being commented on in the recommendations for eligibility criteria. The definition for the term ‘publicly available’ has been deleted. Since this is a reference to the public domain, I welcome this deletion due to the reasons outlined above.

The definition of the term ‘Use/Utilization’ is divided into three case groups which concern the use of TK/TCEs in a product, a process or in research and development. This is linked to the original concept in the draft articles. However, it is much less detailed in the Chair’s Text. In my view, this approach is ideal, as it creates legal clarity while not being overly descriptive. Especially when drafting an instrument for TK and TCEs simultaneously, it is crucial to phrase provisions broad enough to encompass the particularities of both and to leave enough leeway for unforeseen cases. I do wonder, however, whether it is then necessary to create an entire article for a single definition. If the article were to be kept as ‘Use of Terms’, I suggest including other definitions for terms like customary law, beneficiaries, etc. Alternatively, I suggest either renaming the

¹⁰⁵⁷ Chair’s Information Note on TK/TCE op cit note 846 at p. 6.

¹⁰⁵⁸ As outlined by Chapter Four, III. 2.; See also IKS Act at Section 10.

article to 'Forms of Utilization' since it does not include any other terms and moving it further down between 'Subject matter' and 'Beneficiaries' or the definition could simply be included in the article on 'Subject Matter'.

(c) Objectives

Based on the lowest common denominator regarding objectives, the alternative that most parties had a general preference for was Alt 2 if the phrasing was changed in a way that accommodated all views. This alternative is the shortest one and reflects a minimum standard approach, as it contains a brief general objective without listing specific examples.¹⁰⁵⁹ Despite it being short, it still mentions a balance between the rights of IPLCs and users of TCEs. While the exact phrasing was not agreed upon yet, the preference for Alt 2 is a good indicator of a possible baseline to which all parties can agree.¹⁰⁶⁰ In addition to that, the chair noted the importance of the objectives including all perspectives instead of being too one-sided and removing a reference to the public domain from the objectives.

Based on the above, I suggest deleting all alternatives other than Alt 2 and focusing on the phrasing of the remaining text. The provision should highlight all perspectives and not be overly detailed, similar to Alt 1 or the Facilitators Alternative. Furthermore, it should include a reference to what the instrument is trying to protect from (i.e. unauthorised and uncompensated uses) to keep the instrument linked to the policy objectives of IPLCs, while at the same time preventing it from being too broad. References to the public domain are not necessary, as the existence of the public domain will be unaffected by it, and the protection of it is not the primary goal of the negotiations, as elaborated above.

In the 2023 Chair's Text, the section on 'Objectives' comes closest to the Facilitators Alternative in the 2023 TCE Draft Articles. However, one subsection has been deleted. It is kept very short and simply lists two objectives which are the effective, adequate and balanced protection of TK/TCE and the prevention of the erroneous grant or assertion of IP rights over TK/TCEs. While I do support a short and concisely phrased text, I argue that the current phrasing does not speak enough to the needs of both *demandeurs* and

¹⁰⁵⁹ 2023 TCE Draft Articles op cit note 409.

¹⁰⁶⁰ As outlined in Chapter Six, I. 3.

non-demandeurs. On the one hand, it should be specified what the instrument is trying to protect from. As illustrated by the numerous case studies,¹⁰⁶¹ the unauthorised and uncompensated use of TCEs is one of the biggest realistic threats to IPLCs. I therefore highly recommend the inclusion of these terms into subsection (a) as the term ‘protection’ alone is too unspecific. This would also help clarify that the aim of the instrument is not to safeguard but to protect from economic misappropriation. At the same time, the need for legal clarity around the appropriate use of TCEs by third parties is crucial to *non-demandeurs* and should thus also be included. Therefore, I suggest including the term ‘regulate the appropriate use to encourage creation and innovation’ in subsection (a) as well. The final article could be formulated as follows (changes indicated in bold):

Article 2 - Objectives

The objectives of this instrument are to:

1. effectively, adequately and in a balanced manner protect traditional knowledge and traditional cultural expressions from unauthorised and/or uncompensated uses **while regulating the appropriate use to encourage creation and innovation**; and
2. prevent the erroneous grant or assertion of intellectual property rights over traditional knowledge and traditional cultural expressions.

In my view, this phrasing would address the respective policy objectives in more detail whilst still not being overly descriptive.

(d) Eligibility Criteria

While there is some common ground on the eligibility criteria, certain elements are still highly debated. A general agreement can be found on the need for a separate article and that the criteria should be distinct from the definition in Article 1 to avoid duplications and to be more specific. There are currently four specific criteria being discussed: the manner of the creation of TCEs, their link with the social identity and heritage of IPLCs, the nature of their transmission, as well as a temporal element. According to the facilitators, the first three already enjoyed consensus, while the element of the temporal

¹⁰⁶¹ As outlined in Chapter Two, II.

requirement is still highly debated.¹⁰⁶² This temporal element, as currently discussed by the IGC, would require TCEs to exist for a minimum period of time, like 50 years, 30 years or five generations, before they were protected by the instrument.¹⁰⁶³ It is important to note that the temporal element within the eligibility criteria is only one out of two time-based restrictions discussed within the IGC. The second one refers to a suggested term of protection, which would limit the overall duration of protection. This concept, which can be found in Article 8 of the 2023 TCE Draft Articles, stems from copyright law and is based on the idea that TCEs should fall into the public domain after a certain time period.¹⁰⁶⁴

In my opinion, the provision on the eligibility criteria should include the first three elements but not the fourth, the temporal requirement. This is, firstly, because common ground only exists on the first three. Secondly, I argue that it would make no sense to include a minimum age as a requirement in an instrument that seeks to protect TCEs with all their particularities. This is because the need for a new instrument is built upon the significant protection gaps that existing IP laws leave open.¹⁰⁶⁵ Copyright law, for example, does often not protect them due to a lack of originality, a lack of fixation, and often because an individual author, according to a western concept, does not exist.¹⁰⁶⁶ Because of this, copyright law could not act as a fall-back solution for TCEs that are newer than 50 years. Requiring a minimum age for TCE protection would mean that new TCEs would be unprotected for those first 50 or 70 years. If this were combined with an overall term of protection as suggested in Article 8, Option 1, 8.1, the instrument would create a very small timeframe in which TCEs were actually protected. This would significantly limit the effect of the instrument that the IGC is aiming to create.

Furthermore, setting a minimum age for TCEs would create a law that disregards reality. Like any other creations, TCEs do not only start existing after 50 years. In Copyright law, no one would suggest that the copyright only vests in the author 50 years after a work is created. The member states that cling to structures of existing IP laws

¹⁰⁶² As outlined in Chapter Five, IV.

¹⁰⁶³ WIPO Report of the 39th IGC meeting, op cit note 52 at p. 24.

¹⁰⁶⁴ See Article 7 of the Berne Convention, which ends the term of protection 50 years after the death of the author.

¹⁰⁶⁵ As outlined in Chapter Two, IV. 4. (d).

¹⁰⁶⁶ As outlined in Chapter One, I.

should be consistent in their suggestions and not make up artificial eligibility criteria for TCEs that contradict the reality of indigenous creations.

Assuming that that idea for a minimum time limit stems from the fear that the range of protection could be too wide, I suggest drafting the remaining criteria as specifically as possible. For example, claim holders should prove that the expression in question is embedded in the cultural identity of the group and not simply an individual art piece detached from the community.¹⁰⁶⁷ Additionally, the affiliation with the specific group should be controlled in a strict manner. This would both protect the IPLCs from infringement and, at the same time, rein in the extent of protection.

In the 2023 Chair's Text, the eligibility criteria were merged with the definitions of TK and TCEs and the title of the section was changed to 'Subject Matter'. The reasoning behind this is that they are thematically interlinked and that merging the definition with 'the scope of protectable subject matter' better accommodates the possible detail an international instrument can prescribe, as this is traditionally left to national law.¹⁰⁶⁸

While I agree with the existing connection between the definitions and the eligibility criteria for what is protected, I do think that there is merit in keeping them separate. All parties analysed in this thesis favoured a distinction between the two, and I argue that keeping it that way would give the instrument more structure, i.e., if the definition of the subject matter is addressed separately from the eligibility criteria and placed at the beginning of the instrument, as is typical in legal instruments. Beyond that, I welcome the eligibility criteria used as they align with what I have outlined above, including with regard to the deletion of any temporal element.

