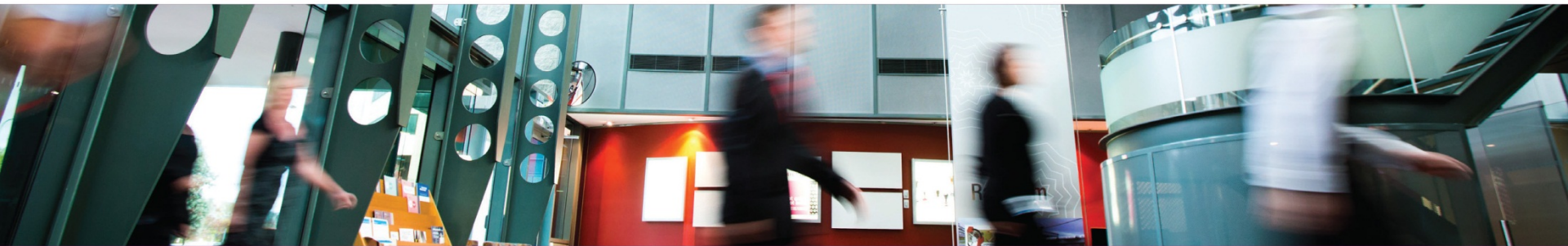




Australian Government

IP Australia

International IP negotiations on Indigenous Knowledge



Robust intellectual property rights delivered efficiently

Polymer
Bank Notes



Overview

- Comparing Systems
- IP Australia
- Intergovernmental Committee
- Issues in Current Negotiations on TK and TCEs
- Australian Participation
- Future Work



Australian Government

IP Australia

Comparing Systems

- Scientific Systems
- Education Systems
- Land Management Systems
- Intellectual Property Systems



Australian Government

IP Australia

IP Australia

- Responsibility for patents, trade marks, designs and plant breeder's rights.
- Three outcomes for portfolio of Department of Industry
 - Administer industrial property legislation
 - Public education and awareness
 - Advice to government



Australian Government

IP Australia

Intergovernmental Committee

- 2000, World Intellectual Property Organization established an intergovernmental committee.
- Operating under a mandate, agreed in 2009, to negotiate international instrument(s).
- Participation from ~100 WIPO Member States.
- Current process of negotiation.



Australian Government
IP Australia



E

WIPO/GA/46/5
ORIGINAL: ENGLISH
DATE: JULY 22, 2014

WIPO General Assembly

Forty-Sixth (25th Extraordinary) Session
Geneva, September 22 to 30, 2014

MATTERS CONCERNING THE INTERGOVERNMENTAL COMMITTEE ON
INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL
KNOWLEDGE AND FOLKLORE (IGC)

Document prepared by the Secretariat

INTRODUCTION

1. The WIPO General Assembly at its Forty-Third (21st Ordinary) Session in September 2013 agreed on the mandate for the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) for the 2014/2015 biennium.
2. The IGC's mandate for the 2014/2015 biennium, which was set out in document WO/GA/43/22, provides as follows:

"Bearing in mind the Development Agenda recommendations and acknowledging the progress made, the WIPO General Assembly agrees that the mandate of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore be renewed as follows:

"(a) The Committee will, during the next budgetary biennium 2014/2015, and without prejudice to the work pursued in other fora, continue to expedite its work with open and full engagement, on text-based negotiations with the objective of reaching an agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs.



Australian Government
IP Australia

Australian Participation



Robust intellectual property rights delivered efficiently



Australian Government

IP Australia

Issues for Negotiation in IGC

- Similar to issues raised for “Recognising and Protecting Indigenous Knowledge associated with Natural Resource Management”
- Comparing the international, national and regional approaches.