(e) Beneficiaries

It is argued here that the article on beneficiaries needs a lot more clarification. The interpretation of the term 'beneficiaries' has not been agreed upon and ranges from a narrow understanding of only IPLCs to a wider understanding that includes society at large or governments of the member states. The lowest common denominator is that the majority of parties see IPLCs as primary beneficiaries, no matter how wide the term is interpreted. The chair of the 40th meeting suggested clarifying the roles of each of the

¹⁰⁶⁷ As exemplified by Article 3, Facilitators Alternative, subsection (b) of the 2023 TCE Draft Articles.

¹⁰⁶⁸ 2023 Chair's text op cit note 378 at p. 9.

potential groups and creating a clear distinction between the concepts of ‘beneficiaries’, ‘rights-holders’ and ‘administrators of rights’.¹⁰⁶⁹

My suggestions are very similar. Observing IGC 45 confirmed that parties had significantly different understandings of what the word ‘beneficiary’ actually means, which makes every substantial discussion on who should be included almost impossible.¹⁰⁷⁰ The term ‘beneficiaries’ is very vague and should be changed into ‘rights-holders’, ‘other beneficiaries,’ and ‘administrators of rights’ in the provision. There should be a clear distinction between the terms ‘rights-holders’, ‘other beneficiaries’ and ‘administrators of rights’:

‘Rights-holders’ should be the IPLCs that create TCEs or affiliate themselves with long-existing TCEs. They are the ones that decide which TCEs should be allocated to a specific tier, and they will be entitled to receive royalties or compensation. Within the term IPLCs, many parties have noted that the term ‘local communities’ is not specific enough to identify potential beneficiaries. Within the CBD, where the term was first used, it was specific through a suffix which related to the objective of the instrument.¹⁰⁷¹

I therefore highly recommend doing the same here. In this context, the suffix should be specifically tailored to the TCE holders that are meant to be protected under the new instrument. I suggest defining ‘local communities’ with the suffix ‘if they are distinctively associated with the traditional knowledge or traditional cultural expressions’. This would clarify the meaning of the term IPLC and allow for communities that are not indigenous to protect their TCEs.

‘Other Beneficiaries’ is supposed to function as a fall-back term for TCEs that are not associated with IPLCs, as some member states have claimed that they have TCEs that fulfil the definition in Article 1 that are not linked to an indigenous or local community. In order to prevent the scope of beneficiaries from becoming too wide, I suggest adding an identical suffix here so the affiliation with the TCEs in question is guaranteed.

‘Administrators of rights’ are the ones that are in charge of granting licenses for the use of TCEs or who assist with information when users want to file a new design or patent. Rights-holders and administrators of rights can be identical, but they do not have

¹⁰⁶⁹ Chair’s Information Note on TK/TCE op cit note 846 at p. 7.

¹⁰⁷⁰ As outlined in Chapter Six, I. 7.

¹⁰⁷¹ As outlined in Chapter Five, III. 4.

to be. National governments should be able to decide whether they establish professional bodies that will be in charge of the administration of rights. This could, for example, be done through existing or newly founded cultural associations that are led by representatives of local IPLCs but are partly government-funded to guarantee their existence. Especially for countries with several indigenous groups, this centralised approach could facilitate the administration of rights and take the burden away from IPLCs with no or little resources to react to infringements.

The 2023 Chair's Text on TK & TCEs only focuses on IPLCs as primary beneficiaries and enables member states to recognise others under national law. The provision is very short and does not mention administrators of rights, as these are captured in a separate provision. In principle, the short provision, as suggested by the Chair, is a good approach. Due to the ongoing uncertainty within the IGC on how wide the term 'beneficiaries' can be interpreted, I do, however, suggest adding a clarification for the second paragraph. As the primary rights-holders must remain the IPLCs, I suggest the suffix 'if they are distinctively associated with the traditional knowledge or traditional cultural expressions.' I worry that the second paragraph will otherwise enable governments or non-indigenous entities to register IP on TCEs and TK. Furthermore, I suggest merging this provision with the one on administrators of rights, as the two are interlinked, and the differentiation becomes clearer if they are in the same section. My suggestion for the final article would thus look as follows (changes indicated in bold):

Article 4 - **Rights-holders, Beneficiaries & Administration of Rights**

1. The **rights-holders** under this instrument are indigenous [peoples] and local communities.
2. A member state may, under its national law, recognise other beneficiaries for the protection of traditional knowledge or traditional cultural expressions as referred to in this instrument, if they are distinctively associated with the traditional knowledge or traditional cultural expressions.
3. **Member States may establish or designate a competent authority or authorities, in accordance with national law and/or customary laws, to administer the rights provided for by this instrument.**

(f) Scope of Rights

The article defining the scope of protection is the most complex one, as it will decide the extent of the rights of IPLCs and the obligations of the users of TCEs. There is wide agreement with the concept of the tiered approach, which provides different levels of protection based on the intended control that the community aims to have over a TCE.¹⁰⁷² However, the details of the actual tiers are not agreed upon. I suggest a clear minimum standard approach that outlines the tiers in a general manner¹⁰⁷³ but leaves room for national legislators to define the details of the tiers. However, this minimum standard must be defined in a specific and coherent way in order to avoid the misinterpretation of the instrument due to it being too vague. The IGC could, for instance, consider including examples for a more specified version of the tiered approach in an annexure of the instrument. That way, if member states do decide to implement it, they would all have the same guidance.

In my view, Article 5 should combine sets of rights and measures as a minimum standard on the international level. This minimum standard should establish the exclusive right for an indigenous community to control the utilisation of their TCEs in a positive as well as a negative manner and the allocation of financial benefits towards that community. In addition, the provision should include the rights of the ‘other beneficiaries’ mentioned in Article 4 and provide the option for a set of measures that member states can implement. Lastly, I argue that every reference to the word ‘Safeguarding’ should be deleted from Article 5. In the 2023 TCE Draft Articles, the provision still includes ‘Safeguarding’ in the heading, yet not in the text. Since it has long been established that safeguarding refers to the preservation of culture that falls within the scope of work of UNESCO, the term should be deleted.

In the 2023 Chair’s Text on TK/TCEs, the section on the scope of rights is nearly identical to Alt 2 of Article 5 of the 2023 TCE Draft Articles, devoid of subsection 5.2. It includes a combination of the rights-based and measures-based approach and encapsulates the tiered approach by dividing the rights into the two categories of restricted and unrestricted access to TK and TCEs. I fully support this provision as it is well-rounded and addresses the need of IPLCs while leaving enough flexibility for

¹⁰⁷² WIPO Report of the 38th IGC meeting op cit note 413 at p. 16.

¹⁰⁷³ As exemplified by the Facilitator’s Alternative in Article 5 of the 2023 TCE Draft Articles.

member states to decide how they would like to set up specific measures and rights. However, I would adjust the wording to fit the different groups of beneficiaries as outlined in the previous section and add one subsection for the inclusion of 'Other beneficiaries' (highlighted in bold):

Article 5 - Scope of Protection

Member States shall take legislative, administrative and/or policy measures, as appropriate, in accordance with national law and with reference to the customary laws and practices of indigenous [peoples] and local communities, and in a manner consistent with [a provision dealing with transboundary cooperation], and with the aim of ensuring that:

1. where access to traditional knowledge and traditional cultural expressions is restricted, including where the traditional knowledge and traditional cultural expressions is or are secret or sacred, **rights-holders** have the following collective exclusive rights:
 - (a) the economic right to maintain, control, use, develop, authorise or prevent access to and use/utilization of their traditional knowledge and traditional cultural expressions; and receive a fair and equitable share of benefits arising from their use; and
 - (b) the moral right of attribution and the moral right to the use of their traditional knowledge and traditional cultural expressions in a manner that respects the integrity of such traditional knowledge and traditional cultural expressions.
2. Where the traditional knowledge or traditional cultural expression is not restricted as described in paragraph (a), the **rights-holders** have the collective rights to:
 - (a) receive fair and equitable benefit-sharing for its use; and
 - (b) attribute and use their traditional knowledge and traditional cultural expressions in a manner that respects the integrity of such traditional knowledge and traditional cultural expressions.
3. **Member states may establish the same rights as set out in Paragraphs (b) for 'Other Beneficiaries', as set out in Article 4.2, as long as the distinct association to the traditional knowledge or traditional cultural expressions can be proven and no IPLC claims affiliation with it.**

As a minimum regulatory measure, I suggest the establishment of regulatory bodies on a national level, which would serve as administrators of rights. How those administrations are regulated in detail should be up to the individual member states and be guided by the needs of indigenous peoples in that region and in accordance with their customary

law.¹⁰⁷⁴ This could be supported, for example, by including a minimum percentage of local indigenous representatives in their management.

The work of these cultural bodies could be organised through a number of formalised measures, e.g. a national or regional database in which IPLCs could register their TCEs on a voluntary basis to facilitate the assessment of infringements or to assist in design or patent applications. Another measure could be to offer legal clinics for indigenous people that are interested in commercialising their TCEs or need to fight infringements. As an extension and a possible connection to the preservation of TCEs, these IPLC-led organisations could also receive the sole mandate to display certain objects in museums or cultural education centres. This would enable indigenous groups to take control over which TCEs are displayed in public and which remain in the community and also create a public association of the TCEs with the community. These bodies could also employ legal experts that advise indigenous peoples in IP-related matters. However, the administration of rights through a centralised body should be an option only, as some IPLCs might want to keep the responsibility and control within their community.

While many indigenous communities reject the idea of including their TCEs in a database because they fear further dissemination of their culture outside of their control or because their customs prevent them from making TCEs accessible to people outside of their community, it may be worthwhile for the indigenous caucus to make concessions in this regard. Any legal instrument needs an efficient administration to be implemented effectively. A reliable administration of rights regarding TCEs will be impossible if individual expressions cannot be registered or included in a centralised collection. The enforcement of rights due to infringements will be significantly harder for IPLCs if they have to prove in each case that a certain expression was, in fact, part of their inherent culture. This database or collection could be maintained on a voluntary basis and not constitute a prerequisite for protection, as exemplified by Article 17 of the Swakopmund Protocol.¹⁰⁷⁵ This formality should be seen as a chance to facilitate the process for both IPLCs as well as the administrators of rights. Concerns about the threats of such databases could be met with strict privacy regulations and limitations on

¹⁰⁷⁴ This would be an ideal way to incorporate customary law into the instrument, and support to policy objective of the self-determination of IPLCs, as outlined in Chapter Two, III.

¹⁰⁷⁵ As outlined by Chapter Three.

who can access them, e.g. only the IPLCs concerned and the employees of the administration body.

More specific ideas for measures could be that those indigenous regulatory bodies would consist of local indigenous representatives and be in charge of granting permissions for the use of TCEs on request. In addition, they could be in charge of maintaining and controlling the information in a voluntary and secret database that could be used for information requests.

Another option for a measure could be the introduction of mandatory disclaimers for songs or films which are based on or inspired by TCEs, which would indicate to the community and the TCEs that the new work is based on. Similar to a disclaimer for age rating, it could be displayed at the beginning of the film to make the audience aware of the origin of the idea.

(g) Exceptions & Limitations

The common ground on exceptions and limitations is very low because some parties would prefer a detailed list of exceptions and limitations instruments, while others reject the entire concept and refuse to have it included at all.¹⁰⁷⁶ Based on this, a real common denominator does not exist. The draft articles currently include two approaches. One leaves maximum flexibility to member states, and the other suggests a list of general exceptions and limitations from existing instruments that member states could implement.

In my view, it would be sensible to include a provision on exceptions and limitations to address the worries of parties that fear the loss of a balanced IP system. The provision on Exceptions and limitations is the right one in which to address these worries by specifically indicating how the relationship between rights-holders and users will be. The provision should therefore be seen as a chance to balance the positions of users and IPLCs. Though a brief and general provision would enable member states to decide on their own exceptions and limitations, in light of legal certainty and a harmonised international approach, I argue that a more detailed minimum standard approach would be more beneficial for both sides. In particular, an exception for educational purposes

¹⁰⁷⁶ As outlined by Chapter Five, VII.

would be in the interest of both because it will enable users outside of the community to extend their knowledge of TCEs, which will simultaneously contribute to their preservation.

When drafting a more detailed provision, I argue that linking the exceptions and limitations to the tiers of Article 5 would be coherent and fair. It would highlight the relevance of the different tiers and create an opportunity to regulate the use based on the level of sensitivity of the respective TCEs. A very similar concept is known in German constitutional law regarding the general right to privacy. The scope of protection of this constitutional right is divided into four tiers: the intimate sphere, the private sphere, the social sphere, and the public sphere.¹⁰⁷⁷ Justifications for violations of the respective spheres depend on the level of the tier and the level of public interest on the other side. While the intimate sphere (e.g. inner thoughts, sexuality) does not allow any violations, the private sphere (e.g. relationships, family) may allow them in exceptions under special circumstances, the social sphere (e.g. public events) allows breaches if they can be justified by the interest of the public, and the public sphere (e.g. person seeks out public actively) allows most invasions because the information is given away freely or legally accessible to the public.¹⁰⁷⁸ Through this graded approach, infringements are determined based on the specifics of the respective tiers and a detailed case-by-case consideration.

The above concept, developed by the German Constitutional Court¹⁰⁷⁹, was adopted by the European Court of Justice (ECJ)¹⁰⁸⁰ and is being applied in cases of the infringement of privacy rights. A similar concept could be drafted for the exceptions and limitations for TCEs. While the first tier of protection would allow no exceptions, the second tier could allow exceptions for teaching and research and the last tier could include a wide scope of exceptions based on the suggested list in the draft articles. This would create a way to balance the interests of IPLCs as well as TCEs users.

¹⁰⁷⁷ Michael Sachs *Verfassungsrecht II – Grundrechte* Berlin, Springer (2017) at p. 235 ff.

¹⁰⁷⁸ *Ibid.*

¹⁰⁷⁹ See for example *BVerfGE 101, 361 (381): Caroline von Monaco II*. 1999 , *BVerfGE 80, 367 (374): Tagebuch*. 2008 or *BVerfGE 34, 238 (245): Tonband*. 2001 .

¹⁰⁸⁰ *European Court of Justice (ECJ) 13.05.2014 – C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González (Case C-131/12) 2014 .*

The 2023 Chair's Text includes a very short and general provision on exceptions and limitations. It is almost identical to Alt 1 of the 2023 TCE Draft Articles and enables member states to adopt

'justifiable exceptions and limitations necessary to protect the public interest [...], provided such exceptions and limitations shall not unreasonably conflict with the rights of beneficiaries nor unduly prejudice the implementation of this instrument.'¹⁰⁸¹

I expect that a brief provision as in the Chair's Text might have a higher likelihood of being accepted by *non-demandeurs*, as it provides member states with almost no limits to the exceptions and limitations they can develop on a domestic level. This phrasing is partly inspired by the Berne three-step-test,¹⁰⁸² which is well established and accepted in Copyright law. However, I do think that the vague phrasing 'not unreasonably conflict' in the second half-sentence could potentially compromise the rights of IPLCs as it is too vague. If a link between the 'Scope of Protection' and 'Exceptions and Limitations' were to be established, this could be avoided. This could be done very easily and in a manner that leads to existing copyright structures. I suggest the following (changes indicated in bold):

Article 7 Exceptions and Limitations

In complying with the obligations set forth in this instrument, Member States may, according to the level of access to the traditional knowledge and traditional cultural expressions, adopt justifiable exceptions and limitations necessary to protect the public interest, where applicable, provided such exceptions and limitations shall not unreasonably conflict with the rights of beneficiaries nor unduly prejudice the implementation of this instrument. **Specifically,**

1. where access to traditional knowledge and traditional cultural expressions is restricted because they are sacred, no exceptions and limitations shall be permitted;

¹⁰⁸¹ 2023 Chair's text op cit note 378 at p. 14.

¹⁰⁸² The Berne three-step-test is based on Article 9 (2) of the Berne Convention and provides a standardised and general approach to exceptions and limitations for literary and artistic works. According to *Hugenholtz and Okediji*, the three steps prescribe that exceptions and limitations cannot be 'overly broad', 'rob right holders of a real or potential source of income that is substantive' or 'do disproportional harm to the rights-holders', see: P Bernt Hugenholtz & Ruth L Okediji *Conceiving an international instrument on limitations and exceptions to copyright* Institute for Information Law University of Amsterdam (IVIR) (2008) .

2. where access to traditional knowledge and traditional cultural expressions is restricted because they are secret, member states may have exceptions, for

a. learning teaching and research;

b. preservation, display, research, and presentation in archives, libraries, museums or other cultural institutions;

3. where the traditional knowledge or traditional cultural expression is not restricted as described in paragraphs 1. and 2., member states may have exceptions, such as the creation of literary, artistic, or creative works inspired by, based on, or borrowed from traditional knowledge and traditional cultural expressions.

A tiered system for exceptions and limitations that is linked to the type of expression concerned might offer the most balanced approach between granting exceptions and limitations on the one hand and protecting sacred and secret from unwanted exposure on the other hand.