Australian Government

IP Australia

Objectives and Principles

- Promoting innovation and creativity
- Preventing misappropriation
- Bringing balance into international IP system



Australian Government

IP Australia

Preamble

The Contracting Parties,

Recognising the distinct creative, intellectual and innovative knowledge and cultures of indigenous and local communities,

Aware of their customary intergenerational custodianship of their collective traditional knowledge and culture,

Concerned at the potential for adverse consequences arising from alienation, division and prescription of their traditional knowledge and culture,

Recalling each Party's support of the United Nations Declaration on the Rights of Indigenous Peoples,

So affirming that Indigenous Peoples have the right to participate in decision-making in matters which would affect their rights,

So affirming further that Indigenous Peoples have the right to maintain, control, protect and develop their intellectual property over their traditional knowledge and cultural expressions,

Respecting that Article 27 of the UN Declaration of Human Rights establishes the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.,

Desiring, in order to encourage creative activity, to promote the protection of the knowledge and cultures of indigenous and local communities throughout the world

Agree as follows:



Article 1 Subject Matter

- 1.1 For the purposes of this instrument, protected traditional knowledge and cultural expressions are the traditional knowledge and cultural expressions of a specific and identifiable beneficiary.
- 1.2 For the purposes of this instrument, use of protected traditional knowledge and cultural expressions is the acquisition of intellectual property rights with that protected traditional knowledge and cultural expressions or the exploitation of intellectual property rights acquired with that protected traditional knowledge and cultural expressions.



ARTICLE 1 SUBJECT MATTER OF [PROTECTION]/[INSTRUMENT]	[ARTICLE 1] [ELIGIBLE]/[ELIGIBILITY CRITERIA FOR] SUBJECT MATTER OF [PROTECTION]/ [SAFEGUARDING]
The subject matter of [protection]/[this instrument] is traditional knowledge:	The subject matter of [protection]/[this instrument] is traditional cultural expressions:
(a) that is created, and [maintained] in a collective context, by indigenous [peoples] and local communities [or nations] [whether it is widely spread or not];	that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities [or nations] [whether they are widely spread or not]; [and]/[or]
(b) that is [directly] [linked]/[distinctively associated] with the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities [or nations];	that are [the unique product of] [directly] [linked with]/[distinctively associated with] the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities [or nations]; [and]/[or]
(c) that is transmitted from generation to generation, whether consecutively or not;	that are transmitted from generation to generation, whether consecutively or not; [and]/[or]
(d) which may subsist in codified, oral or other forms; and [or]	[that have been used for a term as has been determined by each [Member State]/ [Contracting Party] [but not less than 50 years]]; [and]/[or]
	[that are the result of [creative intellectual activity]/[creative activity of the intellect]]; [and]/[or]
(e) which may be dynamic and evolving.	which are/may be dynamic and evolving.]
[Criteria for Eligibility Protected traditional knowledge is traditional knowledge that is [distinctively] associated with the cultural heritage of beneficiaries as defined in Article 2, that is generated, [maintained], shared and transmitted in a collective context, is intergenerational and has been used for a term as has been determined by each [Member State]/ [Contracting Party] [but not less than 50 years].]	



Article 2 Beneficiaries

2.1 Indigenous and local communities shall exercise, and benefit from, custodianship and protection of their traditional knowledge and cultural expressions.

2.2 Contracting parties may determine other beneficiaries of the custodianship and protection of traditional knowledge and cultural expressions exercised under Article 2.1.

2.3 Contracting Parties that are beneficiaries shall consult with Indigenous and local communities for establishing national authorities for the custodianship and protection of traditional knowledge and cultural expressions.



Article 3 Scope of Protection of TK and TCEs

3.1 Subject to the rights conferred under Articles 2 and this Article 3, Contracting Parties shall provide legal, administrative or policy intellectual property measures for the use of traditional knowledge and cultural expressions.

3.2 Subject to Article 4.1, the use of protected traditional knowledge and cultural expressions shall only be with free prior and informed consent or approval and involvement of the beneficiary that is the custodian of that protected traditional knowledge or cultural expression.

3.3 Subject to Article 4.1 and 4.2, the benefits of the use of protected traditional knowledge and cultural expressions shall be shared with the beneficiary that is the custodian of that protected traditional knowledge or cultural expression.

3.4 The beneficiary that is the custodian of protected traditional knowledge and cultural expressions shall be acknowledged in use of the protected traditional knowledge and cultural expressions.



Australian Government

IP Australia

Article 4 Exceptions and Limitations

4.1 For the purposes of Articles 3.1 and 3.2, Contracting Parties shall only except from the scope of protection the use of protected traditional knowledge and cultural expressions that was accessed from a source other than the beneficiary.

4.2 For the purposes of Article 3.2, the protection of protected traditional knowledge and cultural expressions shall not limit:

- (a) providing education
- (b) addressing emergencies



Australian Government

IP Australia

The Tiered Approach to Protection

- This approach arose from informal IGC consultations in March 2014 hosted by Indonesia in March 2014.
- The approach:
 - Not all TK is the same and does not need to be protected in the same way.
 - There are different levels of rights and measures (eg. secret TK compared to TK that is in the public domain).
 - The level of rights can be determined by the character of the TK/TCEs in question and the character of their use.

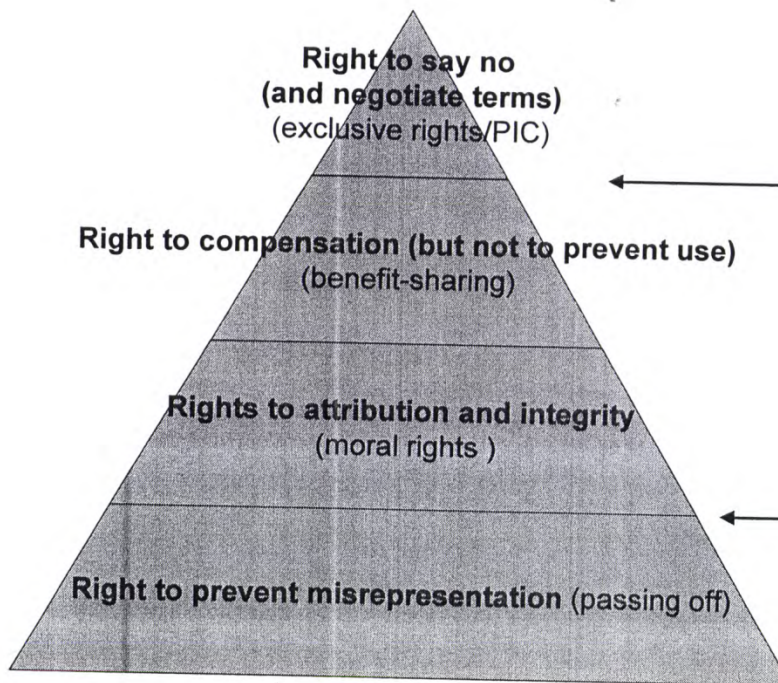


Australian Government

IP Australia

Draft Rights Pyramid Diagram

“Positive”/ “defensive” protection



- Character of the TK, such as

- Secret
- Restricted
- Publicly available
- Shared (not unique to a particular community)