(h) Role of Customary Law

With regard to customary law, I suggest that the IGC approach remain rather general because customary law is as diverse as the IPLCs of the world.¹⁰⁸³ After questions about the precise meaning of customary law in the text by *non-demandeurs* at IGC 46, including the US and the EU, the facilitators decided to include a definition in the draft articles that will help interpret the text and outline how broad the term is:

‘Customary laws for the purposes of this instrument, includes customary laws, indigenous legal traditions, systems, codes, statutes, ordinances, rules, practices and protocols as applied in a collective context by indigenous peoples, local communities or other beneficiaries’, indigenous code, protocols and practices.’¹⁰⁸⁴

The facilitator emphasised the wide scope of the term and that it does not only refer to countries with colonial experiences. It would make sense to leave it to national governments in collaboration with local IPLCs to decide the extent to which it should influence national law. Many jurisdictions already use customary law to determine

¹⁰⁸³ As outlined in Chapter Four, IV.

¹⁰⁸⁴ WIPO Transcript of IGC 46, 3rd of March 2023, Morning Session, WIPO_GRTKF_IC_46_2023-03-03_AM_118495 (2023) available at https://webcast.wipo.int/video/WIPO_GRTKF_IC_46_2023-03-03_AM_118495, accessed on 31.03.2023 at p. 6.

certain aspects of indigenous-related laws, e.g., the US or New Zealand.¹⁰⁸⁵, these could serve as examples when drafting. A possible contribution of customary law could be, for example, to determine what qualifies as an IPLC or TCEs in said local jurisdiction. Other options could be the determination of measures for the administration of specific TCEs or the allocation of local TCEs towards the different tiers of protection.

The 2023 Chair's Text makes three mentions of customary law, one in the preamble, the second in the administration of rights and the third in the scope of rights. These references highlight the importance of respect for customary law and reflect the common ground that was recently voiced at the latest IGC meeting.¹⁰⁸⁶

¹⁰⁸⁵ See Chapter Four, IV. 3.

¹⁰⁸⁶ Kakooza & Lewis Ad Hoc Meeting Report 2023 op cit note 1008.

CHAPTER SEVEN

Conclusions

Indigenous peoples have been fighting for the protection of their cultures for decades. The WIPO IGC has been negotiating a new instrument for over 20 years. Today, IPLCs and member states of WIPO are closer to a shared solution than ever. That being said, an agreement on a final instrument is still missing. The final chapter of this thesis concludes by presenting answers to the research questions introduced in Chapter 1 by reflecting on the author's previous assumptions and hypotheses and by summarising the findings for a potential way forward.

I. RESEARCH QUESTIONS AND FINDINGS

The research framework of this thesis was guided by an overall research question supported by a number of sub-questions. This section serves to summarise the findings and answers to these sub-questions in order to present a concluding response to the overall research question. This overall question was:

*'Within the supranational negotiation process concerning the legal protection of Traditional Cultural Expressions, where does consensus exist between the conflicting positions, and how can this common ground be leveraged to conceptualise a legal framework that will form a realistic base for an international agreement?'*¹⁰⁸⁷

1. What are the main procedural obstacles in the current negotiation process at the IGC?

The long duration of the WIPO IGC negotiations can be traced back to a multitude of procedural obstacles and negotiation dynamics.

The first issue that makes the negotiation dynamics different to other negotiation fora is that of the general law-making approach. While most international IP instruments were created 'bottom-up', this is not possible within the IGC. Member states

¹⁰⁸⁷ Chapter One, III.

do not have enough practical experience or existing domestic laws that could be harmonised into an international instrument. Thus, the subsisting ‘top-down’ approach harbours the challenge that member states have to create a new instrument from scratch while they are often guided by uncertain future concerns instead of past experience.

The second obstacle is based on the stark power inequalities between the global north / industrialised states versus member states of the global south / post-colonial states. These sides have vastly different policy objectives, as the former is aimed at retaining and applying the existing IP system as much as possible to advance creativity and development and oppose a binding instrument. The latter wants to establish a new binding instrument with exclusive rights for indigenous knowledge holders. The task of creating a balance between protecting traditional culture and TCEs as economic assets, on the one hand, and creative development, on the other hand, is not an easy one.¹⁰⁸⁸ In addition, the negotiations are pervaded by coalition-building by individual member states as well as geographical or economic negotiation blocks.¹⁰⁸⁹ These complex and interwoven dynamics make it next to impossible to develop a common ground.¹⁰⁹⁰

In addition to that, many hindrances result from the practical negotiation procedure itself. For example, parties can reintroduce the same working documents or studies in every single session without any connection to the text-based negotiations and any follow-up analysis of whether these documents actually contribute to the negotiations. The reintroduction of studies takes up a significant amount of time at each IGC meeting, yet the respective parties never expressively draw conclusions from them or adapt the documents according to comments that follow in the plenary.¹⁰⁹¹ Another obstacle is created by the parties regularly revisiting conceptual discussions on matters that are already reflected and discussed in specific provisions.¹⁰⁹² Furthermore, the definitions of many basic terms still cause reoccurring discussions. Starting with basic definitions like

¹⁰⁸⁸ For an extensive review of conflicting policy objectives see Chapter Three, IV. 4. (b).

¹⁰⁸⁹ For an extensive review of procedural obstacles see Chapter Three, IV. 3. (c).

¹⁰⁹⁰ For an extensive review of the consensus-finding procedure see Chapter Three, V.

¹⁰⁹¹ At IGC 45 several delegations reintroduced studies which they have introduced in several meetings before. The reintroduction took up nearly the entire morning session of one of the five days. See: WIPO pp. 3 ff.

¹⁰⁹² See for example the abstract conceptual discussion on the rights-based or measures-based approach, which emerges in nearly every meeting even though specific rights and measures are already included in the draft articles and discussed as such.

TCEs,¹⁰⁹³ misappropriation,¹⁰⁹⁴ or IPLCs,¹⁰⁹⁵ which are still being debated, or even the meaning of the broad concepts of the measures-based or rights-based approach.¹⁰⁹⁶ This often stems from different domestic circumstances for different member states.¹⁰⁹⁷

2. What consensus-finding and multilateral dispute resolution methods are used at the WIPO IGC?

The term consensus comprises many different variations, and every negotiation can have a different aim. Generally speaking, a consensus is achieved when none of the parties disagrees, even if the outcome is not the preferred one of all. At the WIPO IGC, the negotiation procedure comes closest to the model of deliberate consensus.¹⁰⁹⁸ This requires agreement on every single issue, while every party can make suggestions or block decisions during the drafting process.¹⁰⁹⁹ The existing form of consensus-finding procedure, though fair and transparent, is very slow-moving and a key reason why the negotiations have been going on for more than twenty years. The rules of procedure provide for the option to vote. However, many powerful parties are reluctant to use it. Several commentators have stated that this is because majority voting will place economically powerful countries in the minority.¹¹⁰⁰

As a multilateral dispute resolution tool, the IGC has established the use of facilitators. At each meeting, two member state representatives get selected as facilitators for the duration of the entire meeting. More often than not, the same individuals would consecutively act as facilitators for several IGC meetings in a row. Facilitators play an essential part in the consensus-finding process, as they collect comments from the different member states and, based on this, continuously revise the draft articles.¹¹⁰¹ This revised negotiating text is then presented for discussion by the

¹⁰⁹³ See number of brackets in draft provision.

¹⁰⁹⁴ WIPO *Transcript of IGC 45, 5th of December 2022, Afternoon Session, WIPO GRTKF IC 45 DAY 1 AFTERNOON* (2022) available at https://webcast.wipo.int/video/WIPO_GRTKF_IC_45_2022-12-05_PM_117723, accessed on 31.03.2023, at p. 10.

¹⁰⁹⁵ *Ibid* at p. 20.

¹⁰⁹⁶ Kakooza & Lewis *Ad Hoc Meeting Report 2022* op cit note 386.

¹⁰⁹⁷ As exemplified by the delegation of Indonesia, who reported on the existence of TCEs and TK despite not having any indigenous people, and thus need to recognise the state of Indonesia as a beneficiary. For more info on this issue see Report of the Ad Hoc Expert Group op cit note 386.

¹⁰⁹⁸ As can be taken from the General Rules of Procedure of WIPO that were adopted by the IGC, see General Rules of Procedure of WIPO op cit note 359.

¹⁰⁹⁹ *Ibid*.

¹¹⁰⁰ As outlined in Chapter Three, V. 1. (b).

¹¹⁰¹ As outlined in Chapter Three, V. 2. (b).

parties. This process has proven to be highly effective, with the exception of one element. All sections that are not agreed upon in the text are indicated in brackets, and each draft article can contain several alternatives. This is based on the fact that every party can veto every inclusion or deletion of every single word in the draft law. This approach leads to a bulky and somewhat confusing negotiating text.¹¹⁰²

3. What are the current approaches in substantive law taken on a domestic level in South Africa, Europe and the United States, and what are approaches taken by indigenous customary law?