- Character of the use of the TK, such as

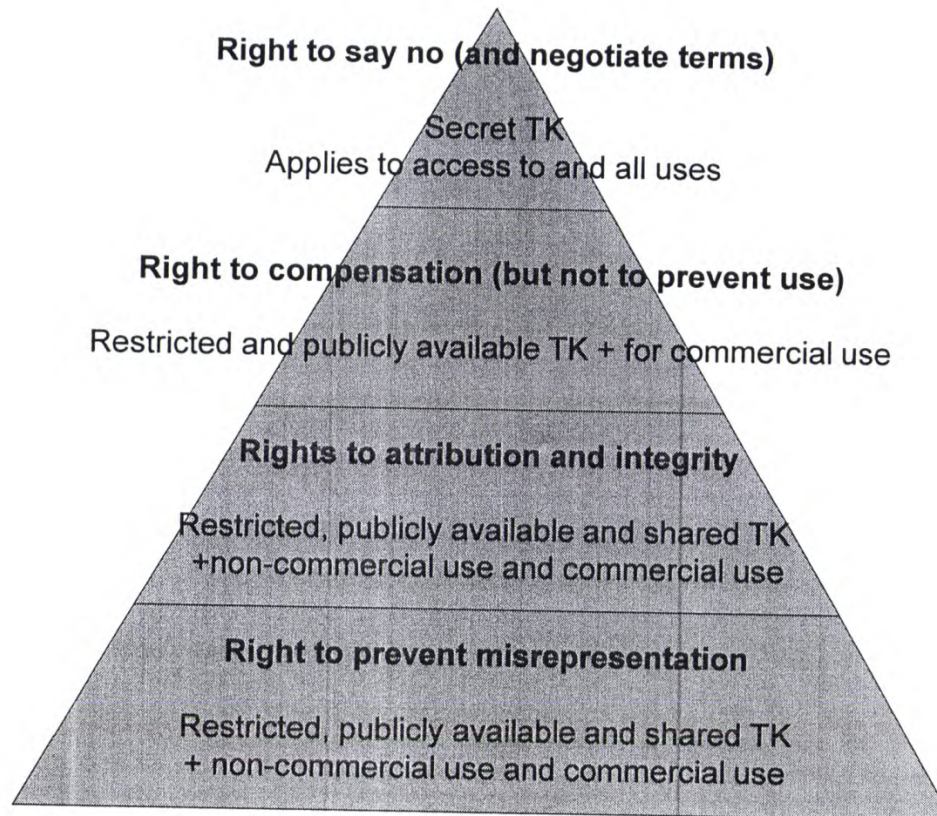
- Commercial
- Non-commercial



Australian Government

IP Australia

Draft Rights Pyramid Diagram – example for illustration purposes





International context Draft Articles 3 and 3 bis

- The two draft articles can be seen as either alternatives or complementary to one another.
- There is disagreement in the negotiations on how to treat them.
- Draft Article 3 (new rights and improving contractual arrangements) sets a relatively *higher ambition* than Draft Article 3 bis (databases and cooperation) .
- Topics for focus group discussions.
 - What are the roles of IP offices in these approaches?
 - Do these approaches provide sufficient protection?
 - Do these approaches promote creativity and innovation?



Australian Government

IP Australia

Draft Article 3 – Summary

- TK that is sacred, secret or closely held within indigenous local communities
- To ensure beneficiaries:
 - maintain, control and develop TK
 - discourage the unauthorized disclosure, use or other uses of TK
 - authorize or deny the access based on prior and informed consent
 - be informed of access to their TK through a disclosure mechanism in intellectual property applications
- Users are to :
 - attribute TK to beneficiaries
 - provide beneficiaries with fair and equitable share of the benefits based on mutually agreed terms, or alternatively, enter into an agreement with the beneficiaries to establish terms of use of the TK
 - use 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



Draft Article 3 – Summary cont.

- Where TK is publicly available users are to:
 - attribute and acknowledge the beneficiaries as the source of the TK unless the beneficiaries decide otherwise
 - provide the beneficiaries with a fair and equitable share of benefits based on mutually agreed terms, or alternatively, enter into an agreement with the beneficiaries to establish terms of use
 - use the knowledge that respects the cultural norms and practices of the beneficiaries
 - be informed of access to their TK through a disclosure mechanism in intellectual property applications



Australian Government

IP Australia

Draft Article 3 – Summary cont.

- Where the TK is in the public domain users are to:
 - attribute the TK to the beneficiaries;
 - use the knowledge that respects the cultural norms and practices of the beneficiary
- or alternatively, protection does not extend to TK that is widely known or used outside the community of the beneficiaries as defined in Article 2.1, in the public domain, protected by an intellectual property right and generally well known



Australian Government

IP Australia

Draft Article 3 bis – Summary

Covers complementary measures

Databases

- National TK databases
- Accessible to patent offices to avoid the erroneous grant of patents
- Minimum standards to harmonize the structure and content of such databases
- The content of the databases should be:
 - languages that can be understood by patent examiners;
 - written and oral information regarding TK
 - relevant written and oral prior art related to TK
- Regional and International cooperation in the creation of such databases
- Intellectual property offices ensure that such information is maintained in confidence, except where the information is cited as prior art during the examination of a patent application



Australian Government

IP Australia

Draft Article 3 bis – Summary cont.

Existing Patent procedures

- Provide opposition measures that will allow third parties to dispute the validity of a patent
- Discourage information lawfully within the beneficiaries' control from being disclosed, acquired by or used by others without the beneficiaries' consent.
- Develop guidelines for the purpose of conducting search and examination of patent applications relating to TK by patent offices

Non-binding user measures

- Encourage the development and use of voluntary codes of conduct



Conclusion

- Comparing IP Systems for TK and TCEs, with other systems
- Issues for international, national and regional
- Tiered approach to protecting TK and TCEs



Australian Government

IP Australia

Steven Bailie

IP Australia

PO Box 200 Woden ACT 2602

steven.bailie@ipaustralia.gov.au



Robust intellectual property rights delivered efficiently

Polymer
Bank Notes