The current approaches taken on a national level in the analysed countries differ greatly. From non-existent laws to very progressively designed instruments, countries follow vastly different concepts.

In the EU, the only legal mechanism concerning TCEs is aimed at their preservation, which is guaranteed through the UNESCO Convention for the Safeguarding of Intangible Heritage. However, there are no laws that are specifically aimed at protecting against the illicit use of TCEs. As for the existing copyright system, the EU is a signatory to the Berne Convention. So it is of no surprise that existing copyright law often fails to fully protect TCEs due to the incompatibility of their specific characteristics with long-standing copyright principles. Other copyright-related treaties like the Orphan works Directive or the DSM Directive are also not able to address these protection gaps, as they were mainly created with the interests of users and the facilitation of the digital market in mind. Trademark law in the EU is regulated by the EU Trademark Directive. The use of trademarks for TCEs that are signs, names, or words is possible within the dual trademark system in all EU member states but only in a commercial context, which excludes sacred and secret TCEs or those that are not meant to be used commercially. TCE holders are partly protected by neighbouring or related rights, like the rights of performers, phonogram producers and broadcasting organizations. However, this protection only relates to the performance as such and not the TCEs themselves.¹¹⁰³

In the US, the existing IP system has similar shortcomings in protecting TCEs. The existing legal frameworks are the Copyright Act of 1976 and the Trademark Act of 1946

¹¹⁰² See for example the latest negotiating text, the 2023 TCE Draft Articles op cit note 409.

¹¹⁰³ For an extensive review of the domestic approach in the EU please see Chapter Three, I.

(Lanham Act), the ‘passing off’ and the ‘misappropriation doctrine’, as well as geographical indications and trade secrets. All of these mechanisms were not developed for TCEs and, as a result, always only apply to a fraction of existing TCEs. There are no laws that are directly aimed at preventing the unlawful exploitation of TCEs. However, there is one legal instrument that is aimed at protecting indigenous knowledge in a broader sense: The Indian Arts and Crafts Act of 1990, which prohibits the misrepresentation of products labelled as ‘Indian-made’. It is a step in the right direction, but it only applies to tangible TCEs and to officially recognised Native American tribes. In addition to that, there are a few non-legal measures aimed at the protection of indigenous culture. These include the Alaska’s Silver Hand Program, the USPTO Database of Native American Tribal Insignia or Protocols for Native American Archival Materials. However, their actual effects are rather limited.¹¹⁰⁴

In South Africa, the domestic approach is the most progressive. There are two Acts that are directly aimed at the protection of indigenous knowledge. The first one is the IPLAA, which seeks to protect and commercialise different forms of indigenous knowledge through their recognition as species of intellectual property.¹¹⁰⁵ While technically in force, it has not really been implemented yet. This is partly due to the fact that it does not follow a *sui generis* approach and is criticised a lot by scholars and experts in the field. The second instrument, which was adopted in August 2019, is the IKS Act. It follows a *sui generis* approach and introduces IK as a form of property under the Constitution. Specific rights are granted to IK holders as soon as the established eligibility criteria are met. In addition, the IK has to be registered with the specifically established authority NIKSO. If the criteria are not met, no rights are granted, and the IK falls within the public domain. Though the IKS Act was received positively among stakeholders, the IKS Act and the IPLAA were introduced by different government departments, and one does not displace the other. This has led to confusion and legal uncertainty regarding how the two interact. Nevertheless, the IKS Act offers one of the most progressive approaches when it comes to national laws on the protection of indigenous culture.¹¹⁰⁶

¹¹⁰⁴ For an extensive review of the domestic approach in the USA please see Chapter Three, II.

¹¹⁰⁵ South African Intellectual Property Laws Amendment Bill , Introduction.

¹¹⁰⁶ For an extensive review of the domestic approach in South Africa please see Chapter Three, III.

As part of their right to self-determination, indigenous people emphasise the importance of their customary law. Customary law is generally characterised as traditions that are treated as laws because of the wide acceptance by the community that holds them. Across the world, communities have been living according to their traditional practices for centuries, and often these include rules on TCEs or concepts related to IP. These can include exclusive economic rights as well as what we understand as moral rights. In addition to that, some countries already take customary law into account when managing indigenous culture under federal law. Examples of this are, *inter alia*, the Indian Arts and Crafts Act as well as the Native American Graves and Repatriation Act within the US or Tikanga Customs which have been part of case law in New Zealand for a long time.¹¹⁰⁷

4. What are key matters of substantive law that jurisdictions cannot agree on within the WIPO IGC

The main legal issues in the negotiations concern the draft articles on the 'Use of Terms', the 'Objectives', 'Eligibility Criteria', 'Beneficiaries', 'Scope of Rights', 'Exceptions and Limitations' and the role of customary law. These issues were determined by the draft articles which produced the most disagreement in the analysed time frame, as well as the mentioning as 'core issues' in the IGC Mandate.¹¹⁰⁸

The first and central point of disagreement revolves around the subject matter itself. Article 1 on the 'Use of Terms' contains several terms which are all not agreed upon. Starting out with how TCEs ought to be defined, there is also disagreement regarding the terms 'IPLCs' and 'Use/Utilization'.

The core article that is lacking agreement is Article 5, which covers the 'Scope of Protection'. In spite of the fact that very detailed suggestions for text already exist, there is a constantly re-emerging conceptual debate on whether to follow the rights-based or measures-based approach. The tiered approach with different protection levels depending on the level of diffusion forms the core of the protection model that is currently envisaged, but the details of the respective tiers are not agreed upon. This is mainly because the distinctive tiers are somewhat related to the discussion on the

¹¹⁰⁷ For an extensive review of selected Customary Law see Chapter Three, IV.

¹¹⁰⁸ WIPO GA Decision on the IGC 2021 op cit note 351.

boundaries of the public domain. While most TCE holders are of the view that their culture does not belong in the public domain and a wide diffusion often happens without their prior and informed consent, many industrialised states are of the opposite view and promote a wide understanding of the public domain.

Furthermore, Article 3 on 'Eligibility Criteria' lacks consensus too, in particular around one out of four potential criteria. The temporal requirement, which needs TCEs to be of a certain minimum age before they can be protected, is highly debated. Some parties insist on including it, while others consider it a non-starter.

In addition to that, Article 7 on 'Exceptions and Limitations' creates disagreement, as some parties see them as a gate for continued misappropriation, while others deem them crucial as a balancing tool and to avoid an infinite scope of the instrument.

Article 4 on Beneficiaries is not agreed upon either, mostly because member states have different positions as to whether only specific indigenous communities should benefit from the instrument or whether other entities, e.g. states, should also be included.

The general article on objectives, Article 2, is also lacking consensus. A conceptual divide here is whether the instrument should lean towards IP or towards a sui generis approach. The crucial point here is whether the instrument should make reference to the public domain.

Another element that member states have not found a solution for is the role of customary law within the instrument. Several draft articles make references to customary law, and IPLCs, in particular, want it to be the determining factor when deciding the affiliation to a specific community as well as what constitutes a TCE.¹¹⁰⁹

It is important to note that there are several other draft articles and elements that are not agreed upon. However, they were not discussed in detail in the IGC meetings that were analysed for this thesis.

5. What is the common ground on matters of substantive law between the evaluated jurisdictions and the indigenous caucus?

As expected, the common ground between the parties examined in this thesis is low.

¹¹⁰⁹ For an extensive and detailed analysis on the different positions on specific draft articles see Chapter Five.

At this point, there is no set of specifically worded provisions that could constitute a minimum standard for an instrument to which all parties would agree. However, there are a few elements that can constitute a middle ground which parties could use as a starting point for further negotiations.

Regarding Article 1, the common ground is that all definitions ought to be clear and not circular. Furthermore, they should be distinct from the eligibility criteria in Article 3. Regarding the objectives in Article 2, common ground prevails in a short and concise provision that provides a minimum standard approach and reflects a combination of the measures-based approach and rights-based approach to keep enough leeway for member states on the national level. With regard to the eligibility criteria in Article 3, three out of four elements are generally agreed upon, which concern their creation, their link to a cultural community and their intergenerational context. A fourth potential criterion, which concerns a minimum age of TCEs, is being rejected by the majority of parties. That being said, many parties will most likely not agree to a binding instrument without the temporal element.

Within Article 4, there is broad agreement that the terms around what constitutes 'beneficiaries' have to be further defined. Significant progress has been made at IGC 45, and the latest facilitator's text received a lot of approval. A common ground could potentially be found in the differentiation of the term into 'Rights-holders', 'other Beneficiaries' and 'Administrators of Rights'. Within the term IPLC the suffix 'local communities' would need to be clearly defined. A key factor here would be to include enough flexibility on the national level and allow for the consultation of indigenous communities, so member states can detect beneficiaries according to local realities.

With regard to the Article on 'Exceptions and Limitations,' a real common ground could not be developed from the statements that were made within the analysed documents. Including a provision with specific examples, however, would benefit both *demandeurs* as well as *non-demandeurs*. Article 5 on the 'Scope of Protection' now holds the common ground of a combination of the rights-based and measures-based approach, as most parties see them as not mutually exclusive. The parties have not commented on the role of customary law extensively. Hence a clear common ground cannot be

described. However, here too, flexibility for member states would be sensible, as customary law and its importance differ within communities and jurisdictions.

6. What is the overall conclusion of the findings presented?

This section provides an outlook of what is possible and puts forward recommendations with regard to the IGC's work as well as the protection of TCEs generally.

(a) How could consensus within the WIPO IGC be achieved?

The analysis in this thesis indicates that a lowest common denominator on substantive law would not be sufficient to draft an instrument that is agreeable to all parties involved. While some common ground on certain issues can be described, very often, the positions of parties diverge drastically, i.e. while *demandeurs* generally ask for a detailed instrument with a high protection level, *non-demandeurs* are more inclined towards a non-binding instrument that respects the rights of the users and the existing IP system.¹¹¹⁰ The consensus-finding procedure in place is not suitable for this wide spectrum of positions amongst the high number of participating parties.

This is because the negotiation procedure aims for deliberate consensus, where nothing is agreed upon until everything is agreed upon. This reflects in a procedure in which every party can veto every insertion or deletion of individual words, despite the existence of facilitators, who continuously update the negotiating texts based on all parties' positions. Elements in draft articles that the majority had already agreed upon can be reintroduced by individual parties at every meeting. The same applies to phrases that the facilitators had already deleted from a draft.¹¹¹¹ This approach does not allow vastly different economic and political positions to be reconciled.

While the existing consensus-finding method is fair and has a base in the General Rules of Procedure of WIPO, it is slow-moving and enables the negotiation process to become circular. At this point in time, the chances of an agreement would only change if parties changed their positions drastically or if the understanding of consensus was altered. This is why I am of the opinion that consensus is possible, but only if the consensus-finding procedure were to be amended.

¹¹¹⁰ As outlined in Chapter Five.

¹¹¹¹ See for example the definition of the public domain, which the majority of parties does not want to be included in the text and the facilitators deleted it from the text at IGC 44. At IGC 45 the US delegation asked for it to be reinserted, which led to it reappearing in the text.

Firstly, I suggest that the aim of achieving deliberate consensus should be adjusted. On individual matters that have been subject to many ‘back-and-forth’ debates, majority voting should be implemented to allow a final decision on said aspect. This vote could be called by the Chair, for example, after a term has been deleted from and reintroduced to the text three or more times. According to the WIPO Rules of procedure, a simple majority would then be enough to reach a decision, and the IGC could move on to other undecided matters, which have not been discussed up to that point.

With regard to the Draft Articles as a whole, the Chair could, for example, call for an acclaimed or imposed consensus on the most recent version of the updated Facilitator’s text. This means that the consensus would simply be assumed unless expressively objected to by a party. Since the facilitator’s text represents a compromise between the comments voiced by the parties in the plenary, it forms a good basis for an imposed consensus.¹¹¹² The text would then be open for comments again at the next IGC meeting, where parties could comment on specific parts of the text that they would like to have amended.

Connected to this acclaimed consensus approach, I suggest the use of a single negotiating text without alternative provisions and terms in brackets. This text would merge all alternatives of one article into a single provision. This would arguably make the negotiating text clearer and more streamlined.¹¹¹³ The recently published Chair’s Text on TCEs/TK¹¹¹⁴ provides a great starting point for this approach and could be adopted by the facilitators as a working document.

Within the negotiation procedure, I suggest amending some of the rules that determine the roles and responsibilities.

One suggestion in this context would be to draw clearer boundaries between the tasks of the facilitators and the member states. This could be done, for example, by reducing the number of vetoes for each party. The ability of each individual member state to veto every single word within the draft text collides significantly with the responsibilities of the facilitators to streamline and consolidate the text. I would thus

¹¹¹² As outlined by Chapter Three, V. 2.

¹¹¹³ As outlined in Chapter Three, V. 2. (b).

¹¹¹⁴ 2023 TCE/TK Chair’s Text op cit note 378.

suggest giving more responsibility to the facilitator by limiting the number of vetoes to three per party per meeting.¹¹¹⁵

In addition, conceptual debates and the introduction of new evidence in line with the evidence-based approach should be limited. The negotiations have progressed to a point where the overall structure of the instrument is mostly agreed upon, and the discussions concern the specific wording of the draft law.¹¹¹⁶ I argue that the discussion on general issues, e.g. what TCEs are or what a combination of rights and measures could look like, are superfluous and hinder the process.

Lastly, I argue it would be beneficial to set a limited time frame for the negotiations. As can be taken from the IGC negotiations on GR and TK, the introduction of a Chair's text and the vote on a diplomatic conference has brought significant momentum to the process.¹¹¹⁷ Once the negotiations on TCEs and TK are more mature, I suggest a similar approach.

(b) How could a potential instrument reflect in substantive law?

The legal nature of the final instrument is mainly determined by the IGC mandate. It states that the aim of the negotiations is to finalise

‘an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs).’¹¹¹⁸

This includes two main elements. Firstly, the legal nature of the instrument is not pre-determined, and secondly, the substantive law must follow a balanced approach.

Within the IGC, the member states either favour a binding treaty or a non-binding agreement, there is no consensus in between.¹¹¹⁹ Thus, the parties have to make a decision on which route to follow. I argue that only a binding agreement will be able to close the currently existing protection gaps in international law¹¹²⁰ and many domestic jurisdictions¹¹²¹ Non-binding Declarations and Model Laws on indigenous culture and

¹¹¹⁵ As outlined in Chapter Six, II. 4.

¹¹¹⁶ As outlined in Chapter Five.

¹¹¹⁷ See Chapter Three, IV. 3 (a).

¹¹¹⁸ WIPO Report on the IGC 2021 op cit note 351 at p. 1.

¹¹¹⁹ As outlined by Chapter IV.

¹¹²⁰ As outlined in Chapter Three, I. - III.

¹¹²¹ As outlined in Chapter Four.

TCEs already exist¹¹²², and their impact on protecting TCEs is practically non-existent.¹¹²³ The WIPO IGC should thus proceed in negotiating towards a binding agreement in order to reach its overall goal effectively.

In order to follow a balanced approach when drafting the law, I suggest a clearly defined minimum standard approach. This would guarantee the protection of TCEs and the rights of IPLCs, on the one hand, while providing member states with enough flexibility to create laws according to their legal systems and in cooperation with local IPLCs. Despite the instrument generally following a new, *sui generis* approach, the adoption of some IP-like elements has proven to relate well to the subject matter and is generally accepted by most parties. These elements show in an overall structure that builds on the interplay of protectable subject matter, rights-holders and access to the subject matter by users.¹¹²⁴ The details of this interplay are outlined as follows:

The provision on definitions, which is Article 1 on the Use of terms in the 2023 Draft Articles, should start by defining the subject matter in a wide manner. Given the vast diversity of TCEs around the globe¹¹²⁵, it is crucial that the primary definition is able to capture all and is open enough for unforeseen cases. The current approach to defining ‘Use/Utilisation’ is in line with this, as it describes three general categories of TCEs usage, of which most relate to a commercial context.¹¹²⁶ Since the commercial misappropriation of TCEs is one of the main reasons for the instrument¹¹²⁷, this definition would serve the cause well. For this reason, I would also recommend retaining only the term ‘Utilisation’ as it is wider than ‘Use.’ In addition, I suggest adding the terms ‘Rights-holders’, ‘Other Beneficiaries’ and ‘Administrators of Rights’ to Article 1. These are terms that, according to my suggestions, describe different groups of beneficiaries under the instrument.¹¹²⁸ In light of the local differences between indigenous peoples and local communities, the definition of both terms should contain a rather general approach that guarantees a certain cultural affiliation with TCEs. The details of the definition, however, should be left to the member states and be developed in accordance with local IPLCs and their customary law.

¹¹²² As outlined by Chapter Three, I. - III.

¹¹²³ As outlined by Chapter Six, II. 5 (a).

¹¹²⁴ See 2023 TCE Draft Articles.

¹¹²⁵ As outlined in Chapter Two, II.

¹¹²⁶ Article 1 of the 2023 TCE Draft Articles.

¹¹²⁷ As outlined by Chapter Two, III.

¹¹²⁸ See Chapter Six, II. 5. (e).

The objectives of the instrument, which can be found in Article 2 of the 2023 TCE Draft Articles, should be short and illustrate the balance the instrument is aiming to achieve. It is, therefore, essential that it contains the interests of TCE holders and users alike. Based on this, I suggest including the objectives of protecting TCEs from unauthorised and/or uncompensated uses while regulating the appropriate use to encourage creation and innovation and preventing the erroneous grant of IP rights over TCEs.¹¹²⁹

The provision on eligibility criteria, Article 3 of the TCE Draft Provisions, plays an important role in the overall balance of the instrument. While the definitions in Article 1 ought to be wide, the eligibility criteria are meant to clarify which of the existing TCEs actually qualify for protection. The criteria should be based on the specific characteristics of TCEs, which often preclude them from being protected by other IP laws.¹¹³⁰ In this context, the current Facilitator's alternative contains a workable approach by including the elements of an indigenous origin, a link to a specific cultural identity, and an intergenerational transfer.¹¹³¹ However, the option for an additional temporal element, which requires a minimum age for TCEs, is not feasible, and I recommend deleting it. It is not connected to the reality of TCEs, and such a requirement would create a protection gap for newly created TCEs.¹¹³²

In the context of beneficiaries, as currently regulated by Article 4 of the 2023 Draft Articles, I recommend clearer distinctions between the respective stakeholders, i.e. 'Rights-holders', 'Other Beneficiaries' and 'Administrators of Rights', as there is currently no shared understanding of the meaning of the simple term 'Beneficiaries'.¹¹³³ While 'Rights-holders' would refer to IPLCs that are affiliated with TCEs, the term 'Other Beneficiaries' refers to TCEs that are not linked to an indigenous or local community.¹¹³⁴ This responds to the request of some member states, which claim to have TCEs, yet no indigenous communities affiliated with them. With regard to the provision 'Administration of Rights' in Article 6, I suggest merging it with Article 4 on 'Beneficiaries' as they are thematically interlinked. The section on the administration of

¹¹²⁹ A detailed drafting suggestion can be found in Chapter Six, II. 5. (c).

¹¹³⁰ As discussed in Chapter Three, IV. 4. (d).

¹¹³¹ Article 3 of the 2023 TCE Draft Articles, Facilitators Alternative 3.1.

¹¹³² As outlined in Chapter Six, II. 5

¹¹³³ As outlined in Chapter Six, II. 5 (e).

¹¹³⁴ *Ibid.*

rights should include the option for member states to establish administrative bodies that are in charge of the allocation of TCE-related rights and the management of other related measures that states decide to implement.¹¹³⁵

Article 5 of the latest TCE Draft Articles covers the scope of protection. This provision is of high importance as it specifically lays out the rights of the TCE holders. Overall, Article 5 follows a combination of a rights-based and measures-based approach, and the participating parties have recently reached the consensus that these two approaches are not mutually exclusive and should be implemented in combination. The 2023 TCE/TK Chair's Text includes a workable approach for the drafting of Article 5.

The rights aspect establishes moral and economic rights according to the so-called tiered approach. This approach establishes rights according to three different TCE categories (closely held / no closely held / no association known).¹¹³⁶ This concept was met with agreement by most parties and is an effective way to establish the rights of TCE holders in balance with the interest of the users and 'the notion of the public domain'.¹¹³⁷ The access-based differentiation meets the IPLC policy objective of self-determination as it allows them to decide which TCEs should be kept secret and which can be used in a commercial context. In the latter case, the provision establishes the specific right to a share of benefits and attribution.¹¹³⁸ At the same time, third parties are granted the utilisation of TCEs whose origin cannot be linked to a specific community, subject to the attempt to locate a potential TCE holder. This section addresses the situation in which TCEs have been in the public domain and should be free to use if ownership by IPLCs can be, in fact, ruled out.

Article 5 also allows the set-up of non-legal measures and mechanisms, i.e. administrative bodies, databases or mandatory disclaimers for the use of TCEs.¹¹³⁹ Even though many IPLCs have rejected the establishment of measures like databases, I would not dismiss the idea too quickly. Databases or collections could significantly facilitate and improve the administration of rights for both rights-holders who want to make claims as well as users who want to do research prior to creating a new work. In order

¹¹³⁵ As outlined in detail in Chapter Six, II. 5. (f).

¹¹³⁶ WIPO Report of the 38th IGC meeting op cit note 413 at p. 16.

¹¹³⁷ Ibid at p. 15.

¹¹³⁸ 2023 TCE Draft Articles at Article 5, Facilitators Alternative.

¹¹³⁹ As outlined in detail in Chapter Six, II. 5. (f).

to meet the worries of IPLCs that secret TCEs would be made public through such collections, I suggest that first of all, the registration of TCEs remains voluntary, and secondly, the content of the database remains confidential and can only be accessed by the staff of the administrative bodies or IPLCs themselves. Including some form of documentation in the administration process would contribute to legal clarity and a more transparent administration process.

Lastly, of the draft articles analysed in this thesis, the provision on ‘Exceptions and Limitations’ can be found in Article 7 of the 2023 TCE Draft Articles. While there is currently no consensus on whether the instrument should include such a provision at all, I argue that it would serve both *demandeurs* and *non-demandeurs*, create legal security, and strike a balance between rights-holders and users.¹¹⁴⁰ In this context, I suggest a new approach which links the exceptions and limitations to the three tiers of Article 5.¹¹⁴¹ While gradually increasing the possible exceptions according to the self-determined categories of TCE holders, the provision would be coherent with the assessment of Article 5 and create an overall balance within the instrument. I argue that the provision on exceptions and limitations should not be phrased too vaguely, as it will otherwise enable each member state to draft its own lists, which would lead to a lot of legal uncertainty.

- (c) Will the most effective solution be found in only one instrument for the protection of TCE & TK, as currently planned by the WIPO IGC? Are there other non-legal protection mechanisms that could be established?

The effect of the final instrument depends on a variety of factors, including the implementation through national law and the establishment of related measures. That being said, there are already a number of measures that can be taken by member states at this point in time.

First of all, member states are, of course, free to develop national laws on the protection of TCEs before the international instrument is fully developed. South Africa, for example, has developed an entirely new *sui generis* law for the protection of IK that included the establishment of an office for the management of TCEs and TK. The

¹¹⁴⁰ As outlined in detail in Chapter Six, II. 5. (g).

¹¹⁴¹ *Ibid.*

development of national laws is not only faster than creating a multilateral instrument, but it is also closer to indigenous communities affected. National governments could also develop domestic laws in close exchange with local indigenous communities and can take local laws and customs into account when drafting those laws. If member states made their national solution more of a priority, local protection levels could be raised much faster. This does not only apply to the adoption of new instruments, but also to the active implementation of existing laws like in South Africa.¹¹⁴²

Furthermore, existing regional and transnational instruments like the Bangui Agreement¹¹⁴³ or the Swakopmund Protocol¹¹⁴⁴ could be used for more guidance. If an agreement amongst all IGC parties will not transpire, countries from a smaller geographical region can still adopt transnational agreements that would unfold protection in their respective jurisdictions. This is not as ideal as a large international agreement as striven for by the IGC, but it would still advance the protection of indigenous culture from illicit exploitation.

Secondly, government departments could create special offices for protecting indigenous culture by offering workshops or law clinics. Even without the establishment of new laws, indigenous people could be supported through workshops on how to use the existing IP law to the biggest possible extent.¹¹⁴⁵ For example, if a community wants to commoditise their TCEs, specialised programs could guide them in registering trademarks or collective marks and how to enforce their respective rights.

On top of that, there are non-legal measures that countries or communities can take. There are a number of NGOs¹¹⁴⁶ worldwide that aim the protection of traditional

¹¹⁴² See Chapter Four, III. 2.

¹¹⁴³ See Chapter Three, III. 5.

¹¹⁴⁴ See Chapter Three, III. 6.

¹¹⁴⁵ See for example programs implemented by the Government of the Republic of Philippines like 'IP Education and Advocacy Services' or 'Culturally Appropriate Responsive and Gender-Sensitive Socio-Economic And Ecology Development Protection Services' at Republic of the Philippines 'National Commission on Indigenous Peoples - Programs' available at <https://ncip.gov.ph/programs/>, accessed on 31.03.2023, or the Indigenous Business Development Programs that include access to capital or access to business opportunities see: Government of Canada 'Indigenous business development' available at <https://www.sac-isc.gc.ca/eng/1100100032796/1610546385227>, accessed on 31.03.2023.

¹¹⁴⁶ See for example ASMETI, a Swiss-Mexican association that is aimed at the safeguarding, exploitation and distribution of indigenous textiles, ASMETI 'Association Suisse-Mexique our le textile indigène' available at <https://asmeti.com/a-propos/lassociation/>, accessed on 31.03.2023, or the Indigenous Friends Association (IFA) that encourages indigenous communities to create digital technologies through their communal values, see: Indigenous Friends Association 'About Us' available at <https://www.indigenousfriends.org/aboutus>, accessed on 31.03.2023.

knowledge. Using the support of these organisations can help a community to educate others about their TCEs and commercialise them if that is desired.

Furthermore, there are a number of specially developed programs by WIPO that are created to support indigenous communities, including a Webinar Series on how to protect and promote culture, as well as information packs on IP and TK in various languages.¹¹⁴⁷ A relatively new offer is the 'Indigenous and Local Community Women Entrepreneurship Program' in which indigenous women are offered training, mentoring and matchmaking to grow their small businesses.¹¹⁴⁸ Through the development of skills in relevant fields such as IP, Marketing or business modelling, as well as matchmaking with experienced mentors and potential business partners, the participants are being supported in growing as entrepreneurs.¹¹⁴⁹ This program has a multiplying effect, as the knowledge then gets transferred from the participants to the rest of the community.¹¹⁵⁰

Last but not least, an important approach to protect indigenous culture would be the education of people that do not identify as indigenous. Member states should establish curriculums on the diversity and the wealth of indigenous knowledge across the globe without displaying it through a Eurocentric lens. If programs in schools or community centres would educate people on modern IPLCs, their TCEs and their self-image, without them being stereotypically depicted as the 'other' and 'exotic' culture, it could create a more respectful understanding of foreign culture from the start. Young creators would then also learn that other peoples' culture does not exist for them to exploit commercially but as a form of self-expression and lifestyle of a particular people.

II. REFLECTION ON ASSUMPTIONS & HYPOTHESIS

This section serves to reflect on the assumptions and initial hypothesis of the study. My general starting point was to develop a minimum standard approach by analysing and comparing positions that are on opposite ends of the spectrum within the IGC negotiations. This approach has yielded the expected outcome and enabled me to

¹¹⁴⁷ See for example 'Protect your culture – A practical guide to Intellectual Property for Indigenous Peoples and Local Communities' or 'Documenting Traditional Knowledge – A toolkit'. These and further resources available at WIPO 'Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions' available at <https://www.wipo.int/tk/en/>, accessed on 31.03.2023.

¹¹⁴⁸ WIPO 'Indigenous and Local Community Women Entrepreneurship Program' available at https://www.wipo.int/tk/en/women_entrepreneurs/, accessed on 31.03.2023.

¹¹⁴⁹ Ibid.

¹¹⁵⁰ Ibid.

display the very low common ground that exists between the parties examined in this thesis. It also brought about that, in some cases, there is no common denominator as the parties actually have goals that are mutually exclusive, despite over twenty years of negotiation.

This outcome is a confirmation of one of my initial assumptions, i.e. that not all parties are actually in favour of a new *sui generis* instrument as per the mandate of the IGC. Many industrialised nations do not want to create new tools according to the uniqueness of TCEs, but they aim to keep the existing IP system as is and prefer the new instrument to be similar to existing structures, especially copyright law. These positions often lead to circular negotiation dynamics and, hence, very slow-moving progress.

My second assumption was that the negotiation procedure itself creates a hindrance to an agreement. After analysing the consensus-finding as well as dispute resolution mechanisms of the IGC, I can confirm that they contribute significantly to the stalling of the process because they are not aligned with the political realities of a post-colonial globalised world. Revised rules of procedure, a smaller number of parties, as well as the re-introduction of majority voting, could significantly speed up the process and lead to a finalised instrument.

Thirdly, my overall hypothesis was that an international instrument alone is not going to bring about the desired result. Given the different cultural realities of indigenous peoples across the globe, individual nations should start developing their own national instruments in close cooperation with indigenous people and their customary laws and practices. In addition to that, indigenous peoples can make use of non-legal programs offered by WIPO or NGOs to use existing IP mechanisms to the fullest possible extent. All approaches combined will lead to a multitude of tools for indigenous peoples and the protection of their TCEs.

III. REFLECTIONS ON KEY OBJECTIVES OF THIS RESEARCH

This research was guided by four personal research objectives that I aimed to achieve.¹¹⁵¹ This section serves to briefly reflect on whether they were attained.

¹¹⁵¹ See Chapter One, VII.

The first objective was to identify possible solutions for the deadlocked negotiations at the IGC. It can be said that this aim was fulfilled. Based on the outcome of my legal and procedural analysis, I was able to propose several approaches to streamline the law-making procedure and move away from circular negotiation dynamics.

The second aim was to create a system that meets the needs of indigenous communities, which most existing legal systems, due to years of systemised colonial oppression and the simultaneous development of international laws, do not. My suggestions for the Draft Articles are based on a common ground developed from numerous statements of the IGC, with a special focus on the indigenous perspective. That being said, I did suggest a binding instrument with a minimum standard approach, because the majority of non-demandeur parties will not agree to a binding agreement with a detailed and extensive protection model.

The third objective was to support creative innovation and development by reducing legal uncertainty. It is too early to determine whether an instrument as envisaged will be implemented on a broader scale and consequently lead to clear and transparent rules for artists.

Lastly, through finding a clear protection mechanism for TCEs, my last objective was to promote self-determined heritage preservation for cultures across the world. I do think that my suggestion to focus on the self-determination of indigenous peoples on an international level and to develop domestic instruments in close collaboration with local IPLCs will lead to more indigenous perspectives being represented and ultimately being the deciding voice on how their culture should be preserved and lived.

IV. SUGGESTIONS FOR FUTURE RESEARCH

There are ways in which the research of this thesis could be extended or supported by additional research in the future.

The analysis of different legal positions in this thesis was limited to statements made available in meeting reports from IGC 37 to IGC 45. Further research could explore statements made in the forthcoming meetings to monitor future developments in positions and coalitions. Furthermore, only a limited number of draft articles were discussed in this time frame, which only represents about half of all existing draft articles. An analysis of the articles that will be discussed in the future will expand the

knowledge of the respective positions of the parties and produce an even more detailed idea of a potential final instrument.

Additionally, qualitative research could be conducted with representatives of IGC parties. This could yield additional information because not every party makes formal statements on every provision of the draft articles at IGC meetings, and some positions are preferred not to be voiced in the plenary session. Qualitative inquiry through interviews would be a helpful tool to close some of these gaps in relation to uncommented provisions or specific positions.

Finally, further research could be undertaken on multilateral consensus-finding processes. This is a field that has not been deeply researched yet, and findings about the most efficient procedures for modern multilateralism would advance not only the negotiations at the IGC but in multiple international fora.

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APPENDIX

Image 1: Illustration of the Alexander Mc Queen vs. Habesha Dispute.....	246
Image 2: Comparison of the retired and the new logo of the Washington Football Team.....	246
Image 3: Cover Art of the Deep Forest Music Album	247
Image 4: T'Boli woman next to T'nalak cloth	247
Image 5: Alaska Silver hand Logo.....	248

Selected Images from Case Studies in Chapter Two



Left: Embroidered Jacket by Alexander Mc Queen

Right: Kaba Gowns of the Habesha Community, here worn by bride and groom on their wedding.

Image 1: Illustration of the Alexander Mc Queen vs. Habesha Dispute

Source: <http://www.tadias.com/04/29/2017/controversy-breeds-over-british-designers-velvet-jacket-almost-identical-to-kaba/>



Image 2: Comparison of the retired and the new logo of the Washington Football Team

Sources: https://www.kindpng.com/imgv/ibxbwT_washington-redskins-logo-hd-png-download/
<https://sports.yahoo.com/nfl/teams/washington/>



Image 3: Cover Art of the Deep Forest Music Album

Source: [https://en.wikipedia.org/wiki/Deep_Forest_\(Deep_Forest_album\)](https://en.wikipedia.org/wiki/Deep_Forest_(Deep_Forest_album))



Image 4: T'Boli woman next to T'nalak cloth

Source: <https://www.thetextileatlas.com/craft-stories/tnalak-weaving-philippines>



Image 5: Alaska Silver hand Logo

Source: <https://alaskamarketplace.greatlandgrocery.com/>